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# Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government

William French Smith

# ALTERNATIVE MEANS OF DISPUTE RESOLUTION: PRACTICES AND POSSIBILITIES IN THE FEDERAL GOVERNMENT

WILLIAM FRENCH SMITH*

In the early nineteenth century Alexis de Tocqueville predicted that the law would become a secular religion in the United States, and that every important political question would be turned into a matter for law and litigation.[1] History once again has proven de Tocqueville's remarkable prescience. Over the past two decades, there has been a staggering increase in litigation.[2] Americans now are filing more lawsuits than ever before, and are litigating a wide variety of disputes that previously had been resolved through other means.[3]

At the same time, Americans also have extended the traditional adversarial process beyond the confines of the courtroom. From the perspective of a government attorney, the most significant extension has occurred in the area of

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* United States Attorney General; B.A., 1939, University of California at Los Angeles; LL.B., 1942, Harvard University.

1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 231-41, 263-70 (G. Lawrence & J. Mayer eds. 1969) (1st ed. Paris 1835); Sarat, *The Role of Courts and the Logic of Court Reform: Notes on the Justice Department's Approach to Improving Justice,* 64 JUDICATURE 300, 301 (1981).

2. The workload at the federal level has increased enormously over the past two decades. In 1960, for example, there were 59,284 civil cases inititated in the federal district courts, and 61,829 were terminated. 1983 DIR. ADMIN. OFF. U.S. COURTS ANN. REP. 114 [hereinafter cited as REPORT]. During the same year, 3,899 appeals were docketed in 11 regional courts of appeals, and those courts disposed of 3,173 appeals. *Id.* at 97. For the year ending June 30, 1983, there were a record 241,842 civil filings in federal district courts, up 17.3% over the previous year. *Id.* at 114. The number of cases filed in the United States Courts of Appeals also reached record levels in 1983. The Courts of Appeals docketed 29,630 cases. *Id.* at 97. The number of appeals filed in federal courts is now more than 600% higher than it was in 1960, *see id.*, and the increase at the district court level has been nearly 300%. *See id.* at 114. *See generally* Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action,* 1981 B.Y.U. L. REV. 617.

3. As Chief Justice Burger noted in 1982, Americans have turned "to the courts for relief from a range of personal distresses and anxieties" and expected them "to fill the void created by the decline of church, family, and neighborhood unity." Burger, *Isn't There a Better Way?,* 68 A.B.A. J. 274, 275 (1982).

administrative rulemaking, which now often contains all the elements of a judicial proceeding, including rules of evidence, testimony, and cross-examination.[4]

Increased use of adversarial procedures in the courts and administrative process has had serious consequences.[5] Regulatory proceedings have become more lengthy and complex as a result of conflict between the government and private parties,[6] and have all too often led to unnecessary and wasteful regulations.[7] Moreover, lawsuits involving the government have become more numerous. The number of lawsuits in which the United States was a party grew by more than 155% in the last decade: from 25,000 new lawsuits a year in 1970 to 64,000 new lawsuits a year in 1980.[8] The accompanying costs to the government have increased at an even greater rate, with legal expenses of federal agencies estimated to have more than tripled in the decade of the 70's.[9] In a time of fiscal constraints, the government simply cannot afford these costs.

Excessive government participation in the adversary process has had other, less tangible, drawbacks. One of the most significant is the unnecessary antagonism it has generated between the government and private parties. Partly because of the conflict created in litigation and administrative proceed-

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4. B. OWEN & R. BRAEUTIGAM, THE REGULATION GAME 23-24 (1978); Wright, *New Judicial Requisites for Informal Rulemaking*, 29 AD. L. REV. 59 (1977).

5. The adversary process has many benefits. It provides a strong incentive for those interested in the outcome of a dispute to present the best arguments for the decisionmaker to consider, and it thus is "a powerful means of generating information." Harter, *Negotiating Regulations: A Cure for Malaise?*, 71 GEO. L.J. 1, 19 (1982). Moreover, because each party knows the contentions of the other parties, he can point out errors in competing positions. *Id.*; *see* Schuck, *Litigation, Bargaining, and Regulation*, REG. July-Aug. 1979, at 26, 31.

6. Cramton, *Causes and Cures of Administrative Delay*, 58 A.B.A. J. 937, 938-39 (1972); Fox, *Breaking the Regulatory Deadlock*, HARV. BUS. REV., Sept.-Oct. 1981, at 97, 104; Harter, *supra* note 5, at 19; Morgan, *Toward a Revised Strategy for Ratemaking*, 1978 U. ILL. L.F. 21, 22 (1978).

7. Fox, *supra* note 6, at 97. Fox has noted that the federal regulation of industry has suffered from a long history of confrontation between government and private businesses. As the regulatory process has become increasingly adversarial, both government and business have approached rulemaking as a battlegound in which combatants committed to fixed positions try to outlast each other through several stages of regulatory and judicial conflict. Instead of attempting to resolve the issue at hand, the parties approach the process as an opportunity to build a record to later bring to court. Moreover, the courts to which the parties finally turn to resolve their disputes are often ill-prepared to handle them. The parties do not settle the essential conflict between them, but rather expend their energies arguing minor procedural issues before a court which often has neither the technical expertise nor jurisdiction to resolve the underlying dispute.

8. REPORT, *supra* note 2, at 121.

9. Information obtained from the Bureau of Justice Statistics in June, 1983.

ings, the public increasingly has tended to view the government as an adversary, rather than a servant of the public interest.

Recognizing these adverse consequences, this Administration has sought to reduce the intensity of battle between the government and the public. With respect to the courtroom, the Department of Justice, among other things, has established a policy of litigating as a last resort, rather than as a first reaction. We also have sought to reduce government participation in administrative battles by establishing alternative rulemaking procedures that are not dependent on adversarial proceedings. This article will examine a few of the steps taken by the federal government to put into practice alternative means of dispute resolution, and will discuss possibilities for other steps the government could take in the future.

## I. ALTERNATIVE DISPUTE RESOLUTION PROCESSES: PRACTICES OF THE FEDERAL GOVERNMENT

Alternative dispute resolution processes were developed by the private sector as a means of resolving controversies without some of the costs associated with traditional litigation. Techniques such as arbitration and mediation have been used for many years in the labor field,[10] and have recently been extended to minor disputes involving consumers, landlords and tenants, family members, and assorted damage claims.[11] Unfortunately, governments, and particularly the federal government, have been slow to adopt these techniques.[12] Federal officials have just begun to recognize the potential of alternative dispute resolution processes and only recently have they tried to apply these processes in resolving controversies in which the government is a party.

### A. *Alternatives to Traditional Rulemaking*

Perhaps the most promising alternative to traditional adversarial rulemaking now being explored in a number of federal agencies is "negotiated rulemaking." This procedure contemplates an informal process of bargaining among parties affected by a proposed regulation. The process is intended to culminate in an agreement that becomes the basis for an agency rule.[13] The procedure, still in its infancy, usually takes one of two forms.[14]

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10. *See generally* M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 315 (1968).

11. *See generally* E. JOHNSON, V. KANTOR & E. SCHWARTZ, OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES (1977); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

12. *See infra* notes 57-58.

13. *See generally* Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981).

14. *See* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 164-68 (1972); Reich, *Regulation by Confrontation or Negotiation?*, HARV. BUS. REV., May-

In one approach, the government agency merely acts as overseer of the negotiations. The agency begins the process by publishing a description of a proposed rule topic in the Federal Register and a general invitation to participate in negotiations. The agency selects a manageable number of representatives from those responding to participate in the bargaining sessions. Agency officials are not present at these sessions. The negotiators develop a proposed rule through the process of compromise, which the agency then publishes along with a statement of basis and purpose drafted by the negotiators. Thereafter, the agency receives public comments, evaluates the negotiated proposal, and promulgates a final rule.

In the second form of negotiated rulemaking, the agency actually participates in the negotiations. After a number of private representatives are selected as negotiators, the agency presents them with its interpretation of the statute involved. Negotiations then begin, and because the agency is one of the negotiators, it must agree to all bargains. If the negotiators cannot agree, the notice and comment process begins under the current system. If the parties reach an agreement, the agency publishes the bargain as a proposed rule and accepts public comment.

In either form, negotiated rulemaking offers a number of potential advantages over traditional adversarial rulemaking.[15] For example, negotiation may yield better rules. While the adversary system encourages parties to take extreme positions,[16] negotiation yields a pragmatic search for intermediate solutions. In negotiation, one party is more likely to discover and to consider economic, political, and other constraints on another party. In sum, the parties are more likely to address all aspects of a problem in attempting to formulate a workable solution.[17]

Another possible advantage is that negotiated rulemaking may increase the acceptability of the rule promulgated by the agency. As one commentator has noted:

> The adversary process usually declares winners and losers and designates a "right" answer. Thus, adversaries may see each other and the agency as enemies and grow alienated from the result. Negotiation, by contrast, fosters detente among participants and has few clear-cut losers. All suggest solutions and ultimately believe they have at least partly consented to the compromise

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June 1981, at 82-86; Schuck, *supra* note 5, at 26, 32-34; Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1790-802 (1975).

15. Phillip Harter has noted a number of drawbacks to the adversarial process in his article on negotiated rulemaking. Harter, *supra* note 5, at 18-21; *see also* 1 C.F.R. § 305.82-4 (1983) (Administrative Conference recommended procedures for negotiating proposed regulations).

16. Darman & Lynn, *The Business-Government Problem: Inherent Difficulties and Emerging Solutions*, in BUSINESS AND PUBLIC POLICY 54 (J. Dunlop ed. 1980).

17. *See* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 658-60 (1976).

rule.[18]

While negotiated rulemaking may offer these and other advantages,[19] there are a number of practical and legal constraints to its use. Not all issues lend themselves to negotiations. This is the case with most all-or-nothing issues, such as whether to require airbags in automobiles.[20] Broad issues that do not directly affect a narrowly concentrated group of persons or entities are also unlikely to be capable of resolution in negotiated rulemaking.[21]

It may also be difficult to select the appropriate representatives for the negotiations. The proposed rule will affect large numbers of people in many cases, but effective negotiations will be possible only if the number of negotiators is kept to a manageable size.[22] Thus, negotiated rulemaking typically will require that groups or persons with a common viewpoint be represented by a single negotiator. The practical considerations aside, it may be legally imperative that this representative be an appropriate spokesperson for the affected group, so as to satisfy the Administrative Procedure Act, which requires that informal rulemaking reflect fair consideration of all affected interests,[23] and due process, which mandates that valid interests not be arbitrarily excluded.[24]

Perhaps the greatest obstacle to negotiated rulemaking is the statutorily and judicially imposed requirement for "open" agency proceedings. Experts in the area of negotiated rulemaking believe that it is a process best conducted in private.[25] Negotiators need to share freely their positions on different issues, without fear of reprisal from those not involved directly. The parties must be able to exchange confidential data that might be useful to the negotiations, without destroying its confidentiality. Similarly, a negotiator must have some assurance that a position he announces or data he presents will not be used against him in another forum, such as in litigation or a later adversary

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18. Note, *supra* note 13, at 1877.

19. Negotiation can also reduce the costs of the decisionmaking process. First, it reduces the need to engage in defensive research in anticipation of arguments made by adversaries. It also can reduce the "time and cost of developing regulations by emphasizing practical and empirical concerns rather than theoretical predictions." Harter, *supra* note 5, at 28, 30.

Negotiations also may reduce judicial challenges to a rule because "those parties most directly affected, who also are the most likely to bring suits, actually would participate in its development. Indeed, because the rule would reflect the agreement of the parties, even the most vocal constituencies should support the rule." *Id.* at 102.

20. Note, *supra* note 13, at 1880.

21. Boyer, *supra* note 14, at 166.

22. Darman & Lynn, *supra* note 16, at 54-55.

23. Moss v. C.A.B., 430 F.2d 891, 894-95 (D.C. Cir. 1970); 5 U.S.C. § 553(c) (1982).

24. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973). *See generally* Stewart, *supra* note 14, at 1756-60.

25. *See* R. FISHER, PRINCIPLED NEGOTIATION: A WORKING GUIDE 142-47, 202 (1979); Fox, *supra* note 6, at 104; Harter, *supra* note 5, at 84.

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Nevertheless, a number of legislative and judge-made rules may limit the use of private negotiations for rulemaking. Three well-known statutes immediately come to mind. The Sunshine Act requires that meetings of collegial agencies be open to the public.[26] The Freedom of Information Act requires agencies to make their records available to the public.[27] Under the Advisory Committee Act, the negotiators might be required to publish minutes of each session in the Federal Register[28] and meet in public.[29]

The rule against ex parte communications may be the most serious judicially imposed obstacle to negotiated rulemaking where an agency participates as a negotiating party.[30] Generally, this rule prohibits an agency from communicating privately with affected groups.[31]

To the extent these rules interfere with negotiated rulemaking, exemptions should be considered. Exemptions would guarantee negotiations the privacy and flexibility needed for success, without sacrificing the concerns these rules were designed to protect. The negotiation process itself will supply virtually the same safeguards that public meetings provide and, in any event, the product of negotiation will be published as a notice of proposed rulemaking so that others will have an opportunity to examine any agreements, and participate in the rulemaking process before the rule becomes final.

In the past year, two federal agencies began experimental projects to test the effectiveness of negotiated rulemaking. In February of 1983, the Environmental Protection Agency (EPA) published a notice in the Federal Register stating that it would "use face-to-face negotiations among interested parties in place of EPA's usual regulation development process" as a demonstration project for two, as of yet unselected, rules.[32] EPA explained that its purpose was

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26. 5 U.S.C. § 552(b) (1982).

27. *Id.* § 552(3).

28. *Id.* app. I § 3(2)(C).

29. *Id.* §§ 10(6), (c), 11.

30. *See generally* Note, *Ex Parte Contacts Under the Constitution and Administrative Procedure Act,* 80 COLUM. L. REV. 379 (1980). The Administrative Procedure Act prescribes procedures for submitting information to federal agencies engaged in informal rulemaking. *See* 5 U.S.C. §§ 551-706 (1982). The APA, however, does not explicitly prohibit oral or written submissions outside these formal channels. In 1976, Congress amended the APA to prohibit ex parte contacts in formal rulemakings governed by 5 U.S.C. §§ 556-557, and conducted under elaborate trial-type conditions. Pub. L. No. 94-409, § 4, 90 Stat. 1241, 1246 (current version at 5 U.S.C. § 557(d) (1982)). The legislative history of the Act expressly acknowledges that this prohibition does not apply to informal rulemaking. S. REP. NO. 354, 94th Cong., 1st Sess. 35 (1975), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1241, 1247.

31. Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir.) *cert. denied,* 434 U.S. 829 (1977), *questioned in,* Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981); Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).

32. 48 Fed. Reg. 7,494-95 (1983).

to test the value and utility of regulation by negotiation, determine the type of regulations that are most appropriate for negotiated rulemaking, and explore procedures that foster effective negotiations.[33] EPA also announced that it would hire an outside contractor experienced in the use of third party intervention techniques to assist in identifying the appropriate parties and in conducting the negotiations.[34] The goal of the negotiations will be to develop a Notice of Proposed Rulemaking that reflects a consensus among the negotiators.

In May of 1983, the Federal Aviation Administration (FAA) published a notice of intent to form a negotiating committee to develop a report concerning flight time, duty time, and rest requirements for flight crew members.[35] For more than thirty years, the FAA's flight and duty time regulations have remained essentially unchanged despite dramatic changes in the equipment and operating practices of air carriers. These regulations have been a constant source of contention between the carriers and employees, and have been the subject of frequent requests for enforcement actions: more than 1,000 pages of interpretive rulings have been generated on the regulations.[36] Based on its inability to promulgate mutually acceptable revised regulations through traditional rulemaking, the FAA has set up an advisory committee composed of persons affected by flight and duty time rules which is currently negotiating to reach a consensus on a new rule.

Encouraged by the potential benefits of negotiated rulemaking, Senator Levin[37] and Representative Pease[38] have each introduced bills in Congress to establish a procedure for the formation of negotiating commissions. Both bills call on the Administrative Conference of the United States to form these commissions and to determine appropriate issues and representatives for affected interests.

From these and other experiments, we can determine whether negotiated rulemaking provides an effective alternative to traditional adversarial rulemaking procedures. It clearly offers the possibility of enhancing our present system of regulation, and agencies should be encouraged to experiment with negotiated rulemaking as an alternative means for dispute resolution.[39]

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33. *Id.* at 7,495.

34. *Id.*

35. 48 Fed. Reg. 21,339 (1983).

36. *Id.* at 21,340.

37. S. 1823, 98th Cong., 1st Sess., 129 CONG. REC. S11,715 (daily ed. Aug. 4, 1983).

38. H.R. 996, 98th Cong., 1st Sess., 129 CONG. REC. H177 (daily ed. Jan. 26, 1983).

39. Phillip Harter has cited a number of innovative regulatory procedures which could improve the factual bases of rules, reduce formality, and accommodate competing interests. Harter, *supra* note 5, at 24-26.

### B. *Alternatives to Litigation*

In addition to using alternative techniques to resolve regulatory disputes, the government also can use alternatives to the adversary process to resolve more effectively disputes that have reached the stage of litigation. In a sense, the government already has devoted much energy to developing alternatives to traditional litigation through the establishment of administrative tribunals. The administrative review process can provide a speedy and effective alternative to litigation because of the unique expertise of Administrative Law Judges and the potential informality of the proceedings.[40] In modern times the administrative process has become increasingly formalized and cumbersome.[41] As a result, the federal government has for some time been exploring other alternatives.

#### 1. Arbitration

A number of federal agencies have used or are gearing up to use arbitration as a means of resolving disputes. The Department of Justice has been participating in an experiment with compulsory pre-trial arbitration.[42] This program, which has been in effect in only a select number of federal districts, calls for arbitration of certain cases, where small amounts of money are at stake and where the cases turn on factual rather than legal issues. The parties are required to go to arbitration, but the arbitrator's decision is not binding. The party rejecting the arbitrator's decision is required to pay the costs of

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40. *See* Jaffe, *The Illusion of the Ideal Administration,* 86 HARV. L. REV. 1183 (1973).

41. *See* note 4 *supra.* The effectiveness of the adminsitrative process has been hampered by the potential for judicial review of administrative decisions. Knowing that the courts can be used as a mechanism of delay or to minimize the discretion of ALJs, private parties have not always used the administrative process as effectively as possible. It has been used by lawyers as an opportunity to build a record to later bring to court. Increased resort to judicial review of agency determinations is also due to the court's injecting themselves into the administrative process. In the past decades, courts began to require agencies to explain the reasons for their actions in greater detail, *e.g.,* Portland Cement Ass'n. v. Ruckelshaus 486 F.2d 375, 392 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974), and to establish that they have taken a hard look at all relevant factors. DeLong, *Informal Rulemaking and the Integration of Law and Policy,* 65 VA. L. REV. 257, 257-72 (1979); *see* United States Lines v. FMC, 584 F.2d 519, 533-36 (D.C. Cir. 1978); United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252-253 (2d Cir. 1977). The court has also tightened the standard of judicial review, discarding the "rational basis" test in favor of the "hard look" standard of review. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971); *see* DeLong, *supra,* at 286 ("Prior to about 1970 the courts would uphold a rule unless it were demonstrably irrational.").

42. E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (rev. ed. 1983).

going to trial if the judgment is not substantially better for him than the arbitrator's decision.

The Department of Labor's Merit System Protection Board is currently adopting a new appeals arbitration procedure for resolving matters subject to the appellate jurisdiction of the Board.[43] This appeals procedure will be used in four regional offices for approximately one year, and then will be carefully evaluated to determine if it should be extended. Under the procedure, the appellant may request that his petition be processed under appeals arbitration. If granted, the Regional Director appoints an arbitrator from a panel of presiding officials who are designated for the new procedure.[44] The award is final, but there is a limited right to petition the Board for review.[45]

### 2. Mediation

Mediation also has been used by a number of agencies as an alternative to or prerequisite for litigation. The Environmental Protection Agency was the first federal agency to formally provide for mediation.[46] Under its procedures, the Appeals Board, in consultation with the parties, may require mediation to resolve a dispute already subject to administrative adjudication. The result of the mediation is not binding unless the parties agree otherwise in writing.[47]

A similar process has also been adopted by the Department of Health and

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43. 48 Fed. Reg. 11,399 (1983) (to be codified at 5 C.F.R. § 1201).

44. *Id.*

45. HUD also has experimented with arbitration. The Land Sales Fraud Division, which administers the Interstate Land Sales Fraud Disclosure Act, uses arbitration as an alternative to litigation and to fashion consent decrees. The Divison sues land developers who have engaged in fraud in selling land developments to the public. The Commodities Futures Trading Commission uses an industrial association arbitration service to hear complaints by consumers against brokers. The Federal Trade Commission uses the Better Business Bureau to arbitrate a large number of consumer complaints. Finally, the Securities Exchange Commission has assisted stock exchanges in setting up their own arbitration service. *See generally* Simon, *U.S. Tries Alternatives to Litigation,* NAT'L L.J., June 27, 1983, at 31.

46. Mosher, *EPA, Looking for a Better Way to Settle Rules Disputes, Tries Some Mediation,* ___ NAT'L J. 504 (1983). Prior to EPA's formal adoption of mediation, the technique had been used by various groups and agencies to resolve environmental disputes. Environmental mediation won its spurs in 1974, when two mediators settled a dispute between the Army Corps of Engineers and local conservationists involving a flood-control dam on the Snoqualime River near Seattle. As of this year, more than 40 major environmental disputes have been settled through mediation. Moreover, in the past three years a number of states have passed laws specifying how negotiations and mediation procedures can be used to resolve environmental disputes. *Id. See generally* Susskind, *Environment and Mediation and the Accountability Problem,* 6 VT. L. RV. 1 (1981); Sviridoff, *Recent Trends in Resolving Interpersonal, Community, and Environmental Disputes,* ARB. J., Sept. 1980, at 3.

47. 40 C.F.R. § 123 (1983).

Human Services (HHS). For a decade, federal agencies administering programs of grants-in-aid have used grant appeal boards to adjudicate disputes between the granting agencies and their grantees.[48] The first of these boards was established by the Department of Health, Education, and Welfare (HEW) in 1973, and the board has been continued under new and revised regulations by HHS.[49] Even before it had a regulation formally authorizing mediation of pending grantee appeals, the HEW/HHS appeals board often pushed grantees and the agency to the conference table. The Board institutionalized this practice in 1979 by routinely informing the parties that the Board favored efforts by the parties to resolve disputes by direct discussion.[50] In August 1981 HHS issued a final rule formally providing for mediation to resolve disputes.[51] Mediation may be instituted under this rule either at the suggestion of a party to the pending case or upon the Board's initiative. Once instituted, it has been the Board's practice to suspend its proceedings until mediation is concluded.[52]

### 3. Governmental Entities

Two important governmental entities that have encouraged use of alternative dispute resolution processes, and helped resolve disputes through such processes, are the Community Relations Service (CRS) and the Federal Mediation and Conciliation Service (FMCS).

The CRS, a component of the Department of Justice, is required, under Title X of the Civil Rights Act of 1964,[53] to provide "assistance to communities and persons therein resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color or national origin, which impair the rights of persons in such communities under the Constitution or laws of the United States which affect or may affect interstate commerce."[54]

CRS conciliators and mediators have attempted to fulfill these objectives

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48. 38 Fed. Reg. 9,906 (1973) (codified at 45 C.F.R. § 16.1 (1973)).

49. 45 C.F.R. §§ 16.1-16.23 (1983).

50. Barrett, *Mediation and Adjudication: The Double Track Approach,* 30 FED. B. NEWS & J. 436 (1983).

51. 45 C.F.R. § 16.18 (1983).

52. Mosher, *supra* note 46.

53. 42 U.S.C. § 2000(g) (1976).

54. *Id.* The CRS function is also addressed in two other statutes. Title II of the Civil Rights Act of 1964, which prohibits discrimination in public accommodations on the basis of race, color, religion or national origin, provides that a federal court may refer a civil action under Title II to CRS "for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance." 42 U.S.C. § 2000a-3d (1976). Title VIII of the Civil Rights Act of 1968 requires that the Secretary of HUD "cooperate with and render technical and other assistance to the Community Relations Service as may be appropriate to further its activities in preventing or eliminating discriminatory housing practices." 42 U.S.C. § 3608(d) (1976).

from ten regional offices. The CRS has recently taken a more active role. In 1982, the agency processed 1,996 alerts to potentially serious racial/ethnic conflicts, almost 500 more than in the preceding year.[55] From those alerts, 893 new cases were opened in which the CRS was called upon to help resolve disputes arising from school desegregation, police conduct, and resettlement of Cubans, Haitians and other refugees and immigrants.[56] Through the efforts of the CRS, we have helped reduce racial harassment and tensions, improve cooperation between the police and the minority communities, and avoid needless and time-consuming court litigation. The FMCS has played an important role in mediating disputes in the area of labor-management relations. The FMCS was created by the Labor Management Relations Act of 1947 for the purpose of preventing disruptions in the flow of interstate commerce resulting from labor management disputes by providing mediators to assist disputing parties in the resolution of their differences.[57] The FMCS mediators have no law enforcement authority, but rather work with the parties to settle disputes. The FMCS has closed approximately 20,000 disputed cases in recent years, holding mediation sessions with both labor and management present in about half these cases.[58]

The FMCS is active not only the private sector, but also in the federal government. Approximately 60% of federal employees are represented by a union and have concluded a collective bargaining contract.[59] Under Executive Order 11,491, which became effective on January 1, 1970, the FMCS provides mediation and other assistance in disputes arising from negotiations between federal agencies and labor organizations.[60] Title VII of the Civil Service Reform Act of 1978[61] gave the FMCS statutory authority to carry out this function, providing that the FMCS "shall provide services and assistance to agencies and exclusive representation in the resolution of negotiation impasses."[62]

### 4. Other Alternatives

The federal government has used a number of innovative, alternative techniques to resolve or settle disputes in several difficult cases. One of the best known examples occurred in a case in which contractors attempted to recover additional compensation because the National Aeronautics and Space Administration (NASA) imposed certain technical requirements three years

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55. 1982 COMMUNITY REL. SERV. ANN. REP.

56. *Id.*

57. Labor Management Relations Act of 1947, §§ 202, 203, 61 Stat. 136, 153-54, (current version at 29 U.S.C. §§ 172, 173(d) (1976)).

58. 1981 FED. MEDIATION & CONCILIATION SERV. ANN. REP. 45.

59. *Id.* at 13.

60. 34 Fed. Reg. 17,605 (1969), *reprinted in* 5 U.S.C. § 7101 app. at 793 (1982).

61. Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1208 (1978).

62. 5 U.S.C. § 7119(a) (1982).

after the contracts at issue had been awarded.[63] Because of the complexity of the issues and the anticipated length of discovery and the hearing, the parties held a "mini-hearing" to help resolve the dispute.

In a mini-hearing or mini-trial, both sides agree to present their cases in summary form to a panel, which may be composed of senior officials from each side or neutral advisors or a combination of the two. At the end of the mini-hearing, the panel does not render a decision, but rather comments on the strengths and weaknesses of each side's presentation. The parties are then in a better position to evaluate both their own and the other side's case, and thus to conclude a settlement.[64]

Unlike most mini-trials, in the NASA mini-hearing the parties did not negotiate a detailed written agreement specifying the procedures to be followed. Rather the parties simply agreed to exchange written briefs on technical, cost, and legal issues, and then to have top management, with written authority to resolve the technical issues, come together to hear summary presentations by counsel. During a one-day mini-hearing, the Director of the Goddard Space Flight Center, the NASA Associate Administrator for Tracking and Data Systems, and two senior officials for the contractors heard two-and-a-half hour presentations by counsel for each side. No witnesses were called. The next day the four persons that heard the arguments met privately, and a few days later an agreement was signed resolving the issues.

The NASA mini-hearing saved more than $1 million in legal fees alone. A workable, mutually beneficial solution was developed by involving top management that was superior to any decision that could have been imposed by a third party.[65]

The government also used an innovative dispute resolution technique in connection with litigation commenced April 1, 1976, over the value of the properties transferred by seven bankrupt railroads to Conrail. While the government estimated a $500 million valuation, Penn Central, one of the bankrupt railroads, estimated its holding at more than $4 billion. The case would have involved a huge expenditure of public resources in litigating the value of the property. The parties settled on November 18, 1980 for $2.1 billion.[66]

The parties were able to achieve this relatively quick settlement because they adopted a "two-team" approach, consisting of a "settlement" team and a "litigation" team. Corporate specialists, who were put on the "settlement" team, could more easily understand the financial analysis than the litigators. In addition, the "settlement" team was better able to maintain the privacy

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63. Johnson, Massi & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, LEGAL TIMES WASH., Sept. 6, 1982, at 16.

64. *Business Saves Big Money with the 'Minitrial,'* BUS. WEEK, Oct. 13, 1980, at 168.

65. *Id.*

66. Lempert, *Complex Cases Demand Lawyers for All Seasons*, LEGAL TIMES WASH., July 27, 1981, at 1.

needed for disclosure of confidential settlement information.[67]

## II. Alternative Dispute Resolution Processes: Possibilities for the Federal Government

Virtually everyone agrees that alternative dispute resolution processes can offer a more speedy and cost-effective means of resolving disputes than traditional adversarial processes in some circumstances. While those in both the private sector and government find alternative means of dispute resolution attractive in theory, they have been less willing to adopt these techniques in practice in disputes where the government is a party.

Government resistance to alternative mechanisms for dispute resolution stems from a number of different sources. One of the most important causes of this resistance is the fact that government lawyers have traditionally been unconcerned with the cost of defending and prosecuting disputes in court and in administrative proceedings. Perhaps because these costs, though immense in absolute terms, are such a relatively small part of the national government's budget, the public has not pushed for cost-effective dispute resolution by the government.

Those who manage the government's litigation may also be reluctant to use informal dispute resolution processes because of a fear that they will be criticized. For certain issues, such as public health and safety, the perception remains with some that private, informal hearings are inadequate, and that public officials who allow such hearings may be abusing their power.

Finally, and on the more technical level, government lawyers sometimes are reluctant to use alternative means of dispute resolution because it is not clear whether Congress has authorized such means. Where Congress has, it still may be unclear who in the agency has power to approve their use or how an agency pays for the nonjudicial forum.

The government is in no sense solely to blame for its minimal use of alternative means of dispute resolution. The private sector also has resisted. Although private parties are willing to accept as final and binding decisions of nonjudicial officials in private disputes, the private sector has been considerably less inclined to accept finality in disputes with the government. Private parties have long believed that justice cannot be insured in adversarial proceedings with the government unless they have available an endless administrative and judicial review process. As a result, our administrative tribunals, which could serve as effective alternatives to court litigation, have become places to build a record to later bring to court.

One final constraint on the use of alternative dispute resolution techniques is that they require lawyers both inside and outside government to accept new attitudes and learn new skills. Litigators, by long training and perhaps by tem-

67. *Id.*

perament, will typically defend tenaciously all points of their client's position, put forth every claim and every argument that can be made on their client's behalf, and seek every possible procedural advantage. These skills have a place in full-scale litigation, but they are the type of skills that tend to create conflict rather than resolve it. In order for alternative means of dispute resolution to become most useful, lawyers must be willing to relinquish secondary claims and arguments to achieve their client's objective. They must be willing to discuss issues in a spirit of candor, and forego minor tactical advantages to achieve a workable consensus. Fortunately, attorneys seem to be quickly adopting these new attitudes as they face increasing pressures from clients to render legal services in a more cost-effective manner.

To encourage more effective use of alternative means of dispute resolution, a number of steps might be taken. One way to more quickly implement alternatives to court litigation in government is to make our administrative process more effective. Administrative Law Judges often have unique expertise in their area, and the informality of the administrative process can result in more speedy and effective resolution of disputes at times, but to improve the effectiveness of the administrative process, we must be willing to do such things as limit and, in some cases, eliminate judicial review.

The government could also develop a mechanism to give its lawyers a greater incentive to resolve disputes in a cost-effective manner. The federal government is only now beginning to monitor its lawyers to ensure that the costs of their efforts do not exceed the benefits, and to ensure that they are not wasting government money and resources. This type of review process is essential to increase the use by government of alternative dispute resolution mechanisms.

Another important step would be to develop a highly effective clearinghouse to collect, process, and disseminate information on the use of alternative means of dispute resolution in government cases. The clearinghouse could enable government attorneys to stay up-to-date on successful and innovative alternative dispute resolution mechanisms that have been applied by their colleagues, and could provide lawyers with information regarding the most effective dispute resolution devices for various types of controversies. It also could make known which theoretically promising techniques have proven unproductive in practice. The Department of Justice has recently set up such a clearinghouse, and plans to implement a training program for line attorneys on the use of alternative techniques. The Department also intends to work with its client agencies to help them develop their own training programs on alternative means of dispute resolution so that the clients will be aware of these options.

Finally, legislation must be enacted and new rules must be promulgated if alternative means of dispute resolution are to become more prevalent. Legislation to facilitate the formation of negotiating commissions would allow for a comprehensive evaluation of the effectiveness of negotiated rulemaking. In addition, legislation must be considered that would more clearly give agencies

authority to use alternative techniques. In turn, agencies must promulgate regulations to give Administrative Law Judges and other government officials appropriate discretion to request that parties use alternative means of dispute resolution.

Our constant resort to "trial by battle" to resolve both traditional litigation and regulatory conflicts has had a number of adverse consequences. Excessive court litigation has not only wasted government money, but has also resulted in unnecessary antagonism between the public authorities and the public itself. Regulatory conflicts between the government and private parties have led to ineffective regulations and to even more complex, time-consuming litigation in our courts. Less adversarial methods must be found and implemented to avoid needless waste of scarce resources.

Lord Bacon once observed:

> [He] that will not apply new remedies must expect new evils; for time is the greatest innovator; and if time of course alters things to the worse, and wisdom and counsel shall not alter them to the better, what shall be the end?[68]

It is clearly time for us to use "wisdom and counsel" to consider reforming our system of resolving disputes and to be unafraid to apply "new remedies" to achieve these reforms.

68. THE ESSAYS OF FRANCIS BACON 109 (M. Scott ed. 1908).