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Charles E. Grassley

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CONGRESS, THE EXECUTIVE BRANCH AND THE DISPUTE RESOLUTION PROCESS

Senator Charles E. Grassley
Charles Pou, Jr.

I. A PERSPECTIVE ON ADMINISTRATIVE DISPUTE RESOLUTION

Originally, legal disputes in America that were not resolved by self-help were litigated and settled in courts. Later, Congress and state legislatures began to create administrative agencies as more expert, economical alternatives, resulting, it was anticipated, in better decisionmaking. More formal, bureaucratized systems have developed in recent years, characterized increasingly by red tape and regulations. As Chief Judge Loren A. Smith of the United States Claims Court observed:

In the last several decades we have erected an elaborate and complex system of procedures to help control our government. These procedures are embodied in various statutes and codes that would rival any of the great legal schemes of history.1

Hearings before boards, administrative law judges and other presiders are now typical of thousands of different conflicts growing out of hundreds of federal programs. Initially, clients often represented themselves in agency adjudications, but over time legal adversaries for each side became more and more typical of administrative processes.2

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1 United States Senator (R-Iowa), B.A., M.A., University of Northern Iowa.
2 Senior Attorney, Administrative Conference of the United States, B.A., Rice University, J.D., Harvard Law School. The authors would like to thank Diane M. Stockton for her research on this article, and Samuel J. Gerdano, former Minority Chief Counsel and Staff Director of the Senate Judiciary Subcommittee on Courts and Administrative Practice, for his advice.

2. See, e.g., SOCIAL SECURITY ADMINISTRATION, DEP'T OF HEALTH & HUMAN SERVICES, OPERATIONAL REPORT OF THE OFFICE OF HEARINGS & APPEALS 29 (1985) (SSA Pub. No. 70-032) ("the participation of attorneys has more than doubled from 20% of cases in FY 1970 to 52% in FY 1985").
While the burdens accompanying this system may be hard to measure precisely, they are indubitably large. A variety of agency boards and offices handle a diversity of cases raising issues that arise regarding grant, benefit, regulatory, and other kinds of programs. Jurisdictions of existing offices of administrative law judges and other boards have been expanded. Whole new sections of the bar have sprung up to service (and instigate) litigation over energy, contract, environmental, safety, labor, health, and other decisions.

This rapid, recent expansion in administrative proceedings and related litigation is not, of course, a unique or isolated phenomenon. It is part of a greatly increased reliance on our judiciary to decide all manner of social, political, and economic issues. Much of this litigation may be an inexorable result of complicated social and economic interactions, heightened resort to regulatory schemes to deal with environmental, health and safety, civil rights and welfare concerns, and other historical factors. However, the point has been reached where much of it is unnecessary, unproductive, and less than ideally suited for many of the conflicts involved. More and more administrative, business, regulatory, employment, benefit, and other decisions are being made by judicial officers pursuant to marginally relevant criteria in forums not always conducive to efficient decisionmaking.

A few doubters have suggested that, relatively speaking, litigation has not really increased, that America is not an especially litigious society, or conversely, that it has always been as lawsuit-prone as today. These "explanations" are


4. Literally scores of statutes in recent years have created new programs enforced via administrative adjudication. These include, for example, section 101 of the Immigration and Control Act of 1986, adding sections 274A and 274B to the Immigration and Nationality Act, which created two new categories of on-the-record APA proceedings for cases involving sanctions against employees for hiring illegal aliens or for discriminating against individuals (other than illegal aliens) because of their national origin. 8 U.S.C. §§ 1324(a) & (b) (1988). The Department of Justice has employed four administrative law judges to hear these cases. For a broad discussion of administrative enforcement, see Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Agencies, 79 COLUM. L. REV. 435 (1979).

5. The American Bar Association now has sections or committees devoted to matters as diverse as customs law, dispute resolution, air and space law, construction, entertainment, military law, antitrust law, business law, family law, international law, labor and employment law, litigation, natural resources, energy, and environmental law, administrative law and regulatory practice, patent, trademark, and copyright law, public contract law, public utility law, taxation, tort and insurance practice, and urban, state, and local government law. AMERICAN BAR ASS'N., 1990/91 DIRECTORY iii-v (1990).


7. See, e.g., Galanter, Reading the Landscapes of Disputes: What We Know & Don't Know (& Think We Know) About Our Allegedly Contentious & Litigious Society, 31 UCLA L. REV. 61, 63 (1984).
largely beside the point. A vast, diverse landscape of litigation-like activity now exists in court, arbitration and administrative settings, as well as other less visible ones. Whether or not we confront a "litigation crisis," we must face the fact that tens of thousands of administrative decisions and court cases are handled through highly adversarial sets of procedures that are all too often complex, costly, and lengthy and can even inhibit consensual resolution.

II.  THE DISPUTE RESOLUTION LANDSCAPE

The United States has the largest bar and the highest rate of lawyers per capita of any country in the world (612,000, double the number in 1960). Estimates show that only 1% of the United States population receives 95% of the legal services provided. The implications are clear. While the largest segment of the population is precluded from real access to the justice system, the greatest users of legal services, corporations and wealthy individuals, pay an enormous price for this justice. With legal expenditures growing at a faster rate than the gross national product, our nation's overall productivity is almost certainly harmed by this drain on valuable resources. Much of this time, money and expertise could be better used for other government, corporate, and personal endeavors.

Federal agencies are involved in far more disputes than ever before (even on a per capita basis), and decide far more cases than do the federal courts (hundreds of thousands annually). According to former Attorney General William French Smith, the number of lawsuits in which the United States government was party rose from 25,000 cases in 1970 to 64,000 in 1980. The Administrative Office of the United States Courts estimates that, for the year ending June 30, 1987, 30% of all civil cases commenced involved the United States as a party—over 72,000 actions. Data from the United States Court of Appeals for the District of Columbia Circuit indicate that appeals involving the federal government tend to be considerably more burdensome for the court to

9. Id. at 16.
10. The Vice President's Council on Competitiveness has made this point emphatically. VICE PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM 1-4 (Aug. 1991).
12. Pou, Federal Agency Use of "ADR": The Experience to Date, in SOURCEBOOK, supra note 8, at 101.
14. STATISTICAL ANALYSIS & REPORTS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 5 (1987) (table C3, "U.S. District Courts: Civil Cases Commenced, by Nature of the Suit & District, during the 12 month period ended June 30, 1987") (there were a total of 238,982 civil cases in the circuit courts during this time-frame and a 72,022 of these involved the U.S. Government as a party).
resolve than other appeals,\textsuperscript{15} tending to involve even more lawyers, briefs and records, and take longer to decide.

Cases are becoming longer as well as more numerous, and a case requiring a lengthy trial is disproportionately more expensive.\textsuperscript{16} Not only does cost include the trial, where legal expenses tend to increase, but there is also the cost of protracted discovery, either due to the complexity of the issues or because of the sheer volume of evidence adduced to resolve the case.\textsuperscript{17} In the federal system, the number of civil trials lasting beyond nine days more than doubled between 1973 and 1983.\textsuperscript{18} The number of civil trials lasting approximately a month or more increased almost as rapidly.\textsuperscript{19}

From 1973 to 1983, the portion of the gross national product (GNP) attributable to legal services increased by 58.6\% in real terms.\textsuperscript{20} Estimates reveal that business spent approximately $5.8 billion for in-house counsel, who constitute about 10\% of all lawyers.\textsuperscript{21} The legal services industry’s share of the GNP grew by 30\% in one decade.\textsuperscript{22} The GNP figure does not include what the public pays to run courts, such as the cost of judges and government attorneys.\textsuperscript{23} Litigation costs are increasing at a faster rate than overall legal services.\textsuperscript{24} In the federal judicial system, there has been an increase in the number of civil cases filed in United States District Courts, a 145\% increase in the decade between 1973 and 1983.\textsuperscript{25}

Other costs of litigation cannot be measured so easily, but are real. This includes the value of the time and attention of senior officials, which is especially costly to corporations.\textsuperscript{26} These costs also include the diversion of management’s

\textsuperscript{15} FEDERAL JUDICIAL CENTER, THE CASES OF THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT 3 (July 1982).

\textsuperscript{16} Id. at 227 & 229.

\textsuperscript{17} Id. at 229.

\textsuperscript{18} Id. (from Table C8 of the 1983 annual report of the Director of the Administrative Office of the U.S. Courts).

\textsuperscript{19} Id.

\textsuperscript{20} Id. at 222.

\textsuperscript{21} Id. at 225 (the weighted average salary of in-house counsel in 1983 was calculated to be $63,552, with benefits, staff support, and other associated expenses brings the expenditure per attorney to approximately $95,000.)

\textsuperscript{22} Id. (the legal services share of GNP grew from 1.03\% of GNP in 1973 to 1.32\% in 1983; this is a 29.7\% increase in the share of GNP accounted for by legal services.)

\textsuperscript{23} Id.

\textsuperscript{24} Id.


time and energy, the costs of delay and uncertainty, lost opportunities, and damaged business relationships.\textsuperscript{27}

Due to the costs of litigation, the Federal Rules of Civil Procedure were amended twice between 1980 and 1985, with further amendments since proposed.\textsuperscript{28} Justice Lewis F. Powell dissented from the 1980 order because he did not think it went far enough, stating:

Delay and excessive expense now characterize a large percentage of all civil litigation, . . . the problems arise in significant part . . . from abuse of discovery procedures available under the rules, . . . discovery practices enable the party with the greater financial resources to prevail by exhausting the resources of a weaker opponent.\textsuperscript{29}

Within the federal bureaucracy, a few examples should serve to illustrate the problems we face. Administrative caseloads increased by approximately 50% between 1978 and 1983.\textsuperscript{30} For example, the Social Security caseload increased 85% from 1978\textsuperscript{31} to 1983.\textsuperscript{32} During this same period, the Labor Department’s caseload also increased fivefold.\textsuperscript{33} During fiscal year 1986, the Armed Services Board of Contract Appeals’ (ASBCA) docketed appeals numbered 200% more than in 1978.\textsuperscript{34} Between fiscal years 1984-1985, the numbers of new appeals and cases pending at the ASBCA increased by about 20% each.\textsuperscript{35}

In Judicialization: The Twilight of Administrative Law,\textsuperscript{36} Judge Loren Smith argues that the current level of judicialization is a symptom of a fundamental dysfunction. He reminds us that "formal methodologies cannot by themselves resolve the difficult issues that inevitably arise in the context of those important social programs placed under the auspices of the administrative

\textsuperscript{27} Federal Judicial Center, supra note 15, at 225.

\textsuperscript{28} Levin & Colliers, Containing the Cost of Litigation, 37 Rutgers L. Rev. 219, 219-20 (1985) (the latest amendments under consideration focus upon economic incentives associated with settlement offers).

\textsuperscript{29} Id.


\textsuperscript{32} Lubbers, supra note 30, at 383-85 (there was an average of 363,533 new cases between 1982-1983).

\textsuperscript{33} Id. The Labor Department reported 2,769 new cases in 1979; this figure rose to an average of 14,457 new cases between 1982 and 1983. Id.

\textsuperscript{34} Id.

\textsuperscript{35} Id. In 1984, there were 1369 new appeals docketed and 1729 cases pending at ASBCA. Id. In 1985, there were 1638 new appeals and 2074 cases pending. Id.

\textsuperscript{36} Smith, Judicialization: The Twilight of Administrative Law, 1985 Duke L.J. 427.
agencies" and argues that "an infatuation with procedural safeguards ... is counterproductive insofar as it has the effect of diverting attention away from critical substantive problems."

Enthusiasm for the potential of alternative means of dispute resolution (ADR) stems from the hope that they will reduce this burden on courts, agencies, and the economy, as well as provide better decisions and more satisfying means of justice for a larger portion of the population. In an era of deficit reduction, the potential of ADR for improving government decisions must not be overlooked. ADR is not only in the interest of the government; it is also in the public's interest. Our society will fail to channel many regulatory and other decisions into new processes at its peril.

III. THE GROWTH AND UTILITY OF CONSENSUAL DISPUTE RESOLUTION

In diverse private sector disputes, consensual means of dispute resolution have been used to great advantage. These include a variety of family, employment, environmental, landlord-tenant, divorce, labor, and consumer conflicts. These ADR methods include negotiation, facilitation, conciliation, mediation, convening, minitrials, factfinding, use of settlement judges, and binding and nonbinding arbitration.

37. Id. at 427.
38. Id.
39. Obviously, methods akin to mediation are hardly brand new, having formed a basic part of some societies—such as the Chinese—for centuries. See, e.g., Gellhorn, *China's Quest for Legal Modernity*, 1 J. CHINESE L. 1 (1987).
40. The Administrative Conference’s Recommendation 86-3 defines these processes as follows: Arbitration. Arbitration is closely akin to adjudication in that a neutral third party decides the submitted issue after reviewing evidence and hearing argument from the parties. It may be binding on the parties, either through agreement or operation of law, or it may be non-binding in that the decision is only advisory. Arbitration may be voluntary, where the parties agree to resolve the issues by means of arbitration, or it may be mandatory, where the process is the exclusive means provided.
Convening. Convening is a technique that helps identify issues in controversy and affected interests. The convener is generally called upon to determine whether direct negotiations among the parties would be a suitable means of resolving the issues, and if so, to bring the parties together for that purpose. Convening has proved valuable in negotiated rulemaking.
Facilitating. Facilitating helps parties reach a decision or a satisfactory resolution of the matter to be addressed. While often used interchangeably with "mediator," a facilitator generally conducts meetings and coordinates discussions, but does not become as involved in the substantive issues as does a mediator.
Factfinding. A "factfinding" proceeding entails the appointment of a person or group with technical expertise in the subject matter to evaluate the matter presented and file a report establishing the "facts." The factfinder is not authorized to resolve policy issues. Following the findings, the parties may then negotiate a settlement, hold further proceedings, or conduct more research.
Mediation. Mediation involves a neutral third party to assist the parties in negotiating an agreement. The mediator has no independent authority and does not render
ADR has developed into a viable option for tens of thousands of disputants at the state and local level. Over 20 state legislatures have enacted laws establishing statewide mediation centers or other dispute resolution procedures; more than half of the nation's law schools offer courses in dispute resolution; increasing numbers of elementary and high schools are teaching courses in "conflict management;" and there are more than 360 non-profit community resolution programs operating throughout this country.\textsuperscript{41} A 1987 survey of state court administrators identified 275 operating court-related ADR programs of various types in over 40 states.\textsuperscript{42} ADR has proven itself for over a decade in conflict settlement at the state and local level, including disputes to which state governments are parties. The federal government can learn from these experiences of more receptive states and localities with the ADR option. The quick pace with which ADR has been adapted to conflict resolution at this level illustrates the flexibility of these techniques. The fact that ADR has been such a benefit in the settlement of various disputes around the country points to its potential, and demonstrates that it is not some new high-risk technique but a viable option at the federal agency level.

While it is often asserted that alternative methods are cheaper and faster than litigation, numerous factors make it difficult to compare with scientific accuracy the relative cost and effectiveness of traditional and alternative dispute resolution methods; nevertheless, much available data and reams of anecdotal evidence indicate considerable advantages in using mediation and similar means.\textsuperscript{43} An exact comparison between mediation and litigation is difficult, because of the lack of parallel data between cases that use each of these techniques.\textsuperscript{44} A major difficulty in evaluating the relative expenses and expedition of consensual dispute

\textsuperscript{41} Friedman, Alternative Dispute Resolution, 1 \textsc{Washington Law.} 3, 4 (1987) (president's page).

\textsuperscript{42} ADR Programs Surveyed by State Court Administrators, 1 Alternative Dispute Resolution Rep. (BNA) No. 16, at 316 (November 26, 1987).

\textsuperscript{43} See, e.g., Crowell & Pou, Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques, 49 \textsc{Md. L. Rev.} 183, 197 n.77-78 (1990).

\textsuperscript{44} See generally G. Bingham, Resolving Environmental Disputes: A Decade of Experience 127-47 (1986).
resolution processes and litigation is the difficulty in finding truly comparable disputes. 45

Thus, in measuring the relative costs, benefits, and results of litigation and dispute resolution alternatives, one may be measuring and comparing very different kinds of things. Many mediated environmental disputes may be resolved quickly, but voluntary dispute resolution processes are not necessarily fast where issues are complex. Although mediators generally charge less than attorneys, one is not necessarily a substitute for the other, and attorneys’ and mediators’ fees are not the only costs associated with resolving disputes. 46 It may be unrealistic to begin counting the costs of mediation at the time when the parties agreed to negotiate, when the previous period of contention, litigation, or clarification of relative power contributed to the parties’ willingness to negotiate a voluntary settlement. Also, filing a lawsuit may be the only way that some of the parties to a dispute can get the attention of the other side.

Most of the efforts at making cost and benefit comparisons suggest that real advantages accrue to ADR use. The United States Merit Systems Protection Board (MSPB) was established to protect Federal personnel systems against political abuses and create channels within which to resolve employee disputes. 47 A pilot study was set up to compare the formal appeals procedure (FAP) with an alternative appeals arbitration procedure (AAP), later referred to as the voluntary expedited appeals procedure (VEAP). 48 The results of the study indicated that the VEAP cut the time to obtain an initial decision in half compared to the traditional FAP. 49 VEAP expedited the appeals process by more than doubling the likelihood of a voluntary settlement. 50 VEAP also achieved cost savings of 40% per case compared to similar FAP disputes. 51 Agencies were also able to reduce witness and travel costs in half while minimizing potential backpay settlements. 52

In the area of government procurement contract appeals, the current system is cumbersome for a variety of reasons. Many contracting officers fear having their decisions second guessed which reduces their incentive to settle complex cases and motivates the contracting officer to hand the appeal over to the boards

45. Some disputes involve complex scientific and technical issues, different statutes may apply to different disputes, the cases may or may not have precedential value, and the number and types of parties differ widely.

46. "The burdens of litigation include high legal fees, wasted executive energies, lost opportunities, prolonged uncertainties, destruction of business relationships, and sometimes impediments to financing." CPR LEGAL PROGRAM, CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 565 (1988).


48. Id.

49. Id.

50. Id.

51. Id.

52. Id.
or Claims Court.\textsuperscript{53} This willingness to pass along managerial decisions resulted in staggering increases in Boards of Contract Appeal's caseloads. The active docket of the Armed Services Board of Contract Appeals (ASBCA) has almost doubled since 1979\textsuperscript{54} without a concomitant increase in manpower. More recently, Judge Ronald J. Lipman of the ASBCA referred to the fact that the contractor appeals went from 11,000 in 1977 to 23,000 in 1987, which he feels is a driving force towards ADR.\textsuperscript{55}

In cases where the Department of Justice's Community Relations Service (CRS) offered formal mediation services as a means of resolving civil rights disputes referred by federal district court judges, CRS estimated that mediation saved $340,000 per case in its evaluation of the court referral pilot project.\textsuperscript{56}

In a survey of Fortune 500 companies, approximately 60\% found that ADR has the primary advantage of saving time and money compared to litigation.\textsuperscript{57} It has been estimated that a minimal costs only about 3\% of what it costs to litigate and leads to an expeditious disposition in about 95\% of the cases in which the parties agree to its use.\textsuperscript{58} Even if an informal settlement cannot be reached, the cost is money well spent because it can be viewed as preparation for actual trial.\textsuperscript{59} According to the same survey, 75\% of these ADR users expanded its use over the last five years.\textsuperscript{60} Five years ago, these corporations disposed of 2.2\% of their litigated cases using ADR; currently they are resolving 6.8\% of their cases in this manner.\textsuperscript{61}

Simply comparing monetary and resource costs leaves out perhaps the most important consideration in analyzing the value of settling a dispute—the nature and quality of the outcome itself. A trial, with a winner and a loser, may be a desirable outcome in cases where what is at stake is a matter of principle or law. Occasionally, the publicity of even a hopeless fight might be better than an agreement that offers little or no gain. Other times, neither the winner nor the loser really benefits because of excessive costs and headaches, or because the decisions in lawsuits can turn on procedural grounds or legal doctrines irrelevant to the parties' actual interests. In a voluntary dispute resolution process, the parties are more likely to deal with the substantive issues giving rise to the

\textsuperscript{53} Crowell & Pou, supra note 43, at 190-91 & 243-45.
\textsuperscript{54} Id. at 184 n.3 (citing Williams, A Brief Look at the Armed Services Board of Contract Appeals, 22 PUB. CONT. NEWSL. 3, 17 (1986)). The number of cases was 1,221 in 1979; this number grew to 2,074 by the end of 1985. Id.
\textsuperscript{56} COMMUNITY RELATIONS SERVICE, OFFICE OF NAT'L LIAISON & POLICY DEVELOPMENT, DEP'T OF JUST., EVALUATION OF THE PILOT PROGRAM ON COURT-REFERRED MEDIATION (Feb. 23, 1981).
\textsuperscript{57} Wilkinson, ADR is Increasingly Effective, Averts Litigation in Many Cases, NAT'L L.J., April 4, 1988, at 22-23 (mediation law).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
dispute. Choosing a winner and loser in a lawsuit also may preclude creative problem-solving or negotiations in search of new alternatives that achieve joint gains for all parties.62

IV. THE CONGRESS AND ADR

Occasionally, Congress recognizes the value of ADR methods and is beginning to do so with some regularity. In enacting the Arbitration Act63 during the 1920's, the legislative branch legitimized a useful method for hearing and deciding commercial, labor, international,64 and a variety of other cases—a method that most American courts had traditionally disfavored. This Act, which some commentators consider a turning point, helped make possible the development of an enormous realm of private sector dispute resolution that is now central to many kinds of activity.

Subsequently, Congress created three federal agencies whose primary goals were to resolve consensually certain conflicts in key social and economic areas—the Federal Mediation and Conciliation Service (FMCS) for private labor and age discrimination disputes, the Community Relations Service of the Department of Justice (CRS) in civil rights and social justice concerns, and the National Mediation Board (NMB) for railroad and airline disputes.65 These agencies achieved impressive results and stand as eloquent witnesses to the manifold values of ADR in cases affecting the nation's welfare.66 In other pieces of legislation, Congress sought to encourage private persons to make use of mediation-type processes, as with the Dispute Resolution Act of 1980.67 This Act had little impact, due in large part to Congress' failure to follow up with funds for implementation.

This brief survey is far from exhaustive.68 However, except for Congress' successful private sector forays with arbitration, labor mediation in 1947, community disputes in 1964, and relatively recent ADR initiatives, Congress has done very little to explore, encourage, or effectuate these useful methods. Far too often, Congress has either ignored procedural questions while focusing on

62. Id.
66. See COMMUNITY RELATIONS SERVICE, supra note 56.
substantive and fiscal concerns, or worse, added unnecessary procedural steps to those already mandated. 69

A prime example of the addition of procedural requirements is rulemaking, including that by the Federal Trade Commission, Environmental Protection Agency, OSHA, and several others. During the 1970's, Congress subjected rulemaking to added, trial-type processes. 70 Although some of these "hybrid" rulemaking procedures originally stemmed from requirements imposed by court decisions, in the 1970's, Congress did much to codify and extend them. 71 While some of these processes protect the citizenry, ensuring a thorough airing of all available evidence, in many cases policymaking processes that were initially flexible now inhibit and even cripple necessary actions. Currently, they delay regulatory decisions by requiring records, cross-examination, ex parte limits, and a host of other hurdles. 72

The problems confronting rulemaking agencies, reviewing courts, regulated entities, and the public are aggravated by Congress's apparent tendency, noted by many observers, to avoid using the same procedural language twice. In the words of Justice Antonin Scalia, Congress engaged in "Balkanizing" administrative procedure with its diverse procedural requirements. 73 These obstacles, their costs and complexity, and their potential for delay and exploitation are demonstrated in


71. OFFICE OF THE CHAIRMAN, supra note 70, at 197-99.

72. See id. at 199; Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 COLUM. L. REV. 943, 972-78 (1980).

the FTC's attempts at trade negotiation rulemaking under the Magnuson-Moss Warranty Act—Federal Trade Commission Improvement Act.⁷⁴

The Administrative Conference, after undertaking a massive study of these huge proceedings at Congress' direction,⁷⁵ concluded that the added procedures are not effective and should not generally be statutorily required.⁷⁶ This proceduralization of rulemaking often serves to increase the contentiousness of the administrative process and the incidence of related litigation. To take a single example, over 80% of the significant rules issued by Environmental Protection Agency in recent years ended up in court.⁷⁷

It is, to say the least, ironic that relatively little congressional attention focuses on the impact of the high incidence of hearings and litigation, or on possible executive and independent regulatory agencies' uses of consensual dispute resolution methods. Congress originally created many of these agencies to serve as alternatives to the courts; some might even be viewed as early forms of "ADR" that have gradually ossified, transformed from a "cure" to being part of the problem.⁷⁸ Agencies are handing over more and more of their decisions to


76. Trade Regulation Rulemaking Under the Magnuson-Moss Warranty Federal Trade Commission Improvement Act, supra note 75.

77. PROGRAM EVALUATION DIVISION, ENVIRONMENTAL PROTECTION AGENCY, AN EVALUATION OF EPA'S NEGOTIATED RULEMAKING ACTIVITIES 1 (1987).

78. Contract disputes may be viewed as a prototype. The growth in the number, complexity, and cost of these cases is described in Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation With Alternative Dispute Resolution Techniques. The authors state that in recent years:

hearings on the merits became more formalized and extensive. Caseloads and backlogs increased, disputes became more heavily lawyered, and discovery and motions practice were introduced and expanded. More and more decisions took longer to be reached, and heard. Many applauded these trends as enhancing contractors' due process rights; other viewers decried them as inducing delay, bureaucratic irresponsibility, and litigation expenses.

Crowell & Pou, supra note 43, at 188.
judicial-type officials, who reach decisions based on increasingly longer hearings and lengthier records. Congress, itself, is largely responsible for this eventuality, abetted by court decisions requiring more judicialized procedures and second-guessing by the Inspector General and other oversight bodies that act deter risk-taking by agency officials.

By contrast, several state legislatures have acted quite boldly and imaginatively in furthering ADR use. Several states created central dispute resolution offices with missions of increasing state court or administrative uses of ADR. These offices vary in precise functions, but generally include building agency and public awareness of ADR options, setting up mediation programs or mediating specific agency or court disputes, consulting with interested state agencies, compiling rosters of neutrals, and suggesting legislation.

In those relatively few laws where Congress did think to encourage the executive to make use of consensual dispute resolution methods, the results are typically encouraging. The Civil Service Reform Act of 1978 created the Merit Systems Protection Board (MSPB) to hear employee grievances, and encouraged that agency to use alternative appeal processes like conciliation, mediation, arbitration, and similar methods mutually agreeable to the parties. The MSPB followed up with an experimental "voluntary expedited appeal procedure" (VEAP) featuring expedited schedules, mediation, and curtailed interagency review. The

Whatever the merits of these various viewpoints, in 1978 the judicialized model of claims resolution prevailed with the enactment of the Contract Dispute Act (CDA) due in large part to a few court decisions finding broad due process rights and agitation by some private bar and board members. See, e.g., United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966); United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963).


80. Susskind, 2 supra note 79, at 323.


The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or for an employee who is not in a unit for which labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section.

§ 7701(b), 92 Stat. at 1139. The Senate report, which accompanied passage of the CSRA, urged the MSPB to develop alternative methods for resolving appealable matters including "suitable forms of conciliation, mediation, arbitration, and other methods mutually agreeable to the parties." S. REP. NO. 969, 95th Cong., 2d Sess. 61 (1978).

83. The cost-effectiveness of the VEAP was discussed above in connection with the utility of consensual dispute resolution. See supra notes 48-52 and accompanying text.
MSPB attributes its approximately 35% increase in recent settlements in part to the mediation and related processes emphasized in the VEAP.84 Congress has, on occasion, encouraged experimentation in some Superfund, pesticide-related, and other environmental cases. It explicitly authorized arbitration of Superfund claims in cases where the total response costs are $500,000 or less.85 Congress' most recent excursions into ADR appear to hold great promise. In January 1988, the Agricultural Credit Act86 called on the United States Department of Agriculture (USDA) and the Farm Credit Administration to make use of state farmer-lender mediation programs already required by several legislatures.87 Previously, USDA held the position that its status as a federal agency administering federal programs exempted it from these laws as a result of the "preemption doctrine."88 Congress' action, which was accompanied by a requirement for USDA to offer matching grants to support and encourage these state-level mediation programs, should serve to protect thousands of farm families from hasty foreclosures and debilitating legal fees. Indeed, a recent recommendation by the Administrative Conference suggests that the program has been quite valuable.89 Several other recent laws offer hope for remedying the results of congressional inattention and improving federal agencies' unenthusiastic reception to ADR.90 The 101st Congress approved a law to encourage expanded use of negotiated rulemaking. The "Negotiated Rulemaking Act,"91 of which the principle author was a co-sponsor, sets up a framework for agencies to establish

88. Id. at 8 n.40.
89. Administrative Conference of the United States, Recommendation 91-7, Implementation of Farmer-Lending Mediation by the Farmers Home Administration, 1 C.F.R. § 305.91-7 (1992) (this recommendation was based largely on Professor Leonard Riskin's excellent report, see supra note 87).
90. For a general survey of ADR-related bills pending in Congress, see the ABA's survey, Alternative Dispute Resolution in the Legal System. AMERICAN BAR ASS'N, ALTERNATIVE DISPUTE RESOLUTION IN THE LEGAL SYSTEM (1988). A few agencies have taken initiatives for ADR and negotiated rulemaking, including some adjudications in parts of the Army Corps of Engineers, EPA, Department of the Navy, and Health and Human Services' Grant Appeals Board. See generally Harter, Points on a Continuum: Dispute Resolution Procedures & the Administrative Process, 1 ADMIN. L.J. 141 (1987); Office of the Chairman, Administrative Conference of the United States, An Overview of Federal Agency Use of Alternative Means of Dispute Resolution, 1 ADMIN. L.J. 405 (1987).
rulemaking negotiating committees.\textsuperscript{92} Further, the Act authorizes funds to assist agencies in implementing the negotiated rulemaking process, to provide training, and to pay certain expenses of negotiating committees.\textsuperscript{93} The Act also provides for the Administrative Conference of the United States to act as a clearinghouse for assistance, information and study regarding regulation and negotiation.\textsuperscript{94} Negotiated rulemaking has been used repeatedly at the EPA and the Departments of Transportation and Labor with success, and several other agencies have begun experimenting.\textsuperscript{95}

V. \textbf{SPECIAL ISSUES IN AGENCY ADR}

The Administrative Dispute Resolution Act (ADR Act)\textsuperscript{96} makes a variety of helpful changes in the law. The Act, which the principal author initially introduced in 1988, encourages and extends the use of alternative dispute resolution (ADR) by agencies and makes life easier for those who choose to take advantage of it. The ADR Act recognizes that, as with private disputes, ADR is not appropriate for all cases involving the government. The Act also seeks to deal with the fact that agency use of some kinds of ADR—mainly arbitration—may raise policy, practical, and even legal concerns that are not present in most private sector disputes. The introductory article in the Administrative Conference's Colloquium on Improving Dispute Resolution: Options for the Federal Government\textsuperscript{97} sets forth these concerns at some length. Briefly stated, they include the following:

(1) Disputes involving the government's rules and enforcement activities often have greater impact and precedential value than most private sector lawsuits.

(2) Needs for open processes and for assigning executive responsibility can deter negotiations.

(3) Some officials fear using ADR because finality of negotiated decisions often cannot be guaranteed.

\textsuperscript{92} Id. at § 581. Negotiated rulemaking is discussed in greater detail below. See infra text accompanying notes 111-25; see also ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK (1990).

\textsuperscript{93} 5 U.S.C. § 582.

\textsuperscript{94} Id. at § 583. The bills incorporate the basic provisions of Administrative Conference of the United States Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (1982) [hereinafter ACUS Recommendation 82-4]; Administrative Conference of the United States Recommendation 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.85-5 (1985) [hereinafter ACUS Recommendation 85-5].

\textsuperscript{95} See infra notes 111-25 and accompanying text (where this process is discussed in greater detail below, along with agencies' experiences).


\textsuperscript{97} Office of the Chairman, supra note 90 at, 407-10.
(4) Public interests often are less clearly defined than those of private entities, and government officials' decisions are more susceptible to second-guessing by Congress, press, and other agency employees.

(5) Public access and other procedures imposed by statute or court decisions can inhibit negotiations.

(6) The General Accounting Office from early in the century prohibited the use of outside arbitrators to determine the liability of the U.S. government.

(7) Some delegations of governmental decisionmaking authority to private arbitrators may on occasion raise constitutional questions.\(^9\)

(8) Budget limits and tight procurement procedures can deter or delay acquisition of the services of private mediators.

(9) Agencies' negotiated settlements may sometimes be subject to more judicial review than private agreements, adding uncertainty to efforts to use innovative procedures.\(^9\)

Even taken together, these obstacles are far from insuperable. Some have been dealt with by statute, such as the General Accounting Office's hidebound opposition to nearly all forms of arbitration involving claims by or against the government. Others can be easily exaggerated. Most of the above concerns can be dealt with by careful attention to detail in implementing a mediation or other ADR procedure. Alternative dispute resolution should not lead to unsupportable, "backroom" decisions; however, processes can be developed to ensure that flexibility needs do not overwhelm the concern for accountability. As Marshall J. Breger, former Chairman of the Administrative Conference, noted in his testimony on the proposed ADR Act before the Senate Judiciary Subcommittee on Courts and Administrative Practice:

[A]gency officials already routinely negotiate and adjust tens of thousands of disagreements over contracts, penalty assessments, and other major decisions pursuant to guidance that is generally viewed as adequate. To take one instance, the Office of the Inspector General at the Department of Defense has specifically endorsed the documentation standards developed by the Administrative Conference for ADR in contract claims; indeed, that Office specifically approved the use of ADR in one large, controversial case by the Corps of Engineers as being in the government's best interest. Criticizing current dispute procedures, the Inspector General applauded the Corps' innovative

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approach and predicted "good things ahead" for the Corps' program. The Environmental Protection Agency has likewise been pursuing alternatives to conventional processes with success. What these examples demonstrate is that, in the federal arena, the mere existence of a formal dispute or presence of a mediator does not render suspect the consensual settlement worked out by the parties.100

A crucial point is that, apart from arbitration, all ADR methods allow agency decisionmakers to retain all of the decisional authority they ordinarily have. They simply serve to facilitate or expedite the process for reaching the decision, and parties should not view them as an exotic new species of procedures.

VI. AGENCIES' INITIATIVES TO DATE

On their own, with little or no congressional encouragement, a few agencies have begun to make use of ADR. Contracting agencies like the Army Corps of Engineers adopted policies to further use of minitrials, mediation, summary proceedings, and related forms of ADR.101 Among contractors and government officials these efforts respond to dissatisfaction with the present system, where it is not atypical for cases to take three to four years from filing to decision. In fact, some cases have taken ten to twelve years.102 Among the problems created by this system are those described by Lester Edelman, Chief Counsel of the Corps of Engineers:

The most significant dissatisfaction is the disruption to management, which leaves both the claimant and the government complaining. To support the litigation, the parties are forced to pull technical experts and professionals from other projects. This results in the ripple effect of litigation on management operations. An entire industry has been created to provide additional experts and consultants to support the litigation efforts, further adding complexities and costs to both sides.103

The Corps' solution was to begin developing processes that are quicker, less costly, and more consensual.

The Corps examined the minitrial process, which was originally developed in 1977 to resolve a patent infringement suit. After

100. Hearings Before the Subcomm. on Courts and Administrative Practice of the Senate Committee on the Judiciary, 100th Cong., 2nd Sess. 39 (1988).
103. Id. at 556.
reviewing this ADR technique, the Corps decided to fully develop the concept to match the Corps unique organization. The adapted minitrial was then tested and evaluated in a pilot program. The result of the pilot program was the resolution of several complex contract claims in a matter of months. These claims most likely would have taken years to conclude had litigation been used. In addition, the minitrial was inexpensive to use, and the disruption to management was minimal... In designing the ADR programs for the Corps, it was not forgotten that the thrust of the programs were and are based on the belief that the resolution of disputes is most often a management problem, rather than a legal problem, and that the Corps wanted to use managers, not lawyers, as decisionmakers.\footnote{104}

The Corps repeatedly used this and related processes to resolve claims since 1984.\footnote{105} Its lead was followed by the Department of the Navy and the United States Claims Court.\footnote{106} The Environmental Protection Agency, in environmental enforcement cases, also made use of minitrials, mediation, and related ADR methods. An Administrative Conference study\footnote{107} concluded that "ADR has adapted well to traditional agency decisionmaking formats...[w]here these methods have been used, they have worked."\footnote{108} The Administrative Conference in its 1987 recommendation on resolving contract disputes endorsed these agencies' efforts to all contracting agencies.\footnote{109} The Conference called on agencies to adopt pro-ADR policies and take other training and related steps to "begin creating an atmosphere in which these methods can be readily employed."\footnote{110}

Another area of creative activity involves rulemaking. Even without congressional prodding, negotiated rulemaking emerged in the 1980's as an alternative to traditional procedures for drafting proposed regulations at several agencies. The basic idea is that in certain situations it is possible to bring together representatives of the various contending interests under the auspices of the agency to negotiate the text of a proposed rule.\footnote{111}

Negotiated rulemaking gives parties an opportunity to participate at an early stage of rulemaking, in a setting that fosters a will to reach a consensus and

\footnote{104}{Id.}

\footnote{105}{See, e.g., Crowell & Pou, supra note 43, at 203.}

\footnote{106}{Department of the Navy, Alternative Dispute Resolution Program, Memorandum from the Secretary, in SOURCEBOOK, supra note 8, at 847; United States Claims Court, General Order No. 13, Notice to Counsel on Alternative Dispute Resolution Techniques, in SOURCEBOOK, supra note 8, at 731.}

\footnote{107}{Alternatives for Resolving Government Contract Disputes, supra note 6; Crowell & Pou, supra note 43; see also Edelman & Carr, The Mini-Trial: An Alternative Dispute Resolution Procedure, 42 ARB. J. 7 (1987); Harter, supra note 90.}

\footnote{108}{Crowell & Pou, supra note 43, at 254.}

\footnote{109}{Alternatives for Resolving Government Contract Disputes, supra note 6.}

\footnote{110}{Id.}

\footnote{111}{ACUS Recommendation 82-4, supra note 94.
encourages them to set their own priorities among the issues to be considered and to make tradeoffs among them. If the negotiators can reach a consensus on a draft for agency consideration, through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them, then the likelihood of subsequent litigation is diminished. However, reducing the risk of costly litigation is not the only benefit of negotiated rulemaking. Persons who must ultimately be governed by the rule are more likely to understand the practicalities of living with the rules, and should find negotiated rules more acceptable. Moreover, by avoiding litigation, regulated businesses, or others who need to plan for the future, can plan for implementation earlier than would otherwise be the case. Participation in the drafting can avoid misunderstandings about the meaning of the rules, and can also foster a more cooperative relationship for future dealing among the affected parties and the agency. The negotiated rulemaking process was assessed as follows by EPA’s Program Evaluation Division, after an intensive review:

Negotiated rulemaking can sometimes be better than the conventional rulemaking process. In the ‘right’ situations, negotiated rulemaking can produce proposed rules that meet statutory requirements but are more pragmatic than proposals EPA would be likely to develop on its own and may produce better environmental results; in addition, negotiated rules are more likely (than conventional rules) to be accepted by the affected industries and other interested parties involved in developing them. Negotiation also may reduce the time it takes to proceed from proposed to final rulemaking.

That office concluded that negotiations facilitated exchanges of information and understanding of the issues, made final rulemaking easier and less costly, and created working relationships that helped some participants work together constructively in other situations. These negotiated rulemaking processes stem in considerable part from a series of reports and recommendations of the Administrative Conference beginning in 1981. These reports deal with

112. Id. Negotiated rulemaking should be viewed as a supplement to the rulemaking provisions of the Administrative Procedure Act. 5 U.S.C. § 553 (1966). This means that the negotiation sessions generally take place prior to issuance of the notice and the opportunity for the public to comment on a proposed rule that are required by the Act. Id.


114. Id.

procedures for negotiated rulemaking, characteristics of rulemaking proceedings that favor use of a negotiated alternative, and participation by agencies.116

The Federal Aviation Administration (FAA), the first federal agency to try using negotiated rulemaking, assembled a committee in 1983 to negotiate a revision of flight and rest time requirements for domestic airline pilots.117 The committee included representatives of airlines, pilot organizations, public interest groups, and other interested parties.118 The prior rules had been in effect for 30 years, a period of substantial change in the airline industry in which the FAA had to issue more than 1,000 pages of interpretations.119 On several occasions, the agency proposed revisions, but withdrew them because of substantial opposition. A final rule based on the negotiations was adopted in 1985; it has not been challenged in court. The Department of Transportation followed this successful use of negotiated rulemaking by convening advisory committees to negotiate several other proposed rules.120

The Environmental Protection Agency has used negotiated rulemaking in several important proceedings, and is committed to expanding its use of the procedure.121 Final rules negotiated by EPA include clean fuels requirements, penalties for manufacturers of vehicles not meeting Clean Air Act standards, emergency exemptions from pesticide regulations, performance standards for woodburning stoves, and inspection and abatement of asbestos-containing materials in school buildings.122

The Occupational Safety and Health Administration (OSHA) convened committees to negotiate proposed standards for worker exposure to benzene and to a chemical known as MDA, an animal carcinogen used in the manufacture of plastics.123 Although the benzene effort did not result in a negotiated rule, the MDA committee did submit a set of recommendations to OSHA for a rule.124 Other agencies that use negotiation procedures in rulemaking include the Nuclear Regulatory Commission, the Federal Trade Commission and the Departments of the Interior and Agriculture. In addition to EPA's negotiated rulemaking activity, its Office of Enforcement and Compliance Monitoring has taken the lead in using ADR in enforcement cases. In late 1987, EPA Administrator Lee Thomas issued

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116. ACUS Recommendation 82-4, supra note 94; ACUS Recommendation 85-5, supra note 94.
117. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, supra note 92, at 327-28; Negotiated Rulemaking Before Federal Agencies, supra note 115, at 1667-74.
119. Id.
120. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, supra note 92, at 328-30.
122. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, supra note 92, at 330-36.
123. Id. at 336-37; Negotiated Rulemaking Before Federal Agencies, supra note 115, at 1647-67.
124. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, supra note 92, at 336-37.
a memorandum calling on EPA's regional offices to begin making greater use of ADR in these situations.\footnote{125}

**VII. PRESCRIPTIONS**

The federal government is in an ideal position to serve as a beacon for the rest of our society. Its agencies should be far more active in using consensual dispute resolution. Instead, almost all lag far behind the remainder of our country's dispute processors. Indeed, more than one knowledgeable observer has noted that while top echelon officials at the Department of Justice sung the praises of ADR, line litigators often clung tenaciously to the motions and discovery practice with which they are comfortable and disdain less adversarial approaches.\footnote{126} This duality must come to an end; ADR must cease being "one of those subjects that receives almost universal endorsement in theory but substantially less in practice."\footnote{127} This attitude should be replaced, with government attorneys, program officials and presiding officers viewing alternative means of dispute resolution as a major set of tools that can be routinely considered and aptly used.

How is this change to come about? It is likely that the impetus for meaningful change will have to come from the top levels of government—Congress and top executive officials. Otherwise, line employees may prefer the safety of the status quo to experimentation. There is evidence that, with the recent report and executive order on Civil Justice reform, the executive branch has begun to deal with this situation. With the new Administrative Dispute Resolution Act, Congress sends a clear signal to agencies, reviewing courts and regulated persons that "ADR is OK," and that informed, thoughtful efforts to use it will be supported. The Act goes far to establish a pro-active government policy in favor of public sector use of mediation and similar methods. By amending the Administrative Procedure Act (APA) to authorize parties to fit the process to the case-at-hand, the Act also affords parties the flexibility to use ADR in those cases in which routine processes would inhibit dispatch or consensual resolution. General Accounting Office's overly restrictive prohibition on arbitration has been repealed for those cases in which arbitration can be used consistently with the public interest. Specific statutory provisions that inhibit effective negotiation—for instance, parts of the Federal Tort Claims Act\footnote{128} and Contract Disputes Act\footnote{129}


\footnote{126} See, e.g., Mays, supra note 85, at 10091; Administrative Conference Colloquium on Improving Dispute Resolution: Options for the Federal Government, 1 ADMIN. L.J. 399 (1987).


\footnote{128} Ch. 753, title IV, 60 Stat. 842 (codified in scattered sections of 28 U.S.C.).

—were also amended. Vital efforts at training government personnel to negotiate better and judicial officers to take greater advantage of mediation and other ADR processes are encouraged.

The Act amends the APA to authorize the parties specifically to agree to use mediation, simplified or expedited procedures, or other mutually agreeable processes to resolve disputes arising under federal administrative programs. Although the use of ADR is not necessarily inconsistent with APA requirements, the bill will resolve any doubt about the compatibility of ADR with current APA requirements. Arbitration is included subject to general guidelines on issues likely to be apt or inapt for ADR. The ADR Act also includes necessary guarantees of confidentiality in agency ADR, and provides judicial review processes that balance the needs for expedition, finality, and accountability. The Act takes steps to make it easier for agencies to use ADR. For instance, it authorizes them to accept volunteer services from mediators or other "neutrals" and to hire them promptly and efficiently.

The Act amends the Federal Tort Claims Act to raise the extent of agencies’ settlement discretion from the present $25,000. The current level, set decades ago, requires Department of Justice approval of many proposed settlement agreements in small cases that raise no significant issues. It also serves to chill settlement discussions, since agencies often cannot negotiate effectively. The Act amends the Contract Disputes Act to encourage agency contracting officers and panels of contract appeals (BCA) to use consensual methods to settle acquisition disputes and it specifically authorizes use of ADR in contract disputes, subject to the aforesaid guidelines. These changes will greatly enhance the flexibility of contracting officers, panels of contract appeals, and contractors to use minitrials and other appropriate means to handle contract claims better. The changes will also encourage other agencies to follow the initiatives of the Army Corps of Engineers, the Department of the Navy, and the Claims Court in an area where litigation increased almost exponentially in recent years.

The Act enlarges the authority of the Administrative Conference of the United States and the Federal Mediation & Conciliation Service to aid agencies’ use of current resources to achieve better decisions with ADR. One commentator has noted that the Administrative Conference has led in recommending the appropriate uses of ADR to federal agencies. Its expertise in agency administrative processes, experience in working with agencies in ADR,

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130. ADR Act, §§ 6 & 8, 104 Stat. at 2745-47.
133. Id.
134. See id. §§ 4-5, 104 Stat. at 2740-41 & 2744-45.
135. Id. § 4, 104 Stat. at 2739-40.
136. Id. § 8(a), 104 Stat. at 2746-47.
137. Id. § 6(a), 104 Stat. at 2745-46.
138. Id. §§ 4 & 7, 104 Stat. at 2737-46.
139. See, e.g., Mays, supra note 85.
and its unique relationship with both federal agencies and private sector experts can make it a key participant in the effort that is needed. For these reasons, the Act creates new roles for the Conference in supporting, assisting, and monitoring agencies' ADR use. Federal Mediation & Conciliation Service's (FMCS) authority is increased to include mediation, training and other assistance in resolving administrative disputes.

A basic premise of the new Act is that increasing the number of dispute resolution methods available to government officials will enhance the operation of the government and better serve the public. The Act authorizes a lot, demands very little, but offers tremendous opportunities. Its four principle requirements are (1) for each federal agency to designate a senior official as dispute resolution specialist, (2) to review all programs systematically for ADR potential and to develop, in consultation with the Administrative Conference and FMCS, a policy on ADR use, (3) to provide training for selected personnel, and (4) to review grants and contracts for inclusion of clauses encouraging use of alternatives.

A dispute resolution policy should not be thought of as simply a document to be written and put into agency manuals, though that certainly may be a part of it. Developing a policy should set in motion a process within each agency, with the designated agency dispute resolution specialist as initial catalyst and long-term nurturer. First, the dispute resolution specialist and selected, key personnel in each agency should become familiar with the variety of consensual processes now available. For most agencies, additional training in mediation skills for some personnel will be advisable to create in-government cadres of potential dispute resolvers. Once a specialist, or the specialist's staff or work group, is familiar with these processes and any legal or policy issues they raise, they should review, with other affected officials, and private entities, each category of dispute in which the agency is typically involved. Section 3(a)(2) of the Act lists several categories for review: formal and informal adjudications, rulemaking, enforcement actions, issuing and revoking licenses or permits, contract administration, litigation, and, just in case anything got left out, "other agency actions." The message here should be clear. The term "dispute" should not be construed narrowly; it goes far beyond court litigation and focal APA adjudication to encompass virtually any dispute concerning an agency program. Clearly, agencies should take a similarly broad view in reviewing areas where ADR methods may be useful.

VIII. CONCLUSION

A variety of quantitative and qualitative benefits emerge from the use of more consensual means of agency dispute resolution. Their successes at the court, state and local levels, and even in the few experiences at the federal level, provide

140. ADR Act, § 4, 104 Stat. at 2737-45.
141. Id. § 7, 104 Stat. at 2746.
142. Id. § 3, 104 Stat. at 2736-37.
143. Id. § 3(a)(2), 104 Stat. at 2737.
agencies with opportunities to learn, to emulate, and to innovate. Recent initiatives must be complemented by informed, periodic congressional oversight, and by creation of incentives for high level executive branch officials and other agency personnel to use ADR. In the long run, whatever slight costs may be involved will be far outweighed by the improvements in decisionmaking and the greater satisfaction of participants. Conceivably, these efforts might mark the beginning of a new trend, away from formalized procedures toward a new flexibility that realistically recognizes limits on our resources.

Trite but true, justice that is delayed or excessively costly is denied, and administrative justice need not be so expensive or time-consuming. The Congress and the Executive Branch should accept the challenge of working together for improvement. The successes of ADR methods in other arenas have all but eliminated the risks for the federal bureaucracy. The recent legislation gives agencies encouragement to innovate. The opportunity is ripe.