
Administrative Conference of the United States



Toward Improved Agency Dispute Resolution: Implementing the ADR Act

**Report of the
Administrative Conference of the United States
on
Agency Implementation of the
Administrative Dispute Resolution Act**

**Thomasina V. Rogers
Chair**

February 1995

Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

Administrative Conference of the United States
2120 L Street NW
Suite 500
Washington, DC 20037
(202) 254-7020
Fax (202) 254-3077

Toward Improved Agency Dispute Resolution: Implementing the ADR Act

**Report of the Chairman
of the
Administrative Conference of the United States
on Agency Implementation of the
Administrative Dispute Resolution Act**

February 1995

**Thomasina V. Rogers
Chair**

**Mary Candace Fowler
Project Manager**

ACUS Staff Attorney Mary Candace Fowler served as the project manager and principal drafter of this report. Also contributing to project management and drafting was former Assistant Research Director Michael W. Bowers. ADR Program Director Charles Pou, Staff Attorneys Nancy Miller, Deborah Laufer, and David Pritzker, and Visiting Executive Leah Meltzer all made contributions to the preparation of this report and its appendices. B. Clarice Ulu and Sharon Anderson were responsible for production.

TABLE OF CONTENTS

Executive Summary	v
Introduction.....	1
Chapter One: The Administrative Dispute Resolution	
Act: A Summary	5
I. Implementation Requirements.....	5
II. Agency Authority	5
III. Confidentiality	6
IV. Arbitration	7
V. Other Provisions.....	7
Chapter Two: Administrative Conference Efforts	
to Implement the ADR Act	8
I. Laying the Groundwork: ACUS Activities Preceding	
Enactment of the ADR Act	8
II. Start-up and Implementation of the Act: ACUS	
Activities Since 1990.....	10
A. Introducing the Act	10
B. Assistance on Agency ADR Policies.....	10
C. Aid in Acquiring Neutrals.....	10
D. Educational and Training Materials	12
E. Interagency Working Groups	12
F. Assisting the National Performance Review.....	13
G. Cooperation with FMCS.....	14
H. Program Design and Technical Assistance to Agencies.....	14
I. Evaluating ADR Programs	14
J. Ongoing Research	15
III. Future Activities.....	15

Chapter Three: Alternative Dispute Resolution Activities	
in the Federal Government: A View of the Landscape.....	16
I. General Observations on Agencies' Implementation	
of the Act	16
II. ADR Use in Government Contracting.....	17
A. Contract Dispute Resolution in Practice	19
B. Partnering.....	21
III. Use of ADR to Resolve Federal Workplace Disputes	22
A. EEO and Individual Grievance Resolution in Practice	22
B. ADR in Labor-Management Disputes	24
IV. Use of ADR in Regulatory Enforcement, Policy	
Development and Program Administration	25
A. ADR in Enforcement Disputes.....	25
B. Policy Development and Complex Regulatory	
Disputes	28
C. Financial Services and Banking Regulation	28
D. ADR Using Settlement Judges	29
E. Grant Audits and Disputes.....	30
F. Citizen Complaints/Ombudsman Programs.....	30
G. Claims.....	31
Chapter Four: Implementation Issues	32
I. Policy Development and Implementation.....	32
II. Training and Education	33
III. Neutrals	34
IV. Evaluating ADR's Costs and Benefits	36
Chapter Five: Recommendations for Improving the Act.....	38
I. Should the ADR Act Be Reauthorized?.....	38
II. Dispute Resolution Specialists and Policy Development.....	39
III. Scope of Coverage	39
A. Specific Exclusions	39

B. Definition of “Alternative Means of Dispute Resolution”	41
IV. Neutrals	41
V. Confidentiality Issues.....	42
A. Communications Available to All Parties.....	42
B. Relationship to the Freedom of Information Act	43
VI. Arbitration.....	43
VII. Contract Disputes.....	44
Attachment: The Administrative Dispute Resolution Act	

Appendices Separately Bound

**Appendix I: Selected Alternative Dispute Resolution Materials
Developed by the Administrative Conference of the United
States and the Interagency Working Groups Sponsored by
the Administrative Conference**

Appendix II: Agency ADR Reports

Toward Improved Agency Dispute Resolution: Implementing the ADR Act

Executive Summary

Alternative means of dispute resolution, or ADR, is the name for a group of techniques designed to resolve conflicts consensually, generally with the assistance of a neutral third party. Use of these methods has grown dramatically in recent years, in federal and state courts, in the private sector, and, most recently, within the federal government. When used appropriately, ADR techniques can save money and time compared to traditional, adversarial methods of resolving disputes. In addition, they can preserve good working relationships, increase the odds of developing lasting solutions to conflict, and provide opportunities to craft "win-win" solutions that meet the real needs of the parties to a dispute.

The Administrative Dispute Resolution Act, passed by Congress in 1990, encourages federal agencies to use ADR to resolve disputes. Since its enactment, key officials at many agencies have recognized the value of alternative processes like mediation and are working to expand their use. The programs they have launched show the potential for ADR in government, but much remains to be done. Additional progress will require high-level commitment and careful consideration of relevant issues. The Act is slated to sunset in October 1995; this report, which describes the Act and its implementation by the Administrative Conference of the United States (ACUS) and other federal agencies, is intended to help Congress consider whether to extend or amend its provisions.

The ADR Act

The ADR Act makes explicit federal agencies' broad authority to use alternative means of dispute resolution in almost any type of dispute in which they are involved. It imposes few requirements, among them the following: each agency must (1) appoint a senior official as "dispute resolution specialist" (DRS); (2) develop a policy addressing the use of ADR in resolving its disputes, in consultation with ACUS and the Federal Mediation and Conciliation Service (FMCS); (3) provide training for the DRS and other key employees; and (4) review its standard contract and grant agreements to see whether they can be amended to encourage ADR use. The DRS is to take the lead in developing and implementing the agency's policy.

The Act gives agencies a lot of flexibility in deciding whether and how to use ADR and acknowledges that some types of cases may not be suitable for ADR, giving examples.

The ADR Act instructs ACUS to consult with agencies as they develop ADR policies, establish a roster of "neutrals" (the generic term for the individuals who manage or preside over most ADR procedures) available to help resolve disputes, help agencies acquire neutrals quickly, and gather information on federal agency experience with ADR. It also gives agencies increased flexibility to contract with private neutrals and to share services related to ADR.

The Act seeks to balance the need for confidentiality, critical in sensitive negotiations, against the openness needed in government. Both neutrals and the parties to ADR proceedings are bound not to disclose confidential information obtained in ADR proceedings, with certain exceptions. However, the Act's confidentiality provision does not automatically prevent disclosure of information under the Freedom of Information Act.

The ADR Act also authorizes agencies to enter into binding arbitration, with a twist: an agency head may vacate an arbitral award within 30 days after it is made. Provisions in the Act amend the Contract Disputes Act to authorize ADR use in contract claims, authorize the Attorney General to increase the settlement authority delegated to agencies under the Federal Tort Claims Act and Claims Collection Act, and provide for sunset of the Act on October 1, 1995.

ACUS Implementation Efforts

The Administrative Conference has been working to introduce ADR in federal agencies since 1982. Its efforts have included research, recommendations, publications, conferences, training, assistance to individual agencies, and the development and administration of interagency activities.

The Conference issued 15 recommendations and reports related to ADR between 1982 and 1990. It worked with congressional sponsors to develop and secure passage of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act of 1990.

The Conference's initial activities to encourage ADR Act implementation concentrated on fulfilling its statutory responsibilities and acquainting agencies with the Act's requirements and with dispute resolution processes. ACUS provided numerous educational programs for DRs and other interested agency personnel as well as assistance with policy development on an individual basis. A monograph, *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists* (February 1992), was prepared to assist DRs in developing policies and programs. ACUS has consulted with numerous agencies on policy development, coordinating this effort with the Federal Mediation and Conciliation Service (FMCS), which also has statutory consultation responsibilities.

The Conference's Roster of Neutrals, first established in 1990, is a computerized database of potential neutrals containing information on their experience, expertise, location and fees, among other things. The Conference has also worked with several other agencies to develop a pilot project for sharing of employee mediators among federal agencies. The pilot, launched last year, is designed to provide low cost, high quality neutrals to Washington, DC area agencies to mediate equal employment opportunity disputes. ACUS has also worked with other interested entities on issues related to qualifications of neutrals.

ACUS has produced numerous ADR-related education and training materials for agencies, including a series of primers on basic ADR issues and two videotapes (one produced with FMCS). The Conference has established an extensive ADR library for agency use and has contributed to several government-wide education programs on ADR.

Responding to reduced agency resources and enhanced demand for ADR assistance, ACUS worked with agency DRs to establish four interagency working groups in 1992. The groups, since reorganized into two general working groups and six smaller project groups, create materials, projects, and educational programs that no single agency could accomplish, such as a handbook on designing dispute resolution systems, a prototype mediation skills training course, and a brown bag lunch series. The Conference is also working on several projects related to the National Performance Review: a pilot project for an ADR "e-mail" system, a joint effort with the Office of Federal Procurement Policy to promote ADR use in government contracting, and an initiative to develop joint projects among government and private-sector dispute resolution organizations.

The Conference has also worked closely with dozens of individual agencies to develop training programs and design ADR systems. In the future, ACUS plans to continue developing inexpensive ways to evaluate ADR programs, expand the Roster of Neutrals to meet the needs of agencies with special requirements, go on-line with ADR e-mail and data bases, and continue assisting individual agencies.

Agency Implementation

The many agencies covered by the ADR Act have varied in their approaches to carrying out its requirements. Some have aggressively directed energy and resources to ADR, while others have been less active. Nearly all agencies have appointed dispute resolution specialists, and over 70 are now serving. But the amount of staff time and resources devoted to the DRS function varies widely. Dozens of agencies (or agency components) have issued or begun to develop dispute resolution policies. In consulting with agencies, ACUS has emphasized that the policy development process should be dynamic, so that agency policies can reflect changing needs and the lessons of experience.

While federal agencies have used ADR methods in a broad range of cases and disputes, three areas have been among the most active: government contracting, workplace disputes, and enforcement and program-related disputes.

Some of the first experiments with ADR methods occurred in government contract disputes. The U.S. Army Corps of Engineers established a comprehensive ADR program to handle its contract disputes in the mid-1980's. Other military and civilian agencies have followed this lead; nineteen agencies (including eight components of the Defense Department) responding to an ACUS inquiry reported using ADR methods including mediation, mini-trials, dispute review boards, settlement judges and non-binding arbitration to resolve contract disputes and, in some cases, bid protests. (A glossary of common ADR methods appears at p. 4 of the report.)

A particularly promising development is the increasing use of partnering, a technique in which the parties to large ongoing contracts avoid disputes, or minimize their disruptive impact, by focusing on the development of cooperative working relationships, the maintenance of open communication among parties to the contract, and the prompt use of ADR when conflicts do arise. The Corps of Engineers has experienced a dramatic decrease in its volume of contract claims and appeals in recent years (from 1,079 claims in 1988 to 314 in 1994, and from 742 appeals in 1991 to 365 in 1994), largely as a result of partnering.

Recent developments have provided new impetus for the use of ADR in contract matters. In May 1994, 24 agencies signed a pledge to consider using ADR in contract disputes and partnering in acquisitions, and a follow-up program brought together 250 government contracting officials to discuss practical applications of ADR. Moreover, the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355, extends the sunset date of the ADR Act to 1999 insofar as it applies to contract claims and requires parties to contract disputes to explain any decision to reject another party's request for ADR. The FASA also facilitates contracting for the services of third-party neutrals in certain respects; these changes affect all government uses of ADR, not just those in government contracting.

Resolution of equal employment opportunity complaints, personnel grievances, and labor-management issues has been the area in which the largest volume of federal government ADR activity has occurred. ADR use for these workplace disputes has been encouraged by National

Performance Review recommendations, Equal Employment Opportunity Commission regulations, and the Civil Service Reform Act of 1978 as well as by the ADR Act. President Clinton's Executive Order on Labor-Management Partnerships (E.O. 12871, October 1, 1993) requires agencies, among other things, to train agency employees in consensual methods of dispute resolution, and has prompted increased agency efforts to use ADR in labor-management relations.

More than 20 agencies are already using mediation and other ADR methods to resolve workplace disputes in pilot projects or established programs, and several others are actively planning pilot programs. Some agencies have reported significant savings. The Air Force, for example, successfully resolved over 100 EEO disputes through mediation in 1992 and 1993, realizing an estimated savings of over \$4 million in complaint processing costs.

Regulatory enforcement proceedings and disputes involving administration of agency programs may implicate significant policy issues that require precedent-setting decisions. Although some of these cases may not be appropriate for resolution through ADR, many other enforcement proceedings involving routine regulatory violations lend themselves to use of mediation and other ADR techniques. And consensual techniques can be an especially effective approach to some complex regulatory disputes involving multiple parties and the need to design specific remedies or reconcile the conflicting interests of different groups (for example, many environmental cases).

Several agencies have experienced success with ADR methods in these areas. The EPA has initiated pilot programs to test the use of mediation and arbitration in Superfund (hazardous waste cleanup) cases and the use of ADR methods to resolve Clean Water Act and Resource Conservation and Recovery Act cases. EPA's experience with these programs has been very positive. The agency is also among those who have used consensual techniques to resolve complex policy disputes involving issues like siting or cleanup remedies.

The Department of Labor piloted the use of mediation to resolve cases alleging violation of labor or workplace standards in its Philadelphia Region, using its own program managers as mediators. Twenty-two of 27 cases mediated in the pilot were settled, with cost savings of seven to eleven percent per case, and the cases were resolved months faster than they would have been otherwise. DOL is now expanding this approach to other regions.

The Federal Deposit Insurance Corporation and Resolution Trust Corporation have mediated claims and disputes among failed financial institutions they control, and have reported major cost savings as a result -- over \$13 million in estimated legal costs over three years for the FDIC, and over \$115 million in four years for the RTC.

The Departments of Health and Human Services and Education have mediated grant audits and disputes for several years. And many agencies have used settlement judges to resolve licensing and enforcement disputes. Other agencies have established ombudsman programs to handle complaints or inquiries from people dealing with the agency.

Implementation Issues

ACUS has identified several issues that have caused confusion or hindered full implementation of the ADR Act. With respect to policy development and implementation, agencies sometimes fail to plan programs adequately or to allocate sufficient start-up resources to get a program going. Greater congressional oversight would be helpful. Also, some agencies have taken

narrow views of the Act's coverage, concluding, for example, that it does not apply to court litigation or policy development. Congress may wish to remind agencies that the Act is intended to be read broadly.

Appropriate training is a key factor in developing successful ADR programs. Dispute resolution specialists, potential neutrals, agency officials who may establish or participate in ADR programs and members of the public who are potential users of the programs all need education of various kinds on ADR.

Obtaining highly qualified, relatively low-cost neutrals to preside in ADR proceedings has been a challenge for agencies. Some have used agency employees, while others have turned to outside professionals. The enactment of FASA has facilitated the hiring of private neutrals by raising the threshold for agency use of simplified small purchase procedures from \$25,000 to as high as \$100,000, and providing that agencies need not use full competitive procedures for obtaining expert services in litigation or other disputes (including neutrals' services). Many agencies have begun to use the Conference's Roster of Neutrals, and others have entered into sharing arrangements like the ACUS-sponsored Shared Neutrals Pilot Project in Washington, DC. ACUS is helping agencies address this practical concern.

Another clear need is for better evaluative data on the costs and benefits of dispute resolution processes, and better methods to produce such data. So far, anecdotal evidence suggests that most parties in well-designed ADR programs respond positively to these processes and think they save resources. (A list of examples of cost savings from ADR appears at p. 37.) But there are few measurable data documenting hard savings or substantive impact. ACUS is working to develop model evaluation methods and documents for interested agencies.

Recommended Legislative Changes

The Office of the Chairman of the Administrative Conference recommends that Congress reauthorize the ADR Act on a permanent basis. The Act provides a uniform framework for ADR use across the government and serves as a catalyst for agency activity.

A few changes, primarily aimed at reducing ambiguity or confusion, could improve the ADR Act. Congress should:

- eliminate the exclusions from the Act for certain employee grievance matters and disputes involving prohibited personnel practices.
- amend the Act to eliminate settlement negotiations from the definition of "alternative means of dispute resolution" and delete the portion of the definition that refers to "any procedure that is used in lieu of an adjudication"
- provide that agencies may employ their small purchase authority to contract for services of neutrals from not-for-profit entities as well as small businesses.
- eliminate section 574(b) of the Act, exempting from the confidentiality provisions communications that were "provided to or w[ere] available to all parties to the dispute resolution proceeding."
- amend section 574(j) of the Act to provide that communications covered by the Act's confidentiality provisions shall be exempt from disclosure under the Freedom of

Information Act unless there is some other justification for their disclosure, independent of their use in a dispute resolution proceeding.

- consider eliminating the 30-day agency escape clause provision for binding arbitration.

- raise the certification limit for ADR cases to a level equal to that for all other contract Disputes Act disputes, and redefine agency authority for using ADR in contract disputes to eliminate ambiguities.

Introduction

The Federal Deposit Insurance Corporation saved \$13,500,000 in estimated legal fees and expenses in its bank liquidation and other litigation matters over two years. The United States Mint estimates savings of \$3 million in processing costs in the resolution of equal employment opportunity (EEO) complaints and employee grievances. The Air Force completed construction of a \$226 million Large Rocket Test Facility at the Arnold Engineering Development Center over three months ahead of schedule and \$12 million under budget. The Air Force is completely satisfied with the facility, and the contractor has released all claims against the government. In the private sector, NRC, a company in the computer industry, reduced its pending lawsuits from 263 to 28 and cut its annual outlay for outside attorneys' fees by half, without increasing the expense of in-house counsel, over a ten-year period.¹

These accomplishments have something in common -- they all resulted from the use of alternative means of dispute resolution, or ADR, a group of techniques designed to resolve conflicts consensually, generally with the assistance of a neutral third party. The FDIC turned to ADR when it needed to resolve an increasing number of claims and disputes among failed financial institutions it controlled. The Mint has resolved over 220 employee disputes, 50 percent of which would probably have been litigated rather than settled had ADR not been available. The Air Force achieved its impressive construction contract results through the use of partnering, a technique in which the parties to a contract work together to set and achieve common goals and to avoid disputes. And NRC committed itself to a policy of avoiding litigation

by reviewing disputes early and seeking to mediate or arbitrate many of them.

Use of alternative means of dispute resolution in our society has grown and changed dramatically during the last ten to fifteen years. These methods are becoming integral parts of many federal and state courts' operations, as well as many businesses' and other private entities' approaches to conflict. In-house and outside attorneys for major corporations report increasing use of ADR and generally find it effective and efficient.² Mediation, early neutral evaluation, and other ADR programs are in place in courts around the nation, providing an important tool for judges in managing their caseload and offering significant potential savings to the litigants as well. A 1992 survey of participants in the early neutral evaluation program of the U.S. District Court for the Northern District of California, for example, found they estimated their net savings at an average of \$44,000 per case.³

Satisfied users frequently cite cost savings and time savings as the reasons they use ADR,⁴ though there often are other benefits -- the opportunity to preserve working relationships by avoiding acrimony and managing conflict constructively, the chance to develop solutions that last because the parties have helped to design them and feel committed to them, and sometimes, the opportunity to craft "win-win" solutions that

¹Carver and Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why It Does*, 72 Harvard Business Review 120 (May-June 1994).

²A survey of 246 law firm attorneys and general counsels of Fortune 1000 companies found that 72% had at least some experience with ADR. Sixty-seven percent of these ADR users reported saving money. *Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels: Alternative Dispute Resolution (ADR)*.

³Cited in McDade, *An Overview of Selected Public and Private-Sector Alternative Dispute Resolution Initiatives* (U.S. Air Force, January 1995 Draft), at 30.

⁴*Deloitte and Touche Survey*, supra note 2.

meet the parties' real needs and satisfy them more than "win-lose" alternatives.

With enactment of the Administrative Dispute Resolution Act in late 1990, Congress encouraged the federal government to reap the potential benefits of ADR processes. The Act directs agencies to adopt policies on use of alternative dispute resolution and to appoint dispute resolution specialists responsible for developing and implementing those policies. It facilitates federal ADR use by clarifying agency authority, extending some confidentiality protections, and directing the Administrative Conference of the United States (ACUS or "the Conference") and the Federal Mediation and Conciliation Service (FMCS) to assist agencies' ADR efforts. The Act contains a sunset provision, under which its provisions will expire October 1, 1995.

When the Administrative Dispute Resolution Act was approved in late 1990, nearly all agencies of the federal government, with a few exceptions, lagged well behind private sector institutions and the courts in understanding and using consensus-based approaches to handling conflict. The developments described in this report suggest that this situation is beginning to change noticeably. Key officials at a significant number of agencies now explicitly recognize the value of alternative processes like mediation and are working to expand their use in a variety of conflicts. Due mainly to the ADR Act's encouragement, as well as subsequent, related initiatives, new programs have sprouted in agency after agency. Many of them involve proprietary areas of agency activity, such as contracting and personnel disputes. Several agencies have shown additionally that ADR processes can be employed to avoid or address disputes over making and enforcing policy, licensing, siting, and other regulatory activities. While most are still new, these programs hold potential for yielding great benefits to the public and the government in the next few years. Collectively, they suggest that virtually every area of agency activity potentially lends itself to consensual dispute resolution processes.

Much, however, remains to be done. Most agencies' efforts are still in their infancy, and the use of ADR methods remains relatively infrequent. Establishing improved approaches to agency dispute resolution requires overcoming institutional misgivings about the new and unfamiliar. In an era of budget austerity, accomplishing the training, program development and start-up efforts required to realize the ultimate benefits of ADR requires high-level commitment as well as interagency cooperation and sharing. If most agencies are to move very far forward from here, the federal government will need to address carefully these issues and others concerning resources and quality assurance.

The Office of the Chairman of the Administrative Conference⁵ has prepared this report, as requested by Congress in S. Rep. No. 101-543, Report of the Senate Committee on Governmental Affairs on S. 971 (1990), to assist Congress in reviewing government experience under the ADR Act and to inform the debate over whether to renew or amend the Act's provisions. Separate chapters describe the Act and its impact, the Administrative Conference's activities in fulfillment of its responsibilities under the Act, federal agencies' efforts to implement the Act, and proposals for legislative change or other actions that could improve government use of ADR. For convenience, a copy of the ADR Act, as amended, is included at the end of the report. Two appendices (bound

⁵The Office of the Chairman contains the staff of the Administrative Conference of the United States, an independent, statutorily-created federal agency composed of members from both government and the private sector that studies issues of administrative procedure and recommends improvements. The ACUS ADR efforts described in this report are conducted by the staff of the Office of the Chairman rather than the Conference as a whole, except insofar as formal recommendations of the Administrative Conference are discussed. Similarly, the opinions and recommendations in this report are those of the Office of the Chairman and have not been adopted formally by the Administrative Conference. For convenience, the terms "ACUS" and "Administrative Conference" are used in this report to refer to the Office of the Chairman (except, as noted, in referring to formal Conference recommendations).

separately) include (1) samples of materials produced by the Conference or under its sponsorship to help agencies implement the Act, and (2) individual agency reports to ACUS on their activities to implement the Act.

One government official's description of his own agency's efforts to implement the Act could well apply to the government-wide experience: "While we have achieved a significant beginning in the ADR arena, I believe we are just at the threshold of bringing innovative practices into conflict management in all areas touched by the Department. The possibilities are limitless."⁶ We offer a snapshot of federal government ADR at this threshold.

A Note About Sources

Most of the information about agency ADR activities that appears in this report was supplied to the Administrative Conference by the agencies in response to a September 1994 request. Almost 60 agencies, including 13 cabinet departments, responded to the request for information. A sample copy of the ACUS letter and copies of the agency responses (excluding, in some cases, lengthy appendices which remain available in the Office of the Chairman of ACUS) are included in Appendix I to this report. Citations have not been included for information in these reports unless it is quoted, in which cases the citation is to "[agency name] report to ACUS," including the specific author's name if available.

In some cases, the Conference has supplemented the information in the agency reports with information from agency documents and other available sources. Citations have been provided to these sources.

Federal agencies who conduct regulatory activities were also asked to supply information concerning their use of a particular form of ADR: negotiated rulemaking. Because the Conference is preparing separate preliminary and final reports on implementation of the Negotiated Rulemaking Act of 1990, this report does not include information on negotiated rulemaking.

⁶Norval D. (John) Settle, Dispute Resolution Specialist, Department of Health and Human Services, HHS Report to ACUS.

What is ADR?

ADR (or "alternative dispute resolution") is a collective name for a number of joint problem-solving processes used in lieu of formal, adversarial methods for resolving conflict. These processes usually involve use of a neutral third party who (except in arbitration) works with the parties to help them find mutually acceptable solutions. The various ADR methods can be viewed as points along a continuum, ranging from processes over which the parties have the most control (e.g., mediation, conciliation) to processes over which they have the least control (e.g., binding arbitration). Here are some ADR methods:

Conciliation is the attempt by a neutral third party to reduce tensions and improve communications among the parties in an effort to get them to agree on a process for resolving their dispute.

Mediation involves using a trained neutral third party to help disputants negotiate a mutually agreeable settlement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

Neutral evaluation (or "early neutral evaluation") involves using a neutral factfinder, usually with substantive expertise, to evaluate the relative merits of the parties' cases. This process usually involves an informal presentation to the neutral of the highlights of parties' positions. The neutral provides a nonbinding evaluation that can give the parties a more objective assessment of their positions, thereby increasing the chances that further negotiations will be productive.

Settlement judge describes a neutral, generally a judge other than the presiding one, who serves as a mediator or neutral evaluator in a case pending before an agency tribunal. The settlement judge may give an informal advisory opinion. If settlement is not reached, the case will continue before the presiding judge, who will ultimately make a decision.

Minitrial is a structured settlement process in which each side presents a highly abbreviated summary of its case before senior representatives of each party, who are authorized to settle the case. Following the presentations, the officials seek to negotiate a settlement. A neutral adviser sometimes presides over the proceeding, and can mediate or render an advisory opinion if asked to do so.

Arbitration is like adjudication in that a neutral third party is empowered to decide disputed issues after hearing evidence and arguments from the parties. The arbitrator's decision may be binding on the parties either through agreement or operation of law, or it may be nonbinding or advisory. Arbitration may be voluntary (i.e., where the parties agree to use it), or it may be mandatory and the exclusive means available for handling certain disputes.

Negotiated rulemaking (or regulatory negotiation) is an alternative to traditional procedures for drafting proposed regulations that brings together representatives of the agency and the various affected interest groups to negotiate the text of a proposed rule. It supplements the normal steps in agency rulemaking.

Ombudsman describes a grievance-handling official who investigates citizens' complaints against administrative agencies. Depending on the outcome of the investigation, the ombudsman may recommend relief or persuade the complainant that the government acted properly. When an investigation indicates the problem results from a system failure, the ombudsman may also propose reforms.

Partnering is a process, increasingly used in contracting, that is designed to avoid disputes. At the start of a project, participants seek to identify common goals and interests and establish clear lines of communication. The process may involve a joint workshop, managed by a neutral facilitator, to develop a team charter, as well as follow-up meetings and evaluation processes. A partnering agreement usually includes a commitment by the parties to use ADR to resolve disputes that arise during a project.

Chapter One

The Administrative Dispute Resolution Act: A Summary

The ADR Act is a fairly straightforward and uncomplicated statute. It does not impose many requirements, but it does make explicit federal agencies' broad authority to use alternative means of dispute resolution. Provisions of the Act, summarized below, require agencies to undertake certain implementation activities, clarify agencies' authority to use ADR, provide some confidentiality protection for ADR proceedings, authorize agency use of "binding" arbitration, and call for sunset of the Act in October 1995.

"Potentially, the ADR Act may be one of the most important developments in modern administrative law. . . . [T]his may be the wave of the future."

**Arthur Bonfield and Michael Asimow,
State and Federal Administrative Law
(1993 Supplement, p. 48)**

I. Implementation Requirements

Among the Act's relatively few requirements are Section 3's mandates that each agency appoint a "senior official" as "dispute resolution specialist" (DRS) and develop a policy addressing the use of ADR in resolving disputes. The DRS is intended to act as the agency's point person for developing and implementing a policy. The policy is to be developed in consultation with ACUS and FMCS, and should address the potential use of consensus-based methods across the whole range of disputes in which the agency may be involved.⁷ The Act also mandates that

agencies provide training for the dispute resolution specialist and other key employees, and that each agency review its standard agreements for contracts and grants to determine whether they can be amended to encourage the use of ADR.

II. Agency Authority

Section 4 of the Act amends the Administrative Procedure Act, the basic statute governing agencies' decisionmaking processes, to make explicit that agencies may use ADR to help resolve virtually any dispute in which they are involved. Except with respect to using arbitration, this is not new authority; agencies have always had inherent authority to use nonbinding ADR processes to resolve disputes or cases. The Act simply clarifies this authority for any who may have had doubts. What the Act offers that was not previously available is an explicit congressional endorsement of ADR, some protection of the confidentiality of ADR processes, statutory authority to use "binding" arbitration, and practical aids to simplify and encourage ADR use.

The Act has very broad applicability. ADR may be used in almost any dispute in which a federal agency is involved and the parties agree to use it. The Act covers disputes where an agency is a party, as well as disputes in which an agency serves only as the forum for a dispute among non-government parties. It amends the Administrative Procedure Act to make explicit that ADR may be used in proceedings under the APA, so long as the parties agree. There are a few exclusions, the scope of which are somewhat

⁷The Act contains a list of types of disputes to be considered, which includes "formal and informal adjudications; rulemakings; enforcement actions; issuing and revoking licenses or permits; contract administration; litigation brought by or against the agency; and other agency actions." The Administrative Procedure Act

defines "agency action" very broadly to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 USC §551(13).

vague, involving certain types of prohibited personnel practices and nonnegotiable labor-management issues.⁸ The Act also makes clear that its intent is to supplement rather than limit other available agency dispute resolution techniques.

The Act defines "alternative means of dispute resolution" very broadly, to include the whole range of processes that use third party neutrals to resolve disputes, as well as settlement negotiations. "Dispute resolution proceedings" are those forms of alternative means of dispute resolution in which a neutral is involved.⁹

The Act recognizes that different types of ADR processes may be appropriate in different types of circumstances and that ADR processes are not appropriate in all situations. It contains a list of situations where an agency should "consider not using" ADR. This provision was deliberately drafted so that ADR is never prohibited; rather, the Act suggests certain contexts where agencies might choose on balance not to use it. These situations include those where an agency is looking for an authoritative or precedent-setting decision, where the agency requires absolute uniformity of outcome for similar cases, and where cases need to be resolved on the public record. The list is in the conjunctive; thus, the fact that one, or even more, of the factors is relevant does not mean that ADR absolutely should not be used. This section also recognizes that ADR processes, because of their inherent flexibility, may often be tailored to address and avoid many of these concerns.

The Act provides that ADR processes must be voluntary; all parties must agree to participate. Although agreement in advance of a dispute is acceptable, no contract or grant award may be conditioned on agreement to use ADR to resolve disputes arising from the award.

⁸Given an agency's inherent authority to use ADR processes, the effect of exclusion from the ADR Act means mainly that the Act's confidentiality provisions and authority to use binding arbitration are not available. For further discussion of these exclusions, see *infra*, at 39-41.

⁹See 5 U.S.C. §571(3), (6).

Section 4 of the Act, adding 5 U.S.C. § 573, provides guidance and procedural assistance to agencies for acquiring the services of "neutrals" - the generic term for the individuals who manage or preside over most ADR procedures, and who are usually key figures in their effective use. These include arbitrators, mediators, convenors, facilitators, settlement judges, and others, from inside or outside the federal government. It establishes that neutrals (other than arbitrators) serve at the will of the parties. The Act avoids highly prescriptive qualifications requirements, stating that a neutral may be anyone "who is acceptable to the parties to a dispute resolution proceeding." It calls for the Administrative Conference to maintain a roster of neutrals, develop advisory standards for neutrals, contract for neutrals' services on behalf of agencies, and develop procedures for expedited acquisition of neutrals' services.

The Act recognizes that existing contracting processes often served to impede ADR use by limiting agencies' ability to obtain neutrals' services expeditiously and efficiently. It gives agencies increased flexibility in contracting with private neutrals, so that, for example, an agency seeking a neutral need not select the lowest bidder. The Act also eliminates prohibitions against interagency and intergovernmental sharing of employees' services relating to ADR, and provides explicit authority to accept voluntary, uncompensated services in connection with ADR. The Act authorizes agencies to enter into interagency agreements for the services of other agencies' employees as neutrals on a reimbursable basis, as well as to use government personnel (and nongovernment personnel) on a nonreimbursable basis.

III. Confidentiality

The Act seeks to balance the need for confidentiality, which is critical for sensitive negotiations to yield agreement, against the openness required for the legitimacy of government activity. Although the protection from disclosure prescribed by the Act for communications in ADR proceedings is not

absolute, it is considerably clearer and more extensive than would otherwise exist.

Both the neutral and the parties are bound by the Act's confidentiality provisions. The neutral may not disclose any information provided in confidence; the Act provides narrow exceptions where all parties and the neutral agree, where the information is already public, where a statute requires that the information be made public (but the information should come from the neutral only if no other person is reasonably available to disclose the information), or, by court order, where disclosure is necessary to prevent manifest injustice, help prevent a violation of law, or to prevent harm to public safety or health. Similar rules apply to disclosure by parties to the dispute resolution proceeding, although they may also disclose information where the information is relevant to determining the existence or meaning of an agreement, or where all the parties to the dispute resolution proceeding had access to the information. The Act is not intended to prevent discovery of information otherwise discoverable. Nor does the confidentiality provision act as an exemption from, or an automatic bar to, disclosure under the Freedom of Information Act.

IV. Arbitration

The General Accounting Office has historically held that agencies may not enter into

binding arbitration without specific statutory authority. The ADR Act provides such authority, with certain limitations, where all the parties consent in writing. Specific provisions describe the procedures to be used. The Act contains a significant limitation on the effect of an arbitral award, added in response to constitutional concerns raised by the Department of Justice: the head of an agency has 30 days to vacate the award. This authority is non-delegable, and the agency head may not be advised by any employee involved in investigating or prosecuting the arbitrated matter. A private party does not have comparable authority. If the agency head does vacate an award, the agency will not be bound, but it will be liable for the attorneys' fees and expenses of the private party.

V. Other Provisions

The ADR Act also contains a number of provisions that amend other laws. It specifically authorizes the use of ADR in disputes under the Contract Disputes Act, although that amendment has raised some ambiguities.¹⁰ It also amends the Federal Tort Claims Act and Claims Collection Act to authorize the Attorney General to increase the settlement authority delegated to agencies.

The Act contains a sunset provision terminating its effect on October 1, 1995.¹¹

¹⁰ Proposed revisions to the Act addressing this and other concerns are discussed *infra*, at 38-44.

¹¹ The Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, extends the sunset date for the Act's section covering disputes under the Contract Disputes Act until October, 1999.

Chapter Two

Administrative Conference Efforts to Implement the ADR Act

Recognizing that federal agencies are involved in a variety of disputes as parties, and decide far more cases than do federal courts, the Administrative Conference of the United States has been in the forefront of efforts to introduce alternative dispute resolution in federal agencies, promoting consensual means of resolving disputes as an alternative to litigation since the early 1980s. The Conference's efforts have taken a variety of forms throughout this period, including research, recommendations, publications, conferences, training, assistance to individual agencies, and developing and administering interagency activities, among others.

In the early stages of its activity, beginning in 1982, ACUS laid the groundwork for using ADR to improve dispute resolution in the federal sector, undertaking basic research, issuing recommendations on the subject, and working with congressional sponsors to develop and secure passage of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act of 1990.¹² With passage of the ADR Act in 1990, the Conference's efforts entered a new phase, focusing initially on start-up implementation of that statute. The Conference worked to acquaint agencies with the Act's requirements and ADR processes generally, consulted with them as they developed ADR policies, and established a roster of neutrals available to work with federal agencies. As the needs of many agencies have evolved, so have the Conference's activities, with recent

special emphasis on developing interagency working groups and other cooperative efforts, working with the Administration to implement the National Performance Review's ADR recommendations, and providing direct assistance to agencies establishing ADR programs.

"[T]he Administrative Conference has been of great assistance to the Department in helping us implement both ADR and negotiated rulemaking. I am pleased to report that the conference's contributions have helped us achieve great strides in these areas."

Robert B. Reich
Secretary of Labor
Department of Labor Report to
ACUS

In the future, ACUS hopes to continue to meet agencies' changing needs, as some agencies become more sophisticated in using these conflict resolution mechanisms and others begin the process of considering how to use them. The Conference will continue to work on improving methods to evaluate the success and effectiveness of ADR programs, assist agencies to develop programs that actually work, and help agencies work together and share experiences in person, on paper and on-line.

I. Laying the Groundwork: ACUS Activities Preceding Enactment of the ADR Act

During the period 1982-1990, the Administrative Conference undertook seminal research on whether and how alternative dispute resolution techniques

¹²ACUS has been very active in implementation of both the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act. Because this report is focused specifically on the ADR Act, however, this report does not describe most of the Conference's work on negotiated rulemaking.

could be used to resolve conflicts involving the federal government. It issued 15 formal recommendations and accompanying reports related to ADR:

- Procedures for Negotiating Proposed Regulations (1982)
- Resolving Disputes Under Federal Grant Programs (1982)
- Administrative Settlement of Tort and Other Monetary Claims (1984)
- Negotiated Cleanup of Hazardous Waste Sites Under CERCLA (1984)
- Procedures for Negotiating Proposed Regulations (1985)
- Case Management as a Tool for Improving Agency Adjudication (1986)
- Acquiring the Services of "Neutrals" for Alternative Means of Dispute Resolution (1986)
- Agencies' Use of Alternative Means of Disputes Resolution (1986)
- Alternatives for Resolving Government Contract Disputes (1987)
- Dispute Procedures in Federal Debt Collection (1987)
- Arbitration in Federal Programs (1987)
- Protecting Mediator Confidentiality (1988)
- Agency Use of Settlement Judges (1988)
- Contracting Officers' Management of Disputes (1989)
- The Ombudsman in Federal Agencies (1990)¹³

As part of its commitment to implementing these recommendations, and to promoting improved methods of resolving federal agency disputes, the Conference sponsored a "Colloquium on Improving

Dispute Resolution: Options for the Federal Government" in June 1987, which brought together members of Congress, judges, high-level executive branch officials, private practitioners, and academic experts on administrative law and dispute resolution. The Conference also issued *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution*, a book that for the first time gathered in one place a substantial volume of materials related to ADR use in the federal sector.

Although a few agencies pioneered use of ADR methods, most federal agencies remained hesitant to experiment much, if at all, with ADR during this period. The Conference and others began serious efforts to encourage ADR use through legislation in 1988, prompting Senator Charles E. Grassley (R. Iowa) to introduce S. 2274, a bill to promote use of ADR by federal agencies. ACUS staff assisted congressional staff in drafting the bill, and Conference Chairman Marshall J. Breger testified several times in support of the legislation. Congressman Dan Glickman (D-Kan.) introduced ADR legislation in the House of Representatives in 1989. Near the end of the 101st Congress, the Administrative Dispute Resolution Act, Pub. L. 101-552, and the Negotiated Rulemaking Act of 1990, Pub. L. 101-648, both passed without dissenting votes; they were signed by President Bush in November 1990. The legislation enacted into law virtually all of the Conference's recommendations on this subject.

The Conference's ADR initiative received a boost in 1989 from private grants from the Eugene and Agnes Meyer Foundation and the Culpeper Foundation to support the program.¹⁴ A subsequent grant from the William and Flora Hewlett Foundation also greatly aided the

¹³The Conference's ADR recommendations are included in Appendix I, along with samples of the other ACUS materials described in this chapter.

¹⁴The Conference has statutory authority to accept nonappropriated funds. See 5 U.S.C. §595(c)(12).

Conference's ability to work with agencies to carry out the Act.

II. Start-up and Implementation of the Act:

ACUS Activities Since 1990

Under the ADR Act, the Administrative Conference is to support the federal ADR effort by (among other things) consulting with agencies as they develop their ADR policies, establishing a roster of neutrals available to help resolve disputes, helping agencies acquire neutrals quickly, and gathering information on federal agency experience with ADR. The Conference's initial activities to encourage ADR Act implementation concentrated on fulfilling these responsibilities and helping agencies to get started. As some agencies completed the development of ADR policies and moved from planning to implementing, the Conference's assistance activities evolved to provide new levels of assistance.

A. Introducing the Act

Beginning in 1991, ACUS worked to educate the newly-appointed agency dispute resolution specialists and other agency personnel about ADR methods and their potential uses in agency disputes. In only a handful of agencies did the DRS come to the job with much previous exposure to ADR. The Conference sought to rectify this with a series of educational programs, kicking off the government's effort to implement the Act with a March 1991 introductory roundtable for dispute resolution specialists from about 50 agencies (keynoted by the Act's sponsors). There followed a series of day-long programs on using ADR, selecting neutrals, designing dispute resolution systems, evaluating ADR programs, and ADR use in contracting, civil rights, and rulemaking cases. These programs offered agency officials and others the opportunity to learn from experts in the government and outside. The Conference also developed

and/or participated in a large number of educational programs for officials at individual agencies.

B. Assistance on Agency ADR Policies

As agencies began to appoint dispute resolution specialists and develop policies, the Conference provided guidance and assistance. The ACUS staff worked (and continues to work) with agency DRSs to integrate their goals and policies into broad implementation plans and helped agency personnel to consider the appropriateness of ADR for each category of dispute the agencies deal with, as required by the statute. To assist dispute resolution specialists in developing policies and setting up programs to implement the Act, the Conference issued a formal guidance document, *Implementing the ADR Act: Guidance for Agency Dispute Resolution Specialists* (February 1992).

C. Aid in Acquiring Neutrals

As described above, the Act provides substantial flexibility for selecting neutrals. These provisions appear generally to be working well. Agencies have begun to share ADR resources across the government, and ACUS, using its authority under section 573 of the Act, has facilitated this trend. As required by the ADR Act, the Administrative Conference maintains a Roster of Neutrals containing the names of hundreds of mediators, arbitrators, and other neutrals who are available to help resolve conflicts involving federal agencies. The Roster, initially established in 1990, is a computerized database of potential neutrals, containing extensive biographical information on those listed (e.g., experience as a neutral, subject expertise, geographic service area, training, occupation, degrees, references, fees, and the views of parties in other cases concerning a neutral's performance) that the Conference believes will help users make an informed selection of a neutral. Agency officials and other parties to disputes can identify potential neutrals quickly by requesting names and pertinent

information from the Roster. In addition, the Conference has used its authority for entering into contracts for neutrals' services to help several agencies develop new programs or take efficient advantage of mediation and training opportunities that might otherwise have been lost.

ACUS, working with several other agencies, launched a pilot project in 1994 to promote the sharing of federal employee mediators among agencies. This system should save considerable money and reduce red tape for agencies wishing to mediate EEO (and eventually, other) disputes. Over 15 agencies have signed up to participate, and the first cases have been mediated. The goal of the program is to provide low cost, high quality neutrals to agencies in the metropolitan Washington, DC area. ACUS has also assisted similar cooperative efforts in several regions outside of Washington, and has begun to explore ways to share neutrals among federal agencies and their state and local counterparts.

The Act also instructs ACUS to establish qualification standards for neutrals. The Conference has worked extensively with many experienced, knowledgeable people on issues relating to qualifications of neutrals, given the importance of quality performance to ADR methods' ultimate acceptance. Credentialing and qualifications questions have provoked considerable controversy among dispute resolution professionals and scholars. This lack of consensus, as well as the extreme diversity of agencies' activities and resulting disputes -- ranging from personnel and other internal disputes to enforcement, contracting, financial, and policy conflicts -- and the variety of different roles that neutrals may play in various ADR processes, make development of broad-based advice or guidance problematic. This has caused the Conference to proceed cautiously in setting general standards.

Agencies in ACUS Shared Neutrals Pilot Program

Corp. for National and Community Service
Department of Commerce
Department of Defense
 Air Force
 Army
 Defense Headquarters
 Defense Logistics Agency
Department of Education
Department of Health and Human Services
National Aeronautics & Space
 Administration
National Archives & Records
 Administration
National Endowment for the Arts
National Guard Bureau
Securities and Exchange Commission
Department of State
Department of Veterans Affairs

Rather, the Conference has sought to (1) work with public and private entities to begin developing meaningful criteria and methods for predicting success as a mediator or other neutral, and (2) provide assistance to key agency personnel to become "informed consumers" capable of specifying the characteristics they desire in a neutral for a particular case, locating apt candidates from a variety of sources, and retaining them expeditiously. ACUS has also helped many agencies, individually and government-wide, deal with these topics, often in cooperation with private experts deeply involved in addressing qualifications matters. Given that any qualifications standards for neutrals that are adopted would be highly contentious and might serve less to guarantee quality than to limit artificially agencies' access to capable candidates, the Office of the Chairman believes that, until considerably more progress has been made toward a consensus on qualifications for neutrals, the Act's current nonrestrictive approach is the best.

D. Educational and Training Materials

ACUS has developed numerous materials for agencies to use in implementing the Act. In addition to the *Guidance for Dispute Resolution Specialists*, the Conference published a series of primers for government officials on basic ADR issues. One sought to introduce ADR to government managers. Another, *The Ombudsman: A Primer for Federal Agencies*, was published in 1991, followed in 1992 by *Mediation: A Primer for Federal Agencies*, available in both English and Spanish. The Conference also contributed to, published and distributes a wide variety of materials developed by its interagency working groups, discussed below.

From Conflict to Cooperation: Alternative Dispute Resolution is an 18-minute introductory videotape on ADR that the Conference produced in conjunction with FMCS with funds from the Culpeper Foundation. ACUS also produced a two-hour videotape, *Dispute Resolution Seminar*, that offers information on agency uses of ADR and the basic issues involved.

"[W]e want to applaud the exceptionally high quality training, information, and publications ACUS has made available, at no cost. Budgetary restraints have severely curtailed training, and successful development of various Departmental ADR programs owes much to ACUS's assistance."

Stephen H. Kaplan, General Counsel

Diane R. Liff, Dispute Resolution Specialist
Department of Transportation
Report to ACUS

The Conference has established an ADR library, which houses a large collection of agency ADR training manuals, policy statements, implementation plans, and informational pamphlets, as well as books,

videos, journal articles, and other ADR-related materials; agency personnel and the public draw upon these materials. Much of the collection can be searched electronically.

Conference staff have been involved in designing and teaching a course on ADR offered by the Department of Justice Legal Education Institute, ADR courses presented by the Office of Personnel Management's Management Development Centers, and several other government-wide education programs.

E. Interagency Working Groups

Responding to reduced agency resources and enhanced demand for ADR assistance, ACUS augmented its small staff by establishing interagency working groups. The Conference recognized early on that the ADR Act could be implemented most effectively and efficiently through the cooperative efforts of federal agencies, and that ACUS was uniquely positioned to make a key contribution by launching and coordinating such efforts. In 1992, ACUS worked with agency dispute resolution specialists to establish four interagency working groups (recently reorganized into two general working groups and six smaller special project groups). Under the auspices of a Conference-led Coordinating Committee, the working groups -- involving hundreds of agency personnel representing dozens of agencies across the government -- create materials, joint projects, and educational programs that no single agency would undertake on its own. Some of their many significant accomplishments include:

- Preparation of a state of the art handbook on designing dispute resolution programs in the federal government.
- Development of materials to help agencies evaluate the effectiveness of their ADR programs.
- Presentation of day-long roundtable programs on use of mediation in EEO and contract disputes.

- Publication of *ADR Network*, a newsletter appearing three times a year.
- Development and presentation of a prototype four-day mediation skills training program, including standardized training materials, an instructor's manual, and exercises involving enforcement, contract, EEO and personnel cases.
- Development of a "starter kit" for agencies interested in using mediation in EEO disputes.
- An ongoing "brown bag" lunch series, with practical, focused discussions on a wide variety of ADR-related topics, including qualifications and sources for neutrals and evaluation of dispute resolution programs.
- Interagency working groups have also contributed to some of the Conference's government-wide ADR initiatives, including the sharing of neutrals program. Among the projects the working groups are currently involved in are efforts to develop teams of experienced people who can offer advice to specific agencies, a video on using mediation in EEO disputes, a handbook on contracting for neutrals, an ADR "desk book" to assist contracting officers, and a seminar to educate private contractors and their counsel about federal agency ADR programs.

F. Assisting the National Performance Review

The Conference's ongoing efforts to implement the ADR Act dovetailed with several recommendations of the National Performance Review calling for greater federal use of ADR, greater cooperation between government and the private sector, and innovative uses of electronic mail and information technology.¹⁵ While all of

ACUS' ADR activities contribute generally to achievement of these goals, three special initiatives in particular are closely linked to the NPR's recommendations.

Electronic Mail Pilot Project. An ACUS proposal for an ADR "e-mail" system to facilitate the sharing of ADR information among federal agencies and private dispute resolution organizations was selected as one of three pilot projects for the NPR's electronic mail demonstration. The Conference is also exploring the conduct of an "electronic regulatory negotiation," in which one federal agency would demonstrate "on-line" regulatory development.

ADR in Federal Procurement. The Conference and the Office of Federal Procurement Policy jointly sponsored a May 1994 program in which 24 agencies signed a formal pledge to increase use of ADR in contract disputes and a follow-up ADR/Procurement Conference. ACUS, OFPP, and the working groups have offered educational programs for agency personnel and intend to develop training programs and materials aimed at contracting officers, contract attorneys, and their private sector counterparts.

Government and Private Sector Cooperation on ADR. In response to the NPR's call for greater public-private sector cooperation, the Conference invited the major national dispute resolution organizations, public and private, to explore joint projects and ways to work together to improve resolution of disputes involving the federal government. A number of joint programs and other efforts have resulted or are in progress.

implemented this recommendation with a September 1993 Memorandum to agency heads directing them to consider using the technique. The Administrative Conference, with the Office of Management and Budget's Office of Information and Regulatory Affairs, presented an educational program on negotiated rulemaking for agency managers in November 1993.

¹⁵The NPR Report also encouraged greater use of negotiated rulemaking, and President Clinton

G. Cooperation with FMCS

The Act gives important responsibilities to both ACUS and FMCS, and the two agencies have worked together to complement each other, taking advantage of the unique skills and strengths of each and avoiding duplication of effort. With its background in mediation and negotiation, FMCS has focused on direct delivery of mediation services and mediation skills training. The Conference's experience in research and policy analysis, along with its general knowledge of agency organization and procedure, have helped it to take the lead in policy development and institutionalization of ADR. Both agencies have brought their special skills to bear on program design, evaluation, and other issues. ACUS and FMCS have worked together to produce training materials including the introductory ADR video and mediation training course and manual discussed above, and FMCS staff are key participants in the interagency ADR working groups.

H. Program Design and Technical Assistance to Agencies

The Conference staff has worked closely with dozens of agencies, including the Departments of Labor, Transportation, Commerce, and the U.S. Air Force, to develop training and educational programs and to design ADR systems. Shortly after passage of the Act, for example, the Conference worked with the Department of Labor and the Federal Mediation and Conciliation Service in 1991-92 to design a successful pilot project to mediate enforcement disputes in the Department's Philadelphia region (see box at 27). As part of this effort, the Conference developed and presented a two-day training seminar for DOL regional managers.

More recently, ACUS staff designed a pilot mediation program in 1994 for the Department of Transportation to use in resolving EEO disputes. Staff helped determine where in the agency the program

should be piloted (the Federal Aviation Administration was selected), consulted dozens of persons with an interest in the program, drafted a design plan, and provided training and implementation advice. The pilot is currently underway.

A few of the Conference's current projects involve the National Labor Relations Board (settlement judge training); National Mediation Board (assisting in improving mediation services) and Department of Commerce (mediation training). In addition, an ACUS staff member is on a part-time assignment to help the Internal Revenue Service set up a mediation program for use in certain complex tax disputes.

I. Evaluating ADR Programs

Recognizing that information about the effectiveness of ADR programs in the federal government is the single most potent tool in encouraging ADR use to improve dispute resolution, the Conference has encouraged agencies to measure the success (or lack of success) of their ADR initiatives. The Conference put on a day-long program on evaluating ADR programs and sponsored development by RAND of prototype evaluation materials agencies can use as a starting point for gathering data. With the active participation of one of the working groups, ACUS developed a ground-breaking list of program "performance indicators" that agencies can measure and a handbook for evaluating agency ADR programs.

ACUS has also undertaken an evaluation of the mediation program at the United States District Court for the District of Columbia, which looks closely at litigants' perceptions of the mediation process. Many of the results are likely to be applicable in the context of adjudication at the administrative level. ACUS has also recently started an evaluation of EPA's negotiated rulemaking program, and Conference staff have assisted several agencies in connection with their initial evaluation efforts.

J. Ongoing Research

The Conference continues to conduct research intended to improve federal agency dispute resolution. In 1991, it adopted a recommendation on *Implementation of Farmer-Lender Mediation by the Farmers Home Administration*. Current research is examining the U.S. Fish and Wildlife's Service's conflict management efforts under the Endangered Species Act, the use of ADR to resolve disputes under the Americans with Disabilities Act, the effectiveness of EPA's negotiated rulemaking program, and the relationship between the FOIA and the ADR Act's confidentiality provisions.¹⁶ The Conference may issue recommendations on these topics in the near future.

III. Future Activities

As noted earlier, federal agencies' efforts to improve the way they resolve disputes are "at the threshold." As agencies' programs and needs change, so will the Conference's activities. The Conference anticipates continuing its endeavors to support agency activities, through educational and training programs, support and encouragement for interagency efforts, program design assistance, and additional research on new issues. It expects to focus increasingly on developing evaluation data and helping agencies measure success, improving agencies' efficient access to neutrals, and exploring appropriate neutral qualifications. Among the activities planned by the Conference are:

- Intensifying efforts to develop inexpensive methods to assess the costs, benefits, fairness and effectiveness of their dispute resolution processes.
- Expanding assistance to the NPR by helping enforcement and contracting agencies carry out plans to implement new dispute resolution processes.

- Expanding the Conference's Roster of Neutrals to meet the needs of particular agencies, such as the IRS, that are looking for neutrals with specific expertise in an area of substantive law or a particular ADR process.
- Going on-line with ADR e-mail and data bases to allow agencies to share documents and experiences with each other and with the private sector, and to locate and hire potential neutrals quickly.
- Increasing efforts to help agencies (and especially regional offices) deal with resource constraints, through imaginative sharing and service programs for neutrals, program evaluation, and advice.

"ACUS has been one of the key organizations helping us to develop an ADR program. We are profoundly grateful to members of your staff, We look forward to cooperating with you in greater depth as we get our fledgling ADR programs up and running."

Robert P. Myers, Jr., Dispute
Resolution Specialist
Department of State Report to
ACUS

- Developing training programs and materials to help advocates for the government represent their client agencies effectively in mediation, minitrials and similar informal processes.
- Beginning new research on using consensus-building techniques to develop public policy and on fairness issues that may arise in using ADR processes (e.g., handling enforcement disputes under the ADA, resolving disputes under revised welfare or block grant programs).
- Developing appropriate incentives and job performance criteria to ensure that program managers and attorneys resolve disputes efficiently and promptly.

¹⁶This issue is discussed *infra*, at 43.

Chapter Three

Alternative Dispute Resolution Activities in the Federal Government: A View of the Landscape

I. General Observations on Agencies' Implementation of the Act

The scores of agencies covered by the Act have taken many divergent approaches to carrying out the Act's few requirements -- appointing a dispute resolution specialist, developing a policy on ADR use, consulting with the Administrative Conference and Federal Mediation and Conciliation Service, and providing training. Some have "hit the ground running," providing considerable high level support and resources for starting ADR programs. A roughly equivalent number appear to have done very little. Most agencies fall along a continuum between these extremes.

Nearly all agencies have appointed dispute resolution specialists; about six dozen are currently serving.¹⁷ In addition, several cabinet departments have gone (or plan to go) farther, naming specialists for many or all components of the department. Some agencies, however, have not yet selected a dispute resolution specialist, or have done so only recently.

Agencies' arrangements for appointing and supporting their specialists vary. A few agencies (including the Department of Energy and HHS' Center for Disease Control in Atlanta) have created new positions and filled them with dispute resolution professionals. Most agencies, however, have simply added the specialist function to the duties of a current official, usually one in the general counsel's or policy office. In a number of these (e.g., U.S. Air Force, General Services Administration, HHS, FDIC) the

dispute resolution specialist (or a subordinate) has been freed from some other duties, assigned additional personnel, or afforded some financial resources to undertake implementation. In others, scant resources, or none at all, have been allocated to the position.

Several agencies' implementation strategies have been particularly notable:

- The Department of Defense mandated appointment of a dispute resolution specialist for each service and approximately a dozen other large components of the Department. After the General Counsel and other high-ranking officials issued policy memos and statements strongly supporting ADR initiatives, Defense established late in 1994 its own departmental working groups, modeled on the Administrative Conference's interagency approach. Some of these new DOD groups, like the one on contract disputes, now operate both internally and jointly with the Conference's interagency counterparts to develop training programs and materials that benefit many agencies.
- The Department of Justice convened a task force on ADR to develop recommendations and a plan for enhanced ADR use as part of its civil justice initiative under the Associate Attorney General.
- The Department of Health and Human Services has employed both experienced mediators and newly trained personnel from the Departmental Appeals Board and other HHS offices to carry out extensive education and training, mediate disputes at HHS and in other agencies, and assist various components of HHS to implement new uses of ADR (see box at 34.)

¹⁷A list of agency dispute resolution specialists is included in Appendix II.

- The Federal Deposit Insurance Corporation expanded an existing "Conflicts Unit" to develop, implement, and coordinate ADR programs throughout the agency. The FDIC's ADR program is overseen by central attorney coordinators, but much of the ADR activity is carried out at local service centers where over 700 FDIC employees have received ADR training.
- The Department of Veterans Affairs has designated employees in each program area as ADR contacts with responsibility for suggesting applications of ADR.

To date, dozens of agencies, or major components of agencies, have issued dispute resolution policies, or at least begun the policy development process by issuing notices or consulting with the Conference. The policies have ranged from one typewritten page to many Federal Register pages. It should be noted, however, that the length or content of an agency's policy document does not always correlate with the scope or success of its implementation efforts. The Air Force, for example, has a very brief policy that has stimulated considerable interest and activity.

In fulfilling its obligation under the Act to consult with agencies on policy development, the Conference (along with FMCS¹⁸) has emphasized that policy development should be a dynamic process, not one that focuses on a single document fixed in time; agency policies should be viewed as plans for considering and instituting apt use of alternative dispute resolution methods.

The following sections describe uses of ADR by specific agencies, with special emphasis on three areas in which a significant amount of recent agency activity has occurred: government contracting, workplace disputes, and regulatory enforcement and program administration. While this report offers a generally accurate picture of

the most common uses of ADR, it is not intended to be exhaustive.

Air Force ADR Program

The U.S. Air Force offers a good example of an ambitious, comprehensive ADR program that has sprung up in response to the ADR Act. Air Force Secretary Donald Rice issued a brief ADR policy for the agency and named the Deputy General Counsel the dispute resolution specialist in January 1993. Building on efforts that had already begun in the areas of civilian personnel disputes and contracting, the Air Force allocated staff (including a full-time professional and up to 25 percent of the time of ten additional professionals) and resources to developing and expanding its ADR program. In addition, components of the Air Force (for example, the Air Mobility Command and Air Force Space Command) have developed their own ADR policies.

The Air Force has mediated hundreds of civilian personnel EEO disputes, estimating annual savings of \$4 million in processing costs. Additional efforts involve contract and labor disputes; the Air Force now routinely reviews contract claims over \$50,000 for their suitability for ADR and signed the ADR in Contracting Pledge last May. The agency is also piloting ADR use for environmental disputes, personnel grievances, and military EEO complaints.

A key element of the Air Force program is training. Over 300 people have been trained as certified mediators, and 100 senior contracting personnel and attorneys have received training to become ADR specialists. In all, the Air Force has provided various types of ADR training to over 1,200 employees.

II. ADR Use in Government Contracting

Government contract disputes provided the focus for some of the earliest efforts to use ADR methods. The National Aeronautics and Space Administration resolved a major contract dispute

¹⁸Both ACUS and FMCS have responsibility under the Act to consult with agencies on policy development. In the interest of simplifying the consultation process, ACUS arranged with FMCS to incorporate Administrative Conference and FMCS comments into a single response to a requesting agency.

through the use of a minitrial as early as 1982, and other agencies including the Navy and, most notably, the U.S. Army Corps of Engineers, experimented with this and other ADR techniques in the mid-1980's. The Corps of Engineers was the first agency to establish a comprehensive ADR program, focusing initially on its many construction contract disputes. The Corps has used methods including minitrials, non-binding arbitration, settlement judges, mediation, and dispute review boards to resolve these and other conflicts.

Since passage of the Act, other components of the Department of Defense, cabinet departments, and federal agencies have also begun ambitious programs to resolve contract disputes successfully with ADR. Most recently, a growing number of government agencies have taken steps to employ ADR techniques even before conflicts arise in order to minimize or avoid disputes, through the use of partnering. This technique, in which contractor and agency client work together throughout the contract term to maintain a relationship of open communication and joint problem-solving, has been particularly effective. In addition, a few agencies have successfully used ADR to resolve bid protests before the General Accounting Office or General Services Board of Contract Appeals.

The commercial nature of many contract disputes and the frequency with which they present primarily factual rather than legal or policy issues may explain why many agencies have felt comfortable resolving them through ADR. As noted by the U.S. Navy, "ADR has been particularly effective in small contract cases with facts and legal issues that are not complex and in large contract cases with complicated fact patterns and no significant legal principles at stake."¹⁹ The U.S. Army further noted that cases involving technical issues and those in which liability is clear and only the amount remains to be determined (both circumstances that may arise in contract cases) particularly lend themselves to ADR.

Recent developments have provided new impetus for the use of ADR in contract matters. In May 1994, at a ceremony jointly sponsored by the Office of Federal Procurement Policy and ACUS, 24 agencies signed a pledge to consider the use of ADR techniques in contract disputes, to consider the use of partnering and similar techniques in acquisitions, and to work together to expand the use of ADR and share relevant experiences. A follow-up program in October 1994, also co-sponsored by OFPP and ACUS and hosted by the General Services Administration, brought together 250 government

ADR in Contracting Pledge: Participating Agencies

Defense Agencies

Department of Defense

Defense Logistics Agency

U.S. Air Force

U.S. Army

U.S. Navy

Other Cabinet Departments

Department of Commerce

Department of Energy

Department of Health and Human Services

Department of Housing and Urban
Development

Department of the Interior

Department of Justice

Department of Labor

Department of State

Department of Transportation

Department of the Treasury

Department of Veterans Affairs

Other Agencies

Environmental Protection Agency

Equal Employment Opportunity Commission

Federal Emergency Management Agency

General Services Administration

Nuclear Regulatory Commission

Office of Personnel Management

Small Business Administration

United States Information Agency

¹⁹DOD report to ACUS, Appendix III, at 2.

contracting officials to discuss practical applications of ADR for preventing and resolving disputes.

The Federal Acquisition Regulation has been amended (pursuant to the ADR Act's requirements) to encourage the use of ADR in procurement, and the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355, provided added impetus for agency ADR use. The FASA extends the sunset date of the Administrative Dispute Resolution Act to 1999 insofar as it applies to contract claims. It also facilitates contracting for the services of third-party neutrals by (1) providing that agencies need not use full competitive procedures when contracting for expert services in litigation or ADR processes and (2) raising the small purchase ceiling (under which agencies may use simplified procurement procedures) from \$25,000 to \$100,000 under certain conditions. Finally, the FASA requires contracting officers to explain any decision to reject a contractor's request for ADR (and vice versa).

A. Contract Dispute Resolution in Practice

Nineteen agencies (including eight components of the Department of Defense) reported having used ADR methods to resolve contract disputes, and four cited examples of ADR use in bid protests.²⁰ The Army Corps of Engineers, for example, used ADR in 55 contract disputes in the five-year period preceding March 1994, reporting successful resolution of the dispute in 53. The Corps has made particularly heavy use of minitrials in its large construction disputes, engaging in 24 during this period (of which all but one succeeded in resolving the case). In one example, a \$55.6 million claim was resolved for \$17.3 million in four days. The Corps of Engineers noted that it is difficult to determine specific cost savings from ADR. The

agency stated unequivocally, however, that "ADR has been extremely effective in resolving contract claims and appeals."²¹

Since passage of the Act, other military branches have made increasing use of ADR for contract matters:

- The Air Force has successfully resolved 17 contract disputes using ADR, 14 of which used the procedures available at the ASBCA. While these efforts resulted in time savings through earlier decision, they often required preparation time similar to that for a hearing, and Air Force attorneys were not always satisfied with the outcomes. As a result, the Air Force is working to employ ADR methods earlier in its disputes. In a pilot program to use ADR before cases reach the Contract Appeals Board, the Air Force has successfully resolved two of three cases using hybrid ADR techniques, saving an estimated 100 hours of hearing time in the two cases.
- The Army Judge Advocate General's Office reported using ADR techniques including mediation, minitrials, and summary trials in 13 cases before the ASBCA in 1993.
- The Navy Department cited two recent examples of ADR use involving multimillion dollar contract claims and another case in which \$8,000 in witness time and travel expenses were saved through the use of ADR. The Navy's Oakland Public Works Center has recently established an ADR program for contract cases.
- The Defense Information Systems Agency has successfully mediated one contract dispute, the National Security Agency saved time in resolving an ASBCA appeal by using a minitrial, and the Defense Nuclear Agency settled a bid protest using a settlement judge. The Defense Logistics Agency has used ADR in four disputes involving \$9 million in

²⁰A few additional agencies reported resolving these disputes through negotiation; ACUS does not consider these to be instances of ADR use, however, unless there is some indication of neutral involvement or "interest-based," rather than adversarial, negotiation.

²¹DOD Report to ACUS, Appendix IID.

claims and has agreed to ADR on an additional contract claim.²²

Non-defense agencies also report increasing ADR use in contract disputes and bid protests. The General Services Administration has initiated a 2-year pilot project for resolution of contract claims and is beginning to track ADR use to quantify savings and other benefits. The pilot has handled 10 significant claims so far, with "uniformly positive" results.

GSA is also home to the largest non-military board of contract appeals, the GSBICA, which has adopted procedures for the use of ADR and regularly informs parties to its proceedings of the availability of ADR methods to resolve their disputes.²³ Since September 1992, parties have used ADR in 10 contract appeals and 7 bid protests filed with the GSBICA (mediation in 14 cases and minitrials in 3 others); 12 of the cases were resolved successfully, another two were dismissed, and ADR failed to bring about a resolution in only three cases. The judges report that "ADR has saved time and helped the parties reach the true issues of the case."²⁴ Both the Federal Energy Regulatory Commission and the Commerce Department have used the ADR procedures at the GSBICA, and Commerce has launched a pilot project for the sharing of neutrals in contract disputes.

The Department of Veterans Affairs began using ADR in contract proceedings in mid-1992. Although the new methods have been employed in only 10% of the cases before the Board of Contract Appeals in that time, that percentage

includes some very large contract cases that have been successfully resolved. While mediation, minitrials, and arbitration have all been used by the Department of Veterans Affairs, most of the cases are handled with settlement judges. ADR has successfully resolved 80% of the cases in which settlement judges have been used; in the remaining 20% it has helped to narrow the issues. Among the examples of successful ADR use offered by DVA are a case in which 19 contract claims were resolved through a 2-day ADR proceeding, avoiding the expenditures for a 6-week hearing, and the quick resolution of a \$24 million construction claim that would have taken years to resolve otherwise.

"Given the Department's extensive procurement activities (\$5.8 billion annually), and large construction program (\$982 million in the current fiscal year), numerous contract disputes are an inevitable by-product. For this reason, the advantages of ADR have become readily apparent to VA officials."

**Guy H. McMichael III
Dispute Resolution Specialist
Department of Veterans Affairs
Report to ACUS**

The Department of Transportation Board of Contract Appeals was the first agency board to adopt a formal rule offering ADR methods (settlement judges and minitrials) to the parties before it, in 1988. Use of these alternatives increased significantly since passage of the ADR Act in 1990; the parties tried ADR in only three pre-Act cases, compared to over 20 afterwards, most of which were successfully resolved.

The Bureau of Mines and Bureau of Reclamation at the Interior Department also report ADR use in contract administration. At the Interior Board of Contract Appeals, ADR techniques have been available for over 2 years, and a majority of the Board's cases are settled without hearing.

Other agencies, including the Department of Agriculture, the Office of Personnel Management, the Federal Reserve Board, and the

²²DLA reports extensive use of ADR to resolve contract disputes as well as other types of conflicts. The five cases noted here were recent examples of contract ADR undertaken in response to the OFPP ADR in Contracting Pledge.

²³Several other agency boards of contract appeals reported routinely providing information about ADR, and frequently the parties have followed up by using the suggested techniques. Of these contract appeals boards, only the Department of Housing and Urban Development Board has not yet had a contract dispute in which the techniques have been used.

²⁴GSA report to ACUS, at 3.

USIA (resolution of the largest claim in agency history through ADR in 1994 "likely saved over \$1 million in interest charges"²⁵) report occasional use of ADR methods, and agencies including the CIA, CPSC and SEC are considering greater use of ADR in their contract proceedings.

B. Partnering

A promising new application of consensual dispute resolution methods to contract administration is the use of partnering, a technique in which the parties to large ongoing contracts avoid disputes, or minimize their disruptive impact, by focusing on the development of cooperative working relationships, the maintenance of open communication among parties to the contract, and the prompt use of ADR when conflicts do arise. Agencies signing the OFPP pledge on ADR in contracting agreed to consider the use of partnering, and several agencies have already used it to reduce conflict and save time and money on major construction projects:

- The Army Corps of Engineers, Navy, and Washington Headquarters Services of the Defense Department have all used partnering successfully, and the Defense Logistics Agency is working with "process oriented contract administration services," a similar technique in which teams of contractors, agencies and customers meet to share information and focus on common goals.
- The General Services Administration has used partnering in building the U.S. Courthouse in Shreveport, where the entire project was completed with no formal claims; the Douglas, Arizona, Border Station; and the Trenton, New Jersey, Courthouse. New contracts for the Minneapolis Courthouse and Atlanta Federal Center also include partnering clauses. In one case, GSA salvaged a troubled relationship with an existing contractor by introducing partnering.

²⁵USIA report to ACUS, at 1.

Partnering at the Army Corps of Engineers

Partnering is a key element of the Army Corps of Engineers' pioneering ADR program. The Corps has used the technique in construction contracts since the late 1980's and is enthusiastic about it. According to Howard B. Jones, Chief of the Construction Division of the Corps' Portland District, where the Corps used partnering on three of the contracts for replacement of the navigation lock at Bonneville Dam, "[p]artnering provides an opportunity to work effectively with the contractor and a forum where we can discuss issues and develop mutually acceptable solutions. On a variety of projects. . . we have seen impressive benefits in cost containment, on-schedule completion, value engineering savings, safety records, and organizational morale." (US Army Corps of Engineers, *Partnering*, Alternative Dispute Resolution Series Pamphlet 4 (December 1991), at 15.)

The Corps states its interest in partnering when it requests proposals for projects, but using the technique is not mandatory. If the contractor agrees to use partnering, the Corps and contractor work to build an environment of communication and information sharing. The process usually begins with a meeting of key project personnel, who try to agree on roles and responsibilities, set goals for the project, develop an action plan that includes dispute resolution procedures, and draft and sign a partnering agreement. Periodic reviews by the Corps, contractor and end customer help to identify any problems early.

The Corps' experience bears out its belief that partnering can prevent disputes. The volume of contract claims and appeals in which the Corps is involved has dropped dramatically over the past few years -- from 1,079 contract claims in 1988 to 314 in 1994 and from 742 contract appeals in 1991 to 365 in 1994.

- By April 1993, the Department of Veterans Affairs was using partnering on more than a dozen projects, and the agency has offered

partnering to all construction bidders since that year. The Office of the Associate Chief Medical Director for Construction is among the agency units using partnering for construction contracts. The Department reports good success with partnering in construction and is now looking into using it for the design phase of projects.

- The Department of Health and Human Services has launched a Partnering in Procurement initiative in response to the ADR pledge. The Interior Department began using partnering for construction contracts in 1993. USIA has used partnering on three construction contracts for the Voice of America. And the Commerce Department has targeted \$500 million in construction contracts for partnering.

III. Use of ADR to Resolve Federal Workplace Disputes

Federal government use of ADR to resolve equal employment opportunity disputes, personnel grievances and labor-management issues has grown rapidly in recent years, receiving encouragement from several sources in addition to the ADR Act:

- The National Performance Review adopted recommendations encouraging ADR use for federal employment disputes and promoting the formation of labor-management partnerships, and in response to this and other NPR recommendations, the Office of Personnel Management has proposed to abolish its regulations on the Administrative Grievance System for federal employees (59 Fed. Reg. 62353, December 5, 1994). The OPM proposal would give agencies the freedom to customize their grievance procedures, and specifically to use ADR techniques for workplace disputes. President Clinton's Executive Order 12871 on Labor-Management Partnerships also implements the NPR recommendation, giving an added boost to consensual dispute resolution techniques in this area.

- The Equal Employment Opportunity Commission issued regulations promoting ADR use by federal agencies in their internal EEO disputes. 29 CFR §1614 et seq. Perhaps as a result, EEO cases have been a major focus of agency interest in ADR.
- The Civil Service Reform Act of 1978 authorized the Merit Systems Protection Board to experiment with alternative methods of dispute resolution in resolving personnel grievances involving federal agencies and their employees. The MSPB responded in the 1980's with an expedited appeals system that evolved into a more flexible approach giving administrative judges discretion to use ADR techniques to encourage settlements.

Although there is some question about the extent to which the specific provisions of the Administrative Dispute Resolution Act apply to some types of federal workplace disputes,²⁶ activity in this area has increased greatly since passage of the ADR Act.

A. EEO and Individual Grievance Resolution in Practice

Over a dozen agencies (or major components within cabinet departments) have established ADR programs or routinely use ADR to resolve EEO and other personnel disputes, and about ten more have begun pilot programs to test use of ADR in this area. In addition, several others are planning pilot programs or actively considering using ADR for these disputes.

Most programs and experiments involve the use of ADR at the earliest stages of conflict. EEO disputes in particular lend themselves to this type of early resolution because, under EEOC regulations, federal employees who believe they may have experienced discrimination must speak with an EEO counselor before filing a formal complaint. For example, last year the Department of Transportation launched a pilot program within the Federal Aviation Administration's Headquarters to mediate EEO

²⁶See *infra*, at 39-41.

disputes at the precomplaint stage. In the pilot, designed by ACUS, DOT employees trained by FMCS serve as mediators on a collateral duty basis. The aggrieved employees make the decision whether to use mediation or stick with traditional procedures. While the pilot is too new to have undergone formal evaluation, the Department reports that "initial results appear favorable."²⁷

Other agencies are also mediating EEO disputes:

- The Department of the Interior, which has a decentralized ADR program, reports mediation of EEO matters in several agency offices, including the Office of the Secretary, Bureau of Mines, Bureau of Reclamation, Fish and Wildlife Service, Minerals Management Service, National Biological Survey, National Park Service, Office of Surface Mining, and U.S. Geological Survey. Most reported high rates of complaint resolution, many at the informal stage (10 of 10 cases in the Office of the Secretary, 13 of 17 cases at the Fish and Wildlife Service, 80% (or about 16 cases) resolved at the informal stage by the Bureau of Mines, four of six cases resolved at the informal stage by the Minerals Management Service). The Office of the Secretary credits ADR for a 43% reduction in formal case filings between fiscal 1992 and fiscal 1993. At the Bureau of Reclamation, a pilot program including other administrative grievances as well as EEO complaints has enjoyed success using both outside contractors and agency personnel as mediators. Of 26 conflicts, 18 EEO cases and four non-EEO cases were successfully resolved.
- The Army Corps of Engineers had mediated six cases by March 1994 in a new EEO pilot program.
- In an agency-wide EEO pilot program initiated by its Office of Equal Opportunity, the National Aeronautics and Space Administration has offered fact-finding,

mediation, and "pre-pre-complaint" counseling at eight of ten centers.

- The Defense Logistics Agency reports using ADR in the pre-hearing stage of EEO complaint processing. Even unsuccessful ADR, the agency noted, clarifies the issues and provides a useful exchange of information.
- The Department of Labor conducted a pilot for early resolution of EEO complaints, offering mediation to the 22 employees who filed informal complaints between April 1 and September 30, 1994. Of the eleven cases in which employees elected mediation, four had been resolved by the end of the pilot period (two through mediation and two before mediation), a fifth had been mediated but not yet finally resolved, and six were pending. Of the eleven cases in which employees did not elect the early resolution process, none had yet been resolved. The pilot has been extended through March 1995.
- The U.S. Postal Service has conducted a multi-year pilot program to mediate EEO disputes in Santa Ana, California, and has recently agreed with other federal agency offices in Louisville, Kentucky, to share neutrals for the mediation of employment disputes.

Some agencies have experimented with methods other than mediation for the resolution of EEO and personnel disputes.

- The Department of Agriculture uses Dispute Resolution Boards to attempt voluntary resolution of EEO conflicts. Under an interagency agreement, USDA Dispute Resolution Boards will also try to resolve discrimination complaints referred by the Department of Housing and Urban Development.
- Ombudsman programs to resolve personnel disputes are operating at the Bureau of Alcohol, Tobacco & Firearms, the Secret Service, the Department of Energy, the Voice of America, the State Department and the Social Security Administration.

²⁷DOT report to ACUS at 3.

- The Merit Systems Protection Board is conducting a pilot project to use settlement judges in its regional offices and another pilot in which settlement attorneys in its headquarters office attempt to resolve disputes in which the parties have filed petitions for review.
- In its Western Region, the Immigration and Naturalization Service is piloting a conciliation program.

Many of these programs are too new for information to be available on cost savings. Some agencies, however, have reported significant savings from using ADR for personnel disputes:

- The Air Force, which reports its greatest successes with ADR in the resolution of discrimination complaints and grievances, successfully resolved 57% (127 of 218) of cases in which EEO counselors attempted mediation in fiscal years 1992-93. Based on its estimate that mediation saved approximately half of the average \$80,000 processing cost per EEO complaint, the Air Force estimates an overall savings of \$4 million or more in EEO complaint processing costs.
- The Defense Mapping Agency has used a combination of mediation and arbitration in an effort to reduce the backlog of performance rating appeals and in an EEO pilot project. The agency estimates savings of 4200 personnel hours and over \$135,000 in 33 performance rating appeals and has saved approximately \$8,850 in processing costs in two EEO cases.
- The United States Mint has settled about 220 formal and informal EEO cases and grievances through ADR techniques and estimates a resulting savings of \$3 million (assuming an average cost to the Government of \$38,000 per litigated case and the probable litigation of 50% of the resolved cases, and taking into account costs associated with administering ADR programs and applying ADR techniques).

B. ADR in Labor-Management Disputes

Like partnering in government contracts, labor-management partnership councils are designed to promote cooperative working relationships, rather than adversarial ones, and to avoid disputes where possible by fostering open communication and mutual understanding from the beginning. Several agencies reported using interest-based bargaining and assisted negotiations to deal with difficult issues in partnership councils or in contract negotiations. The United States Information Agency, for example, successfully resolved issues related to the impact of agency restructuring on employees through the efforts of its Partnership Council with two labor unions. The Bureau of the Public Debt uses mediation to resolve disputes that arise during collective bargaining. The National Aeronautics and Space Administration, Nuclear Regulatory Commission, and Social Security Administration report efforts to incorporate ADR approaches into labor-management relations while implementing the President's Executive Order on Labor-Management Partnerships, which requires federal agencies, among other things, to "provide systematic training of appropriate agency employees . . . in consensual methods of dispute resolution, such as alternative dispute resolution techniques and interest-based bargaining approaches."²⁸

A number of agencies have begun using ADR to supplement formal grievance procedures under collective bargaining agreements.²⁹

- In 1991, the Department of Health and Human Services, the National Treasury Employees Union and the Federal Mediation and Conciliation Service began an experiment to use neutral outside mediators (provided by FMCS) during the negotiated grievance procedure for the HHS multi-regional bargaining unit. Either party may

²⁸Exec. Order No. 12871, section 2 (c) (October 1, 1993).

²⁹U.S. Office of Personnel Management, *Alternative Dispute Resolution: A Resource Guide* (May 1994) has served as a source for some of the information in this section in addition to the agency reports filed with ACUS.

request use of mediation at two points in the normal grievance procedure. Unresolved grievances may proceed to arbitration.

- A program in HHS' Chicago region seeks to resolve any type of personnel problem, including discrimination complaints, even before employees begin the informal stage. Before filing a complaint or grievance, employees may request help from a panel including employee and labor relations specialists, the union president, and senior management officials from various HHS agencies in the region. The panel either seeks a solution itself or assigns the case to a mediator (from a pool of HHS employees trained in mediation). The employee may terminate the process at any time and pursue the regular EEO or grievance process.
- Since 1993, the Department of Housing and Urban Development and its union have employed a process in which grievance cases that would otherwise go to arbitration may be referred to the HUD Chief Administrative Law Judge for mediation or early neutral evaluation.
- The Office of Personnel Management and the American Federation of Government Employees, Local 32, negotiated a collective bargaining agreement that includes an ADR option as part of the grievance procedure. A labor-management committee comprised of three union and three management appointed members hears grievances that remain unresolved after initial review by supervisors in the unit involved. If either party rejects the committee's recommendation, the grievance moves to arbitration.

In addition, FMCS, which is the government agency primarily responsible for serving the collective bargaining needs of the public and private sectors, has encouraged its mediators to participate in ADR projects involving other agencies, and about 30% of its mediator workforce has been involved in ADR projects. The encouragement of ADR in Executive Order 12871 has dramatically increased FMCS' involvement in agency labor-management partnership activities.

IV. Use of ADR in Regulatory Enforcement, Policy Development and Program Administration

Use of ADR in disputes involving the enforcement of federal laws and regulations and the administration of agency programs raises somewhat different issues than it does in contracting and the personnel/EEO/labor relations areas. These programs are neither internal matters, like personnel issues, nor largely commercial matters, like contract administration. Instead, they go to the heart of many agencies' missions, and the disputes that arise under them may implicate significant policy issues.

Perhaps because of this, some agencies have been hesitant to try ADR in enforcement, policy development, and other program-related disputes. Enforcement cases sometimes do involve the need to set controlling agency precedent, and these cases, as the ADR Act notes, may not be appropriate for resolution through ADR. But many other enforcement proceedings, involving routine regulatory violations and no groundbreaking issues, lend themselves to ADR use. Moreover, for some more complex cases involving multiple parties and the need to design specific remedies or reconcile the conflicting interests of different groups (for example, EPA Superfund enforcement or facility siting disputes), consensual techniques can provide an especially effective way to obtain important information and craft lasting solutions. Several agencies have instituted or experimented with ADR in these cases, particularly since passage of the ADR Act, and have experienced considerable success.

A. ADR in Enforcement Disputes

One agency pioneer in the use of consensual means of dispute resolution in enforcement and regulatory disputes has been the Environmental Protection Agency. EPA first adopted a policy favoring ADR use in enforcement actions in 1987. Concurrently with passage of the ADR Act, the agency's Office of Enforcement began putting into action an agency-wide ADR Implementation Plan including actions designed

to promote the use of mediation, arbitration and other ADR techniques. Under the plan, training, staff assistance, neutral ADR services, and funding of government expenses related to ADR use have been made available to regional offices, Department of Justice attorneys, and members of the regulated community.

"The use of mediation has proven extremely useful in decreasing regional resources required to obtain Superfund cost recovery and RD/RA [remedial design/remedial action] settlements Transaction cost savings of 20%-50% have been noted by regional management with similar savings reported by PRP [potentially responsible party] representatives."

**Environmental Protection Agency
Report to ACUS**

EPA has initiated several pilot enforcement programs during the past five years. In 1991, EPA's Region V completed a year-long pilot program to test the use of mediation in civil actions under the Superfund program for cleanup of hazardous waste sites. Six cases were mediated during the pilot, including cost recovery and remedial design/remedial action disputes; settlements were reached in five of the six cases.

Another pilot, begun in 1992, is exploring the potential for using arbitration to resolve selected Superfund claims. Additional ongoing pilot programs are focused on using ADR to settle enforcement cases under the Clean Water Act and the Resource Conservation and Recovery Act. Mediation has been used in over 30 enforcement cases. The agency's experience with these programs has been very positive.

Other examples of ADR use in enforcement proceedings include the following:

- The FDIC employs mediation, minitrials and neutral evaluation in appropriate cases against former officers, directors, accountants, attorneys and other professionals of failed financial institutions.
- The Internal Revenue Service has undertaken several ADR initiatives in disputes with

taxpayers, including a voluntary binding arbitration process, formally adopted by the Tax Court in 1990; an "early neutral evaluation" process used during negotiations; and "neutral expert fact-finding" for the resolution of factual disputes. The IRS estimates that it has an inventory of approximately 50,000 cases in dispute, and it credits ADR use for the fact that only 13% of those cases stay in inventory longer than a year. The IRS has also developed a proposal for a one-year pilot allowing taxpayers in the Appeals administrative process to request mediation of certain appeals. The parties will be able to select mediators from among the Appeals staff or from outside the IRS, with the assistance of ACUS and FMCS if necessary.

- The Department of Labor undertook a pilot project to use mediation in enforcement proceedings (see box) and plans to expand the program to additional regions. DOL has also successfully resolved several major court and administrative proceedings through use of ADR on an ad hoc basis.
- The Office of Fair Housing and Equal Opportunity at the Department of Housing and Urban Development uses conciliation to resolve fair housing complaints. Conciliation is available from the time of filing to the time of the issuance of a reasonable cause determination. In the past 2 years, all of FHEO's investigators have received conciliation training from the Federal Mediation and Conciliation Service. HUD has used settlement judges to resolve these disputes later in the administrative process (see *infra*, at 29).
- Use of ADR by the Department of Justice, the government's chief litigator, is growing in a number of areas, including enforcement of civil rights laws. The Coordination and Review Section of the Civil Rights Division investigates complaints under Title II of the Americans with Disabilities Act of 1990 (ADA), alleging discrimination by state and local governments. Resolution through ADR is encouraged by both the ADA and

regulation. The Section has expedited and resolved claims through a modified mediation process. Using ADR has resulted in 22

DOL Enforcement Pilot

The Department of Labor handles numerous cases alleging violations of labor or workplace standards (such as occupational safety and health, wage-hour, or pension plan requirements). Most of these cases are eventually settled; however, according to the Department, many take years to resolve (while the violation may continue) and require resources (follow-up investigations, discovery, depositions) that otherwise could be spent on cases that can only be resolved in court.

With the assistance of ACUS and FMCS, DOL conducted a pilot project using its own program managers to mediate cases in the Philadelphia Region. To provide greater neutrality, the mediators handled only cases outside their own agency's responsibilities (e.g., a Wage-Hour manager would act as the mediator in an OSHA case); respondents also had the option to choose a private mediator, but none did.

Of 27 cases selected from the Regional Office's inventory and actually mediated in the pilot, 22 (81%) were settled, most in a single mediation session. A separate cost analysis confirmed that mediation saved time and money, reducing the cost of resolving an individual dispute by 7-11% and the time required by from two to six months.³⁰ Moreover, the participants generally concluded that the settlements reached were at least as good as the likely outcomes of litigation.

The results of this pilot were so encouraging, the Department reports, that Congress has authorized funding in FY 1995 to begin expansion of this process to the remaining regions.

settlements before completion of a full investigation and resolution of about 100 other cases without formal settlement agreements.

- The Equal Employment Opportunity Commission conducted a pilot program to test the use of mediation in processing EEO charges against private employers in four agency regional offices. The parties reached agreement in 52% of the 267 mediated cases (another 17 were settled before mediation) and generally reported satisfaction with the process and the outcome.
- In June 1992, the FCC initiated a pilot project to determine the effectiveness of ADR in resolving complaints filed against common carriers by their competitors under Section 208 of the Communications Act, alleging violations of the Act or the Commission's rules. As of the FCC's report to ACUS, the pilot project had resulted in formal requests for ADR from both the complainants and defendants in sixteen separate proceedings. Nine of these had been resolved as a result of the ADR procedures. The parties to the complaints are often involved in outside litigation and that litigation was usually also settled as part of the mediation of the formal complaint. Two proceedings were then in active mediation with Commission attorneys serving as mediators. While there are no precise data available concerning the time and resources saved, the FCC estimates a significant savings in staff time for cases resolved through ADR, which typically require less than ten hours' work, compared to 40 hours for a routine case disposition without ADR. The agency reported saving approximately two hundred seventy work hours in the nine cases resolved through ADR.³¹

³⁰U.S. Department of Labor, *A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project* (Aug. 1993).

³¹In addition, the Commission reports that the Bureau's entire section 208 complaint processing function benefits indirectly from the ADR pilot project. Since June 1992, over half of the approximately 550 formal complaint disposals recorded by the Commission resulted from negotiations. Counsel in several cases advised the Bureau that consultations with the Enforcement Division

- The Department of Labor's Wage and Hour Division has been using a Farm Labor Appeals Committee to resolve civil money penalty assessments related to migrant worker employment practices against growers in southern New Jersey. The FLAC, composed of representatives of the Wage and Hour Division, the local District Office of the Department, and the New Jersey Farm Bureau (representing the interests of the agricultural community), meets with growers who have been assessed civil penalties to discuss the situation and negotiate possible solutions which can then be suggested to the Department of Labor. All seven cases handled in this pilot thus far have been settled, generally within three months of the original fine rather than the customary three to four years.³²

B. Policy Development and Complex Regulatory Disputes

Some agencies have sought to employ consensual dispute resolution techniques in the development of policy and the resolution of complex regulatory disputes involving multiple parties. One such agency is EPA, which has used neutrals to facilitate public meetings in site-related disputes to great benefit. The agency's regional office in Boston launched a pilot in 1993 exploring the use of ADR to facilitate public involvement in remedial decisionmaking at Superfund sites. EPA has also used "policy dialogues" to get input on complex regulatory issues.

The Army Corps of Engineers has used ADR in complex environmental disputes. In one example, a minitrial helped resolve the relative responsibilities of Goodyear Tire and Rubber Co.

and the Department of Defense for contamination at a Superfund site.³³

The Federal Highway Administration has offered training in interest-based negotiation to representatives of agencies involved in resolving highway wetlands issues since 1991, and has offered mediation in cases where needed. Under the National Environmental Policy Act, state transportation departments must obtain federal permits before they can dredge or fill waters in wetlands to construct highways. Multiple federal agencies, including the EPA, National Marine Fisheries Service, Fish and Wildlife Service, and Army Corps of Engineers in addition to the FHWA, are involved in the permitting process. While no formal dispute resolution system has been designed for these disputes, participants are using the consensus-based approaches learned in the training to resolve informally the complex, often controversial issues in permitting cases.

C. Financial Services and Banking Regulation

Agencies dealing with banking regulation or other aspects of financial transactions often face conflicts that, while not strictly "enforcement" disputes, directly implicate their ability to perform their assigned responsibilities. The Federal Deposit Insurance Corporation has been a leader in exploring ADR use to resolve these conflicts; the agency estimates that in 1993 alone it saved \$9.3 million in legal fees and expenses by using ADR rather than litigation. Facing numerous claims and disputes among the increasing number of failed financial institutions controlled by it or by the Resolution Trust Corporation, the FDIC instituted a program in 1989 to train agency personnel to resolve these disputes through ADR. After passage of the ADR Act, the FDIC expanded the concept, creating an ADR Unit assigned to develop, implement, and coordinate ADR programs throughout the FDIC and RTC. By the end of 1991 there were over 200 trained ADR specialists at the FDIC and RTC, and to date

about the benefits of the pilot project provided the impetus for their case settlements. FCC report to ACUS at 2-3.

³²Memorandum from Suzanne Seiden, Employment Standards Administration, Department of Labor, to ACUS, February 24, 1995.

³³L. Susskind, Goodyear Tire and Rubber Co., Case Study #5, IWR Case Study 89-ADR-CS-5 (August 1989)

over 700 FDIC employees at the corporation's local service centers and 250 regional RTC employees have received ADR training.

The FDIC has also used ADR in enforcement actions (discussed *supra*, at 26) and in disputes over loan workouts as well as to resolve creditor claims against failed financial institutions. A 1993 creditor claims pilot project in Massachusetts using outside mediators resulted in successful mediation of nine out of twelve cases and cost savings of \$410,475 in estimated legal fees and expenses..

The RTC has continued to work with the FDIC to resolve disputes among controlled institutions and has also piloted ADR use for creditor claims in its Tampa Office. In addition, the RTC has used dispute resolution techniques on an ad hoc basis in many cases, including the mediation of a complex series of lawsuits involving seven parties and an RTC suit against a major corporation that was mediated for a \$15 million recovery. The RTC estimates that it has saved over \$115 million legal fees and expenses in four years by using ADR.

Financial issues arise in a different context in disputes between farmers and their creditors. Under the Agricultural Credit Act of 1987, the Farmers Home Administration certified (and gave grants to) state agricultural loan mediation programs established to resolve farmer-lender disputes. Eighteen state mediation programs have been certified under the statute. In implementing the law, FmHA also instructed its state program directors to contract for mediation services where no state program meeting the certification standards exists. The agency developed a roster of mediators for use in these states. Because FmHA was itself a farm lender, it often became involved in mediation as a participant, as well. The certified mediation program for the state of Texas concluded that FmHA realized benefits of \$5.31 from the program for every dollar in federal matching grants. Under a departmental reorganization, responsibility for this and other farm lending programs now resides with the Consolidated Farm Service Agency.

D. ADR Using Settlement Judges

Sometimes disputes have already reached the point where a proceeding has been docketed with an administrative law judge or review board before ADR is attempted. Several agencies have established settlement judge programs to provide a practical and readily available opportunity to resolve these conflicts before hearing. Many, but not all, of these programs involve enforcement disputes.³⁴

A settlement judge is an administrative law judge or other hearing officer who has been trained in mediation skills. The settlement judge assigned to a particular dispute is not the same judge who will hear the case should ADR fail. A strength of the settlement judge technique is that it provides the parties with a neutral who can speak as an expert on the subject matter and the merits of the case, while preserving the parties' ability to negotiate freely without fear of conceding any points in front of the deciding official.

Examples of the use of settlement judges include the following:

- For more than a decade the Federal Energy Regulatory Commission, a pioneer with the technique, has used settlement judges to help resolve complex, multi-party licensing and rate proceedings.
- The Department of Housing and Urban Development has successfully used settlement judges in its program enforcing fair housing laws. Of 87 HUD ALJ cases assigned to settlement judges between March, 1989 and September, 1994, 59 (or 68%) were settled by consent order.
- The Occupational Safety and Health Review Commission, which adjudicates contested DOL citations for violations of occupational safety and health standards, has used settlement judges, generally in 25 to 30 cases

³⁴In addition to the examples offered here, judges from various contract appeals boards have also served in this role.

per year.³⁵ The Department of Labor has also used the technique with its own administrative law judges. Still in its early stages, the program to date has involved eight enforcement cases of various types, two of which have been successfully resolved (others remain pending).

- Other agencies, including the Nuclear Regulatory Commission and the Federal Maritime Commission, have used settlement judges in enforcement proceedings from time to time, and the National Labor Relations Board has just begun a settlement judge program, for which ACUS has arranged training.

E. Grant Audits and Disputes

A number of agencies have found ADR methods useful in resolving disputes in grant programs, which generally involve conflicts arising during grant audits over the way funds have been used or whether program requirements have been met.

- The Department of Health and Human Services has been a pioneer in use of ADR to resolve grant disputes. The HHS Departmental Appeals Board has jurisdiction to hear disputes arising from HHS grant programs. When its jurisdiction was expanded in 1978 to include grant programs under the Social Security Act, the bigger and more complex caseload prompted a number of changes, including use of mediation techniques.³⁶ The Board has mediated hundreds of cases involving audit and other grant determinations. The Chair of the Board is the Department's dispute resolution specialist, and the Board's mediators have become a general ADR resource for other HHS components as well as other federal agencies.

³⁵ACUS interview with Chief Judge Irving Sommer (August, 1994).

³⁶For background, see A. Steinberg, *Federal Grant Dispute Resolution: A Report for the Administrative Conference of the United States* 54-128 to 54-205.

- The Department of Education also reports that it had established procedures for ensuring use of alternative means of disputed resolution in its ALJ proceedings before the advent of the ADR Act. Mediation is frequently used to settle these cases, using mediators provided by the Federal Mediation and Conciliation Service.
- The Employment and Training Administration of the Department of Labor recently undertook a pilot program to test ADR in the resolution of audit and debt collection cases.³⁷ As of October 15, 1994, nine cases had been referred for mediation, and additional cases were under consideration. Of the nine cases referred, two settled successfully, one was withdrawn, and six were pending. The likelihood of resolution through ADR in the cases still pending is considered high.³⁸

F. Citizen Complaints/Ombudsman Programs

Several agencies have instituted programs in which an ombudsman or advocate fields complaints or inquiries from people dealing with the agency and attempts to resolve them. Most of the programs discussed here are those mentioned in response to ACUS' ADR inquiry; they do not comprise a complete listing.³⁹

- *Social Security Administration.* The Social Security Administration has created an Office of the Ombudsman, located in the

³⁷The program was later expanded to include contract disputes as well.

³⁸In addition to these nine cases, the Employment and Training Administration, through the Solicitor's Office, has participated in the mediation of five cases under review by the United States Court of Appeals. All five settled successfully. ETA also participated in a settlement judge procedure at the suggestion of the Office of Administrative Law Judges, but ADR was not successful in that case.

³⁹In addition, some agencies have instituted ombudsman programs to help resolve their internal EEO and personnel disputes; these have been mentioned earlier in this report.

Office of the Commissioner, which directs and manages SSA's ADR program. The Office's function is to settle disputes by making suggestions or recommendations and otherwise aid the parties in resolving a controversy or dispute.

- **Department of Veterans Affairs.** Another form of ombudsman has been implemented by the Department of Veterans Affairs. In 1991, the Secretary directed all VA medical centers to implement a "Patient Representative Program." A Patient Representative acts as a special kind of grievance handling official who investigates complaints by patients, patients' families, or staff against the VA medical center. The VA's Patient Representatives have a broad range of powers, roles and responsibilities which vary by individual medical center, depending on the management policy of the facility director.
- **Treasury Department.** An early example of ADR use by the Internal Revenue Service is its Taxpayer Ombudsman program, which responds to hundreds of thousands of cases each year.⁴⁰ The Office of the Comptroller of the Currency has established an ombudsman program to administer its appellate process, in order to resolve disputes fairly and foster an unbiased review of policies. The Midwest Region of the Office of Thrift Supervision, as part of the OTS Outreach Program, has instituted an informal review process akin to an ombudsman. In this process, the Regional Examination Oversight Managers will visit several recently examined institutions each month, interviewing the senior management staff about the examination, its findings, and any problems or good aspects of the process.

- **Food and Drug Administration.** The FDA has an Office of the Chief Mediator and Ombudsman that investigates and facilitates the resolution of disagreements about the application of agency policy and procedures for which there are no other established remedies. The Office reports directly to the Commissioner, and to the extent possible, serves as a neutral third party in the resolution of disputes. Approximately 100 cases per year, relating to every aspect of FDA regulatory activity, are referred to the Office.

G. Claims

Agency reports indicate that ADR is also being used or considered for settling a variety of non-contract claims.

- The Attorney General issued an order on May 22, 1992 which integrated administrative dispute resolution into adjudication of claims brought under the Federal Tort Claims Act.⁴¹ This order, applicable government-wide, provided that agency personnel should be trained in dispute resolution techniques and skills and authorized to use any alternative dispute resolution technique or process in the adjudication of appropriate claims. It also implemented section 8 of the Administrative Dispute Resolution Act by increasing the delegated authority of several agencies to compromise tort claims under a certain amount.
- The Department of Interior reports that the Minerals Management Service has been utilizing ADR for some time to settle outstanding mineral royalty claims; this has reduced appeals and litigation and increased royalty collections.

⁴⁰D. Anderson and D. Stockton, *Ombudsmen in Federal Agencies: The Theory and Practice*, Report for the Administrative Conference of the United States (1990) at 11-18.

⁴¹Attorney General Order No. 1591-92 (codified at 28 CFR 14.6).

Chapter Four

Implementation Issues

I. Policy Development and Implementation

About half of all agencies have made significant progress in developing a policy and consulting with ACUS and FMCS. As discussed further below, ACUS would not suggest that Congress insert deadlines in a revised Act, but more, and more consistent, congressional and OMB oversight could do much to encourage slower agencies.

Even where enthusiasm and activity have been manifested, agencies take divergent approaches to developing policies, training personnel, and setting up new programs. A few agencies have taken time to plan, giving attention to involving those with a stake in the process, proper administration of the program, resources, fairness, and evaluating to make mid-course adjustments. Many others, however, have tended to "just do it." ACUS has sought to educate DRSs and their staffs about "dispute systems design" through our interagency working groups, roundtables and educational programs, and publications. Still, much remains to be done if these processes are to operate effectively in most agencies.

"Many agencies have not given sufficient attention to the design of appropriate ADR systems and as a result have had problems implementing programs. . . . Typically, a failed program results from minimal top level support, leading to inadequate education on ADR to agency management and staff."

**John Calhoun Wells, Director
Federal Mediation and Conciliation
Service Report to ACUS**

Another significant variable has been resources. Several agencies have made personnel and funds available to start programs and educate users, but most have tried to do it on a shoestring. While a revised Act should not

mandate spending or specific additional activities, Congress and agencies should recognize that some up-front investment of time and resources is necessary if agencies are to realize the long term potential of these processes.

In the course of developing policies to implement the Act, some agencies have taken narrow views of its coverage. There has been some difference of opinion, for example, about whether the provisions of the ADR Act apply to federal agency litigation in the courts. The original sponsors of the ADR Act have made clear their view that litigation is covered,⁴² while the Department of Justice has taken the view that the Act only applies to disputes at the administrative level.⁴³

The issue comes into play primarily in connection with development of agencies' ADR policies, but has clear implications for agencies' willingness to use ADR processes in disputes that might end up in civil litigation. Since the Department of Justice seems recently to have taken a broader view about ADR's usefulness and is taking concrete steps to make greater use of these methods, the issue does not appear to be a major one at this time. However, Congress may wish to remind agencies through legislative history or oversight activity that the Act is intended to be read broadly.

Similarly, policy development is not expressly covered by the ADR Act, although it is certainly covered implicitly, both by Section 3 (development of ADR policy)⁴⁴ and in the more

⁴²Letter from the Honorable Dan Glickman, U.S. House of Representatives, to the Honorable William P. Barr, Attorney General, Jan. 16, 1992 (on file at ACUS).

⁴³Memorandum from Assistant Attorney General Stuart M. Gerson to General Counsels of Executive Branch Agencies, November 12, 1991 (on file at ACUS).

⁴⁴Section 3(a)(2) lists topics that agencies should examine for possible use of ADR in the course of developing an ADR policy; it includes "(G) other agency

general authorizing provisions. Negotiated rulemaking, as provided for in the Negotiated Rulemaking Act, is the most formal example of using mediation to develop consensus about a regulatory issue. As noted above, however, ADR methods have been used successfully to resolve difficult policy issues in less formal contexts as well, and more agencies should be open to opportunities to make use of these techniques to resolve policy-related conflicts.

Agencies should also seek to create incentives for cost-effective case handling by establishing "appropriate dispute resolution" as a criterion by which the performance of agency attorneys and managers is assessed. At present, performance standards in most agencies reward personnel for the number of cases they bring or handle, with little regard for the cost-effectiveness of the outcome.

II. Training and Education

Appropriate training is a key factor in developing successful ADR programs. Lack of knowledge about how consensual dispute resolution methods work and failure to understand their potential benefits have frequently hampered the use of ADR. Often, moreover, even those who think they understand ADR have misconceptions about how the techniques work.

The Act requires agencies to provide training for their dispute resolution specialists and others responsible for implementing their ADR policies, and most agencies have done so.

actions." This is clearly a broad term, and would include agency action to develop policy. This seems particularly likely in view of the fact that the section instructs agencies to consider the use of ADR techniques in rulemaking. Thus the ADR policy is to include areas covered by the Negotiated Rulemaking Act as well as those expressly otherwise covered by the ADR Act. Section 571, which amends the APA, defines "alternative means of dispute resolution" as "any procedure that is used, in lieu of an adjudication as defined in section 551(7) . . . to resolve issues in controversy" An agency may make policy through adjudication or through rulemaking or other processes. Informal policy development would therefore be a procedure in lieu of adjudication.

Beyond this, however, those who will be involved as participants in ADR processes (or are in a position to encourage their use as supervisors) need to learn how these processes work and how to negotiate effectively so that the government's interest will be well served in dispute resolution proceedings. In addition, agency personnel serving as neutrals need training in ADR skills. Many of the programs described in this report have involved training components for both neutrals and potential participants. In other cases, agencies have provided education for their officials in order to pique their interest in developing programs.

"A lesson learned from our pilot projects in the contract disputes area is that our workforce knows little or nothing about ADR. Lack of familiarity with such processes is, we believe, the biggest single obstacle to the increased use of ADR in the contract disputes area."

U.S. Air Force

Department of Defense Report to ACUS

In the contracting area, for example, the Air Force has provided two days of intensive ADR training to over 100 senior acquisition officials and a shorter briefing session to thousands of contracting officers and other acquisition personnel. GSA is also heavily involved in training agency procurement staff in ADR; its one-day course on the subject has been taken by over 1000 officials and is open to employees from any federal agency. A two-day advanced training course is now in the works as well. The ACUS-sponsored Procurement ADR Working Group is now developing generic training materials to be made available for training contracting officers government-wide.

ACUS, FMCS and other agencies have developed training resources for multiple agency use in other areas as well. One of ACUS' interagency working groups developed complete materials for a prototype four-day mediation skills training course and tested them in an interagency training session (see *supra*, at 13); these materials are now available to all agencies.

With ACUS staff support, the Office of Personnel Management and the Justice Department's Legal Education Institute have begun to offer classes about ADR to federal personnel. The availability of government-wide resources like these can significantly reduce the cost of training.

HHS Training Initiatives

A major focus of the Department of Health and Human Services' ADR Act implementation has been an ambitious training program. An ADR work team sponsored by the dispute resolution specialist and drawn from several organizations within the department has provided training and other ADR assistance throughout HHS and its numerous components.

The ADR team offers training in conflict management and mediation skills; introductory "ADR Awareness" training for managers; more extensive training for contracting officers, managers and attorneys; and ADR training in the context of specific programs for managers in HHS components. The team often trains managers "just in time," combining a design module with skills training, so that trainees can move immediately to developing program plans based on what they've learned.

Recent initiatives include conflict management skills training for the Indian Health Service, training for managers in the Office of the Secretary serving on an EEO ADR project team, and negotiation training for health care advocates for the elderly who deal with the Health Care Financing Administration.

FMCS is authorized under the ADR Act to offer ADR training to agencies and has done so for many agencies. FMCS notes, however, that training of potential mediators and education for agency management must go hand in hand: "When agencies form cadres of collateral duty mediators, it is important that an appropriate system be created in which to utilize these people. . . . Typically, a failed program results from minimal top level support, leading to

inadequate education on ADR to agency management and staff."⁴⁵

Even in areas where government agencies have begun to accept the value of ADR, often nongovernment participants in disputes are unaware of agency programs or have doubts about participating. In the EEOC pilot project described above, for example, 87% of charging parties who were offered an opportunity to mediate accepted, but only 43% of the respondent private employers were also willing to go to mediation. Much work remains to be done to increase awareness and understanding of consensual processes by both government and private parties. The joint OFPP/ACUS project promoting ADR use in contracting is an example of the type of high profile, comprehensive program that will be needed to make progress on this front.

III. Neutrals

The Act provides disputants with substantial flexibility in selecting neutrals. Agencies have responded accordingly, using their own program or legal personnel, ALJs or contract appeals board members, private lawyers or other experts, professional mediators or other professional neutrals, retired judges or government officials, academics, and (on occasion) other individuals who happened to be known and acceptable to the disputants. FMCS has provided mediators and facilitators on an interagency contract basis for many agency programs, both before and since the ADR Act.

In deciding what kinds of persons are most likely to be acceptable to the disputants and effective as neutrals, agencies have used different approaches, depending on available resources, the nature of disputes that arise, the parties involved, and the ADR processes likely to be used. As agencies have found, drawing from any one source of neutrals has both advantages and disadvantages. Most EEO and personnel grievance program offices, and even a few

⁴⁵John Calhoun Wells, Director, FMCS Report to ACUS at 9.

enforcement agencies like the Department of Labor, are training selected agency personnel in mediation techniques and using them to resolve disputes whenever possible. In some agencies, however, employees have expressed reluctance to confide in neutrals from their own bureau or agency; several programs therefore offer mediators from other agencies or private alternatives to employees in internal disputes. In contracting and enforcement disputes, neutrals have been far likelier to come from academia or private entities, although contract appeals board judges are sometimes used. Since private parties in these cases are often concerned about pro-agency bias, other federal personnel have seldom been mutually acceptable.

Some agencies find that using agency employees as neutrals is less expensive than hiring outsiders. The Interior Department's Bureau of Reclamation, for example, which uses both federal employees and private contractors as mediators, determined that the average cost for in-house mediator services (including salary, travel, and contract costs) was \$2,000 per case compared to \$3,500 per case for a non-government mediator. Outside professionals, on the other hand, may have greater experience and credibility to bring to the process, and the reduced expense of using in-house personnel may be offset to some extent by training costs.

Federal procurement procedures also affect the use of neutrals from outside the government. Most agencies seeking outside neutrals have been able to use the simplified procurement procedures applicable to small purchases (except for large contracts involving convening and facilitation of negotiated rulemaking or large environmental or policy disputes, extensive systems design assistance, or long term training or dispute resolution activities). The Federal Acquisition Streamlining Act raises the small purchase limit and (with one significant exception discussed in Chapter Five) appears to have further enhanced most agencies' ability to hire private neutrals expeditiously even in purchases exceeding that limit. EPA and the Army Corps of Engineers have sought to expedite the process for obtaining neutrals by developing large "indefinite quantities contracts" with private groups that can offer fast

access to small, select rosters of experienced neutrals. This approach holds broad promise to help other agencies.

Many agencies have begun to make use of the Conference's Roster of Neutrals. In certain areas, like environmental, personnel, and policy disputes, the Roster is deep with experienced professionals; in others, like tax, the Administrative Conference is working with affected agencies like the IRS to deepen its listings; in still other areas, like transportation or financial services, the Roster's selection and usage are considerably smaller. The FDIC and RTC, in a recent experiment, developed their own roster and provided orientation for neutrals in relevant regulatory and business issues. The Farmers Home Administration (in USDA), which employed mediation to try to avoid farm mortgage foreclosures, has relied on state agencies for neutrals in about 15 states and contracted with private groups for its needs in many other states.⁴⁶ Some agencies, like the Office of ALJs at the Department of Education, regularly go to FMCS -- which has about 200 mediators across the country -- to obtain neutrals via interagency agreement. Agencies have begun experimenting with interagency arrangements as a convenient source of acceptable mediators. About 15 agencies have joined the shared neutrals project organized by the Administrative Conference to provide Washington area government employee neutrals for EEO disputes.

Still other agencies have drawn on a combination of sources. The U.S. Postal Service, for example, will shortly begin comparing a series of four prototype EEO mediation programs; depending on location, USPS employees in three prototypes will use, respectively, private professionals, other USPS employees trained in mediation, or mediators from ACUS's shared neutrals program, while those in the fourth will have a choice from any of these sources.

⁴⁶In a departmental reorganization, the Farmers Home Administration's responsibilities have recently been reassigned to a new Consolidated Farm Service Agency.

Notwithstanding these diverse, creative efforts, agency reports still reveal that a significant factor limiting use of alternative methods, especially in personnel and EEO disputes, has been unavailability of trained mediators. A few agencies have begun to develop small cadres of employee mediators, but more needs to be done, especially to take advantage of those personnel (e.g., some ALJs, BCA judges, hearing officers) whose perceived neutrality may enhance their acceptability to private parties in disputes with a government agency. ACUS' sharing pilot is a good start, but a nationwide system, possibly even including state and local government employees, would be optimal. This is one of several practical concerns that the Administrative Conference is helping agencies address.

IV. Evaluating ADR's Costs and Benefits

Other parts of this report discuss benefits and savings from using ADR methods. One clear need is for better evaluative data on the relative costs and benefits of various dispute resolution processes, including litigation, and better methods to produce such data. Such information would be valuable in persuading management in some agencies to experiment with ADR or to allot resources to successful ADR programs. In addition, well conceived evaluations can help agencies to determine where particular dispute resolution techniques are most helpful and to improve the design and implementation of their dispute resolution systems. Moreover, evaluating dispute resolution programs is not simply a

matter of dollars and cents. Savings in time, the quality and durability of dispute outcomes, participant satisfaction with the dispute resolution process and the outcome and, in some cases, the impact of the resolution on relationships between the parties are among the possible measures of any method's effectiveness in resolving conflicts, although some of these criteria are not easily quantifiable.

So far, anecdotal information and polls reveal that most parties in well-designed ADR programs respond positively to these processes and think they save resources. But there are few measurable data documenting hard savings or substantive impact. This is true in part because many programs are still quite new; however, developing this type of information has proven difficult even for established programs.

In an effort to alleviate this problem, ACUS' staff and its Systems Design Working Group have taken very active roles in developing model evaluation methods, procedures and documents for interested agencies (see Chapter Two).

Evaluation requires commitment of time and money; agency resources are limited in both areas. Nor have evaluations of ADR programs in other contexts produced definitive results. However, those evaluations that agencies have conducted, such as the Department of Labor's evaluation of its pilot mediation program for enforcement cases and the Department of Agriculture's evaluation of its EEO ADR process, have gathered useful data that reflect some savings in cost and time and high levels of user satisfaction.

Cost Savings and Benefits of ADR

To date, there has been no comprehensive study of cost savings and benefits associated with ADR use in the federal sector. Evaluations of several pilot programs and anecdotal evidence, however, indicate that use of ADR in the federal sector has produced significant savings. Here are some examples (all from agencies' reports to ACUS unless otherwise noted).

Federal Deposit Insurance Corporation: Use of ADR rather than litigation in liquidation and litigation matters produced estimated cost savings in legal fees and expenses of \$325,000, \$4,200,000, and \$9,300,000 in 1991, 1992, and 1993, respectively. The FDIC's ADR creditor claims pilot project resulted in cost savings of \$410,475.

Resolution Trust Corporation: Use of ADR from 1991 through 1994 led to estimated agency savings of \$115,497,232 in legal costs. (Annual Comparison of ADR in the RTC, February 15, 1995 fax to ACUS).

Department of Labor: A regional mediation pilot program for enforcement cases produced savings of 7-19% and case-processing time savings of 18-64% (depending on the statistical method chosen). (US DOL, *A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project*, August 1993, at 15).

U.S. Air Force: Using mediation in over 100 EEO complaints, the Air Force saves an estimated 50% of its average \$80,000 processing cost per complaint, resulting in an estimated \$4 million savings.

Defense Mapping Agency: An ADR program to reduce the backlog of performance rating appeals saved an estimated 4200 personnel hours and over \$135,000 in 33 appeals.

U.S. Air Force: Through partnering among the Army Corps of Engineers, prime contractors and subcontractors, the Air Force completed a \$226 million Large Rocket Test Facility \$12 million under budget and 114 days ahead of schedule (McDade, *An Overview of Selected Public and Private-Sector Alternative Dispute Resolution Initiatives* (US Air Force, January 1995 Draft), at 12-13).

U.S. Information Agency: USIA used ADR to settle the largest contract claim in its history -- saving over \$1 million in interest charges alone.

U.S. Mint: Using ADR on 220 cases in the EEO and grievance areas saved an estimated \$3 million.

Federal Election Commission: During seven months of 1994, the FEC realized a possible savings of \$640,000 by using ADR in EEO disputes.

U.S. Army Corps of Engineers: Using partnering, the Corps lowered the number of contract appeals in which it is involved from 779 in 1987 to 307 active appeals at the end of FY 1994 (January 17, 1995 FAX to ACUS from U.S. Army Corps of Engineers, at 3).

These initial results from federal programs are consistent with private sector studies. Some illustrations:

The CPR Institute for Dispute Resolution resolved business disputes involving 440 companies and \$6.7 billion in controversy using ADR between 1990-1993, resulting in estimated legal cost savings in excess of \$187 million, or an average of \$425,000 per company (Cronin-Harris, *ADR Cost Savings & Benefits Studies*, (CPR, 1995), at 26). A 1994 survey of corporate law departments by **Price Waterhouse** produced similar findings: Forty-five percent of participants reported cost savings of over \$100,000 through use of ADR, and 10% of those saved over \$1 million. (*ADR Cost Savings* at 31).

Deloitte & Touche surveyed law firm attorneys and corporate general counsels about their experience with ADR. Sixty-seven percent of those who had used ADR and 78% of extensive users said it saved money, typically 11-50% of the cost of litigation (*Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels* at 14).

Participants in an empirical study of 13 environmental enforcement mediations conducted by the **Florida Department of Environmental Regulation** from 1990 to 1992 reported average direct savings per case of \$325,000 compared to litigation (*ADR Cost Savings* at 56).

Chapter Five

Recommendations for Improving the Act

Although there have been relatively few areas where the Act's language has served to hinder implementation, several changes could improve it. This section will discuss some of these and offer suggestions from the Office of the Chairman of the Administrative Conference⁴⁷ for statutory amendments. Most of these changes are aimed primarily at reducing ambiguity or confusion.

I. Should the ADR Act Be Reauthorized?

The Act sunsets on October 1, 1995. Although federal agencies have the inherent authority to use ADR processes to resolve disputes, the Act's congressional imprimatur makes the authority explicit, thereby reducing any need for debate or hesitancy on the part of agencies or private parties. Simply by its existence, the Act has served as a catalyst for agency activity. On a more practical note, it provides confidentiality protection that would not otherwise exist, as well as authority for agencies to enter into binding arbitration (or something like it). It offers simplified mechanisms for acquiring the services of neutrals. Moreover, the Act requires agencies to develop policies on the use of ADR and to appoint dispute resolution specialists. Although these requirements have not been completely effective in encouraging all agencies to make better use of ADR processes in appropriate situations, they have gone a long way toward bolstering familiarity with and acceptance of alternative dispute resolution techniques.

In addition, the Act provides a uniform framework for ADR use across the government. In the absence of the Act, individual statutes focusing on particular subject areas would very

likely create inconsistent rules governing confidentiality, standards for neutrals, or other issues. This would increase confusion and potentially result in increased litigation.

"In the opinion of the [DOT] Board [of Contract Appeals], passage of the Act has made parties more amenable to accepting ADR methods sanctioned by the Act. In particular, the Board believes the Act provides important statutory encouragement to government parties and counsel to enter into negotiations, thereby aiding change in the culture of contract disputes at federal agencies."

Stephen H. Kaplan, General Counsel
Diane R. Liff, Dispute Resolution
Specialist
Department of Transportation Report
to ACUS

The Office of the Chairman is not aware of any disadvantage to reauthorizing the Act on a permanent basis. The American Bar Association also favors permanent reauthorization.⁴⁸ The five-year period of this initial authorization has demonstrated substantial benefits and has revealed no significant problems that would justify repeal. Moreover, failure to reauthorize the Act might lead to unnecessary uncertainty about the status of ongoing proceedings and suggest that Congress actually prefers formal dispute resolution processes.

⁴⁷As noted earlier (supra n. 5), the recommendations in this chapter are solely those of the Office of the Chairman and have not been adopted or approved by the Administrative Conference as a whole.

⁴⁸The ABA adopted a resolution supporting reauthorization of the Act at its midyear meeting in February 1995.

RECOMMENDATION

The Administrative Dispute Resolution Act should be permanently reauthorized. Section 11 should be repealed.⁴⁹

II. Dispute Resolution Specialists and Policy Development

The Act currently contains no deadlines for agencies to complete their ADR policy development. As described above, many agencies have made at least some progress in developing a policy, although some have as yet done little or nothing.

Some in the government have suggested that imposing a statutory deadline for developing a policy or initiating pilot programs would encourage those agencies that have not yet complied with the Act's requirements. However, we believe that resort to ADR processes should be voluntary; in any case, rigid mandates on agency priorities might be counterproductive, especially in light of current resource limitations. Moreover, agencies' policies and pilot programs are not meant to be one-time events, created on deadline and then forgotten, but plans that evolve to reflect changing circumstances.

Some observers believe that individual agencies should be required, as an added incentive to action, to report directly to Congress about their progress. Currently, the Act's legislative history asks the Administrative Conference to report on federal agency activity. This report would seem adequate; it provides information to Congress, it offers some incentive to agencies to comply with the Act, and the Act already requires agencies to provide information to the Administrative Conference. At the same time, having ACUS prepare a government-wide report limits the amount of time spent by

agencies and Congress to prepare and review reports.

One difficulty agencies have noted in developing policies and starting up ADR programs is lack of funds. While using consensual processes can be expected over time to reduce both the time and costs of resolving some disputes, there are associated start-up costs, including training expenses and the costs of designing systems to make effective processes available. Proposals have been made that every agency be required to earmark some portion of its budget for ADR implementation. However, in the current tight budget environment, there is some question whether this would be the most effective use of limited funds, especially for those agencies that may have relatively few disputes. On the other hand, a recognition by appropriations and oversight committees in Congress that limited seed money may be an effective use of funds in this area would be quite helpful. Perhaps the most positive incentive for agencies to take seriously their statutory responsibilities would be active congressional oversight of their implementation activities.

RECOMMENDATION

No specific deadlines or reporting requirements should be imposed on agencies under the Act. The Act should specifically direct the Administrative Conference to report to Congress periodically about federal agencies' progress in implementing the Act, including information about costs and benefits. Congress should reaffirm its endorsement of ADR as an effective way to improve conflict resolution in federal agencies through active oversight, and should recognize the importance of upfront investment to encourage longer-term savings and other benefits.

III. Scope of Coverage

A. Specific Exclusions

The ADR Act applies to most disputes in which the federal government may be involved. There are, however, two exceptions incorporated

⁴⁹ In addition, section 6 of the Act, which amended the Contract Disputes Act, subject to a comparable sunset provision, was amended by the Federal Acquisition Streamlining Act to extend the sunset for disputes under the Contract Disputes Act until October 1, 1999. That sunset provision should also be repealed.

into the definition of "issue in controversy" that have caused some uncertainty.

The first exemption is for "matters specified under the provisions of section[] 7121(c) . . . of title 5." Section 7121 relates to grievance procedures in collective bargaining agreements involving federal employees. Subsection (c) lists several issues that may not be subject to negotiated grievance procedures, including grievances relating to violations of the Hatch Act, retirement and insurance, certain suspensions or removals, examinations, certifications and appointments, and classifications that do not result in reductions in grade. These topics, which Congress appears to have intended to exclude from ADR Act coverage,⁵⁰ involve issues that have been thought not to leave much room for negotiation, which is the basis for most ADR processes.

On the other hand, there does not seem to be any reason specifically to exclude these types of disputes from the Act. To the extent that ADR processes might be helpful, access to those processes should remain available. If ADR processes might not be appropriate in particular situations, such disputes would, and should, fall within the general provision of cases where agencies should consider not using ADR.⁵¹ The legislative history of the amendment including this provision focused on concern about making the already convoluted processes governing federal employee disputes more complicated, rather than trying to limit the use of ADR.⁵² If using ADR can reduce the number of disputes or resolve them at early stages, however, limiting its availability seems counterproductive. Moreover,

⁵⁰As noted above, of course, excluding a dispute from ADR Act coverage does not preclude the use of ADR; agencies have the inherent authority to use ADR (except binding arbitration). Rather, the effect of the exclusion is to eliminate the protection of the confidentiality provisions, prevent arbitration, and preclude use of simplified access to neutrals.

⁵¹For example, it may be especially important to maintain consistent results in similar cases. See 5 U.S.C. § 572(b)(3).

⁵²136 Cong. Rec. S18082, 18088 (Oct. 28, 1990) (emphasis added) (remarks of Sen. Pryor).

the Labor-Management Partnership initiatives of the Vice-President's Reinventing Government program are actively encouraging the use of ADR processes in resolving labor-management disputes; clear availability of the Act's provisions would further this goal. Given the confusion that has arisen over the applicability of the Act, the exclusion has perhaps complicated rather than simplified the dispute resolution process.

The scope of the second exclusion is even murkier. It refers to "matters specified under the provisions of section[] 2302 . . . of title 5." Section 2302, which lists prohibited personnel practices for federal employees, is part of statutory provisions relating to proceedings that ultimately may be heard by the Merit Systems Protection Board. The prohibited practices include appointment of relatives to government positions, coercing political activity, seeking to prevent someone from competing for employment, and discrimination. Section 2302 specifically states that it is not intended to "extinguish or lessen any effort to achieve equal employment opportunity" through the use of any other remedies. The legislative history of this exclusion, as with the section described above, focuses on concerns about further confusing the already confusing federal employment appeal area; it does not appear to be trying to limit ADR use. The legislative history also describes this exclusion as relating to "appeals involving . . . certain personnel practices."⁵³ These various descriptions and comments make understanding the scope of the exclusion difficult, causing the very confusion the amendment intended to prevent, and discouraging the use of ADR in some of the areas where it is arguably the most effective. In fact, the Equal Employment Opportunity Commission has specifically encouraged federal agencies to develop "dispute resolution procedure[s]" to resolve EEO complaints.⁵⁴ As described in Chapter Three, a considerable number of agencies have set up or are in the process of

⁵³136 Cong. Rec. S18082, 18088 (Oct. 28, 1990) (emphasis added) (remarks of Sen. Pryor).

⁵⁴See 29 CFR 1614.105(f).

setting up ADR processes to use at the preliminary stages of the EEO dispute process, but a few have raised questions whether those processes qualify for the confidentiality protections of the ADR Act.

RECOMMENDATION

Eliminate the exclusions for "matters specified under the provisions of section 7121(c) of title 5" and "matters specified under the provisions of section[] 2302 . . . of title 5."⁵⁵

B. Definition of "Alternative Means of Dispute Resolution"

The definition of "alternative means of dispute resolution," found in §571(3), is as follows:

any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof.

This definition is intended to be extremely broad, but has inadvertently resulted in some ambiguity.

The inclusion of "settlement negotiations" has caused some confusion. All of the ADR processes, with the exception of settlement negotiations (and occasionally minitrials), use a third party neutral to assist disputing parties in resolving a controversy. The confidentiality provisions apply only where a neutral is involved; indeed, most of the Act's operative provisions relate to ADR processes where a neutral is involved. Moreover, since virtually all agencies engage in unassisted (i.e., without a neutral) settlement negotiations on a routine basis, some have sought to avoid consideration of other ADR processes by concluding that they are already using ADR and need do nothing more.

⁵⁵Should concerns arise over applying the Act's arbitration provisions to these disputes, Congress should provide at least that the remaining parts of the Act extend to them.

Eliminating the term "settlement negotiations" from section 571(3) will not have any adverse effect, since disputes where unassisted settlement negotiations are being used gain no real benefit from the ADR Act; it provides no confidentiality protection.

The portion of the definition stating that "'alternative means of dispute resolution' means any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy" was intended to make clear that ADR processes under the Act could be used in the full range of agency processes other than rulemaking.⁵⁶ However, rather than clarifying the scope of the Act, it has caused confusion, having been misread by some to imply that it could only be used in lieu of formal adjudication.

RECOMMENDATION

Eliminate the term "settlement negotiations" from section 571(3), and delete the language "in lieu of an adjudication as defined in section 551(7) of this title."

IV. Neutrals

The neutrals provisions of the ADR Act generally appear to be working well, and have proven valuable to many agencies. However, they have not eliminated all of the significant difficulties that agencies face in effectively acquiring neutrals' services; some of these have been discussed above. A major new source of aid -- and, incidentally, of some possible new problems -- was the recently enacted Federal Acquisition Streamlining Act, which, among other things, (1) raises the threshold for agency use of simplified small purchase procedures from \$25,000 to as high as \$100,000, and (2) provides that agencies need not use full competitive procedures for obtaining expert services in

⁵⁶Section 551(7) is the Administrative Procedure Act's definition of adjudication: "agency process for the formulation of an order." "Order" is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, in a matter other than rulemaking but including licensing." §551(6).

litigation or other disputes (including third party neutrals in ADR proceedings). This legislation could meet the agencies' need for expedition in getting help to resolve disputes and for addressing the unique aspects of contracting with neutrals, who usually must be selected and compensated by both the government agency involved and the private parties in a dispute. Unfortunately, FASA may have had the unintended impact of complicating matters for agencies that use non-profit organizations extensively as neutrals. FASA, by raising the limits for small purchases, apparently also raised the threshold for contracts that are supposed to be reserved for small businesses.⁵⁷ Many firms that provide neutral services are non-profit entities, such as universities; they are not considered to be "small businesses." Limiting these contracts to small businesses may not only increase costs to the government, but also substantially restrict access to a large diverse pool of highly capable neutrals.

RECOMMENDATION

Provide that agencies may employ their small purchase authority to contract for services of neutrals from not-for-profit entities as well as small businesses, which are by definition for-profit entities. The Office of the Chairman believes that no other changes to the Act's neutrals provisions are needed or appropriate.

V. Confidentiality Issues

Section 574 contains the provisions that extend confidentiality protection to "dispute resolution proceedings," i.e., those in which any type of ADR process involving appointment of a neutral is used.⁵⁸ Confidentiality is a critical element of successful ADR processes. Participants and neutrals need to be assured that the communications between and among them will be kept confidential, so that they feel free to be open and forthcoming. Assurances of confidentiality allow the neutral to learn enough about the parties' needs and priorities to be able

to help them develop creative and effective solutions. Such confidentiality allows the disputants to discuss a variety of settlement options without fear that their discussions would become public. Confidentiality protection should shield the communications between one party and the neutral from the other party, as well as protecting the communications among the parties and the neutral from those outside the dispute.

The ADR Act's provisions try to strike a balance between the confidentiality that is critical for sensitive negotiations to yield agreement and the openness required for the legitimacy of many agency decisions. As described above, the Act prohibits the neutral from disclosing (and protects the neutral from being compelled to disclose) confidential information except in certain limited circumstances designed to protect the public. For example, a court may order disclosure to prevent injustice, help establish a violation of law, or prevent harm to public health and safety. The Act also limits disclosure by parties in similar circumstances, although there are more exceptions for disclosure by parties.

The confidentiality provisions are not absolute. While the involvement of the government as a party must preclude complete protection from disclosure, there are some provisions of section 574 which should be amended to strike a more effective balance.

A. Communications Available to All Parties

Section 574(b)(7) exempts from the confidentiality protection communications that were "provided to or w[ere] available to all parties to the dispute resolution proceeding," thus making them potentially available to outsiders (although not from the neutral). Although these types of documents are clearly not intended to be confidential between the neutral and any one party, they could well be intended to be kept confidential from those outside the process. Disclosure of such communications could easily provide outside persons with sensitive information about the nature of the discussions and the issues discussed. The benefit of this provision, which was added late in the legislative

⁵⁷See 15 USC §644(j).

⁵⁸See §571(6).

process, is unclear, especially in light of the provision elsewhere in section 574 that makes clear that documents otherwise discoverable or available as evidence do not cease to become so merely because the evidence was presented in the course of an ADR process.

RECOMMENDATION

Eliminate section 574(b)(7).

B. Relationship to the Freedom of Information Act

Section 574(j) provides that section 574 will not be considered a statute specifically exempting disclosure under 5 U.S.C. §552(b)(3). The latter provision is the section of the FOIA stating that documents specifically protected from disclosure by another statute will not be disclosable under the FOIA. Although the drafters' original intention was that section 574 *should* be considered such a statute, the provision was changed shortly before passage of the Act. In principle, this means that documents that are treated as confidential under section 574 might have to be produced in response to an FOIA request if none of the FOIA's exemptions apply.⁵⁹

The issues raised by this provision are not likely to be problems when a private neutral is involved, because documents in the neutral's possession would not be considered to be agency records.⁶⁰ However, where a government employee is serving as a neutral, it is at least arguable that any such records the neutral retains might be subject to FOIA. Even assuming that mediator notes are agency records, there is no reason for disparate treatment. Any such

⁵⁹ For example, exemptions 4 (trade secrets), 5 (predecisional documents or attorney work product), 6 (personal information), or others would likely protect many individual documents used in a dispute resolution proceeding.

⁶⁰ Many standard government contracts contain a clause providing that all work product of the contractor belongs to the government. To avoid possible confidentiality problems, government agencies should not use clauses of this type in contracts with private neutrals.

documents should be protected from disclosure no matter who serves as a neutral.

Similarly, any documents created only for use in a dispute resolution proceeding (and not available under FOIA for some other reason), whether in the possession of the parties or the neutral, should not be subject to FOIA. On the other hand, if the documents are subsequently used in some other forum, or if they pre-existed, and if there is some basis for disclosure other than to determine what occurred during the dispute resolution process, the fact that they were used in an ADR process should not necessarily preclude disclosure under FOIA. To the extent that disclosure would be related only to the dispute resolution process, section 574 should be allowed to protect confidentiality.⁶¹

RECOMMENDATION

Amend section 574(j) to provide that communications covered by its terms shall be exempt from disclosure under the Freedom of Information Act unless there is some other justification for their disclosure, independent of their use in a dispute resolution proceeding.

VI. Arbitration

As discussed above, the ADR Act's provisions relating to arbitration authorize agencies to enter into "binding" arbitration, but provide a one-sided escape route for agencies by allowing the head of an agency 30 days to vacate the award before it becomes final. This provision was included in the Act to accommodate Department of Justice concern over the constitutionality of binding an agency through a decision made by someone who is not an "officer of the United States." The Administrative Conference did not and does not share that concern, but did not oppose inclusion of this provision in order to ensure passage of the Act. In general, the Office of the Chairman does not believe that arbitration is the best choice of ADR processes; it prefers to encourage use of more consensus-based approaches. However, it should

⁶¹ The ABA has adopted a resolution supporting this change. See n. 47, *supra*.

be available to agencies in appropriate cases. Although the Act's legislative history suggests that agencies should use the escape clause only rarely, the Conference argued then and, based on anecdotal evidence, continues to believe that the escape clause serves as a significant disincentive to private parties to enter into arbitration, even in cases where arbitration might be appropriate. The arbitration provisions have been used only a few times, and never to ACUS' knowledge with a private neutral. (The escape clause has never been used.)

RECOMMENDATION

Congress should consider whether the 30-day agency escape clause provision should remain in the Act.⁶² If Congress concludes that the escape clause should be repealed, sections 580 (c), (f), and (g) and 581(b)(2) should be eliminated.

VII. Contract Disputes

In amending the Contract Disputes Act to encourage ADR use, the Act created some inadvertent ambiguity and undesirable consequences. First, the Act requires that all contract claims submitted to ADR be certified, rather than just those exceeding \$100,000⁶³ as is

ordinarily required. We see no reason for a different threshold in claims involving ADR. Indeed, the requirement is likely to deter agencies from using ADR procedures in many small cases where they might be especially appropriate.

Also, the Contract Disputes Act amendment authorizes use of "any alternative means of dispute resolution under [the Act] or other mutually agreeable procedures" for resolving claims. We recommend replacing this phrase with "dispute resolution proceeding under the ADR Act" to delineate agency authority more clearly and to avoid any misunderstanding that unassisted settlement negotiations might fall under the Act's provisions. This is particularly important if Congress does not eliminate the special certification requirement for ADR proceedings, as the provision could be read to require certification of every claim that is to be settled, no matter how small.

RECOMMENDATION

Raise the certification limit for ADR cases to a level equal to that for all other Contract Disputes Act disputes. Redefine agency authority for using ADR in contract disputes to eliminate ambiguities.

⁶²A February 1995 American Bar Association resolution recommends repealing this provision.

⁶³When the ADR Act was passed, the Contract Disputes Act certification requirement applied to claims exceeding \$50,000; FASA changed the cutoff to \$100,000.

Attachment

Administrative Dispute Resolution Act

Public Law 101-552, as amended by Public Law 102-354

Sec. 1. Short Title

This Act may be cited as the "Administrative Dispute Resolution Act."

Sec. 2. Findings

The Congress finds that--

- (1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
- (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
- (3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
- (4) such alternative means can lead to more creative, efficient, and sensible outcomes;
- (5) such alternative means may be used advantageously in a wide variety of administrative programs;
- (6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;
- (7) Federal agencies may not only receive the benefit of techniques that were developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and
- (8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

Sec. 3. Promotion of Alternative Means of Dispute Resolution

(a) **Promulgation of Agency Policy.**--Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall--

- (1) consult with the Administrative Conference of the United States and the Federal Mediation and Conciliation Service; and
- (2) examine alternative means of resolving disputes in connection with--
 - (A) formal and informal adjudications;
 - (B) rulemakings;
 - (C) enforcement actions;
 - (D) issuing and revoking licenses or permits;

- (E) contract administration;
- (F) litigation brought by or against the agency; and
- (G) other agency actions.

(b) **Dispute Resolution Specialists.**--The head of each agency shall designate a senior official to be the dispute resolution specialist of the agency. Such official shall be responsible for the implementation of--

- (1) the provisions of this Act and the amendments made by this Act; and
- (2) the agency policy developed under subsection (a).

(c) **Training.**--Each agency shall provide for training on a regular basis for the dispute resolution specialist of the agency and other employees involved in implementing the policy of the agency developed under subsection (a). Such training should encompass the theory and practice of negotiation, mediation, arbitration, or related techniques. The dispute resolution specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.

(d) **Procedures for Grants and Contracts.**

(1) Each agency shall review each of its standard agreements for contracts, grants, and other assistance and shall determine whether to amend any such standard agreements to authorize and encourage the use of alternative means of dispute resolution.

(2)(A) Within 1 year after the date of the enactment of this Act [Nov. 15, 1990], the Federal Acquisition Regulation shall be amended, as necessary, to carry out this Act and the amendments made by this Act.

(B) For purposes of this section, the term 'Federal Acquisition Regulation' means the single system of Government-wide procurement regulation referred to in section 6(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 405(a)).

Sec. 4. Administrative Procedures.

(a) **Administrative Hearings.**--Section 556(c) of title 5, United States Code, is amended--

(1) in paragraph (6) by inserting before the semicolon at the end thereof the following: "or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter"; and

(2) by redesignating paragraphs (7) through (9) as paragraphs (9) through (11), respectively, and inserting after paragraph (6) the following new paragraphs:

"(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

"(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;"

(b) **Alternative Means of Dispute Resolution.**--Chapter 5 of title 5, United States Code, is amended by adding at the end the following new subchapter:

"Subchapter IV Alternative Means of Dispute Resolution in the Administrative Process

§571. Definitions.

§572. General authority.

§573. Neutrals.

§574. Confidentiality.

§575. Authorization of arbitration.

§576. Enforcement of arbitration agreements.

§577. Arbitrators.

§578. Authority of the arbitrator.

§579. Arbitration proceedings.

§580. Arbitration awards.

§581. Judicial review.

§582. Compilation of information.

§583. Support services.

§571. Definitions

For the purposes of this subchapter, the term--

(1) "agency" has the same meaning as in section 551(1) of this title;

(2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;

(3) "alternative means of dispute resolution" means any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including, but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

(4) "award" means any decision by an arbitrator resolving the issues in controversy;

(5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(7) "in confidence" means, with respect to information, that the information is provided--

(A) with the expressed intent of the source that it not be disclosed; or

(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--

(A) between an agency and persons who would be substantially affected by the decision; or

(B) between persons who would be substantially affected by the decision,

except that such term shall not include any matter specified under section 2302 or 7121(c) of this title;

(9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(10) "party" means--

(A) for a proceeding with named parties, the same as in section 551(3) of this title; and

(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;

(11) "person" has the same meaning as in section 551(2) of this title; and

(12) "roster" means a list of persons qualified to provide services as neutrals.

§572. General authority

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if--

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

§573. Neutrals

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) In consultation with the Federal Mediation and Conciliation Service, other appropriate Federal agencies, and professional organizations experienced in matters concerning dispute resolution, the Administrative Conference of the United States shall--

(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential conflicts of interest, and other qualifications) to which agencies may refer;

(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;

(3) enter into contracts for the services of neutrals that may be used by agencies on an elective basis in dispute resolution proceedings; and

(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.

(d) An agency may use the services of one or more employees of other agencies to serve as neutrals in dispute resolution proceedings. The agencies may enter into an interagency agreement that provides for the reimbursement by the user agency or the parties of the full or partial cost of the services of such an employee.

(e) Any agency may enter into a contract with any person on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

§574. Confidentiality

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless--

(1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) the dispute resolution communication has already been made public;

(3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) a court determines that such testimony or disclosure is necessary to--

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication, unless--

- (1) the communication was prepared by the party seeking disclosure;
- (2) all parties to the dispute resolution proceeding consent in writing;
- (3) the dispute resolution communication has already been made public;
- (4) the dispute resolution communication is required by statute to be made public;
- (5) a court determines that such testimony or disclosure is necessary to--

- (A) prevent a manifest injustice;
- (B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.

§575. Authorization of arbitration

(a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to--

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency may offer to use arbitration for the resolution of issues in controversy, if such officer or employee--

(1) has authority to enter into a settlement concerning the matter; or

(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

§576. Enforcement of arbitration agreements

An agreement to arbitrate a matter to which this subchapter applies is enforceable pursuant to section 4 of title 9, and no action brought to enforce such an agreement shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

§577. Arbitrators

(a) The parties to an arbitration proceeding shall be entitled to participate in the selection of the arbitrator.

(b) The arbitrator shall be a neutral who meets the criteria of section 573 of this title.

§578. Authority of the arbitrator

An arbitrator to whom a dispute is referred under this subchapter may--

(1) regulate the course of and conduct arbitral hearings;

(2) administer oaths and affirmations;

(3) compel the attendance of witnesses and production of evidence at the hearing under the provisions of section 7 of title 9 only to the extent the agency involved is otherwise authorized by law to do so; and

(4) make awards.

§579. Arbitration proceedings

(a) The arbitrator shall set a time and place for the hearing on the dispute and shall notify the parties not less than 5 days before the hearing.

(b) Any party wishing a record of the hearing shall--

(1) be responsible for the preparation of such record;

(2) notify the other parties and the arbitrator of the preparation of such record;

(3) furnish copies to all identified parties and the arbitrator; and

(4) pay all costs for such record, unless the parties agree otherwise or the arbitrator determines that the costs should be apportioned.

(c)(1) The parties to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(2) The arbitrator may, with the consent of the parties, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each party has an opportunity to participate.

(3) The hearing shall be conducted expeditiously and in an informal manner.

(4) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(5) The arbitrator shall interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(d) No interested person shall make or knowingly cause to be made to the arbitrator an unauthorized ex parte communication relevant to the merits of the proceeding, unless the parties agree otherwise. If a communication is made in violation of this subsection, the arbitrator shall ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of a communication made in violation of this subsection, the arbitrator may, to the extent consistent with the interests of justice and the policies underlying this subchapter, require the offending party to show cause why the claim of such party should not be resolved against such party as a result of the improper conduct.

(e) The arbitrator shall make the award within 30 days after the close of the hearing, or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless--

(1) the parties agree to some other time limit; or

(2) the agency provides by rule for some other time limit.

§580. Arbitration awards

(a)(1) Unless the agency provides otherwise by rule, the award in an arbitration proceeding under this subchapter shall include a brief, informal discussion of the factual and legal basis for the award, but formal findings of fact or conclusions of law shall not be required.

(2) The prevailing parties shall file the award with all relevant agencies, along with proof of service on all parties.

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void. Notice shall be provided to all parties to the arbitration proceeding of any request by a party, nonparty participant or other person that the agency head terminate the arbitration proceeding or vacate the award. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, advise in a decision under this subsection to terminate an arbitration proceeding or to vacate an arbitral award, except as witness or counsel in public proceedings.

(d) A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

(e) An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.

(f) An arbitral award that is vacated under subsection (c) shall not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.

(g) If an agency head vacates an award under subsection (c), a party to the arbitration (other than the United States) may within 30 days of such action petition the agency head for an award of fees and other expenses (as defined in section 504(b)(1)(A) of this title) incurred in connection with the arbitration proceeding. The agency head shall award the petitioning party those fees and expenses that would not have been incurred in the absence of such arbitration proceeding, unless the agency head or his or her designee finds that special circumstances make such an award unjust. The procedures for reviewing applications for awards shall, where appropriate, be consistent with those set forth in subsection (a)(2) and (3) of section 504 of this title. Such fees and expenses shall be paid from the funds of the agency that vacated the award.

§581. Judicial Review

(a) Notwithstanding any other provision of law, any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9.

(b)(1) A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

(2) A decision by the head of an agency under section 580 to terminate an arbitration proceeding or vacate an arbitral award shall be committed to the discretion of the agency and shall not be subject to judicial review.

§582. Compilation of information

The Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall, upon the request of the Chairman of the Administrative Conference of the United States, supply such information as is required to enable the Chairman to comply with this section.

§583. Support services

For the purposes of this subchapter, an agency may use (with or without reimbursement) the services and facilities of other Federal agencies, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31. "

Sec. 5. Judicial Review of Arbitration Awards.

Section 10 of title 9, United States Code, is amended--

(1) by designating subsections (a) through (e) as paragraphs (1) through (5), respectively;

(2) by striking out "In either" and inserting in lieu thereof "(a) in any"; and

(3) by adding at the end thereof the following:

"(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

Sec. 6. Government Contract Claims.

(a) Alternative Means of Dispute Resolution.--Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 606) is amended by adding at the end the following new subsections:

"(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code, or other mutually agreeable procedures, for resolving claims. In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable. All provisions of subchapter IV of chapter 5 of title 5, United States Code, shall apply to such alternative means of dispute resolution.

"(e) The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) shall cease to be effective on October 1, 1995, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate."

(b) Judicial Review of Arbitral Awards.--Section 8(g) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)) is amended by adding at the end the following new paragraph:

"(3) An award by an arbitrator under this Act shall be reviewed pursuant to sections 9 through 13 of title 9, United States Code, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute."

Sec. 7. Federal Mediation and Conciliation Service.

Section 203 of the Labor Management Relations Act, 1947 (29 U.S.C. 173) is amended by adding at the end the following new subsection:

"(f) The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 573 of title 5, United States Code, may be assigned to act as neutrals. The Service shall consult with the Administrative Conference of the United States and other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection."

Sec. 8. Government Tort and Other Claims.

(a) Federal Tort Claims.--Section 2672 of title 28, United States Code, is amended by adding at the end of the first paragraph the following: "Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee."

(b) Claims of the Government.--Section 3711(a)(2) of title 31, United States Code, is amended by striking out "\$20,000 (excluding interest)" and inserting in lieu thereof "\$100,000 (excluding interest) or such higher amount as the Attorney General may from time to time prescribe."

Sec. 9. Use of Nonattorneys.

(a) Representation of Parties.--Each agency, in developing a policy on the use of alternative means of dispute resolution under this Act, shall develop a policy with regard to the representation by persons other than attorneys of parties in alternative dispute resolution proceedings and shall identify any of its administrative programs with numerous claims or disputes before the agency and determine--

(1) the extent to which individuals are represented or assisted by attorneys or by persons who are not attorneys; and

(2) whether the subject areas of the applicable proceedings or the procedures are so complex or specialized that only attorneys may adequately provide such representation or assistance.

(b) Representation and Assistance by Nonattorneys.--A person who is not an attorney may provide representation or assistance to any individual in a claim or dispute with an agency, if--

(1) such claim or dispute concerns an administrative program identified under subsection (a);

(2) such agency determines that the proceeding or procedure does not necessitate representation or assistance by an attorney under subsection (a)(2); and

(3) such person meets any requirement of the agency to provide representation or assistance in such a claim or dispute.

(c) Disqualification of Representation or Assistance.--Any agency that adopts regulations under subchapter IV of chapter 5 of title 5, United States Code, to permit representation or assistance by persons who are not attorneys shall review the rules of practice before such agency to--

(1) ensure that any rules pertaining to disqualification of attorneys from practicing before the agency shall also apply, as appropriate, to other persons who provide representation or assistance; and

(2) establish effective agency procedures for enforcing such rules of practice and for receiving complaints from affected persons.

Sec. 10. Definitions.

As used in this Act, the terms 'agency', 'administrative program', and 'alternative means of dispute resolution' have the meanings given such terms in section 571 of title 5, United States Code (enacted as section 581 of title 5, United States Code, by section 4(b) of this Act, and redesignated as section 571 of such title by section 3(b) of the Administrative Procedure Technical Amendments Act of 1991).

Sec. 11. Sunset Provision.

The authority of agencies to use dispute resolution proceedings under this Act and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate.

Members of the Administrative Conference

Council Members

Thomasina V. Rogers, Chair
Susan Au Allen
Walter Gellhorn
William B. Gould IV
C. Boyden Gray
Sally Katzen, Vice Chair
Ginger E. Lew
William R. Neale
John D. Podesta
Jack Quinn
Paul A. Vander Myde

Public Members

Warren Belmar
Edward E. Benavidez
Caryl S. Bernstein
Joan Z. Bernstein
Arthur E. Bonfield
Elliot Bredhoff
Ronald A. Cass
Douglas M. Costle
Martha Derthick
Thomas J. Downey
Steven G. Gallagher
Mark H. Gitenstein
Lawrence B. Hagel
Sandra J. Hale
David G. Hawkins
Thomas D. Hopkins
Elena Kagan
Robert A. Katzmann
Robert M. Kaufman
Frederic Rogers Kellogg
Randolph J. May
Theodore 'Tony' Miles
Joseph A. Morris
Marian Opala
Jaime Ramón
Jonathan Rose
John C. Rother
Peter M. Shane
Donald J. Simon
Marianne K. Smythe
Girardeau A. Spann
David C. Vladeck
Edward W. Warren

Senior Fellows

William H. Allen
Robert A. Anthony
Marshall J. Breger
Clark Byse
Betty Jo Christian
Lewis A. Engman
Ernest Gellhorn
Brian C. Griffin
Paul D. Kamenar
Richard J. Leighton
Malcolm S. Mason
James C. Miller III
Alan B. Morrison
Owen Olpin
Max D. Paglin
Sallyanne Payton
Reuben B. Robertson III
Victor G. Rosenblum
Harold L. Russell
Antonin Scalia
Loren A. Smith
Peter L. Strauss
Thomas M. Susman
Paul R. Verkuil
Edward L. Weidenfeld
James E. Wesner
Richard E. Wiley

Special Counsels

Philip A. Fleming
Darrel J. Grinstead

Government Agency

Members

Agriculture
CFTC
Commerce
CPSC
Defense
Defense/BCA
Education
EEOC
Energy
EPA
FCC
FDIC

FEC
FERC
FMC
FRS
FTC
GSA
HHS
HHS/SSA
HHS/FDA
HUD
HUD/ALJ
ICC
ITC
Interior
Justice
Labor
Labor/OSHA
MSPB
NASA
NLRB
NRC
OGE
OMB
OPM
OSHRC
SBA
SEC
State
Transportation
DOT/FAA
Treasury
Treasury/IRS
US Comm'n on Civil
Rights
US International Trade
Comm'n
US Postal Service
VA