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DISPUTE RESOLUTION AND ADMINISTRATIVE LAW:
THE HISTORY, NEEDS, AND FUTURE OF A
COMPLEX RELATIONSHIP

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I. INTRODUCTION

THE invitation to this Symposium described the “concern over the backlog in our courts and the high costs to litigants for full-scale trials” and mentioned that alternative means of dispute resolution have become a “timely subject to the legal community.”¹ Others have described the potential of alternative means of dispute resolution in similar terms:

Society cannot and should not rely exclusively on the courts for the resolution of disputes. Other mechanisms may be superior in a variety of controversies. They may be less expensive, faster, less intimidating, more sensitive to disputants’ concerns, and more responsive to underlying problems. They may dispense better justice, result in less alienation, produce a feeling that a dispute was actually heard, and fulfill a need to retain control by not handing the dispute over to lawyers, judges, and the intricacies of the legal system.²

There is no question but that a great deal of attention is currently being paid to dispute resolution — finding ways of resolving our differences outside of (or perhaps along side of) the courts — both as a way of providing relief to the courts and as a way of reaching more satisfactory decisions.

Interestingly, it also seems customary to describe the purpose of many administrative programs and the accompanying process as providing a more responsive, flexible means by which society’s decisions can be made.³ Trials before agencies were supposed to be less cum-

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1. Letter from J. Gordon Cooney, Jr., Editor-in-Chief, Villanova Law Review to Philip J. Harter (Aug. 10, 1983) (invitation to participate in 1984 Law Review Symposium).

2. OFFICE OF LEGAL POLICY OF THE UNITED STATES DEPARTMENT OF JUSTICE, PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTION (1984).

3. See B. SCHWARTZ, ADMINISTRATIVE LAW 3 (1976). Thus, for example, ad-

bersome, less expensive, and less time consuming than courtroom hearings.⁴ Rulemaking was seen as a way of filling in the details of legislation or responding to particular needs in an easy, quickly executed manner as opposed to the vagaries of legislation or using trials to develop policy through the common law. Throughout this process, the courts were to ensure that the action taken was not arbitrary or capricious, and certainly within the bounds of legality, but other than that they were to accommodate the agencies' decisions.⁵

It seems equally clear that the administrative process has now become part of the problem. Programs founded to be responsive have become laborious, unyielding, and repressive. The process itself is "increasingly being criticized for being unduly costly, cumbersome and slow."⁶ These problems arose no doubt in part through bureaucratic momentum and an effort to protect past values. But, they also arose from quite appropriate responses to very real difficulties.

It therefore seems incumbent on those of us who are interested in the administrative process and in improving the way we make decisions affecting each other to be vigilant to see if there are ways of

ministrative agencies were to address and redress problems created by or beyond the reach of the courts. One commentator explained that the definition of an "agency" in the Administrative Procedure Act (APA) "equates the agency with the executive branch." *Id.*; see Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1982). The APA defines an "agency" as:

[E]ach authority of the Government of the United States whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia.

5 U.S.C. § 551(1)(A)-(D) (1982).

4. See generally K. DAVIS, ADMINISTRATIVE LAW TEXT 194-214 (3d ed. 1972) (describing the adjudication procedures used by agencies) [hereinafter cited as DAVIS TEXT]; B. SCHWARTZ, *supra* note 3, at 263-327 (discussing the fair hearing requirements which are applied to agencies). In addition to being less expensive and less time consuming, the rules of procedure and evidence were to be tailored to achieve justice and economy. See generally 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 102, at 308-09 (1979) (discussing "fair informal procedure" as a more accurate description for agency action currently referred to as "adjudication") [hereinafter cited as DAVIS TREATISE].

5. See Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (1982). The APA directs the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*; see generally 1 DAVIS TREATISE, *supra* note 4, at § 6:6 (discussing judicial review of agency rules and the effect of that review on the agency's choice of a rulemaking procedure).

6. Announcement of ABA Section of Administrative Law, Consensus as an Alternative to the Adversarial Process (program held September 30, 1983).

aligning the difficult balance of providing appropriate safeguards while reestablishing the original promise of administrative law.⁷

The review of the administrative process may be particularly pertinent to a general discussion of dispute resolution because it arose to meet a need in dispute resolution. In addition, as its processes evolved and matured, it had to struggle — and is struggling — to define its relationship to the courts. Thus, the “institutionalization”⁸ of dispute resolution may learn much from the administrative process, and in turn the administrative process can profitably draw on the insights we are gaining on various forms of dispute resolution.

To put the complex relationship of dispute resolution and the administrative process into perspective, it is helpful to look at its history, the current needs, and the future.

II. HISTORY OF ADMINISTRATIVE LAW

A. *Establishment of Programs*

Many administrative agencies, the programs they administer, and individual regulations they issue can be explained, at least somewhat, by a dissatisfaction with existing mechanisms for resolving either rights or interest disputes.⁹ The response has been the creation of agencies that are designed to alter the substantive rights of the affected parties and supplant judicial processes with an administrative one that, it is hoped, will better fulfill the goals of the program. Consider five examples:

1. National Labor Relations Act (Act).¹⁰ Traditional legal concepts and doctrines, such as criminal prosecutions alleging conspiracy or application of antitrust laws to union organizing, which were applied by the courts to labor relations led to broad dissatisfaction with the resulting antiunion or antiself-help holdings.¹¹ The result was the passage of the National Labor Relations Act that is administered by the National Labor Relations Board (Board). The

7. For discussion of the appropriate balance between safeguards and responsiveness, see notes 31-32 and accompanying text *infra*.

8. That seems an unfortunate term for the long run establishment of dispute resolution programs. While “establishment” has an aura of success about it, institutionalization sounds like a commitment to the local mental hospital. Nonetheless, that appears to be accepted terminology.

9. Perritt, “*And the Whole Earth Was of One Language*”—*A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221 (1984).

10. 29 U.S.C. §§ 151-168 (1982).

11. Much of the following analysis applies to regulatory programs that are designed to address “social” concerns that arise from an inequality of bargaining power.

Act itself gave rise to substantive rights of organization that were previously denied, and the Board was to be an expert body that would be sympathetic to the cause of the rights of employees to organize and bargain collectively.¹² Moreover, a piece of the prolabor legislation¹³ barred courts from interfering with this policy by issuing injunctions based on the traditional doctrines.¹⁴ Thus, there was substantive dissatisfaction with the state of the law as administered by the courts, so it was changed. There was also dissatisfaction with the bias that judges were reflecting and so a new, more sympathetic forum was created to hear the disputes that arose.

2. Environmental Protection Agency (EPA). On first blush, the failure of dispute resolution would seem to have little to do with the Clean Air Act,¹⁵ the Federal Water Pollution Control Act¹⁶ or any of the other statutes that EPA administers.¹⁷ If those who live

12. See 29 U.S.C. § 151 (1982). The Act was passed to protect "by law the right of employees to organize and bargain collectively," and as a result safeguard "commerce from injury, impairment, or interruption." *Id.*

13. The Norris-LaGuardia Act "declared it to be the public policy of the United States that employees be permitted to organize and bargain collectively free of employer coercion and sought to achieve that goal by regulating and in most cases barring altogether the issuance of injunctions in a 'labor dispute.'" R. GORMAN, BASIC TEXT ON LABOR LAW 4 (1976); see 29 U.S.C. §§ 101-110, 113-115 (1982).

14. R. GORMAN, *supra* note 13, at 4; see generally A. COX, D. BOK & R. GORMAN, CASES AND MATERIALS ON LABOR LAW 55-60 (9th ed. 1981) (a general discussion of some of the traditional doctrines upon which injunctions were based prior to the Norris-LaGuardia Act).

15. 42 U.S.C. §§ 7401-7642 (1982). The Clean Air Act "regulates industrial air pollution by two distinct methods: air quality control and emission control." R. ZENER, GUIDE TO FEDERAL ENVIRONMENTAL LAW 1 (1981).

16. 33 U.S.C. §§ 1251-1376 (1982); see generally R. ZENER, *supra* note 15, at 59-124 (an in-depth discussion of water pollution control legislation).

17. The analysis that follows applies generally to regulatory programs that address "externalities." See S. BREYER, REGULATION AND ITS REFORM 23-26 (1982); I. MILLSTEIN & S. KATSH, THE LIMITS OF CORPORATE POWER 138-42 (1981). It also applied to those regulatory areas known as "preclearance," although not as well. See generally I. MILLSTEIN & S. KATSH, *supra*, at 142-43 (preclearance regulation requires agency approval before product is marketed). It would apply, for example, to the safety and efficacy of pharmaceuticals, since an expeditious means of resolving disagreements would internalize costs of mistakes and other problems. For that argument to work, one must assume the firm will anticipate the adverse consequences that would flow from marketing a dangerous drug and hence would conduct the optimal amount of testing to ensure its reasonable safety (and anticipating the need to get it on the market to meet a legitimate need). Not surprisingly, some people are repulsed by the notion that some individuals would pay with their lives to provide the information on hazards, and hence they argue in favor of a regulatory system that anticipates risks and seeks to prevent unreasonable risks before the drug is marketed. Even in that case, the dispute resolution theory might apply to the efficacy of drugs which are now regulated by the Food and Drug Administration. There is an extensive debate over whether the anticipatory regulation may actually lead to more deaths and serious illness than would the dispute resolution model. See, e.g., Roberts & Bodenheimer, *The Drug Amendments of 1962: The Anatomy of a Regulatory Failure*, 1982

around a plant that is polluting the air or water had a responsive, inexpensive means of enforcing a “right”¹⁸ to clean air or water and recovering damages from the offending plant, the costs of the pollution would be internalized and the company would be forced to make an economic choice between paying and polluting or cleaning up. That choice would be enforced better than the EPA is likely able to do because those affected would presumably have a greater incentive — and appropriate knowledge — to bring an action. Moreover, the choice would likely be more nearly economically optimal since the costs would be distributed more precisely than is possible in command-and-control regulation.¹⁹ Thus, under this system there would be no externalities to necessitate or justify regulation. But, of course, such a system does not exist: there is no direct, inexpensive, accurate system for internalizing those costs. Doing so would be wildly expensive and time consuming so that, as a result, the costs of pollution are borne by the neighbors. As a result of what has been perceived as a misallocation, the regulatory program was created that prohibits certain conduct altogether as a means of internalizing the costs. Moreover, a central agency is called upon to enforce its proscriptions. Sometimes that is because the beneficiaries — the neighbors in this case — still could not afford to enforce their new rights; and in other cases they could afford to do so, in which case the regulated company urges the limitation as a way of raising barriers to dispute resolution and hence warding off payments (be they accurate or not).²⁰

3. Federal Trade Commission (FTC). Several of the FTC’s rules appear to be based, in fact if not as the stated purpose, squarely

ARIZ. ST. L.J. 581, 612-13 (recommending informal dispute resolution to expedite new drug approval process).

18. That “right” could be created by statute and administered by the elusive dispute resolution mechanism, or it could evolve from a “common law” response. There are several ways of altering the resolution of competing interests. The point here is the need for a functioning mechanism to resolve the disputes that would arise once the interests were identified.

19. Command-and-control is a type of regulation in which the agency “require[s] or proscribe[s] specific conduct by regulated firms.” Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1264 (1981). The regulating body enforces the commands with controls such as “orders, injunctions, civil penalties, and criminal fines.” *Id.*

20. Note that disputes over whether the Clean Air Act and its implementing regulations have been violated are resolved by a court, not before the agency itself. *See* 42 U.S.C. § 7413 (1982). Given that it has become commonplace to have agencies themselves conduct hearings on whether the duties they impose have been met, this may well have reflected a concern on the part of business that the agency itself would be biased in favor of finding a violation and that it could receive a fairer, more impartial hearing before a court. That is certainly the history of the separation of the Occupational Safety and Health Review Commission from the Occupational Safety Health Administration, which issues the standards and citations for their violation.

on the Commission's belief that existing dispute resolution mechanisms are inadequate to redress what it perceived to be a problem. For example, if it were not so expensive and difficult to prosecute common law or statutory fraud cases, the Commission's regulation of vocational schools²¹ would make little sense. In order to prevent this pattern of fraud more effectively, the Commission prescribed specific rules the schools must meet.²² The violation of these rules was then a violation of a duty owed to the FTC; and the Commission would enforce the rule against the errant school. Thus, as a result of the failure of a ready means for seeking redress, specific duties were created and the aggrieved party was changed from the individual to the Commission. Interestingly, the student was left in about the same position as before: without recourse other than complaining to the Commission which might or might not take action.²³ The FTC's rules on franchises²⁴ are similar.

4. Workers Compensation.²⁵ Worker compensation programs were in fact established because of dissatisfaction with the tort system for compensating injured employees. The programs created new rights that overrode the existing substantive law and were to be administered by an agency. Disagreements are resolved not in courts — at least in the first instance — but before the agencies themselves. The process was likely envisioned as a mix of bureaucratic justice, in which expert desk officers make the initial decisions, and a more judicial-like, but nonetheless sympathetic, forum resolves remaining disputes.²⁶ Only after that were courts invoked. Again, the lack of a

21. The FTC established regulations with which proprietary vocational and home study schools had to comply to avoid committing unfair and deceptive acts. *See* 16 C.F.R. § 438 (1984). The purpose of this rule was "to alleviate currently abusive practices" such as "unfair and deceptive advertising sales, and enrollment practices engaged in by some of the schools." *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 661 (2d Cir. 1979) (quoting 43 Fed. Reg. 60,795-817 (1978)).

The FTC's rule was held invalid in 1979 because the regulation treated violations of the FTC's "requirements prescribed for the purpose of preventing' unfair practices as themselves the unfair practices." *Id.* at 662.

22. *See* 16 C.F.R. § 438 (1984).

23. The existence of the rule might, of course, alter the student's bargaining power in informal negotiations with the school. The student is not, however, provided the right to enforce the duty created by the rule in any forum that can issue a binding order. The rule required that the school include specific rights in its contract with students, and those rights would presumably be enforceable by the student through civil litigation; if the required clauses were omitted, however, it would appear that enforcement would remain solely with the FTC. *See id.*

24. *See* 16 C.F.R. § 436 (1984).

25. A similar analysis would apply to Social Security Disability, Black Lung, or Railroad Retirement programs.

26. For a thorough discussion of the mix of bureaucratic and judicial justice in Social Security disability cases, see J. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

sympathetic, responsive forum led to the creation of an administrative program.

5. Toxic Torts.²⁷ The enormous amount of litigation, both before courts and in workers compensation programs, over occupational exposure to asbestos and the current concern over illness resulting from exposure to toxic materials²⁸ has led to proposals for the creation of new agencies, or the adaptation of existing ones, to deal with the problem.²⁹ Some commentators have suggested that an agency could process disputes over whether a particular illness is sufficiently linked to a substance as to impose liability on its manufacturer.³⁰ Other authorities have suggested that an agency could develop information and presumptions that would be used in processing future claims and disputes.

In sum, many regulatory programs are created to rectify a perceived market imperfection³¹ that may in fact reflect an inability to resolve substantive disputes appropriately. That is, some people are regarded as "victims" because they lack the redress that would be necessary for their rights and duties to be properly aligned with the rights and duties of others. The response, then, is the creation of an administrative program that both alters the substantive relationships and provides a built-in dispute resolution mechanism under more sympathetic procedures.³²

The lesson in all of this is simply that dispute resolution and regulation are closely related. We therefore need to consider both how

27. For a review of the problems in the area of toxic torts, see *Seventeenth Annual Symposium, Toxic Torts: Judicial and Legislative Responses*, 28 VILL. L. REV. 1083 (1983); Comment, 28 VILL. L. REV. 1298 (1983).

28. See Schwartz & Means, *The Need for Federal Product Liability and Toxic Tort Legislation: A Current Assessment*, 28 VILL. L. REV. 1088 (1983).

29. See *id.* at 1109-15.

30. This rather awkward way of saying (or, rather, avoiding saying) causation, is in recognition of the difficulty in establishing "causation" in any rigorous sense under traditional tort law. The diseases may become manifest decades after exposure, have multiple etiologies, and also have a significant background incidence. Thus, ascribing a particular disease to a particular event (even one continuing over a period of time) may be impossible under the best of circumstances, and even more so given the frequent lack of data. As a result, a new form of resolving the question of illnesses that are attributed to exposure to toxic materials has been advocated. Some commentators have also been opposed on the ground that the uncertainty would be inappropriately resolved in favor of excessive recovery. The debate will likely be one of the lively political debates of the year. See Kircher, *Federal Product Legislation and Toxic Torts: The Defense Perspective*, 28 VILL. L. REV. 1116, 1119-31 (1983).

31. This theory may not apply to regulatory programs that are designed to cure failure of competition. See I. MILLSTEIN & S. KATSH, *supra* note 17, at 132-46.

32. Some programs are, of course, enforced in courts, or by other existing means. The dispute resolution mechanism is nonetheless altered by changing the nature of the underlying dispute.

to improve dispute resolution and whether a regulatory program is needed to cure some perceived social ill. Lack of sensitivity to that link may result in dysfunctional overkill that will actually hurt in the long run. Moreover, one needs to be sensitive to the history of administrative programs when looking at the institutionalization of new forms of dispute resolution: perhaps the appropriate response is not a new form of dispute resolution but the creation of an agency; or, contrariwise, perhaps in some cases the experience will indicate the nature of future problems that are likely to arise.

B. *Administrative Procedure*

While new administrative programs were being created during the 1920's and 1930's to provide new rights, greater flexibility, and more responsiveness to new situations, efforts were simultaneously being made to use the procedure by which they operated to confine the exercise of the new powers to that explicitly granted by Congress.³³ Moreover, many of the programs that were developed during this period required quite formal proceedings for developing rules and operated through formal processes.³⁴ Congress passed a bill in 1939³⁵ that would codify this approach generally, only to have it vetoed by President Roosevelt because it was too rigid. In language reminiscent of that describing the need for alternative means of dispute resolution and the problems with both courts and lawyers, President Roosevelt pointed out his problems with the bill:

The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes

. . . [A] large part of the legal profession[, however,] has never reconciled itself to the existence of the administrative tribunal. Many of them prefer the stately ritual of the

33. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671-73 (1975). Professor Stewart has explained the confines placed upon administrative law as follows: "Coercive controls on private conduct must be authorized by the legislature, and, under the doctrine against delegation of legislative power, the legislature must promulgate rules, standards, goals, or some 'intelligible principle' to guide the exercise of administrative power." *Id.* at 1672 (footnote omitted).

34. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 105-08 (1941).

35. Walter-Logan Bill, H.R. 6324, 76th Cong., 3d Sess. (1940).

courts, in which lawyers play the speaking parts, to the simple procedure of administrative hearings which a client can understand and even participate in.³⁶

Thus, there has been a tension in administrative procedure between those who desire a relatively formal process and those who desire a more flexible process. While the Administrative Procedure Act (APA) codified some types of procedures, the battle over the administrative process continues.³⁷

The APA, unlike Gaul, is divided into two relatively distinct camps: notice and comment rulemaking and hearings of some sort, with an emphasis on formal, trial-type activities.³⁸ The rulemaking section calls only for a notice of proposed rulemaking in the *Federal Register*, the receipt of comments from interested members of the public, the consideration of "relevant" matters presented, and finally a notice of the final rule along with a "concise general statement of [its] basis and purpose." In fact, however, a far more comprehensive procedure was contemplated for rules of much substance.³⁹ On the other hand, intricate and complex procedures are spelled out for adjudication and formal rulemaking.⁴⁰

But in fact these two models are only the poles of a continuum of procedures.⁴¹ There is more, and it is complicated. The two models do not recognize⁴² some of the important variations of the administrative process that have arisen in the past twenty years during the enormous growth of the administrative state.

For example, is a permit issued by the EPA under any of the several statutes it administers a rule or an adjudication?⁴³ What

36. 86 CONG. REC. 13,942-43 (1940).

37. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 2-18 (1982).

38. For example, the APA first defines a "rule." 5 U.S.C. § 551(4) (1982). An "order" is then defined as "the whole or part of a final disposition . . . of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). "Adjudication" is in turn defined as the "process for the formulation of an order." *Id.* § 551(7). Thus, the world is divided into two parts: rules and orders, and the correlative procedure is either rulemaking or adjudication.

39. Harter, *supra* note 37, at 9-10.

40. 5 U.S.C. §§ 557-558 (1982).

41. Since rulemaking has *some* structure, it is not actually the lower bound since some administrative actions are without any structure whatever. It is, however, likely to be the pole with respect to any defined process since it is so flexible and has many exceptions.

42. Along with the APA, administrative law texts tend to follow the rigid dichotomy and overlook the other processes.

43. While reading the definition of a rule (a statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law) might reasonably lead one to believe that a permit is a rule (it is, of course, of particular applicability; it will take effect in the future; and it implements law) that is not

about the restrictions in the Chrysler loan guarantee or other subsidies? What about all those conditions put in grants to states—such as the 55 m.p.h. speed limit—that are every bit as coercive as a regulation but outside the confines of the APA? How are agencies supposed to make decisions such as whether to put roads in national forests, to approve an environmental impact statement, or to approve a request for a rent increase in subsidized housing? And, indeed, what of adjudication itself? The provisions of the APA are genuinely Byzantine. But they apply only to the formal hearings presided over by administrative law judges. Other forms of hearings are not described. Moreover, the Departments of Labor and Health and Human Services alone employ more than 800 administrative law judges and process 400,000 cases each year.⁴⁴ The procedures which agencies actually follow are far more diverse than those defined in the APA. They arise through ad hoc judgments, are provided for in substantive statutes, and are imposed by courts. Agencies have created a broad range of alternative means of making the incredibly varied decisions the government is called on to make. It might help if we explicitly recognized these alternatives. Perhaps the APA could be expanded to take account of what is really happening, thereby consolidating our experience so that others could build on it.

We need also to build on the experience of others. We are gaining insights into new forms of dispute resolution or, more accurately, the application of dispute resolution techniques in new settings. A literature is developing — this Symposium is part of it — on the subject, often along substantive lines. We need to take advantage of this trend and marry that experience and understanding with the peculiar needs of the administrative process.

These alternative techniques have been used in the administrative process, and much more appears to be developing currently. But no particular theory has developed as to how they should be used, how they relate to the traditional processes, what forms of procedures should be used to ensure that appropriate protections are afforded the parties and the body politic, and what their advantages and disadvantages are in particular settings. Research on that front is in progress and our understanding will undoubtedly grow as our experience does.

In the meantime, four areas of administrative procedure seem

the answer. See note 38 *supra*. The adjudicatory sections of the APA are not terribly responsive to the needs here, however.

44. See generally Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 AD. L. REV. 109 (1981).

particularly in need of various means of dispute resolution that have not been generally used in the administrative process, or at least are not recognized as having been generally used.

III. NEEDS OF ADMINISTRATIVE PROCEDURE

Administrative law has been, as the saying goes with respect to the states, a "laboratory" where many alternative procedures have been created and experimented with, sometimes discarded and sometimes institutionalized.⁴⁵ But it has lagged behind the private sector in its use and adaptation of the various forms of dispute resolution that are being discussed at this Symposium. Happily, a number of agencies are responding to the challenge and a considerable amount of effort is going into looking at new ways of doing things.

We are on the verge of a new round of experimentation with administrative procedure.⁴⁶ While the use and adaptation of these dispute resolution mechanisms is needed across virtually the entire span of administrative law, it seems convenient to break down the analysis into four categories: rulemaking; agency adjudication; forms of administrative decisions not specifically mentioned in the APA; and dispute resolution mechanisms in the private sector that are used in lieu of agency action or are required by agency action.

A. Rulemaking

The rulemaking provisions of the APA are remarkably sparse — consult, draft, consult, publish. They were borne of a compromise between those who favored very little restriction on an agency and those who wanted everything done in trials.⁴⁷ While an agency's duties are few, the drafters clearly contemplated that more would be

45. See, e.g., *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1133-34 (D.C. Cir. 1983) (Wilkie, J., dissenting) (judicially created consent decree requiring creation of new EPA programs should not be enforced because it limits the flexibility of the EPA Administrator in making choices as to priorities, methods, and allocation of resources), *cert. denied*, 104 S. Ct. 2668 (1984).

46. It is interesting to note that in general over the past twenty-five years, American administrative law has become increasingly judicialized. Both its rulemaking and adjudicatory procedures have become formal and more courtroom-like. European procedure, on the other hand, was more informal, contained more direct negotiations among the major parties in interest but with little ability on the part of others to sway the decisions, and hence relied more on the general political environment to ensure decisions consistent with the public will. Recently, however, we have seen a leavening of the American approach, with an increasing reliance on oversight, internal controls, and direct participation through informal means, while in Europe the procedures are becoming increasingly structured. Thus, the two are converging.

47. See generally DAVIS TEXT, *supra* note 4, at 9 (the 1946 enactment of the APA was the result of a compromise between the plans proposed by the Administration and the American Bar Association).

done when necessary.⁴⁸ There would be two reasons for faith in the resulting regulations: One theory had it that the agencies were “experts” and, in a technocratic way, could figure out how best to respond to the situation at hand.⁴⁹ The second reason was that agencies would operate comfortably within the confines of a political consensus, so their actions could be judged directly against the prevailing norms.⁵⁰ Both theories broke down, however, as we moved into the regulatory state. New regulations require enormous factual material and as a result the expert model does not work terribly well: indeed it has been repudiated in fact if not explicitly, although vestiges clearly remain.⁵¹ Few agencies enjoy a consensus as to their mission, and there is a strong feeling by many that the agency has an independent agenda, although both sides tend to think it favors the other. Thus, that too has waned as a justification for agency action.

The “hybrid rulemaking process” evolved to provide the missing legitimacy. Although its details vary almost from proceeding to proceeding, its basic contours are that all interested parties have a right to present facts and arguments to an agency under procedures designed to test the underlying data and ensure the rationality of the agency’s decision;⁵² a court of appeals will then take a “hard look” at the agency’s action to ensure that the requirements have been met. As a result, the focus is on narrowing the agency’s discretion by controlling the record, and hence the fight over the record becomes particularly bitter and adversarial.

But while the factual basis of a rule is unquestionably important, there generally is no purely rational answer or response to it. Rather, at bottom the resulting rule is a political choice that reconciles a host

48. The Supreme Court has made clear that the choice as to whether to invoke the additional procedures belongs to the agency, not a court or any private party. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978).

49. *See Stewart, supra* note 19, at 1274.

50. *Id.* Perhaps the prime example of this was the Securities and Exchange Commission (SEC). While there may have been differences of opinion at the fringes, there appeared to be general consensus on its mission, both as to what conduct in the private sector was and was not acceptable and how the agency was to go about policing unacceptable conduct. The SEC was, during that time, widely credited with being the “best” agency. Now that the Commission has ventured into new and controversial areas such as corporate governance, that consensus has broken down and attacks are common.

51. For a discussion of the breakdown of the “agency as expert” model of administrative law, see Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505 (1984).

52. While anyone can, of course, submit comments in response to a notice of proposed rulemaking, only interested parties can participate in this process fully by invoking the aid of courts or forcing participation in agency hearings.

of competing values or interests. Usually the way to legitimize such a political choice is through a legislative process in which representatives of those affected would meet to reach an appropriate resolution.⁵³ Thus, it appears appropriate to look for a process that is modeled more on the legislature than on the judiciary: regulations developed by those substantially affected would have a political legitimacy beyond that of the hybrid rulemaking process. The Administrative Conference of the United States has recommended that agencies experiment with negotiating regulations directly among the interests that would be substantially affected.⁵⁴ The conditions that are hospitable for using direct negotiations are:

1. There are a limited number of interests that will be significantly affected, and they are such that individuals can be selected to represent them; a rule of thumb is that fifteen is a practical limit on the number of people who participate at any one time;⁵⁵
2. The issues are ripe and mature for decision;⁵⁶
3. The resolution of the issues presented will not require any interest to compromise a fundamental tenet or value, since agreement on that is unlikely;⁵⁷
4. There is a reasonable deadline for the action so that unless the

53. The historical method of legitimizing a political choice was through the legislative process. The Founding Fathers of the United States created a "representative democracy" as a mechanism to reconcile the competing political values and to legitimize the choice which the legislature would make between those values. *See generally* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 58-59 (1969) (direct election of the representatives of the people rendered America's government a form of representation ingrafted upon democracy).

54. Administrative Conference of the United States Recommendation No. 82-4, 1 C.F.R. § 305.82-4 (1984). The following discussion of negotiating rules is a synthesis of the discussion in the report upon which the Administrative Conference of the United States based its recommendation. *See Harter, supra* note 37; *see generally* Comment, *supra* note 51, at 1513-35 (discussing Mr. Harter's proposal for negotiating rules and summarizing a comparative case study of rules of regulations which involved extensive public participation without using Mr. Harter's negotiation format).

55. Harter, *supra* note 37, at 46. *But see* Comment, *supra* note 51, at 1535-36 & n. 118 (a 15-person limit is too inflexible; the focus should be on representation of all important interests at negotiations).

56. Harter, *supra* note 37, at 47. An issue may not be ready for resolution because of lack of information, because the interests involved in its resolution are unascertainable, or because the parties involved are still "jockeying for position." *Id.*

57. *Id.* at 49-50. No party is likely to compromise something it regards as fundamental or an article of faith. Thus, for example, it is not likely that one could have reached agreement on the role of costs in an Occupational Safety and Health Administration health regulation since industry and labor had fundamentally different views on the matter and it was central to how future standards would be developed. Now that the Supreme Court has wrestled with the issue and, even if not resolving it, has put boundaries on the matter, standards may be able to be negotiated. *Id.* (citing *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639 (1980)).

parties reach an agreement, someone else will impose the decision;⁵⁸

5. There are sufficiently many and diverse issues that the parties can rank them according to their own needs and priorities;⁵⁹

6. There is sufficient countervailing power so that no party is in a position to dictate the result;⁶⁰

7. Participants view it as in their interest to use the process as opposed to the traditional one;⁶¹ and

8. The agency is willing to use the process and will appoint a senior staff member to represent it.⁶²

The process envisions that a neutral third party would contact the various parties to review the issues posed by the proposed regulation and determine whether there are additional parties that should be represented in discussions. If the conditions are met, the agency would publish a notice in the *Federal Register* announcing its intention to develop the proposed rule in this way and inviting parties who are not represented to come forward. It would then empanel the group as an advisory committee.⁶³ Its charge would be to develop a consen-

58. *Id.* at 47-48. Some party is likely to profit from delay, and because no interest is likely to be willing to invest the time and energy in discussions until it is necessary, a reasonable deadline for action is very helpful. The parties will then know that delay will be greeted with a loss of control or some unacceptable cost. *Id.*

59. *Id.* at 50. What may be very important to one party may not be that important to others. One of the major benefits of the discussions is that the parties can address the issues directly and attempt to maximize the overall return — against the backdrop of the statute, which defines the national interest, and precedent — by adjusting the response to the various issues. A single, bipolar choice is not the stuff of negotiations. *Id.*

60. *Id.* at 45. One of the major incentives for direct discussions is that parties are otherwise at loggerheads and cannot move without incurring an unacceptable cost. Some parties may gain the power to inflict that cost solely through traditional procedures. In that case, the situation must be carefully reviewed to see if the *threat* of invoking that process is sufficient to empower the party to negotiate, or whether using the alternative process would disenfranchise them. In short, without countervailing power at the table, the process could be badly abused. *Id.*

61. *Id.* at 43. If parties do not view the process as in their overall interest, it is not likely that discussions will be productive. Thus, it may be inappropriate to say simply that the rule will be developed this way and if anyone wants to participate they must do so in this way. On the other hand, if a process is started, parties frequently will come and participate fully even if they would have advocated it at the outset. *Id.*

62. *Id.* at 51. *But see* Comment, *supra* note 51, at 1536-37 (agency should be represented by middle-level employees in addition to senior staff members). An agency that is not in favor of this process can always find creative ways to sabotage it. Moreover, experience shows rather vividly that if the agency itself does not participate or have some other intimate connection to it, the fruits of the discussions are highly likely to be rejected or atrophy for lack of attention through the “not invented here” syndrome. Harter, *supra* note 37, at 51.

63. An advisory committee would have to be empanelled in order to comply with the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1982). An advisory committee exists whenever a committee, conference, panel, or similar group is convened in order to render advice to the President or an agency. H.R. REP. NO. 1017,

sus on a proposed rule and supporting preamble. "Consensus" in this context means that no *interest* that is represented dissents from the recommendation.⁶⁴ This is necessary so that no interest loses power it might otherwise have through the traditional process. Note also that an individual might object, but overall the interest as a whole does not.⁶⁵ It may be, of course, that the group is not able to reach agreement on a particular recommendation, but the discussions reveal a "region" or area within which the parties can "live with the result." In that case, the recommendation would be that agency arbitrate among the interests by developing the rule within those boundaries.

The agency would agree to use the results as the basis of its proposed rule unless something were quite wrong with them. That is appropriate because a senior agency official presumably concurred in the result, and he should have received the appropriate internal clearances before doing so. Thus, the agreement is not alien to the agency. The group is likely to want such assurance before it will be willing to incur the time, expense, and anguish of reaching an agreement, lest its work simply be disregarded.⁶⁶ The agency might wish to append its own comments on the proposal to flesh out public response, but it should clearly delineate between that which is its and that which reflected the consensus of the group. The agency would then subject the proposal to the normal rulemaking process and would, of course, modify the proposal in response to meritorious comments.⁶⁷

Several agencies have started using the process. The Department of Transportation recently announced that it planned to use it to revise its rule concerning pilots' flight duty status time.⁶⁸ The rule had proved particularly intractable, and the Federal Aviation Administration had tried several times to revise it, only to be blocked by one interest or another. The existing rule had generated more requests for interpretations than any other, with the result being that the rule was supplemented by over 1,000 pages of agency comments. Nineteen parties⁶⁹ started the process on June 29, 1983⁷⁰ and held

92d Cong., 2d Sess. 2-4, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3491, 3492-94.

64. See Harter, *supra* note 37, at 92-97.

65. *Id.*

66. *Id.* at 99-102; Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471, 480 (1983).

67. Harter, *supra* note 37, at 100-02.

68. Notice of Intent to Form Advisory Committee for Regulatory Negotiation, 48 Fed. Reg. 21,339 (1983).

69. Notice of Establishment of Advisory Committee, 48 Fed. Reg. 29,771, 29,772 (1983). The original advisory committee was made up of representatives from the FAA, National Air Carrier Association, National Air Transportation Association,

seven meetings⁷¹ over an eight month period.

The group was not able to reach a consensus on a single proposal, but it did hold thorough and productive sessions. Based on those discussions, the FAA drafted a proposal that was reviewed by the group, which concurred that it should be published as a notice of proposed rulemaking. At this time, it is too early to tell whether the discussions will lead to a rule which is acceptable to the parties that participated in the discussions, as well as any who did not participate.⁷²

The Occupational Safety and Health Administration (OSHA) undertook a "feasibility analysis" to determine whether it would be appropriate to use the process for the development of its standard on the occupational exposure to benzene.⁷³ Following discussions with the interested parties, it appeared that the above conditions were met particularly well. The only possible difficulty was that a great deal of emotional commitment was attached to the standard because of the regulation's history and, since OSHA had announced that it wanted a draft standard within only a few months, there was likely not enough time to use the process. But, since the criteria appeared to be met and it appeared that the parties did in fact have a great deal to discuss, a preliminary meeting was held to determine if it would be fruitful to hold further, informal discussions to the end of developing a consensus on the contours of a standard. The group decided that such meetings would be fruitful, and several informal discussions were held.⁷⁴ The meetings thoroughly explored the parties' needs and concerns and alternative ways of meeting them. The parties came very

Air Line Pilots Association, Flight Engineers International Association, Alaska Air Carriers Association, Aviation Consumer Action Project, Air Transport Association, Regional Airline Association, Helicopter Association International, Pan American World Airways, People's Express, New York Air, Southwest Airlines, DHL Cargo, and International Brotherhood of Teamsters. *Id.*

70. *Id.*

71. The advisory committee met seven times between June 29, 1983 and February 14, 1984, for a total of seventeen days. Notice of Proposed Rulemaking, 49 Fed. Reg. 12,136, 12,137-38 (1984).

72. *See id.* (publication of proposed regulation); *Advisory Committee Supports FAA Draft for Pilot Time Rules*, AVIATION WEEK SPACE TECH., March 12, 1984, at 194.

73. *See generally* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (rule promulgated by OSHA to replace national consensus standard for occupational exposure to benzene held invalid). The *API* case opened the door for negotiation of a new benzene regulation. *See id.*

74. *Failure of Mediation Group to Agree Will Not Delay Rulemaking, OSHA Says*, 7 CHEMICAL REG. REP. (BNA) 1696 (1984). OSHA did not participate in the discussions, but expressed its support for them and its interest in using their fruits. OSHA continued to develop its own proposal in-house, and hence would have been in a position to judge rather immediately the merits of any proposal that might have emerged. *Id.*

close to a consensus⁷⁵ but enough issues separated them that discussions have been adjourned.⁷⁶ It seems clear that the group got farther than virtually anyone thought they would over so controversial a regulation, and there was consensus that it had been a productive, rewarding experience. As with the FAA rule, only time will tell whether the discussions have a direct and wholesome effect on the development of a standard.⁷⁷

Although thus far there are no clear success stories that have gone all the way to a consensus on a proposed rule and supporting preamble, it appears that regulatory negotiation offers significant advantages. It enables the parties to address the issues directly and to explore them in a detail that is impossible in the hybrid process. That its first two uses addressed enormously controversial and complex issues also attests to its ability to breach previously unresolvable differences between the parties. As will be discussed below, these two experiences will likely pave the way for future uses, precisely because future parties can be more comfortable with using a "known" process and not worry about the vagaries of the unknown.⁷⁸

B. *Adjudication*⁷⁹

The APA defines the adjudication procedure only for those adjudicatory proceedings "required by statute to be determined on the record after opportunity for an agency hearing," except in certain

75. *Id.* The participants were representatives of the Chemical Manufacturers Association, the Rubber Manufacturers Association, the American Iron and Steel Institute, the American Petroleum Institute, the AFL-CIO, the United Steelworkers of America, the Oil, Chemical, and Atomic Workers International Union, and the United Rubber Workers. *Id.*

76. *Id.*

77. Mr. Doug Clark, special assistant to the OSHA Administrator, commented that the discussions between labor and industry will result in "a strong standard for worker protection" when the benzene standard goes into effect. *Id.*

One benefit that is likely to come from the experience is that it served to break the ground for the actual use of the process; doing so entails a new way of looking at regulatory questions that can pose practical problems for the participants. For example, it requires the parties to actually address what they want or need and to bear the responsibility for the decisions that are made. It is often far easier simply to blame a recalcitrant agency for "not understanding" than to decide what is appropriate. The representatives and the parties confronted this difficulty with admirable energy and ability. That will likely serve as the foundation for future efforts.

78. *See generally* Comment, *supra* note 51.

79. The preceding section on rulemaking was developed extensively both because research on it has been completed and because the newly recommended procedures are beginning to be used. The sections that follow will be more abbreviated and raise more questions than they put to rest. That is because research in this area is only now beginning for the Administrative Conference of the United States in conjunction with the Department of Justice.

specified instances.⁸⁰ That limitation notwithstanding, agencies in fact provide a wide variety of hearings and a substantial literature has developed analyzing the range of procedures.⁸¹ Much of the analysis was generated in response to the Supreme Court's decision in *Goldberg v. Kelly*,⁸² in which the Court analyzed the minimal qualities a hearing must have to pass constitutional muster prior to the termination of welfare benefits. The Court demonstrated the paucity of the legal approach by showing a mindset that the only satisfactory way to do something is to emulate courts: while it denied it was requiring a formal hearing, it required most of the attributes of a Perry Mason trial.⁸³ The concern is not so much for the burden the court imposes, which is very likely substantial, but for the irrelevance of its dictates to solving the problem, and its insensitivity for the long run consequences. Happily, the case has not been followed rigorously.⁸⁴

As a result, it is appropriate to ask two questions: what kind of proceedings can be provided that meet the constitutional requirements for "some kind of hearing"⁸⁵ and, perhaps more importantly for our purposes, what sort of hearings can be offered as a voluntary al-

80. 5 U.S.C. § 554(a) (1982). Section 554(a) provides in pertinent part:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court.

Id.

81. See Friendly, "Some Kind of a Hearing," 123 U. PA. L. REV. 1267 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

82. 397 U.S. 254 (1970). The issue in *Goldberg* was "whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 255. The Court held that the recipient should have been afforded "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Id.* at 267-68.

83. *Id.*

84. See *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Court explained that the nature of the required hearing could be determined by balancing the need for accuracy against the magnitude of the deprivation and the burden it would impose on the system in which the hearing is being held. *Id.* at 339-49. It may have reached its decision more by an ad hoc determination of the comparative magnitude of the deprivation of losing welfare rights as opposed to disability rights. *Id.* at 340-43.

85. See Friendly, *supra* note 81, at 1267. Judge Friendly explained that the expression "some kind of hearing" is "drawn from an opinion by Mr. Justice White He stated, 'The Court has consistently held that *some kind of hearing* is required at some time before a person is finally deprived of his property interests.'" *Id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)) (emphasis added by Judge Friendly).

ternative to more formal means. While, to be sure, agencies have used informal "modified hearings" for decades, given the current interest and the growth of experience with alternative means of dispute resolution, it is appropriate to ask when they can be used and how they need to be adapted to meet the dictates of the administrative process.

It is also necessary to ask whether *any* sort of process, in the form of an adaptation of trial-type hearings, is the appropriate response to achieving the desired goals. No one would seriously contend that a disagreement over how much postage should be placed on a package should be made by means of a trial. Rather, the better solution is likely to be some sort of "quality control" mechanism to ensure that the bureaucratic decisions are made with acceptable accuracy. Thus, as in any other dispute, the nature of the issue in question must be analyzed before the appropriate method for addressing it can be designed.⁸⁶

A range of techniques might be used to provide alternatives to traditional forms of agency adjudication.

*Mediation.*⁸⁷ The decision that needs to be made may be quite appropriate for mediation or direct negotiations among the affected parties. The criteria that are described above can also be used to determine whether the issues would be suitable. The one major difference between negotiation and mediation in the administrative process and their private counterpart is that for at least some types of decision, the parties themselves cannot dispose of the issue but, rather, additional procedures may be necessary. It may be, for example, that agency officials who have the ultimate decisional authority are not present, or that the decision must be reconciled with existing public policy and hence subject to review by someone, or that the decision may affect other members of the public in such a way that they have the right to participate somehow in the decision before it is final. Thus, before undertaking discussions, the parties must analyze every-

86. See Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981).

87. One authority has described the role of a mediator as follows:

A mediator is an impartial outsider who tries to aid the negotiators in their quest to find a compromise agreement. The mediator can help with the negotiation process, but he does not have the authority to dictate a solution. He might not even choose to suggest a final solution; rather, his purpose is to lead the negotiators to determine whether there exist compromises that would be preferred by each party to the no agreement alternative, and to help the parties select on their own a mutually acceptable agreement.

H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 23 (1982) (emphasis omitted).

thing that must be done before a final decision can be reached and what the likelihood is that their efforts could be derailed before fruition. That analysis would include factors such as the participation of others after the agreement is reached⁸⁸ or disapproval by agency officials who did not participate. Mediation and negotiation in this context constitute a recognition that the great bulk of administrative hearings are settled, just like their civil counterparts. What is needed is to recognize and encourage the use of mediation as a means of fostering settlement.

*Arbitration.*⁸⁹ Arbitration is widely used in the private sector for a variety of subjects.⁹⁰ Several agencies and programs are beginning to use variants of it instead of formal administrative hearings. For example, the Merit Systems Protection Board (MSPB) began offering it as an alternative means of hearing appeals from adverse action determinations against government employees.⁹¹ The Commodity Futures Trading Commission (CFTC) has just inaugurated a program of arbitration for customer claims of \$15,000 or less.⁹² Arbitration is also used in resolutions of disputes under the Superfund,⁹³ disputes involving patent issues,⁹⁴ disputes in age discrimination cases,⁹⁵ and for determining the payments from users of pesticide data.⁹⁶

These programs typically use regular presiding officers as the arbitrators and, unlike traditional arbitration, the parties are not able

88. For example, the Occupational Safety and Health Review Board can disapprove an agreement entered into between OSHA and a company that settles a citation issued by OSHA for violation of a standard.

89. Professor Raiffa has described the role of an arbitrator as follows:

An arbitrator (or arbiter), after hearing the arguments and proposals of all sides and after finding out "the facts," may also [like the mediator] try to lead the negotiators to devise their own solutions or may suggest reasonable solutions; but if these preliminary actions fail, the arbitrator has the authority to impose a solution. The negotiators might voluntarily submit their dispute for arbitration, or the arbitration might be imposed on them by some higher authority.

H. RAIFFA, *supra* note 87, at 23 (emphasis omitted).

90. *See* Perritt, *supra* note 9, at 1266-70.

91. Merit Systems Production Board: Practices and Procedures, 5 C.F.R. §§ 1201.200-.221 (1984).

92. *See* 17 C.F.R. §§ 180.1-6 (1983).

93. *See* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9612(b)(4) (1982).

94. *See* 35 U.S.C. § 135 (1982); 37 C.F.R. §§ 1.201-.288 (1984).

95. *See* Equal Employment Opportunity Commission — Procedure — Age Discrimination in Employment Act, 29 C.F.R. §§ 1626.15-.16 (1983).

96. *See* Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a(c)(1)(D)(ii) (1982). The constitutionality of this provision has recently been upheld as a taking for public use. *See* Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862, 2882-83 (1984).

to select the arbitrator from among a panel of candidates offered by some third party. The decisions are based on agency precedent but are not themselves precedential in any way. The cases which use arbitration procedures are those where time is quite important to at least one party,⁹⁷ and no complex factual or policy issues are presented. They are generally based on some sort of discovery or other method of requiring the parties to tender relevant data, not in exhaustive detail but at least sufficient for decision. The arbitrator's decision may be, as in the case of the CFTC, simply an award⁹⁸ or, as in the case of the MSPB, a brief recitation of findings of fact and conclusions of law. The agency itself has limited review authority, but even if it does not reverse the arbitrator's decision, it may not necessarily mean the agency agrees with the result. The review is summary, akin to the judicial review of an arbitration award, except that the agency will also look for gross errors in applying agency precedent. The full nature of judicial review has yet to be developed: to the extent the award becomes an agency "order," it is subject to judicial review under the Administrative Procedure Act. Just what sort of review that is to be and the record on which the court would base its review has yet to be developed.⁹⁹ In short, this area of administrative law is only beginning. It may be, however, that when all is said and done, it may substantially resemble some procedures that have been around a long time. Even if that is the case, the area will profit from sights gained by private sector experience.

*Minitrials.*¹⁰⁰ The minitrial that has been developed for commercial litigation, in which the lawyers for the opposing sides present summaries of their cases in the presence of representatives of the parties who are authorized to negotiate a settlement of the dispute, has been used successfully in an enormously complex contract dispute

97. That only one of the parties is in a hurry for resolution can present problems when both parties must consent to using the process, since the other one will often profit from delay and is not likely to consent to the process. In some cases, however, the parties would simply like to get the matter resolved, and hence both would agree. The question of whether one party can force the other into use of the process, or whether the forum agency can direct that it be used, needs to be explored.

98. One reason for this is that a decision might have collateral effects, and it was thought that avoiding them might make the process attractive to some parties that would otherwise profit from delay.

99. To the extent the parties agree to the process, just as in private sector arbitration, a limited form of judicial review may be appropriate on the ground that the parties made the choice that it was in their overall interest to use the process and hence should not complain if they lose. If, however, the process is forced on a party, a different standard might apply.

100. See Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1984).

with the National Aeronautics and Space Administration.¹⁰¹ Considerable work is now being done on the application of the technique to more routine — but nonetheless complex — disputes that are heard before the Defense Department's Board of Contract Appeals. Although not quite administrative adjudication, the Department of Justice was reviewing the *minitrial's* applicability in settling litigation over contract claims in lieu of full trials before the courts. Interestingly, however, the government may be prohibited from entering into an arbitration agreement to resolve its controversies because it is prohibited from relying on arbitration to resolve claims involving questions of legal liability.¹⁰²

C. *Other Forms of Administrative Action*

While the APA, and hence the legal writing, focuses virtually exclusively on rulemaking and adjudication, there are many other types of agency decisions, and many of them could be improved by invoking the ADR experience. For example, the staff of the Federal Energy Regulatory Commission regularly acts as a quasi-mediator among competing factions over environmental conditions that are placed on low-head hydroelectric plants.¹⁰³ Agencies have entered into mediation over a range of other decisions involving issues such as the protection of endangered species or the technologies required to meet standards issued under the Clean Air Act.¹⁰⁴

What is needed for this category of decisions is a recognition of the availability of techniques that may be used by agencies to reach far more satisfactory decisions than would be possible if the agency arrogated them to itself.

101. Johnson, Masri & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, *Legal Times*, Sept. 6, 1982, at 13, col. 1.

102. See 31 U.S.C. § 1346 (1982). This section prohibits the government from expending public funds for the work of any commission, council, board or similar group not authorized by law. The Comptroller General has opined that this section prohibits the government from entering into arbitration agreements to resolve questions involving the rights of the United States, absent express authorization. 8 Op. Comp. Gen. 96 (1928); 7 Op. Comp. Gen. 541 (1928). However, this bar does not prevent the government from entering into arbitration agreements for the purposes of determining a factual question of reasonable value, which does not impose any obligation on the government and does not leave "questions of legal liability" for determination by arbitrators. 20 Op. Comp. Gen. 95, 99 (1940); 22 Op. Comp. Gen. 140 (1942).

103. See Kerwin, *Environmental Analysis in Hydropower Licensing: A Model for Decisionmaking*, ENVTL. IMPACT ASSESSMENT REV., June 1983, at 131, 134.

104. See Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 2 n.6 (1981)

D. *Alternatives in Lieu of Agency Action*

Section II of this paper argued that much of modern regulation can be viewed as a combination of a failure of substantive standards by which to judge conduct and, perhaps even more importantly, the lack of a suitable mechanism by which rights can be enforced. Professor Perritt's hapless student is a perfect example.¹⁰⁵ When confronted with defects in a new car, he sought to enforce his right under the warranties against its manufacturer; he even invoked the dispute resolution mechanism created for this purpose by the auto company and the Better Business Bureau, but it was unavailing. Without satisfaction, he had to begin to build power, and that was successful only through the invocation of litigation. Coercion won out.

The question here is, what if the student were not a law student itching for some practical experience but rather someone for whom the prospect of litigation would be expensive,¹⁰⁶ emotionally wrenching,¹⁰⁷ and time consuming? The likely reponse would be: nothing, at least nothing short of a few letters and some frustration. If that is the case, then the lack of a dispute resolution mechanism (DRM) leads to a quasi-externality in which the buyer, who may have reasonably expected a product free of defects or the need of repair, must absorb the resulting costs. The classic response to that is regulation — an agency will prescribe conduct and prosecute violations.¹⁰⁸ Thus there is a clear trade-off between a reasonable, responsive DRM and regulation. If the arbitration program that the student used had teeth¹⁰⁹ and the arbitrator was a responsible neutral party, the issue may well have been defused. The company would likely have corrected the difficulties instead of dallying, since it too would likely want to avoid

105. See Perritt, *supra* note 9, at 1223-24.

106. The transaction costs of bringing a lawsuit against an auto company to force the repair of a defective automobile would likely exceed the value of the defects themselves. Thus, unless some statute, regulation, or common law precept provided for a shifting of the fees, the consumer might decide not to bring the litigation. Even if the American rule were abrogated, the consumer would still face the gamble of whether the claim was sufficiently meritorious to merit the award of fees.

107. The plethora of currently popular books on assertiveness and winning through intimidation must surely reflect a timidity on the part of most individuals when faced with having to pursue something they believe is rightfully theirs in the face of either indifference or hostility.

108. See notes 3-5 & 31-32 and accompanying text *supra*.

109. It should be noted that in fact many of the arbitration/mediation programs for auto warranties are binding on the auto company. See Brenner, *Dispute Resolution Movement Gathers Momentum*, Legal Times, Mar. 21, 1983, at 27, col. 1. How they work in practice and what happens if their orders are disregarded need to be appraised.

the costs of subsequent proceedings and the ill-will generated by an unpopular result.

As a result of all of this, one of the areas of administrative law that deserves careful attention is the establishment of private sector DRM's as a substitute for agency regulation or hearings. Several programs, for example, either require or permit private organizations to establish a forum for reviewing complaints or other issues that arise with respect to some particular activity.¹¹⁰ If more of such programs are not created, the government agencies will have to play a larger role in resolving contests.

The use of DRM's is also likely to be an important aspect of proposals for "self-regulation." It is not enough simply for companies to argue that they are taking appropriate action "voluntarily," and hence there is no need for government intervention, unless there is a correlative right on the part of the beneficiaries of that action to enforce it in some manner. In some cases, of course, that will be through market transactions, but in others some sort of DRM will be needed to ensure that the promised actions, as in Professor Perritt's example, are discharged.

The pressing questions, then, are what should the characteristics of those DRM's be and what relationship will they have to the agency? How, for example, do you ensure neutrality? How coercive is the decision to be, and on whom? Is the DRM's use mandatory on the consumer? May a "defendant" decline its use, and, if so, with what result? What sort of due process rights are provided the consumer and the company against whom an order might run? What appeal rights are there and to what body — higher private sector authority, the agency, or a court? Is deference given the DRM's decisions or is there *de novo* review? How expensive will it be? How much will the reviewing authority be bound by precedent and how much will it seek justice under the circumstances? We will need to develop guidelines and insights into this emerging area. That will entail defining the procedures, or general principles, that are to be used in embedded dispute resolution mechanisms that will be sufficient to ward off government action.¹¹¹ The Federal Trade Commis-

110. *See, e.g.*, Securities Industry Conference in Arbitration, Securities Exchange Act Release No. 13,470 (Apr. 26, 1977); Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 (1982).

111. The violation of the minimal rules of procedure could result either in the agency's resolving the underlying dispute or the agency taking action against the organization that was supposedly responsible for compliance with the general procedures. While invalidated under the statute under which it operated, the Federal Trade Commission took this approach in the vocational school rule when it imposed requirements that were prescribed for the purpose of preventing unfair practice, and

sion has taken an initial step in this direction. Under the Magnuson-Moss Warranty Act, warrantors that incorporate a dispute settlement program must comply with the standards for those programs that the Commission has defined in its Rule on Informal Dispute Settlement Procedures.¹¹² Another example is the self-policing rules of the stock exchanges.¹¹³ They operate under the supervision of the Securities and Exchange Commission, but with relative autonomy provided the procedural standards are met.

IV. THE FUTURE OF ADMINISTRATIVE PROCEDURE

The future of the use of alternative means of dispute resolution — or, if the term “dispute” or “conflict” is somehow inappropriate, of alternative ways of resolving issues that are complex and affect several parties — by the government appears promising. But it will not come automatically, and several hurdles exist that need to be addressed.

A. *Familiarity*

Undoubtedly the greatest need is simply to generate familiarity with the attributes of the range of alternative procedures. Agencies, like most people, are likely to be a little leery of unknown processes. As such, they would be unable to determine whether it would be in their interest to use them. Moreover, agencies always run the risk of judicial and congressional oversight, so they must also be confident that the new processes meet the demands placed on them from the outside.

This will come from several sources. First, it is always helpful if a complete model is created and analyzed so the agency can determine whether it meets its needs, and doing so removes some of the fear of the unknown. Second, the experience of other agencies is invaluable because it reduces the risk of developing a new approach. Third, the growing acceptance and experience in the private sector will lap over into the administrative process. That is clearly what is happening

was prepared to treat a violation of those requirements as an unfair trade practice per se. *See Katherine Gibbs School, Inc. v. FTC*, 612 F.2d 658 (2d Cir. 1979). For further discussion of the *Katherine Gibbs* decision, see note 21 and accompanying text *supra*.

General Motors Corporation recently entered into a consent decree with the Federal Trade Commission over the repair and replacement of defective engines. The decree provides for a system of arbitration, which is binding on GM to determine the extent of liability and the repairs to be performed. This dispute resolution mechanism was accepted in the face of those who argued for more stringent mandatory actions. *See General Motors Corp.*, 3 TRADE REG. REP. (CCH) ¶ 22,010 (1983).

112. 16 C.F.R. § 703 (1984).

113. *See Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

with the minitrial, for example.¹¹⁴ Fourth, it will come simply through talk and through discussions, such as this Symposium.¹¹⁵

B. *Particular Needs*

The government also has some particular needs that must be addressed in some manner.

1. *Negotiation/Mediation*

There is sometimes a peculiar problem that arises when the government reaches a decision by negotiation with the interested parties or, worse, with only some of them. The integrity of the negotiation process is generally assured by the self-interest of each party: no one will agree unless they think they are better off for doing so, as compared with the available alternatives. But it is not always clear just what the government's interest is, and someone could be accused of selling out its substantive interest to gain some other benefit, such as political favors or a new job for the bureaucrat. In the abstract such motives may be impossible to detect, and hence any government official who participates in the negotiations may be vulnerable to wholly baseless attacks. Thus, a timid official may be reluctant to risk that exposure. As a result, it may be necessary in some programs to create a mechanism to protect the integrity of negotiated decisions. That could come through a board of senior officials that reviews settlements,¹¹⁶ a structured settlement process, publication of a proposed settlement and its supporting reasons for comment,¹¹⁷ or some other mechanism.

2. *Acceptance*

Some officials are likely to resist the use of some of the alternatives on the grounds that they are inconsistent with the agency's role as the sovereign. That is especially the case with respect to mediation and negotiation, although it would also likely apply in arbitration. In the case of mediation/negotiation, the agency is more likely to have

114. See Johnson, Masri & Oliver, *supra* note 101, at 13.

115. For example, one government official had been skeptical about some of the alternative processes, but decided to accept their merit because they were frequently discussed with seeming approval by a variety of well-respected individuals and interests.

116. The Attorney General must approve all tort claims settlements of litigation that are worth more than \$25,000. Federal Torts Claims Act, 28 U.S.C. § 2671 (1982).

117. The Federal Trade Commission publishes consent decrees for comment in the Federal Register.

only an illusion of sovereignty rather than sovereignty itself. That results from a confusion of the *authority* to take some action with the *power* to do so. The reason negotiation may be an attractive alternative is precisely because of the countervailing power that others have. For example, an agency may unquestionably have the authority to issue a rule but its efforts to do so can be frustrated by others.¹¹⁸ Thus, direct discussions may not be an abdication of authority or sovereignty but a very real way of furthering the agency's interest: it will continue to represent whatever interest it represents in traditional proceedings but is now in a position to gain information and acceptance of a mutually developed approach. Since the parties in interest concur in it, they are also more likely to be satisfied with the result and comply. But that reluctance to yield some perceived power must be overcome.

3. *Institutionalization*

Premature institutionalization through codification or rigid requirements should undoubtedly be avoided, although there may well be pressure to do so. We clearly need time to experiment and get comfortable with the process. But, once we have some understanding of suitable approaches, some sort of institutionalization could be quite helpful in overcoming the difficulties discussed above.

V. CONCLUSION

In short, the future of alternative means of dispute resolution in the administrative process would appear to be strong. Indeed, the two have a long and complex history. Moreover, the needs of the administrative process have never been greater: to cope with massive caseloads; to develop new alternatives to coercive regulation; and to resolve enormously complex litigation.¹¹⁹ The means of resolving issues that are currently under discussion hold a significant promise for the administrative process.

118. For a particular example of this, see text accompanying notes 68-69 *supra*.

119. One can only imagine the enormous complexity that will be involved in litigation over the failure of two communication satellites that were unsuccessfully launched from the space shuttle. A controversy of similar complexity, indeed also involving satellites, was resolved through the use of a minitrial. Johnson, Masri & Oliver, *supra* note 101. Whether an alternative approach is merited in these instances, it is clear that the complexity of the issues presented are at an all time high, both in their technology and, when considering the social issues involved in government disputes, in their demography.

