7-1-1996

The Ongoing Role of Alternative Dispute Resolution in Federal Government Litigation

Peter R. Steenland, Jr.
U.S. Dept. of Justice

Peter A. Appel
University of Georgia School of Law, appel@uga.edu

THE ONGOING ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN FEDERAL GOVERNMENT LITIGATION

Peter R. Steenland, Jr and Peter A. Appel[**]

The United States wins its point whenever justice is done its citizens in the courts.
—Inscription in the Attorney General's Office, United States Department of Justice.

INTRODUCTION

THE epigraph contains a worthy sentiment: The United States government does not necessarily "win" a case only when it defeats an opponent in court. Government agencies and litigators have always realized that the interests of the United States are not exclusively furthered through courtroom resolution of disputes in which the government finds itself enmeshed—otherwise, the government would not settle so much of its civil litigation.[1] More and more, the government finds the tools of alternative dispute resolution (ADR) a useful means of settling even more disputes than unassisted settlement discussions can yield. Frequently, ADR can save governmental resources and produce results that are more just and comprehensive without undermining core governmental functions.

For many years, the government did not resort to ADR as much as private parties might have for a variety of reasons. Only recently have administrations realized the benefits that ADR can provide in the context of government litigation. President Bush announced in an executive order that:

> It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.[2]

---

* Senior Counsel to the Associate Attorney General for Alternative Dispute Resolution, United States Department of Justice.

** Attorney, Appellate Section, Environment and Natural Resources Division, United States Department of Justice. The views expressed in this essay are solely those of the authors and do not necessarily represent the views of the Justice Department or any of its client agencies.

1. Throughout this essay, we will use the term "government" to apply to the federal government, although many of our observations apply to state governments as well. In addition, this essay focuses exclusively on civil, not criminal litigation.

2. Exec. Order No. 12,778, § 1(c)(2), 3 C.F.R. 359, 361 (1991), *reprinted in* 28 U.S.C. § 519 (1994).

More recently, Attorney General Reno announced a policy of vigorously encouraging ADR within the Justice Department.[3] To accomplish this, she created the position of Senior Counsel for ADR within the Department.[4]

Despite these recent advances, years of inaction means that the government lags behind its counterparts in the private sector in its use of ADR.[5] This essay examines this situation in three parts. First, we briefly explain some of the obstacles that have faced the government in its efforts to implement ADR, many of which arise from the unique characteristics facing the government in its litigation efforts. Second, we identify the types of cases in which use of ADR generally would and would not be appropriate for the government. Third, we detail the steps that the government is taking to overcome the reluctance to use ADR that has existed in the past.

In examining these issues from a practical perspective, this essay demonstrates that within appropriate guidelines, ADR has an important and growing role in the conduct of government litigation. To the extent that ADR can help the government save resources, this alone is of considerable public interest. More importantly ADR can help the government settle entire disputes rather than those pieces of disputes that become litigation events. ADR also involves the parties more directly in shaping the resolution of a dispute, and can often provide a result that is beyond the capacity of a court to provide. Because of the direct participation by the parties in mediation processes, ADR can produce higher levels of satisfaction with outcomes. Thus, the government's use of ADR can lead to more just results. To edit the opening aphorism, the United States wins its point whenever justice is done its citizens, whether that justice comes from a tribunal appointed under Article III of the Constitution or from a negotiated settlement achieved using ADR.

I. THE ENVIRONMENT FOR ADR WITHIN THE GOVERNMENT

The perspective of the government litigator differs from that of his counterpart in private sector Government litigators have a different role in the courts, are subject to a different structure governing settlement, and operate in a environment that stands in contrast to the private world.

The Supreme Court has "long recognized that 'the Government is not in a position identical to that of a private litigant,' both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates."[6] One cannot seriously dispute the truth of

---

3. Order of the Attorney General, Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques 1-2 (1995) (on file with the authors).

4. *See id.*

5. We base this conclusion on internal statistics which indicate that the Justice Department settled fewer than 500 cases in fiscal year 1995 where ADR played a role. Given that in fiscal year 1994 there were 43,158 civil cases commenced in that fiscal year involving the federal government as a party ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1995 REPORT OF THE DIRECTOR 138 (1995) (Table C-2) [hereinafter 1995 REPORT]. Five hundred cases settled using ADR would appear to lag behind the private sector.

6. United States v Mendoza, 464 U.S. 154, 159 (1984) (quoting United States Immigration and Naturalization Serv. v Hibi, 414 U.S. 5, 8 (1973) (per curiam)).

this statement. The U.S. government is the steadiest customer of the federal courts; civil cases involving the federal government as a party make up approximately twenty percent of that part of the federal courts' docket.[7] The government is also the primary or sole enforcer of many of our most important laws, such as civil rights, tax, antitrust, and environmental measures. The government's civil cases often involve more than claims for money; they frequently involve challenges to official policy or other disputes that implicate the public interest.

As a result, there will always be cases that the government will not, and should not, settle. Agencies will often need decisive interpretation of statutes—regardless of the dollar amount involved and regardless of the outcome—to understand how to structure programs under those statutes. For example, the United States once contended that the provisions of the National Environmental Policy Act (NEPA)[8]—which will be described more fully later—did not apply to federal government leases that the government approved in its role as trustee for Indian tribes.[9] The Tenth Circuit ruled against the government on this issue in 1972, while NEPA was still a new statute.[10] In these circumstances, the government needs the guidance of the courts regardless of whether it prevails in persuading a court of its interpretation of the statute or not.[11]

More obvious, although more rare, examples of when the government typically will not settle are when courts have issued conflicting decisions; the need for a uniform interpretation of a statute frequently compels the government to seek further review either in a court of appeals or the Supreme Court. Similarly if a

---

7 The exact number changes by the year. At the time of the Supreme Court's decision in *Mendoza*, the government apparently participated in over 36% of the filings in the district court (over 75,000 of 206,193 filings). *Mendoza*, 464 U.S. at 159-60. The Court does not make clear whether the 75.000 figure includes civil and criminal cases or is limited to civil cases. For district courts, the Administrative Office of the United States Courts reported that in the year ending March 31, 1993, the federal government was a party in: 22% of the cases pending on March 31, 1992 (49,180 out of 220,939); 25% of the cases commenced in that year (57,332 out of 228,162); 26% of the cases terminated in that year (60,161 out of 228,468); and 21% of the cases pending as of March 31, 1993 (46,351 out of 220.633). ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 25 (1993) (Table C-2). More recently, the Administrative Office reported that in the year ending September 30, 1995, the federal government was a party in: 17% of cases commenced in 1995 (43,158 out of 248.335); 1995 REPORT, *supra* note 5, at 138 (Table C-2); over 15% of cases pending (38,009 out of 242,274); *id.* at 150 (Table C 3A); and 20% of cases terminated (46,495 out of 229.820); *id.* at 156 (Table C 3B). Twenty percent appears to be a good working figure that captures this periodic fluctuation. These figures include habeas corpus and prisoner civil rights suits.

8. 42 U.S.C. §§ 4321-4347 (1994).

9 *See* Davis v Morton, 469 F.2d 593, 598 (10th Cir. 1972).

10. *Id.* Congress amended the relevant statute to make clear that the Secretary of the Interior should not approve such leases until the Secretary is satisfied "that adequate consideration has been give to the effect on the environment of the uses to which the lease lands will be subject." Act of June 2, 1970, Pub. L. No. 91-275, § 2, 84 Stat. 303 (codified at 25 U.S.C. § 415(a) (1994)). Nevertheless, the decision in *Davis* was important to establish whether NEPA, without more, imposes a duty on the federal government to evaluate its actions when the government acts in its role as trustee to an Indian tribe.

11. We do not know whether the parties engaged in settlement negotiations in *Davis v. Morton*. Our only point is where a statute is new and creates a legal issue of first impression that can affect how an agency adapts its practices nationwide, settlement is unlikely.

court has held an act of Congress unconstitutional, further litigation is necessary These are cases in which settlement cannot produce a desirable result because the only acceptable resolution is an adjudicated decree from the federal judiciary articulating what the law is.

In addition, the government will typically not settle cases in which it has a valid jurisdictional defense, such as an assertion that the government is immune from suit altogether. For example, the government will be reluctant to settle cases arising under the Federal Tort Claims Act[12] if the government has a strong argument that the plaintiff failed to exhaust available remedies before the agency[13] or that the tort arose from a discretionary function,[14] unless events suggest that the jurisdictional defense will not prevail.[15] In these cases, the government maintains that the dispute is not appropriately before the court at all.[16]

The government's efforts at settlement are affected not only by the different role that the government plays in litigation, but also by the statutory and regulatory structure of processing settlement proposals within the Justice Department. Congress has vested in the Attorney General the authority to conduct the litigation of the United States unless otherwise authorized, and this authority includes the power to settle or compromise claims of or made against the United States.[17] The Attorney General has, in turn, delegated this authority to the Deputy Attorney General and Associate Attorney General, and, within more stringent limits, to the Assistant Attorneys General for the litigating divisions.[18] There are similar delegations of settlement authority to the ninety-four United States Attorneys. The U.S. Attorneys have authority to settle claims against the United States for up to $1

12. 28 U.S.C. §§ 2671-2680 (1994).

13. *See* 28 U.S.C. § 2675(a) (1994).

14. *See* 28 U.S.C. § 2680(a) (1994).

15. In other circumstances, this reluctance to settle in cases involving possible jurisdictional defects may not always bar settlement. For example, citizens bringing suit under the Endangered Species Act must notify the appropriate cabinet secretary in writing of their intent to sue 60 days prior to commencing the action. 16 U.S.C. § 1540(g)(2)(A)(i) (1994). If the plaintiff fails to notify the appropriate cabinet secretary, the federal courts lack jurisdiction to hear the dispute. *See* Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988). *See also* Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989) (discussing a similar requirement under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(b)(1)(A)(1994)). If a plaintiff fails to file this letter, the government will usually move to dismiss for want of jurisdiction. In some of these cases, however, the government may consider settlement negotiations because the plaintiff still may decide to provide the sixty-day notice letter and reinitiate the lawsuit once the sixty days expires.

16. When the government believes that sovereign immunity bars a particular claim, it is asserting that it is immune from suit altogether and should not be before the particular court. *See* Block v North Dakota, 461 U.S. 273, 287 (1983) ("[T]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress."). Thus, the government typically will not settle suits in which it has a substantial immunity claim to the suit. As the Supreme Court has described immunity in a different context, *i.e.*, qualified immunity of officials for their official acts, the immunity is an "immunity from suit," "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth. 472 U.S. 511, 526 (1985).

17 28 U.S.C. §§ 516, 518 (1994).

18. *See* 28 C.F.R. §§ 0.160-.172 (1995). The Attorney General most recently amended the delegation in subpart Y in Authority of United States Attorneys to Compromise and Close Civil Claims, 60 Fed. Reg. 15,674 (1995).

million,[19] and to settle affirmative cases if the original claim did not request more than $5 million and the proposed settlement is within $1 million of the original claim.[20] The Assistant Attorneys General for the litigating divisions can settle all claims against the United States for up to $2 million,[21] and can settle all affirmative cases "in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $2 million or fifteen percent of the original claim, whichever is greater."[22] They can also settle all nonmonetary cases.[23]

These delegations of authority do not apply in certain circumstances. They do not apply if the individual settlement would, as a practical matter, influence the settlement of other claims which, if aggregated, would exceed the monetary amount of the delegation.[24] In addition, the delegations do not apply if: the Assistant Attorney General believes, for policy reasons, that a more senior official should approve the settlement;[25] the proposed settlement "converts into a mandatory duty the otherwise discretionary authority of a department or agency to promulgate, revise, or rescind regulations;"[26] the settlement commits an agency to expend unappropriated funds or to seek an appropriation from Congress;[27] or "the proposed settlement otherwise limits the discretion of a department or agency to make policy or managerial decisions committed to the department or agency by Congress or by the Constitution."[28] These exceptions make clear that settlements with broad policy implications—going beyond the particular dispute—will receive the attention of a top Justice Department official.

To be sure, this structure makes settlement with the government somewhat more cumbersome than settlement with private litigants who can bring settlement authority to the table. In most cases, the Justice Department attorney attempting to settle a civil case will not have the ultimate authority to bind the government to the terms she negotiates. Thus, in settlement negotiations, the government's opponents must recognize that they are dealing with an "honest messenger," a person who has the authority only to recommend that the government accept a particular settlement, but who cannot conclusively bind the government to an agreement if the settlement amount requires higher approval. Indeed, courts have recognized that apparent settlements with the government do not bind the government if the settlement was beyond the authority of the government actor.[29] Additionally, these delegations of

---

19. 28 C.F.R. § 0.168(d)(2) (1995).
20. 28 C.F.R. § 0.168(d)(1) (1995).
21. 28 C.F.R. § 0.160(a)(2) (1995).
22. 28 C.F.R. § 0.160(a)(1) (1995).
23. 28 C.F.R. § 0.160(a)(3) (1995). In addition, the Assistant Attorney General for the Tax Division can settle claims against the United States, regardless of amount, "in all cases in which the Joint Committee on Taxation has indicated that it has no adverse criticism of the proposed settlement." 28 C.F.R. § 0.160(b) (1995). This delegation of authority is subject to the exceptions that are detailed in the text.
24. 28 C.F.R. § 0.160(c)(1) (1995).
25. 28 C.F.R. § 0.160(c)(2) (1995).
26. 28 C.F.R. § 0.160(c)(3) (1995).
27 28 C.F.R. § 0.160(c)(4) (1995).
28. 28 C.F.R. § 0.160(c)(5) (1995).
29. *See* United States v. Beebe, 180 U.S. 343, 351 (1901) ("The power to compromise a suit in which the United States is a party does not exist with the district attorney any more than a power to

settlement authority recognize the unique nature of government practice, and that the government's representatives cannot come to the table with full settlement authority on many occasions.

Nevertheless, this structure of settlement serves many purposes. First, it helps ensure that settlements—especially large monetary settlements—will be more uniform across the nation. Second, the structure of settlement increases accountability By requiring an official at the highest levels of the Justice Department to approve a settlement if the settlement has significant policy implications,[30] a process exists for insuring careful consideration of the settlement not only by the litigators but also by the agency that implements the statute implicated in the dispute and by accountable officials within the Justice Department. Courts have recognized these concerns as legitimate goals and have recognized that government officials with actual settlement authority must be treated differently than their private counterparts.[31] Courts also generally recognize that it would be counterproductive to require the handful of government officials who do have ultimate settlement authority to attend settlement conferences.[32] Such a requirement would have these high officials endlessly ricocheting across the country, unable to deal with the many other pressing demands of their positions.

Finally, the approving officials inevitably show deference to the settlement recommendation of the primary attorney who has developed the settlement proposal. In most cases, if settlement authority does not reside in the line attorney, settlement recommendations of the line attorney are accepted by her superiors. Thus, the commitment of a government litigator to "recommend settlement" is very effective in facilitating a settlement, given the pivotal role the line attorney plays in the settlement authorization process.

---

compromise a private suit between individuals rests with the attorney of either party "); United States v. Walcott, 972 F.2d 323, 327 (11th Cir. 1992) (finding Small Business Administration had no authority to enter into binding settlement once matter was in litigation); United States v. 32.40 Acres of Land, 614 F.2d 108, 113-14 (6th Cir. 1980) (concluding Assistant United States Attorney had no authority to enter into binding settlement in condemnation case).

30. *See* 28 C.F.R. § 0.160(c)(2)-(5) (1995). *See also* 28 C.F.R. § 0.163 (1995) (requiring approval of Solicitor General in any Supreme Court case or any case in which the Solicitor General has authorized appeal).

31. *See, e.g., In re* Stone, 986 F.2d 898, 904 (5th Cir. 1993). The court of appeals recognized that the centralization of settlement authority served many purposes:

> Centralized decisionmaking promotes three important objectives. First, it allows the government to act consistently in important cases, a value more or less recognized by the Equal Protection Clause. Second, centralized decisionmaking allows the executive branch to pursue policy goals more effectively by placing ultimate authority in the hands of a few officials. Third, by giving authority to high-ranking officials, centralized decisionmaking better promotes political accountability

Id. (citations omitted).

32. *See, e.g., id.* at 905 (holding that while a district court has the authority to order the official with actual settlement authority to attend a settlement conference, "it should consider less drastic steps before doing so"). At least one commentator has endorsed this conclusion of *Stone*. *See* Edward F Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV 2079, 2110 (1993) ("This appears to be a reasonable approach to the problem of governmental representation at ADR proceedings ").

The government's role in litigation and the structure of settlement are not the sole factors that distinguish settlement with the government from a settlement between two private parties. The unique nature of the Justice Department also makes settlement with the government somewhat different. For at least two reasons that nature does not necessarily foster settlement at every turn. First, the Justice Department's costs and expenses of litigation are typically not recoverable by means of attorneys' fees provisions. Unlike private parties, the Justice Department does not bill its clients by the hour,[33] nor does it collect a part of the proceeds it obtains as a contingency fee.[34] The government has a duty to insure that justice is achieved, even when the transaction costs of litigation would discourage private parties from continuing with the suit. For example, the government has the duty to litigate some cases that a private party might be inclined to settle, because the nuisance value of the suit—the cost at which it behooves the defendant to pay a plaintiff simply to go away—is not going to be the same for the government.

For most private litigants, the decision to settle is largely a matter of predicting the chance and amount of loss or gain, while factoring in the attendant transaction costs. ADR for private litigants frequently provides additional information to the parties on the accuracy of their calculations. For example, a third-party neutral's participation might result in a plaintiff reaching the conclusion that she has only a sixty-percent chance of prevailing, instead of a ninety-percent chance, in a case of modest dimensions. Accordingly settlement begins to look more attractive as an option. For the government, such an evaluation may not work because of the government's different attitude toward the transaction costs of litigation and the effects that the litigation might have on a particular program. If the evaluation addressed what the government believed was a small but unfounded tort claim, the government might continue to litigate that matter because it perceived a duty to deter others from additional unwarranted attacks on the public fisc.[35] Similarly, the

---

33. There are small exceptions to this statement. For example, under the Superfund law, the government is authorized to collect its fees for litigation where it is recovering its costs at a Superfund site. United States v. Gurley, 43 F.3d 1188, 1199-200 (8th Cir. 1994); United States v. Hardage, 982 F.2d 1436, 1441-43 (10th Cir. 1992); United States v. R.W Meyer, Inc., 889 F.2d 1497 1504-05 (6th Cir. 1989). In practice, the Justice Department bills the Environmental Protection Agency (EPA) for this cost and the EPA then passes that cost on to the responsible parties at the site. Thus, although there are instances in which the Justice Department bills its clients as a formal matter, most of the Department's funds for litigation activities come from money that Congress appropriates for the Department's legal activities.

34. Again, there are small exceptions to this statement. Congress has authorized the Justice Department to collect three percent of favorable judgments in debt collection cases to use to process and track such litigation. *See* Act of Oct. 27 1993, Pub. L. No. 103-121, § 108, 107 Stat. 1153, 1164 (codified at 28 U.S.C. § 527 (1994)). Nevertheless, Justice Department attorneys do not, as a general rule, operate on a contingency fee basis.

35. *See, e.g.*, Dawson v. United States, 68 F.3d 886, 897 (5th Cir. 1995). In *Dawson*, a district court judge—the same judge involved in *In re Stone*—sanctioned government attorneys for refusing to make a monetary settlement offer in a tort case involving a prisoner appearing *pro se*. *Id.* at 887 The court of appeals reversed the sanction award, holding that the district court could not order a party to make a settlement offer. *Id.* at 897. The court of appeals recognized that "parties may have valid and principled reasons for not wishing to settle particular cases." *Id.*

Here, two of the Government's numerous (and, it seems, very valid) reasons for not making a

government might litigate a case involving a relatively small sum of money to obtain judicial guidance on how to structure a statutory program.

Second, the Justice Department is a litigating environment. When recruiting, the Department advertises itself to law students and young lawyers as the "Nation's Litigator."[36] Attorneys come to the Justice Department because they want the experience, the opportunity, and the responsibility associated with litigation. Whether they work as Assistant United States Attorneys in the ninety-four judicial districts, or as attorneys in the litigating components at Justice Department headquarters, these attorneys want to go to court to represent the United States.[37] Moreover, the Department has traditionally rewarded top litigators—typically people who have achieved great successes in trial or appellate advocacy—with promotions and awards. In the past, then, an attorney who wished to stand out sought victories in trials, rather than negotiated settlements that could be seen as obtaining less than total victory

Despite the different calculus in determining whether to settle, the government currently settles a great deal of its civil case load. Because it has such a large amount of litigation, and because of the impact that government litigation can have on public policy, the government has the luxury of picking its best cases for litigation and settling the others.[38] Other settlements are reached when the government and the opposing party conclude that the risks to each of continuing the litigation are outweighed by the benefits assured to each from the settlement. In fact, the government settled a good portion of its civil docket even before there was an emphasis on ADR, and it would do so whether or not the government engages in ADR.

---

monetary offer were because Dawson [the plaintiff] was (before his release while his action was pending) a *pro se* prisoner who had not shown much interest in prosecuting his claims, and because of the concomitant (and most legitimate) concern that settlement might encourage other prisoners to file frivolous lawsuits in the hopes of recovering a "nuisance value" settlement. Such [factors are] extremely relevant, especially when the Government is the defendant and the taxpayers will be footing the bill for any settlement.

Id. at 897-98.

36. OFFICE OF ATTORNEY PERSONNEL MANAGEMENT, UNITED STATES DEPARTMENT OF JUSTICE, LEGAL ACTIVITIES 1995-1996, at 1 (1995).

37 Indeed, the trial experience that attorneys gain at the Justice Department may make the trial attorneys more comfortable with trials, and thus less willing to settle.

38. The Supreme Court recognized this fact, although in a slightly different context. *See* United States v Mendoza, 464 U.S. 154, 160-61 (1984). In that case, the Court considered whether nonmutual collateral estoppel should apply against the government, i.e., should the government be barred from relitigating an issue against a party that was not involved in prior litigation that the government lost. *Id.* at 154. In rejecting the application of nonmutual collateral estopped to the government, the Court considered the impact that applying the doctrine to the government would have. *Id.* In particular, the Court discussed the role of the Solicitor General as a gatekeeper on the crowded dockets of the courts of appeals. *Id.* at 160-61. The Court concluded that "[t]he application of nonmutual estoppel against the Government would force the Solicitor General to abandon prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review." *Id.* at 161. These considerations apply not just in deciding which cases to appeal, but which cases to bring as an enforcement matter, which cases to defend as a defendant, and which cases to attempt to settle.

At least one academic observer has criticized the institution of settlement altogether;[39] other critics accept settlement reluctantly as an evil necessitated by the press of civil litigation.[40] From their perspective, settlement undermines public values because it takes disputes out of the courts.[41] From a practical perspective, without a massive expansion of the entire system required to resolve federal civil litigation, our courts could not continue unless the Justice Department settled as much litigation as it does.[42]

Many of the courts have recognized that not all cases require the full panoply of process that could be provided to litigants. Some courts of appeals have resorted to unpublished opinions and decisions issuing without argument in more and more cases because of the current strains on the system. For many disputes, justice can also be served by encouraging the parties to resolve cases earlier by settlement rather than through adjudication and the delay that such a process generally entails. By settling such matters, the court can handle more effectively—and more efficiently—those core cases in which they play a vital role. Thus, almost all of the courts of appeals now have some form of settlement program, either using volunteer or court-paid trained mediators.[43]

Thus, as the most frequent customer of the federal court system, settlement must play an important role in government litigation. The question remaining is whether, using ADR, the government can reap the benefits enjoyed by private parties.

II. ADR IN THE GOVERNMENT TODAY

ADR is not a mystical enterprise. Rather, it consists of a series of tools that litigators can use to achieve negotiated resolution to particular disputes through the involvement of a third-party neutral. These are tools that all litigators—whether they work for the government or the private sector—should have at their disposal.[44]

---

39 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) ("I do not believe that settlement as a general practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis.").

40. *See, e.g.*, David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2661 (1995).

41. *See, e.g.*, Fiss, *supra* note 39, at 1085.

42. Carrie Menkel-Meadow reports:

> When learning that I was writing yet another "defense" of settlement in response to continued critique of settlement, my colleague, Susan Gillig, remarked: "Those writing against settlement might as well write about colonizing Mars—there may be value in it, but with the 'three strikes and you're out' criminal laws and modern caseloads, civil adjudication is becoming as likely as human life on Mars."

Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664 n.10 (1995).

43. *See, e.g.*, D.C. CIR. R. app. III; 1ST CIR. R. 47.5; 2D CIR. R. app. pt. D; 3D CIR. R. app. VI; 4TH CIR. R. 33; 6TH CIR. R. 18; 7TH CIR. R. 33; 8TH CIR. R. 33A; 9TH CIR. R. 33-1; 10TH CIR. R. 33.1.

44. Much of the criticism of ADR has focused on mandatory ADR programs. *See, e.g.*, G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935, 1965 (1993) ("There is a place for alternate dispute resolution programs in our society, but they should not be mandatory and they should not be

The government has a strong practical interest in using ADR, at least as strong as the private sector. As mentioned above, the federal government is the biggest single customer of the federal courts. To the extent that some ADR techniques can reduce the burden on judicial personnel, the government will benefit because the cases it does litigate will move more quickly Indeed, because the government's docket constitutes such a large part of the civil case load of the federal courts, the public at large will benefit from government settlements because the remaining civil cases can move more rapidly with fewer requiring judicial resolution.

ADR is not likely to be used in those government cases where the government has no interest in settling. In addition, the government will be reluctant to use ADR if a party is appearing *pro se*. For the government, participation in ADR presumes some equality in bargaining power and ability which may not exist with a government attorney on one side of the table and an unrepresented person on the other. In addition, the government will not participate in ADR if it believes that its opponent's interest in negotiating stems solely from a desire to defer an inevitable result.

On the other hand, there are many categories of cases in which ADR works very well. One such category where ADR can work effectively is where the government has an established, ongoing relationship with the other party Private litigants often find ADR to be effective when they have long-term contractual relationships with others. The same is true in the context of government contracts and other long-term relationships such as disputes between the government and its employees.

Even in its role as a regulator, the government has established relationships with members of the regulated community These relationships are different from contractual relationships because the government is not a bargaining partner with the other party, but is an overseer making sure that the other party acts within the bounds of the law Despite this difference in role, the government can use ADR effectively to examine the entire relationship rather than the particular enforcement action it has brought. For example, the polluter that is subject to enforcement actions under the nation s environmental laws may, at the suggestion of a third-party neutral, wish to reevaluate the processes that cause the pollution rather than fight regular enforcement actions. In no way does this suggest that the government would capitulate in its important and sovereign function of enforcing the nation s laws. Rather, ADR efforts in this context can vindicate the policies underlying those laws rather than forcing both the government and the private party to expend efforts at litigation. Moreover, a settlement in this context is more likely to secure long-lasting compliance because the regulated party has agreed to a resolution that it finds acceptable rather than one that the judiciary imposes from "on high."

Similarly, ADR proves useful in cases where, for whatever reason, the agency and the private party have developed distrust for each other. The presence of an outsider to the dispute, such as a third-party neutral, can often help overcome

---

in, or annexed to, our federal district courts."). As a practical matter, a purely voluntary program may not be as effective in resolving disputes because attorneys and parties may be reluctant to suggest ADR if it would suggest a perceived weakness in the case. *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV L. REV 668, 673 & n.15 (1986) (citing WAYNE D. BRAZIL, SETTLING CIVIL SUITS 45 (1985)).

perceived slights and lead to settlement. A neutral can rebuild lines of communication, rebuild trust that has eroded, and clarify important misunderstandings that have arisen.

ADR also proves useful in cases where something other than ultimate relief in litigation is the goal of the litigant, a situation often arising when the government is a party One example of this type of litigation is found in cases arising under the National Environmental Policy Act (NEPA).[45] Under NEPA, government agencies have an obligation to take a "hard look" at the environmental consequences of their proposed actions.[46] NEPA imposes a procedural duty on agencies, but does not require an agency to take the most environmentally beneficial action.[47] Thus, when parties challenge federal agency actions under NEPA, the legal dispute concerns the adequacy of the agency's environmental examination and documentation. Often, however, the real dispute concerns whether the agency should proceed with the proposed undertaking. The most that a challenger can secure from a court is a requirement to prepare a new or amended environmental document, with, perhaps, a temporary bar to the proposed action while the agency accomplishes this task.[48]

Thus, suppose that a group of citizens living near an airport challenges the decision of the Federal Aviation Administration (FAA) to approve a proposal for expansion of the airport. In the litigation, the citizens claim that the FAA had inadequately examined the environmental impact of the proposed action. Under NEPA, the most that the neighboring citizens can obtain from litigation is an order directing the FAA to reexamine the environmental impact of the expansion or make up for the deficiencies of the original environmental document; the neighbors may also obtain an injunction barring the construction until this reexamination is complete.[49] After the FAA completes this process, the scope of the expansion would not necessarily change, and the expansion may go forward as originally planned but at a later date. In addition, the decision of what form this new documentation would take lies within the discretion of the agency [50]

Using ADR, the neighbors would have a place at the table to inform the FAA of their specific environmental concerns, and may convince the agency and the airport sponsor to restructure the expansion or abandon it in favor of other ways of making the existing airport more efficient. ADR in a case like this one allows the parties to address the actual underlying dispute that led to litigation—in the example, the environmental impact of the planned airport expansion. It allows the litigants to sidestep that part of the dispute that can be resolved in litigation—whether the FAA adequately examined the environmental impacts of the expansion—in favor of resolving the bigger picture. As one commentator has argued, ADR can lead to

45. *See* 42 U.S.C. § 4332(2)(C) (1994).

46. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

47 *Id.*

48. *See* Jones v Gordon, 792 F.2d 821, 829 (9th Cir. 1986).

49 *See* Charter Township of Huron v Richards, 997 F.2d 1168, 1174-75 (6th Cir. 1993) (holding that issuance of environmental impact statement moots challenge to agency's decision).

50. *See, e.g.*, Fritiofson v. Alexander, 772 F.2d 1225, 1235 (5th Cir. 1985).

more just solutions because it can give relief that a court cannot order.[51] This works in practice.[52]

Finally, ADR can be particularly useful in disputes that arise between the federal and state or local governments. In such cases, both governmental bodies are pursuing the public interest, and both sets of lawyers represent taxpayers. If ADR can provide an efficient or cost-effective solution to the dispute and if, as suggested above, ADR can resolve an entire dispute, rather than only that portion presented by litigation, then the governmental disputants can best serve the interests of all the citizens they represent by using ADR to resolve that intergovernmental dispute.

Accordingly, ADR may be useful in settling litigation that involves the government, as well as in disputes between private parties. For cases that would settle anyway, ADR can accelerate a resolution, moving it off the courthouse steps. This benefits the courts, government litigators, and those with whom the government litigates. More importantly, in cases in which the parties can structure relief that a court could not grant, ADR can help the government achieve better results than litigation would. Finally, ADR can bring an agency and its critics together—face-to-face—thereby providing citizens with what may be their only opportunity to speak directly with those who make decisions that affect their lives. Thus, ADR is a valuable tool for making government more responsive to its citizens.

---

51. *See* Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV 485, 504-05 (1985); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 804-09 (1984).

52. In a recent speech, the Attorney General used a real-life example (on which the example in the text is based) to show how ADR can work in practice:

> [Three] years ago the City of Phoenix decided to expand its airport. The neighboring City of Tempe feared a larger airport would bring even more unwarranted noise. It sued Phoenix and the Federal Government. On the surface the lawsuit involved the inadequacy of the environmental impact statement; however, the underlying controversy had to do with the construction of a new runway, the long-term operation of the airport, and limitations on aircraft noise.
>
> The court wisely referred the case to mediation. The Justice Department was confident that the case could be won, but we participated in the mediation because a resolution of the lawsuit would not end the dispute between the parties. Using mediation, the parties reached an agreement that involved Phoenix, Tempe, and the FAA in guiding the operation of an expanded airport and the development of noise restrictions acceptable to all.

Janet Reno, U.S. Attorney General, Address to the House of Delegates, American Bar Association 9 (Feb. 5, 1996) (transcript on file with authors).

It is also worth noting that in *Dawson v. United States*—the case in which a district court judge sanctioned government attorneys for failing to offer a monetary settlement—the government was prepared to discuss offering additional medical services to the injured prisoner as settlement of the case. Dawson v. United States, 68 F.3d 886, 889 (5th Cir. 1995). The district court could not have ordered this sort of relief if the case had gone to trial. As it turns out, the underlying tort case was dismissed on the merits as a sanction for failing to comply with a show cause order. *Id.* at 893.

III. ENCOURAGING ADR WITHIN THE FEDERAL GOVERNMENT

Because ADR can benefit the government in conducting its litigation, the Justice Department is taking a number of steps to catch up to its private counterparts in using ADR tools. As mentioned above, the Bush administration issued guidance to all federal litigators by encouraging the use of ADR.[53] The executive order regarding the conduct of litigation encouraged government litigators to use ADR in appropriate cases, and, with one small exception discussed below, did not limit the techniques that government attorneys could employ

The current administration has greatly accelerated the effort to boost the use of ADR in a variety of ways. First, to address some of the structural limitations on the government's use of ADR, Attorney General Reno created the position of Senior Counsel for ADR.[54] The creation of such a position says a good deal about the commitment that the Justice Department has to ADR. This commitment is further demonstrated by the fact that there is no senior counsel for other litigation skills such as discovery or appellate advocacy

Second, each of the litigating components in the Justice Department has issued a policy statement concerning ADR and has created ADR case selection criteria to assist their attorneys in identifying which cases are good candidates for ADR.[55] These guidance documents are simply that—guidance. Justice Department attorneys are not directed by senior management officials to engage in ADR in any particular case, and the Department recognizes that ADR will not be appropriate for every case. Nevertheless, the Justice Department encourages its counterparts in the private bar to propose using ADR in appropriate cases. That invitation will be given thorough consideration. Moreover, having a policy statement that encourages consideration of ADR serves to overcome any perception that the government is tipping its hand regarding the possible weaknesses in a case if it suggests ADR. Now, government litigators can take comfort that, as a matter of policy, ADR should be considered and employed as appropriate even if the government has a strong case on the merits.[56]

Third, the Justice Department is making efforts to change the work environment to become more familiar with and rewarding of ADR. Beginning in 1996, the Department will recognize through its system of Departmental awards those attorneys who have used ADR to better represent the United States, just as the Department has honored attorneys for their work at the trial and appellate levels, and for other litigation-related efforts.[57] The litigating components have committed

---

53. *See* Exec. Order No. 12,778, 3 C.F.R. 359 (1991), *reprinted in* 28 U.S.C. § 519 (1994).

54. Order of the Attorney General, *supra* note 3, at 1-2. As noted at the beginning of this essay that position is occupied by one of the authors of this essay

55. Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895 (1996).

56. One commentator lauded the previous administration's civil justice reform order for having this effect. *See* Carl Tobias, *Executive Branch Justice Reform*, 42 AM. U. L. REV. 1521, 1557 (1993) ("[T]he reform may make government attorneys, many of whom understandably assumed their present posts because they wished to try cases, more receptive to ADR.").

57 *See* Peter R. Steenland, Jr., *Order Fosters ADR Involving Justice Dept.*, LEGAL TIMES, Sept.

to give equal recognition to those attorneys who have obtained favorable settlements when they make decisions on promotions and professional evaluations. The Justice Department is also enhancing its training of attorneys to teach them how to use ADR effectively just as it trains attorneys in trial skills and appellate advocacy These steps will make the environment at the Justice Department more receptive to, and supportive of, ADR.

Fourth, the Justice Department has implemented other measures to make ADR easier to use. The Attorney General has earmarked $1 million to pay for third-party neutrals in fiscal year 1996. This money has been reallocated from the fund used to pay the fees and expenses of witnesses, and the Department has adopted procedures to make hiring a neutral as easy and basic as hiring an expert witness. The Department is also collecting data on ADR use within the Department and is evaluating the experiences of attorneys from ADR processes. Just as trial lawyers love to tell their war stories about cross-examining a particularly hostile witness or relate an especially effective oral argument, these ADR success stories will provide guidance for other attorneys who are considering using ADR in their cases.

The one small exception to the previous administration's encouragement of ADR techniques was a ban on binding arbitration.[58] This general ban entering into binding arbitration probably reflected the view of Attorney General William Barr When Barr was Assistant Attorney General for the Office of Legal Counsel (OLC), he testified before Congress that the Appointments Clause[59] prohibited the appointment of an arbitrator who could bind the United States.[60] The theory was that an arbitrator who could bind the United States would have sufficient power to be an officer of the United States; officers of the United States can only be appointed under the procedures outlined in the Appointments Clause.[61] OLC has recently repudiated that view in a formal opinion.[62] In that opinion, OLC concluded that an arbitrator does not have all of the characteristics of an officer of the United States, that is, someone who occupies a position of employment in the federal government.[63] The ban on binding arbitration contained in the Bush administration executive order was rescinded in Executive Order 12,988, which President Clinton issued on February 5, 1996.[64]

11, 1995, at S25, S37

58. *See* Exec. Order No. 12,778, § 1(c)(3), 3 C.F.R. 359, 361 (1991), *reprinted in* 28 U.S.C. § 519 (1994).

59. U.S. CONST. art. II, § 2, cl. 2.

60. *See* S. REP NO. 101-543. at 5 (1990) (describing the Justice Department's objection to binding arbitration), *reprinted in* 1990 U.S.C.C.A.N. 3931, 3935.

61. U.S. CONST. art. I, § 2, cl. 2.

62. Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to John Schmidt, Associate Attorney General, Office of Legal Counsel 1 (Sept. 7 1995) (on file with authors).

63. *Id.* at 10.

64. Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996). The executive order revoked the previous executive order. Exec. Order No. 12,988, § 12, 61 Fed. Reg. 4734 (1996). The new executive order contains no limitation on use of binding arbitration. *Compare* Exec. Order No. 12,778, § 1(c)(3), 3 C.F.R. 359, 361 (1991) (generally prohibiting binding arbitration), *reprinted in* 28 U.S.C. § 519 (1994), *with* Exec. Order No. 12,988, § 1(c), 61 Fed. Reg. 4729 (1996) (containing no comment on binding arbitration).

As this point, it is not certain what the impact will be from lifting the ban on binding arbitration in government litigation. Because binding arbitration is the only form of ADR that does not involve a consensual resolution of disputes, and the arbiter's resolution can rarely be challenged, the federal government will have to proceed with great caution in using this ADR technique.[65]

While they cannot be implemented by the Justice Department, two other proposals exist that deserve support. First, the Department supported legislation to reauthorize the Administrative Dispute Resolution Act (ADRA).[66] The ADRA authorizes and encourages agencies to incorporate ADR techniques into their administrative processes where appropriate.[67] In many circumstances, disputes arise at the agency level in the first instance. Indeed, with some exceptions, courts expect parties to exhaust their administrative remedies before the court will entertain a challenge to the agency action.[68] The ADR procedures in the ADRA are purely voluntary and are implemented only if both the aggrieved party and the agency agree to use them.[69] The permanently reauthorized ADRA[70] also contains two new provisions that will strengthen the Act. First, Congress exempted certain administrative settlement communications from disclosure under the Freedom of Information Act.[71] This will permit agencies to communicate their settlement positions more freely Second, Congress authorized agencies to enter into binding arbitration to resolve disputes that are within that agency's existing authority to settle or compromise the dispute.[72] When properly used, binding arbitration can avoid disputes from becoming litigation that the Justice Department must handle. Now that Congress has reauthorized and strengthened the ADRA, agencies can make greater use of ADR in their proceedings, and more disputes will be resolved without need for litigation. Rather than having an administrative decision being imposed by the agency, ADR, in appropriate cases, can provide a solution acceptable to the agency and the party before it.

Second, we support the efforts of the Federal Judicial Center to train magistrate judges in mediation.[73] In addition to the routine settlement conference,[74] federal

---

65. *See* Will Pryor & Robert M. O'Boyle, *Public Policy ADR: Confidentiality in Conflict?* 46 SMU L. REV. 2207 2211 (1993) ("Non-binding mediation is the only appropriate ADR process for resolution of most public policy disputes ").

66. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870.

67 As suggested above, there are instances in which settlement and ADR are inappropriate; in the ADRA, Congress identified some instances in which an agency should consider not using ADR. *See* 5 U.S.C. § 572(b) (1994).

68. *See, e.g.*, McGee v United States, 402 U.S. 479, 483-84 (1971); McKart v United States, 395 U.S. 185, 195 (1969).

69 5 U.S.C. § 572(a) (1994). *See* 5 U.S.C. § 572(c) (1994) ("Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.").

70. Congress repealed the sunset provision for the ADRA in the new act. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 9, 110 Stat. 3870, 3872.

71. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 3(d), 110 Stat. 3870, 3871.

72. Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 8, 110 Stat. 3870, 3872.

73. Interview with Donna Stienstra, Director, Civil Justice Reform Act Projects, Federal Judicial Center (Apr. 5, 1996). According to Ms. Stienstra, the Federal Judicial Center offers an all-day

magistrates are uniquely situated to provide confidential assistance, as true third-party neutrals, to assist litigants in negotiating consensual resolutions to matters that would otherwise require adjudication by the courts.

These efforts—both from the federal government and from other quarters—will help speed civil litigation through the courts, and in some cases, avoid it. If the federal government can lessen the burden on the federal courts, everyone benefits.

CONCLUSION

Despite lagging behind its private counterparts, the Justice Department, under the direction of Attorney General Reno, is now making progress toward increasing its use of ADR. There will always be cases in which ADR will not work because of the unique nature of government litigation. Nevertheless, ADR soon will become a frequently used means for parties to resolve disputes with their government, leaving them, and others, more satisfied with both the process an the outcome.

---

training session on magistrates as an optional "add-on" to other training conferences. *Id.* Recently, the mediation course has proved so popular that the Center has had to add more sections to fill demand. *Id.*

74. *See* FED. R. CIV P 16(a)(5), (c)(9).