BACKGROUND REPORT FOR RECOMMENDATION 86-3

POINTS ON A CONTINUUM: DISPUTE RESOLUTION PROCEDURES AND THE ADMINISTRATIVE PROCESS

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TABLE OF CONTENTS

IV
THE LEGAL ISSUES OF ADMINISTRATIVE ARBITRATION.

Statutory Limitations when the Government is a Party.

Article III

Article II: Requirement for Executive Decisions

Delegation to Private Parties

Due Process

Unconstitutional Taking

Standardless Delegation

Conclusion: Properly Executed Arbitration Programs are Constitutional

V
HYBRID PROCESS

The Arbitrators.

Norms and Precedents.

Record and Explanation.

Privacy.

Review by the Agency.

Judicial Review
- No Review: Waiver
- Limited
- Arbitrary or Capricious

VI
CONCLUSION WITH RESPECT TO ADMINISTRATIVE ARBITRATION

VII
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISM

VIII
MINITRIALS.

Minitrial Procedure.

Use by Government Agencies.

When and for Which Cases Should the Government Consider Using Minitrials?

NASA Minitrial.
- Nature of the Dispute.
- Scope of Litigation.
- Motivations to use the Minitrial.

Department of Transportation.
Urban Mass Transportation Administration.
Office of Civil Rights.
National Highway Traffic Safety Administration.

Environmental Protection Agency.

Equal Employment Opportunity Commission

Federal Communications Commission.

Federal Election Commission.

Federal Labor Relations Authority.

Federal Maritime Commission.

Federal Mediation and Conciliation Service.

Federal Reserve System.

Federal Trade Commission.

General Accounting Office.

Interstate Commerce Commission.

Merit Systems Protection Board.

National Mediation Board.

Nuclear Regulatory Commission.

Office of the Federal Inspector, Alaska Natural Gas Transportation System.

Pension Benefits Guaranty Corporation.

Postal Rate Commission.

Railroad Retirement Board.

Securities and Exchange Commission.

APPENDIX II
CASE STUDIES OF ADMINISTRATIVE ARBITRATION

Federal Insecticide, Fungicide and Rodenticide Act.

Pension Benefit Guaranty Corporation.

Commodity Futures Trading Commission Reparations Procedures

Superfund Arbitration.

I
INTRODUCTION

Administrative Experimentation.

The Administrative Procedure Act is by and large divided into two relatively distinct parts: notice and comment rulemaking and trial type hearings presided over by an administrative law judge. The provisions governing the former are, at least in their pristine statutory form,[1] remarkably brief considering the leverage provided agencies for controlling private action through their exercise. The latter are positively Byzantine in their complexity. As opposed to defining even the skeleton of the full range of procedures that are actually used, the two are the endpoints of a continuum of procedures[2] ranging from the flexibility of notice and comment rulemaking to the formal rigidity of a trial type hearing under the APA.

Perhaps unfortunately, the APA itself does not address the great bulk of administrative procedure that lies between its extremes,[3] other than by providing guidance through analogy and adaptation of the specified structures. On the other hand, the lack of codification encourages experimentation with new procedures to meet new needs. Moreover, because the APA itself does not address the requirements of the modern administrative state, Congress has taken to including

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1. The legislative history of the rulemaking provisions of the APA reveal a Congressional intent that far more elaborate procedures would be used for developing any rule with substantial impact. See, Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L. J. 1, 9-10 (1982). While more was expected, the Act did not impose the additional procedures on agencies. Rather, they were simply expected to follow suit. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). Through creative statutory interpretation and the "management" of the administrative process, courts have nonetheless developed the "hybrid" rulemaking procedures to address the need for resolving complex factual questions well beyond customary agency expertise. DeLong, Informal Rulemaking and the Integration of Law and Policy, 65 Va. L. R. 257 (1979).

2. Notice and comment rulemaking is not really the lower bound of administrative procedure, of course, since it has some structure and many decisions are made without any specified process. Applications are reviewed and stamps sold with very little formality short of resolving a dispute over a decision made initially by a government official.

3. In contrast with the APA, the Model State Administrative Procedure Act identifies three types of adjudicatory procedures to be used in appropriate cases: formal (§§ 4-201 to 4-221); conference (§§ 4-401 to 4-403); and summary (§§ 4-501 to 4-506).

   Moreover, Federal agencies actually use a broad variety of adjudicatory procedures for resolving contested issues. Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976). Thus, while the APA-mandated procedures are complex, the Federal adjudicatory apparatus can be responsive to a host of needs.

sometimes elaborate procedures in substantive statutes instead of relying on the APA to develop a coherent general administrative process.[4] As a result, new forms of administrative procedure crop up -- through ad hoc use by agencies, through ad hoc statutory prescription, and through the journals.

While the experimentation and evolution are clearly beneficial, they do have their costs: the new forms sometimes clash with established precepts.[5] That can, of course, mean either the old should adapt to the new[6] or that the new is not living up to expectations and should be changed before further use.[7] Also, because of their ad hoc nature, they sometimes take a considerable time to become accepted and hence widely used even when proven.

We appear to be in the midst of such a process with respect to the use of "alternative means of dispute resolution" in the administrative process -- procedures that are not recognized by the APA but which appear to be useful supplements to the traditional administrative processes.

Interest in Dispute Resolution.

For at least the past decade[8] and particularly the last five years, there has been an extraordinary interest in "alternative" ways of settling disputes -- alternative, that is, to the courts and formal litigation. That interest has spanned the gamut of disputes,[9] from neighborhood justice centers[10] that work to resolve

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4. Elliott, The Dis-Integration of Administrative Law, 92 Yale L.J. 1523 (1985).

5. Witness, for example, the consternation of the courts in the early seventies when directed by several statutes to review notice and comment rulemaking on the basis of the "substantial evidence" test normally reserved for trial type hearings. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

6. Courts seem fully comfortable with the notion of reviewing the factual basis of rulemaking more intensely -- akin to that of the substantial evidence test -- under the "hard look" doctrine that grew up contemporaneously if not as a result of the misfit statutory directions. Ass'n of Data Processing v. Board of Governors, 745 F.2d 677 (D.C. Cir. 1984). Both were responding to a perceived need to force agencies into developing the factual bases of rules built on highly technical or demographic data.

7. For example, the "offeror" provision of the original Consumer Product Safety Act is one such failed notion that was discarded, although it may have had as much to do with its administration as its concept. See Harter, supra note 1, at 60-63.

8. The influential Pound Conference was held in 1976. It built on the growing interest in dispute resolution and planted it firmly in the legal agenda. Professor Frank E. A. Sander's paper that was delivered at the Conference served as an influential introduction and benchmark to the area. Sander, The Variety of Dispute Resolution, 70 F.R.D. 111 (1976).

9. For a general tour of the use so far, see Goldberg, Green and Sander, Dispute Resolution (1985).

pesky controversies from barking dogs and trash in alleys, to more serious social infractions, to major corporate matters.[11] The Chief Justice of the United States has been an outspoken proponent of the use of extra judicial means of resolving matters that would otherwise end up in the courts.[12] The Federal Rules of Civil Procedure were recently amended to encourage the use of a range of means short of actual trial for settling controversies once in the courts.[13]

The literature,[14] legal and otherwise, has also included a vast discussion of alternative means of dispute resolution, such as arbitration, factfinding, and mediation. While very few of these techniques are actually new, their use has been proliferating into areas in which they were previously unknown. We are, therefore, gaining insights into the use of these forms of making decisions in new settings.

It is not surprising, therefore, that they have been used somewhat in the administrative process: Given their promise and use in the judicial setting, it is only logical that they may also address real needs of the administrative process. And, indeed, that has been the case. Some of these dispute resolution techniques have demonstrated their utility to administrative agencies.[15] But, because of the peculiar requirements of the administrative process, in other instances the fit is not entirely comfortable. And, in some instances their use is likely inappropriate.

No particular theory has developed as to what their structure should be,[16]

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10. McGillis and Mullen, Neighborhood Justice Centers (U.S. Dept. Justice 1977); Cook, Roehl, & Sheppard Neighborhood Justice Centers Field Test (U.S. Dept. Justice 1980).

11. Green, Marks, and Olson, Settling Large Case Litigation: An Alternative Approach, 11 Loy. L.A. L. Rev. 493 (1978); the Center for Public Resources has been a major proponent of the use of means other than litigation, particularly the mini-trial, for resolving corporate disputes.

12. Address by Chief Justice Burger, American Bar Association Midyear Meeting (Jan. 24, 1982) reprinted in Burger, Isn't There a Better Way?, 68 A.B.A.J. 274 (1982).

13. F.R.Civ.P 16(c).

14. Breger, The Justice Conundrum, 28 Vill. L. Rev.923 (1983); Sander, Mediation: A Select Bibliography (ABA Special Committee on Dispute Resolution 1984); Bingham, Vaughn, & Gleason, Environmental Conflict Resolution (Conservation Foundation 1980); U.S. Dept. of Justice, Nat'l Criminal Justice Research Service, Dispute Resolution: Techniques and Applications (1985), Alternative Dispute Resolution Program Evaluation; Levin & DeSantis, Mediation: An Annotated Bibliography (1978).

15. See, ACUS Recommendations 82-4 and 85-5.

16. As will become clear, Judge Friendly's observation in the early days of hybrid rulemaking that "One would almost think there had been a conscious

(continued...)

how they should be used, how they relate to the traditional processes, what sort of judicial review is appropriate, and what their advantages and disadvantages are. The full range of ADR techniques can potentially make a significant contribution to administrative procedure by providing additional means of addressing needs within the endpoints of the procedures specified in the APA itself. Indeed, the adaptation and more widespread use of the ADR processes that are proving successful on the civil side may well offer a solution to some of the more pressing problems of the administrative process. That acceptance will be facilitated by familiarity with the use of the ADR processes outside of the administrative process; a familiarity with their use so far in it; and, some understanding of how they fit within the continuum and relate to other needs of the administrative process.[17]

This report is an initial step in that direction.[18]

Contested Issues.

The focus of the report is on the use of non-APA procedures that may be used to resolve disputed issues, as opposed to making administrative decisions in the first instance. These procedures may be employed directly by the agency itself, or they may be used by a private organization under the supervision or some other close relationship to an agency, generally under circumstances in which the agency itself would hear and resolve the issue were it not for the private body. The "issues" that are the subject of this report need not be sufficiently specific or narrow that they must be resolved in an adjudicatory proceeding, although certainly most will. It does mean that some potential disagreement has arisen that needs to be resolved. The need to resolve the matter is what is important from the perspective of this report, not the context in which the need arises. It could be as part of any form of administrative process -- rulemaking, adjudication, permitting, inspections, procurement, or in programs with an intimate connection to an agency but outside of the agency's

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16.(...continued)
effort never to use the same phraseology twice," Associated Industries of New York, Inc. v. Department of Labor, 487 F.2d 342, 345 n.2 (2d Cir. 1973), applies with full vigor at this stage of the use of arbitration in the administrative process.

17. Edelman, Institutionalizing Dispute Resolution Alternatives, 9 Jus. Sys. J. 134 (1984); Harter, Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship, 29 Vill. L. Rev. 1393, 1417-1419 (1984).

18. This report is a survey of the variety of techniques other than those mentioned in the APA itself that are used to make administrative decisions. It is a survey and not a comprehensive analysis. It is designed to review the structure of the new processes and to highlight the legal issues involved in their use as well as provide the basis for further use and analysis. The report is largely based on legal materials. In particular, very little empirical research has been conducted to determine how well the programs have functioned in practice. Before they are institutionalized on any broad basis, that research should clearly be done.

direct purview.[19] The process to be employed may be more a function of the nature of the issue to be resolved than of the proceeding to which it is related.[20]

II
OVERVIEW OF THE ALTERNATIVES

The "alternative" of alternative means of dispute resolution does not necessarily mean "instead of something else".[21] Rather, they are different types of procedures that are used for making decisions, usually for resolving some sort of contested issue. Traditional processes, such as litigation itself, are themselves among the alternatives. Thus, the term alternative means of dispute resolution refers to the entire spectrum of techniques for resolving issues. Like other forms of decision making, each has its benefits and its weaknesses, and is more appropriately used in some situations than in others. Moreover, they are often used in conjunction with one another. And, like rulemaking and adjudication under the APA, they are more distinct conceptually than practically: they fade one into another.

Although there are a number of variations on the themes,[22] the major types of ADR techniques are arbitration, med-arb, factfinding, mini-trial, mediation, facilitation, convening, conciliation, and negotiation. The list is arranged in order of the **decreasing** involvement of a third party (no matter how many parties there may be to the controversy), generally referred to as the "neutral."[23]

Arbitration.

Arbitration is closely akin to adjudication in that the neutral decides the matter after reviewing evidence and hearing argument from the parties. It has been widely used for decades in labor relations and in resolving commercial disputes. It ranges in formality from very nearly that of a court to virtually without structure; the arbitrator may be called upon to apply existing law or to reach "justice under the circumstances."

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19. For example, the stock exchanges have procedures to resolve disputes concerning their members. These procedures, if not the decisions in individual cases, operate under the oversight of the Securities and Exchange Commission. See Appendix III.

20. See, Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 11 U. Pa. L. Rev. 485 (1970).

21. The reference in the text above at notes 8-9 that the interest in "alternatives" to litigation is fairly common, however. The reference, therefore, is somewhat ambiguous, sometimes meaning instead of litigation, and sometimes meaning the full range of dispute resolution techniques including litigation.

22. See generally, Goldberg, Green, and Sander, supra note 9.

23. While, of course, the third party is not always neutral and may sometimes have a very real interest in the outcome, in general the third party is rigorously neutral with respect to the parties and subject matter.

The arbitration may be binding in that the arbitrator's decision ends the controversy, either by agreement of the parties or by some rule of law.[24] It may be advisory or "nonbinding" in that the parties are not bound by the decision; they are expected to consider it seriously, however. Many jurisdictions have established "court-annexed arbitration" in which certain categories of cases, frequently those involving less than a specified level of damages, are either directly referred to arbitration or the litigants are encouraged to proceed to arbitration before trying the case in court. Generally, a dissatisfied party is entitled to a trial de novo although a penalty is sometimes imposed, such as paying the other party's costs, if the requesting party does not better its position in the trial. Interest arbitration is where the neutral decides on the "ordering" among the parties; that is, it determines the relationship of the parties and their interests inter se.[25] Grievance arbitration, on the other hand, is to resolve "rights" under existing agreements or other forms of social ordering. Last offer arbitration, made familiar by the baseball rules, is where the arbitrator's decision is limited to choosing from the last offers made by the parties.

Med-Arb.

"Med-arb" is, as the name itself implies, a hybrid between mediation and arbitration. In it, the neutral first serves as a mediator in attempting to bring about a settlement among the parties and then decides the issues remaining unresolved after the mediated negotiations.[26] Thus, following the mediation, the neutral becomes an arbitrator. Sometimes the arbitration is binding and resolves the issues, but in others the neutral prepares a report analyzing the positions and needs of the parties and recommends a resolution.

Med-arb is to a degree an institutionalization of the common practice of judges' and arbitrators' pushing on parties for a settlement before the hearing or

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24. For a "lexicon" of ADR terms, see U.S. Department of Justice, Office of Legal Policy's Federal Justice Research Program, Paths to Justice: Major Public Policy Issues of Dispute Resolution (Report of the Ad Hoc Panel on Dispute Resolution and Public Policy prepared by the National Institute for Dispute Resolution) (1984) at 36.

25. Perritt, "And the Whole Earth was of One Language" -- A Broad View of Dispute Resolution, 29 Vill. L. Rev. 1221, 1229 (1983-4).

    Perhaps an "interest" dispute is best characterized by an example. Professor Perritt cites one provided by Dean Hazard:

    > It is the type of dispute one gets into say, with one's friend, when you ask: Shall we go to the game or shall we stay at home and watch television? This kind of dispute requires a settlement procedure of some kind, but it is not the kind of dispute that is [suited for the courts].

26. For an example of a med-arb involving a dispute over how much various local jurisdictions should pay for a regional sewage disposal plant, see Susskind, Court Appointed Masters as Mediators, 1 Negotiation J. 295 (1985).

after the hearing but before the decision.[27] In that case, however, the mediation is an adjunct of the main task of judging, and it clearly carries the stick of coercion, whereas in med-arb as usually referred to the emphasis is on the mediation with the arbitration being used as the secondary process.

Unless the parties themselves ask the neutral to render a decision after an impasse is reached, the process is controversial among mediators. The two processes rely on different cultures and different relationships between the neutral and the parties. Mediation requires an exploration of what the parties actually need and are willing to settle for whereas arbitration remains adversarial so that a party may be reluctant to reveal what is acceptable for fear that it would be cut down further in the decision.[28] Oftentimes, especially in labor cases, however, the parties will desire the resolution of the controversy and ask the mediator to arbitrate the remaining issues. In fact, in instances in which some resolution is important so the parties agree before negotiations begin to some sort of med-arb process, the fact that the issues will be arbitrated if no agreement is reached serves as a deadline and powerful incentive for the parties themselves to reach a decision so that the "arb" part of the process often remains unused.[29]

Factfinding.

Many controversies, particularly those that must be resolved by regulatory agencies, turn on enormously complex factual issues. They may be of the highest-tech -- "on the frontiers of scientific knowledge" as the courts have said[30] -- or require predictions of difficult economic developments, or the compilation of demographic issues, or the facts of an industrial dispute. In these cases, the policy or ultimate judgment on the matter cannot be decided until the facts are developed in a relatively authoritative way. Once they are, the parties may then negotiate a settlement, further proceedings may be held, more research may be needed, or the facts may sufficiently drive the outcome so that very little will remain to be done since, for practical purposes, the issue has been resolved.

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27. Fuller, Collective Bargaining and the Arbitrator, excerpted in Goldberg, Green, and Sander, supra note 9, at 247.

    The Merit Systems Protection Board has established this procedure. See, text at note 595.

28. "The consensus among mediators appears to confirm that the trust and candor required in mediation are unlikely to exist if the participants know the mediator may be formulating an opinion or recommendation that will be communicated to a judge or tribunal." Folberg and Taylor, Mediation at 277.

29. Med-arb as a dispute settling technique works, and works well. We have been involved in med-arb in such diverse fields as nursing, newspapers, longshore, public utilities, saloons, teamsters, and teachers, as well as in commercial disputes. Of the literally hundreds of issues involved in such cases, less than a dozen had to be finally arbitrated by the med-arbitrator. The parties, with his aid, successfully negotiated all the rest. Kagel, Comment, excerpted in Goldberg, Green, and Sander, supra note 9, at 264, 265-6.

30. Industrial Union Dept., AFL-CIO v. Hodgson, 499 F.2d 467, 474 (D.C. Cir. 1974).

A "factfinding" proceeding may be appropriate for these issues. Such a proceeding generally entails the appointment of a person or group of people with technical expertise in the subject matter to assay the situation and prepare a report establishing the "facts" of the question entrusted. The factfinder is not asked to resolve the entire issue, only to establish the underlying facts. The matter itself will be determined in another forum -- either by the parties or in some other proceeding. The procedures used for making the determination range from the highly informal to close to a trial.[31]

The factfinder in labor disputes may be someone with familiarity of the industry but certainly someone familiar with labor relations generally; it may also be someone who is widely respected by both sides, so the report will be given credence beyond the purely factual -- objectively determinable -- issues. Factfinding proceedings are, of course, commonly used by administrative agencies, although they frequently are in the form of advisory committees.[32]

Minitrial.

A "minitrial" generally follows the exchange of the parties' key documents and other factual materials.[33] In the minitrial itself, the lawyers for each party are given a relatively short period -- ranging from several hours to several days -- to make their best case. They will sometimes call witnesses but generally they argue what the evidence that has been developed shows and the legal conclusions that would flow from the issues presented. These presentations are made to representatives of the parties who have the authority to settle the controversy and a neutral third party.[34] When the arguments are concluded the representatives then meet to negotiate an agreement.

The process is designed so the executives can view their own case in perspective -- its strengths and weaknesses against those of the other party. The neutral may be called upon to render his or her opinion as to how a court or jury would decide if the matter were submitted for a court's decision; the parties may also ask the neutral for more limited advice. The neutral is, therefore, more an "agent of reality" than an arbitrator. As such, his or her report would potentially change the bargaining position of the parties, and hence they may

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31. For an example of a relatively formal proceeding, see Shapiro, Scientific Issues and the Function of Hearing Procedures: An Evaluation of FDA's Public Board of Inquiry, Report to the Administrative Conference of the United States (1985).

32. See, e.g. Chronic Hazards Advisory Panel, 15 U.S.C. § 2078; Air Quality Advisory Board and Advisory Committees, Sec. 117, Clean Air Act; Federal Insecticide, Fungicide and Rodenticide Act, 7 USC § 136d(a); the Food and Drug Administration has used panels of the National Academy of Sciences/National Research Council to review the efficacy of drugs, see Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Cal. L. Rev. 1256, 1354-1359 (1981).

33. For a discussion of mini-trials in general, see Green, Marks, and Olson, supra, note 11.

34. A neutral third party is not always used, however. The NASA minitrial did not, for example. See text at note 345.

have an incentive to settle before the report is issued. Or, the report may also convince a party that its case is not as strong as originally thought and hence that a settlement may be the advisable route. The function of the minitrial is to convert what could be a complex, protracted legal battle into a business decision to be made by the executives of the parties.

Mediation.

A mediator is a neutral third party who assists the parties in negotiating an agreement. Mediation is simply a negotiation involving a mediator. The mediator has no independent authority and does not render a decision. Any decision that is made is made by the parties themselves. As one mediator with diverse experience has said, "People pay attention to the mediator for the same reason they do to a civilian directing traffic around an accident -- it helps the process."

The mediator may be quite active in that endeavor, however. He or she will usually help the parties frame the issues, analyze what their actual needs are, and what the other side needs; an important part of that process is also deflating more ambitious assertions and desires when there is little chance of their being achieved. He or she will likely offer suggestions for possible ways of settling the issues and draft materials for the consideration of the negotiations. Some of the suggestions for those ideas may, of course, come from the parties themselves but they will be communicated in a way that will not lock a party into an idea that does not fly; in Washington-speak, the mediator provides the parties with the basis for a "plausible denial". The mediator may also need to communicate to the parties what is likely to happen if an agreement is not reached.[35] In the current vernacular, the mediator will help the parties define their "BATNA's".[36]

The mediator may meet privately with the parties and shuttle back and forth. This is frequently helpful in bounding the issues sufficiently that the parties can address them directly in a meeting. Without that prior definition, the parties may find the risk of direct discussion too great from a political standpoint within their constituencies. Moreover, the shuttling can save valuable time by reducing the need for more direct, face-to-face meetings which are always difficult to schedule among senior representatives. The mediator can deflect attention from the negotiators by being the spokesperson to those not engaged in the discussions. Importantly, the mediator also serves as the proponent of the process itself and can help keep discussions on track and moving.

Facilitating.

A facilitator also works "to help a group of individuals or parties with

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35. A relatively common example in public disputes is that one side may ultimately win the issue, but the other will be successful in delaying it. That state of affairs may not be satisfactory to either side so both may wish to resolve their differences through agreement.

    As a result, it is sometimes said that one of a mediator's functions is to carry threats back and forth among the parties.

36. BATNA stands for best alternative to a negotiated agreement. The term is from Fisher and Ury, Getting to Yes.

divergent views reach a goal or complete a task to the mutual satisfaction of the participants."[37] The terms "facilitator" and "mediator" are often used interchangeably. Although the two are close in meaning, they are distinct. A facilitator generally runs meetings and coordinates the negotiations during a meeting but does not become as involved in the substantive issues as does a mediator when working with the parties.[38] Thus, a mediator is also a facilitator but not the other way around.

Convening.

A "convenor" is a neutral who helps identify those who are interested in and affected by a particular issue and indeed what the issues in controversy are.[39] Thus, the convenor's first task is to conduct a "feasibility analysis" or "conflict assessment" as to whether direct negotiations among the parties would be a recommended way to resolve the issues. If they would, the convenor brings the parties together to negotiate or otherwise reach some sort of decision. The convenor's task ends when the parties are assembled, although of course the same person will frequently then serve as the mediator or facilitator.[40]

Conciliation.

A conciliator works to lower tensions, improve communications, and defuse a tense situation. "Conciliation is frequently used in volatile conflicts and in disputes where the parties are unable, unwilling, or unprepared to come to the table to negotiate their differences."[41]

Negotiation.

Negotiation is simply -- nothing more nor less -- communication between people in an effort to reach an agreement. Negotiations clearly happen all the time. As the introduction to the section on negotiation of a leading book says, "We negotiate with our friends about where to eat dinner, with our spouses about who will do the household chores, with our children about what time they will go

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37. Paths to Justice, supra note 24, at 37.

38. Since it is often confused, it bears repeating that a mediator is not an arbitrator and does not decide substantive issues. Rather, the mediator's substantive involvement is through exploring the issues with the parties in an effort to illuminate potential avenues for agreement.

39. See, ACUS Recommendation 82-4, Paragraphs 3-5; Harter, Negotiating Regulations, supra note 1, at 67-82.

40. The convenor will have developed an understanding of the issues and a trust among the parties, and hence it is usually far easier to use the same person as the convenor and mediator or facilitator. Harter, supra note 1 at 77-79.

41. Paths to Justice, supra note 24, at 36-37.

to bed."[42] We also negotiate settlements to controversies large and small. Indeed, we negotiate agreements of all sorts.

Sometimes the term "negotiation" carries a perverse connotation, one of "selling out" or compromising one's integrity. It certainly does not necessarily mean horse trading, log rolling, nor other unpleasant images that conjure up parties' exercising raw power or making inappropriate compromises. The negotiations may be totally principled and based on the substantive evidence. The scientific process of peer review is a form of negotiation in which the various "parties" analyze the situation, raise issues, and attempt to reach a decision on a matter.

Negotiation is such a pervasive means of "dispute resolution" that it is sometimes overlooked as such. Since the vast majority of cases[43] and issues are settled, it is the lifeblood of the administrative process. Many of the procedures developed by agencies to "resolve disputes" are actually ways to further and stimulate negotiated settlements.

III
ADMINISTRATIVE ARBITRATION

Arbitration is a powerful, widely used dispute resolution technique. For example, the American Arbitration Association has over 60,000 arbitrators on its rosters[44] and more than 45,000 matters are referred to it annually for resolution.[45] Its use has been endorsed and supported by the U.S. Arbitration Act[46] which directs courts to enforce arbitration agreements and their resulting awards. The Uniform Arbitration Act, which forms the basis for legislation in more than half the states, establishes a similar provision for state law. Court annexed arbitration is growing in popularity and currently at least 16 states employ some sort of arbitration program as an adjunct to the courts.[47]

Because arbitration results in a decision that is imposed on the parties, its use is particularly appropriate for resolving "distributional" disputes in which a better bargain for one party means less for the other.[48] Reaching an agreement through direct negotiation is particularly difficult in those situations. Arbitration frequently serves as a stimulus to settle, however, since parties are forced to prepare their cases for presentation to the arbitrator, and they will also have to discount the potential of an adverse decision. Hence, like preparing for trial, the

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42. Goldberg, Green, and Sander, supra note 9, at 19.

43. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).

44. Telephone interview with Irene Conway, American Arbitration Association.

45. Telephone interview with Earl Baderschneider, American Arbitration Association.

46. 9 U.S.C. § 1 et seq.

47. Dispute Resolution Forum (Aug. 1985) at 2.

48. Schelling, The Strategy of Conflict, (1960) at 21.

potential of an arbitral award will itself change the parties' BATNA. Similarly, the parties can agree to submit their dispute to arbitration but not be bound by the arbitrator's decision. In that case, the award will serve as the basis for further negotiation.

Voluntary versus Mandatory.

There are essentially three types of arbitration and, since the relationship between the parties and the process itself may vary one from another, it is important to keep the distinctions in mind.

The first two types are voluntary, in which the parties agree to submit the dispute to arbitration. In the first, the agreement is made **before** any dispute arises. The agreement will typically be made in a contract which provides that any dispute arising under it will be submitted to arbitration. The provisions of the arbitration may then be set out. The second form is where the parties agree to submit a dispute that has arisen to arbitration instead of using some other process, such as litigation, for resolving it.[49] Although the two are different for some purposes, for the most part they are similar in their effect on the nature of the arbitration process. One major difference, however, is that a party that entered into a pre-dispute agreement to arbitration may change its mind once the dispute arises and seek to use some other process once confronted with the actual prospect of an arbitration.[50] Under such a situation, the parties may not be fully cooperative with each other in designing a system, and the coercion of the courts in enforcing an agreement to arbitrate may be needed.

The third type is where the process is imposed on the parties: it is the only forum available for resolving the matter, at least in the first instance. Mandatory court annexed arbitration is such an example. In these cases, the parties are generally not as free, if indeed at all, to define the process that will be used.

Nature of Arbitration.

Arbitration has no set, definite process, and indeed that is one of its main attractions. It is an inherently flexible procedure. Common threads run through most arbitration programs in the private sector, however:

Private Neutral. A private individual serves as the arbitrator. That is, the arbitrator generally does not serve in any official, governmental role, although

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49. There is a perception among some who are familiar with corporate dispute resolution that the vast majority of arbitrations are pursuant to pre-dispute agreements. Parties appear to be much more reluctant to submit an existing dispute to arbitration, but rather tend to favor litigation instead. Testimony of Michael F. Hollering, General Counsel of American Arbitration, at ACUS Hearings on Agency Use of Alternative Dispute Resolution by Administrative Agencies, May 2, 1986. Conversation with Jonathan Marks, President, EnDispute, Inc.

50. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985); Hergel and Salpeter, Alternative Dispute Resolution May Have Limits, Legal Times (Dec. 23/30 1985) at 9.

there is nothing to prevent the arbitrator from being a government official absent any conflict of interest.

Parties Choose Arbitrator. The parties are usually able to select the arbitrator. This enables them to choose someone in whom they have confidence. In some instances it is important that they can select someone who has technical expertise in the subject matter of the dispute. That enables the parties to get right to the merits of the dispute, as opposed to having to educate a generalist judge with sufficient background so the matter can be put in perspective. It also enables the arbitrator to exercise a professional judgment based on experience and technical insight instead of solely on a "record" generated by the parties.

The parties themselves may identify an appropriate person or may select from a list tendered to them by an organization such as the American Arbitration Association. That choice may result from the parties' ranking those on the list and the person with the highest rank being selected, or each party may be permitted to strike a name, so that anyone not stricken could serve. If the parties are not permitted to choose, as is customary in the court annexed arbitration programs, a panel of three arbitrators often serves and a decision is made by majority vote. The arbitration in such programs is customarily nonbinding.

Parties Can Select the Norm. The parties can decide what standard the arbitrator will apply. It may be the law of a particular jurisdiction, the rules of some organization, or the ethos of the milieu in which the dispute arose. The norm may also be, and frequently is, the arbitrator's "own brand of justice."[51] If the arbitration program is imposed on the parties, the arbitrator will customarily apply the prevailing law or other established norm of the organization imposing the requirement.

Flexible Procedure. Since arbitration is a private dispute resolution process, the parties themselves can design its procedures. They can range from a virtually total emulation of a court process to the most informal and ad hoc. In some instances, full discovery is permitted and enforced on pain of default. In other cases major documents or other evidence on which a party will rely, are exchanged prior to hearing and in others nothing happens before the hearing. Organizations such as the AAA and the National Academy of Conciliators publish rules that are designed to govern the arbitration proceedings in particular substantive areas;[52] they can serve as the "default" rules that will apply unless modified by agreement of the parties. Because it is not a public process, the proceedings and the result can be kept private and confidential.

The common denominator in the process is that, unless they settle,[53] the

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51. Jones, His Own Brand of Industrial Justice: The Stalking Horse of Judicial Review of Labor Arbitration, 30 UCLA L. Rev. 881 (1983).

52. See, PBGC, FIFRA in App. II.

53. It appears from preliminary research that many fewer cases that are submitted to arbitration settle as compared to those that go to trial. Whereas many do settle on the eve of the hearing, perhaps only half as many do so as are settled prior to a trial. This is perhaps surprising, and certainly something that needs to be borne in mind when considering institutionalizing arbitration on a broad scale.

parties submit evidence and argument to the arbitrator who makes the decision. As a result of the flexible procedure and the fact that the parties can select the arbitrator, the process can be conducted quite expeditiously should they wish, in terms of the time from when the dispute arises to the hearing, the length of the hearing itself, and the time from the close of the hearing to the decision. The parties can determine the trade off between the formality they desire and the need for expedition.

While certainly one of the hallmarks and putative benefits of arbitration is its reduced transactions cost in terms of time and resources, that is not always the case. In some instances the arbitration will look for all the world precisely like a trial with a full complement of discovery, sworn witnesses, briefs, and so on.[54] Even then, the process may still be more expeditious than a court since presumably the hearing can be scheduled more rapidly than a judicial calendar would usually permit. But, before embracing arbitration as a means for resolving a dispute the nature of the arbitration process that is contemplated must also be considered to ensure that the desired benefits will actually materialize.

Award. Typically, the decision in an arbitration is only an award: a final result, without elaboration on the facts found or the resolution of the individual issues presented.[55] Sometimes, of course, the decision is supported by a brief recitation of the facts and conclusions.

Finality. One of the primary benefits attributed to traditional arbitration is its finality. Once an award is made it may be subjected to only limited additional review, in court or otherwise.[56] As one leading commentator has said:

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54. Letter of April 25, 1986 from Chief Administrative Law Judge Naham Litt to Charles Pou; testimony of Stanley Johnson at ACUS hearings, supra note 49.

55. Goldberg, A Lawyer's Guide to Commercial Arbitration (1979) at 62, 66.

56. The provision of the U.S. Arbitration Act pertaining to judicial review is extremely limited:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(continued...)

> The essence of the law of arbitration is that the scope of judicial review of arbitration awards is very limited. When the arbitrators are properly selected, conduct an orderly hearing at which all parties have a fair chance to present their proofs and render an intelligible award within the scope of their authority, the courts will confirm and enforce the award.[57]

Or, as another explained:

> The courts will not review the merits of the award and confirmation will not be denied, nor will vacatur be granted, upon a showing of error of law or fact on the part of the arbitrators. The court's inquiry is confined to determining whether the award falls within the authority of the arbitrators, whether in form it reflects the honest decision of the arbitrators and whether the hearing generally comported with accepted standards of due process.[58]

The relationship between courts and arbitration is itself a bit complex and evolving,[59] but its essence is that it is very limited.

Quality Control. The quality control in arbitration -- the reason people use it and have confidence in it -- is the ability to choose the arbitrator and the minimal rules under which the process operates. They obtain in return, an expeditious decision[60] that is within the bounds of acceptability.

But, it is likely that the arbitration proceeding will be more abbreviated than a trial and that some of the judicial procedures designed to ensure ac-

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56.(...continued)

> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. §10.

57. Goldberg, A Lawyers Guide to Arbitration (2d Ed. ALI 1983) p. 61.

58. Kreindler, Arbitration Practice Under Federal Law, 18 Forum 348, 357 (1983). And see, 9 U.S.C. § 10, 11.

59. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc. 105 S. Ct. 3346 (1985); AT&T Technologies, Inc. v. Communication Workers of America, 106 S. Ct. 1415 (1986); Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

60. The often cited major advantages of arbitration is its expedition and its finality -- it is a means of quickly resolving the dispute within the bounds of acceptability. Statement of Kay McMurray, Director, Federal Mediation and Conciliation Service, and Michael F. Hollering, General Counsel of American Arbitration Association at ACUS Hearings, supra note 49. Thus, if the procedures of an arbitration are unduly complex or if subjected to searching review, its primary value is lost and, absent other needs the matter would likely be better resolved in a full trial.

curacy[61] will not be used. It is, therefore, perhaps inappropriate to expect that arbitration and trials would reach the same result in every case. In some instances arbitration may be viewed as the more accurate because of its flexible nature and its ability to draw on technical expertise. In other instances, the quality control procedures of the courts would be expected to reach a more "accurate" resolution. The question then becomes how much of a spread between the two is acceptable and at what cost.[62]

Benefits/Uses. To summarize and extend, arbitration is a particularly attractive means of dispute resolution when one or more of the following factors are present:[63]

- Time or transactions costs are more important than the "accuracy" of any one decision.[64]
- No decision is of critical importance to any party.[65]
- Technical expertise is important for the decision maker.
- The parties want to choose the basis of the decision, especially if it is to be different from the law that would be applied in a judicial proceeding.
- The parties desire privacy.

Drawbacks. Arbitration is generally not particularly suited where:

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61. E.g. enforced discovery; findings of fact and conclusions of law; subpoena of witnesses; appeals.

62. Many people clearly have a knee jerk reaction to arbitration as simply a sophisticated way to "split the difference" between the parties. That is, these people seem to feel impulsively that the arbitrator will not make an honest effort to apply the designated norms to the facts. Similar allegations can, and frequently are, much of virtually any decisional process. It seems a particularly unfortunate bias with respect to arbitration, however. In the abstract, if the parties are careful in selecting the arbitrator, the problem should not arise. More empirically, however, parties familiar with arbitration generally find it a satisfying way of resolving disputes with integrity.

63. Paths to Justice, supra note 24, at 34; Goldberg, Green, and Sanders, supra note 9, at 8-9.

64. For example, in a commercial or construction dispute, it may be more important to reach some decision than ensuring that it is "accurate" in the sense of emulating the decision a court would reach. That is necessary so the parties can get on with business based on the decision.

65. Arbitration is frequently used where many claims need to be resolved expeditiously, no one of which is of fundamental importance to the parties. The parties may in fact integrate a large number of individual claims. For example, a labor union and a company will be parties to an arbitration agreement to resolve a variety of separate disputes. Whatever the variation of the award, "on the average" they would not only be acceptable but preferable to a more intensive form of resolution.

- Uniform results are desired -- reaching similar results in similar cases.
- The development of a "common law" or significant policy that will govern future decisions is important.
- Maintaining established norms or policies is important;[66] in these cases it is decided that the public policy expressed in established law outweighs the ability of the parties to alter it by selecting the norms or even the forum where the law will be applied.[67]
- Public scrutiny of the process and the result is desired.
- Strict "quality control" is important and cannot be supplied by providing for the technical expertise of the arbiter.
- The matter affects some who are not parties so that they will lack the ability to protect their interests in the outcome.

Administrative Arbitration

The putative benefits of arbitration are attractive indeed. Interestingly, some of the major reasons for the establishment of administrative programs and administrative, as opposed to judicial, adjudication was to tap many of these same virtues. For example, one early case, which exhibited a residual concern and discomfort with agencies, characterized their benefits:

> [T]he obvious purpose of the legislation [is] to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure ... an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the [issues presented].[68]

The benefits of administrative decisions have been described more recently

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66. Wilco v. Swann, 346 U.S. 427 (1953); Alexander v. Gardener-Denver Co., 415 U.S. 36 (1974) (Title VII claims should be heard de novo in Federal Court even after they have been heard in a grievance arbitration). Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279 (1984); Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668 (1986); Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Schoenbrod, Limits and Dangers of Environmental Mediation: A Review Essay, 58 N.Y.U.L.Rev. 1453 (1983).

67. Paths to Justice, supra note 24, at 34.

68. Crowell v. Benson, 285 U.S. 22 (1932).

as avoiding judicial delays, application of expertise, and their efficiency.[69] Thus, the reasons giving rise to the current interest in arbitration and other forms of dispute resolution are a resounding echo of the very basis for the establishment of administrative agencies. But now agencies themselves face crushing caseloads[70] and are themselves accused of exhibiting problems similar to those of the courts for which they were to be the cure.[71] It is surely not surprising, therefore, that agencies,[72] Congress,[73] and private organizations[74] are anxious to find new ways to address the difficulties. Since the non-judicial forms of dispute resolution frequently fulfill the promise, their use in or adaptation to the administrative process is to be encouraged.

Dispute resolution techniques can provide an entirely new range of tools for making administrative decisions or even alleviating the need for governmental decisions.[75] Thus, for example, they could take the burden off an overworked adjudicatory process and provide better "justice" at the same time. They can also provide a means of participation far better than that supplied by the APA itself, even under judicial gloss adding requirements.

Some problems that are addressed through command and control regulation can also be better addressed by establishing a dispute resolution mechanism to resolve individual disagreements in a far more personal, factual based means than

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69. Administrative agencies are both efficient and speedy; and ... [a]gencies provide modern government with the informality of action and decision making usually found in large private business enterprises. Mezines, Stein, and Gruff, Administrative Law (1983) at 1-13.

70. For example, 20,000 cases were referred to the 27 Federal agencies that employed at least one full-time administrative law judge in 1978. An additional 196,428 cases were referred to the Social Security Administration during the same year. Administrative Conference of the United States Statistical Report for 1976-1978 of Federal Administrative Law Judge Hearings, (1980) at 33.

71. For example, the average time from complaint to disposition of a black lung case was nearly 1-1/2 years in the period 1976-78; it was more than 2 years for Service Contracts Act cases; more than 4 years for a Maritime Administration case; 2 years for Investment Company Act cases. ACUS, Federal Administrative Law Judge Hearings (1980). To be sure, arbitration would not be appropriate for some of these cases, but the point is that delay, complexity, and mounds of paper have surrounded administrative trials.

72. CFTC, MSPB

73. Superfund, PBGC, FIFRA, MSPB.

74. The arbitration provisions of FIFRA were enacted at the behest of private organizations apparently seeking an expeditious resolution of a disagreement over payment for the use of data used to register a pesticide. See text accompanying note 409.

75. Just as one need not find fault with a hammer to advocate including a screwdriver and pliers in a tool kit, one need not dwell on the failures of trials to advocate the adoption of ADR techniques. Rather, the techniques are alternative means of making decisions that are better suited in some circumstances.

could result from a generally applicable requirement that may as a practical matter leave the individual in the same situation as before a rule was promulgated.[76] The agency may be in a favorable position to supervise the minimal requirements of the dispute resolution mechanism instead of issuing and then policing a regulation. That process may work to the benefit of all concerned.

Varieties of Administrative Arbitration

The discussion that follows is based predominately on the case studies of administrative arbitration that are contained in Appendix II. The arbitration programs that were studied are those of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA);[77] the Multiemployer Pension Plan Amendments Act of 1980[78] that is administered by the Pension Benefit Guaranty Corporation (PBGC); the reparations procedures of the Commodity Futures Trading Commission[79] (CFTC); the Comprehensive Environmental Response, Compensation and Liability Act[80] (Superfund); and the two programs of the Merit Systems Protection Board.[81] While certain patterns through several of the programs, no two are just alike. Together, they span virtually the full range of possible characteristics of arbitration programs. Their attributes are summarized in the accompanying table, and the details are available in Appendix II.

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76. For an elaboration on this theme of the relationship between dispute resolution mechanisms (DRM) and regulation, see Harter, Dispute Resolution and Administrative Law: The History, Needs and Future of a Complex Relationship, 29 Vill. L. Rev. 1393, 1395-1400 (1984).

77. 7 U.S.C. § 136 et seq.

78. 29 U.S.C. § 1381 et seq.

79. 7 U.S.C. § 18(b).

80. 42 U.S.C. § 9601 et seq.

81. 5 U.S.C. §§ 1101-8911.

TABULAR SUMMARY OF VARIETIES OF ADMINISTRATIVE ARBITRATION

CHARACTERISTIC	FIFRA	PBGC	CFTC	SUPERF	MSPB/ AAP	MSPB/ VEAP
Created by rule or statute	Stat	Stat	Rule	Stat	Rule/ stat	Rule/ stat
Use: voluntary or mandatory	Man	Man	Vol	Vol for pri.; man for gov't	Vol.	Vol.
Arbitrator: agency or private	Priv	Priv	Agency	Priv fr. agency list	Agency	Agency
Arbitrator: app'ted or parties choose	Choose	Choose	App't	Choose	App't	App't
Norms applied: agency rule; stat; none specified	None	Existing law	Same as formal	Rule	Same as formal	Same as formal
Proceeding: formal; informal	For	For	Inf	For	Inf	Inf
Record: full w/ tr. limited; or full if requested (vol).	Vol	Vol	Docs	Full	Vol	Vol
Decision: findings of fact; conclusions of law; award only; full opinion	FF/CL	Fact/ legal basis	Award; brief dis., no find.	Full	Summary of FF/CL	Summary of FF/CL
Agency Review: full limited; none	None	None	Limited	None	Limited	Full
Court Review: limited or arbitrary & capricious standard	Limited, but Tucker Act act.	Unclear: arb & cap or limited	None: "waived"	Arb & cap	Arb & cap	Arb & cap

IV
THE LEGAL ISSUES OF ADMINISTRATIVE ARBITRATION

Some limitations on the administrative use of arbitration need to be borne in mind when considering its use. Some of the problems are conceptual,[82] some are statutory,[83] and some are constitutional.[84] Some are practical:[85] arbitration may be an inappropriate tool to address the issues presented. Its benefits and drawbacks need to be considered when developing a program, and it should not be too quickly embraced without analyzing its utility in dealing with the specific matters to be resolved. With only a few exceptions, most of the obstacles can be overcome. Properly used, arbitration offers the administrative process the same promise it has provided for resolving private sector questions.

Statutory Limitations when the Government is a Party.

The Comptroller General has on several occasions, interpreted an obscure statutory provision with seemingly no relevance whatever[86] to prohibit agency use of arbitration in the absence of specific authorization. This section, enacted in 1909,[87] bars the use of public money for "the pay or expenses of a commission, council, board, or similar group, or a member of that group" unless that commission or board is "authorized by law." The Comptroller General has consistently found this prohibition applicable to arbitration panels established to determine the rights of the United States. The Comptroller General has also viewed Congress's express authorization of agency use of arbitration to indicate that agencies lack authority to submit disputes to arbitration in the absence of such authorization.

The Attorney General reviewed the legislative history of this prohibition on the use of funds to pay unauthorized commissions soon after its enactment. The Attorney General described the breadth of this prohibition when considering the Secretary of War's appointment of a committee of architects to assist in overseeing the development of the landscape surrounding Niagara Falls. The statute ascribing this duty to the Secretary did not expressly authorize such a committee. Nevertheless, the Attorney General approved appointment of this committee, arguing that "public officers have not only the power expressly conferred upon them by law, but also possess, by necessary implication, such powers as are requisite to enable them to discharge the duties devolved upon them."[88] The Attorney General determined that the prohibition on paying for unauthorized commissions was not intended to affect this implied authority. The legislative history shows that the bill as originally introduced would have prohibited all payments to all commissions or boards not "in specific terms authorized by

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82. See text at note 140.

83. See text at note 86 et seq.

84. See text at note 106 et seq.

85. See text at note 66.

86. 31 U.S.C. §1346.

87. Mar. 4, 1909, Ch. 299 § 9, 35 Stat. §1027.

88. 27 Op. Atty. Gen 432, 436 (June 26, 1909).

Congress." This language was later modified. The statute as enacted prohibits payment to boards not authorized by law. The Attorney General interpreted this legislative history to mean that commissions need not be authorized by specific statute but only have to be authorized generally. The opinion states "it would be sufficient if [commissions] authorized in a general way by law."[89] Thus, the Attorney General found that the Secretary of War was authorized by implication to appoint a committee of landscape architects to assist him in performing his duties of administration over Niagara Falls.

The Comptroller General adopted the Attorney General's analysis when he approved the payments made to the committee of landscape architects involved in the administration of Niagara Falls.[90] The Comptroller General reaffirmed this conclusion when it authorized the payments to a board of experts appointed by the Secretary of Interior to assist in administration of Indian schools. The Comptroller General stated, "If a board of experts is necessary to accomplish the purposes indicated, the employment of the members thereof would be authorized under the provisions of this appropriation. Such a board would be authorized by law within the meaning of the act of March 4, 1909."[91]

Despite these initial opinions, the Comptroller General soon began to read this prohibition more restrictively. In 1914, he refused to authorize the use of public funds to pay for the services of a commission which devoted itself to a matter it was not authorized by law to consider. The Mexican Border Commission had been authorized to negotiate boundary disputes. The comptroller determined that this Commission could not be paid for its work in negotiating the United States' and Mexico's rights to the use of water from the Rio Grande.[92] The Comptroller General also read the prohibition to bar payments to boards which were not clearly authorized by law. In 1925, the Comptroller General barred payment for a board of consulting engineers employed to assist in construction of the Coolidge Dam. The statute authorized payment for individual consultants but did not explicitly authorize the appointment of a board of consultants.[93] In another case, the Comptroller General determined that the Navy could not pay its share of the cost for arbitration of a contract dispute with a manufacturer because such a board was not authorized by law.[94]

In 1928, the Comptroller General applied the prohibition to an agency's submission to an arbitration panel. In reviewing a proposed lease between the government and a private company, the Comptroller General determined that the government could not accept a clause agreeing to arbitrate all disputes concerning the condition of the leased property at the end of the lease term. The Comptroller General rejected the arbitration clause for two reasons. First, he argued

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89. 27 Op. Atty. Gen at 437.

90. 16 Comp. Dec. 282 (Nov. 2, 1909).

91. 16 Comp. Dec. 422, 424 (Jan. 10, 1910).

92. 20 Comp Dec. 643, March 18, 1914.

93. 5 Comp. Gen. 231 (August 21, 1925).

94. 5 Comp. Gen. 417 (Dec.9, 1925).

that the act of March 4, 1909[95] prohibited the payment of boards not authorized by law, stating simply that the arbitration board called for under the lease was unauthorized. Second, the Comptroller General argued that the government's provision for contract dispute resolution precluded resort to an alternate forum. The Comptroller General argued that the existence of established procedures for resolving disputes with the government precluded the use of arbitration. The Comptroller General states, "provision having been made by law for the adjustment of claims that may arise under government contracts, there is no power or authority in any administrative or contracting officer of the Government, by means of a provision in a contract, to establish or provide for a different procedure for the adjustment of such claims."[96] These two views were subsequently relied upon to invalidate arbitration clauses in two additional contracts.[97]

The Comptroller General subsequently returned to the broad view of the term authorized by law reflected in earlier opinions. In 1942[98] he quoted extensively from the Attorney General's 1909 opinion.[99] Criticizing subsequent opinions, the opinion held "Subsequent decisions applying a more strict rule on the basis that the creation of commissions, boards, and similar bodies must be specifically authorized by statute may not have taken cognizance of the earlier history of the matter."[100] Concluding that the question of authorization did not bar government agreement to the inclusion of an arbitration clause in a lease of government property, the Comptroller General turned to the more general question of whether the existence of a prescribed method for resolving disputes against the government precluded agencies from adopting alternative means for resolving disputes.

The Comptroller General determined that there is no bar to the use of a board or panel to determine the factual question of reasonable value. Under the terms of the lease at issue, the government could only gain from the arbitration award as the lease provided that the value of the property could not be fixed at any rate less favorable than the original terms of the lease. The Comptroller General approved the inclusion of the arbitration clause under these conditions since the government could not lose under the process and the arbitrators were not deciding any questions concerning the legal liability of the government. These arbitrators were merely making a factual determination of the value of certain rental space.

The Comptroller General has refused to extend its acceptance of the use of arbitration beyond the function of fact finding or appraising value. In 1953, he decided the Navy lacked authority to submit to arbitration as prescribed in a contract it had signed with a Swedish company. After reviewing several nineteenth century court of claims decisions, the Comptroller General decided, "The

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95. 35 Stat. 1027.

96. 7 Comp. Gen 541, 542 (March 3, 1928).

97. 8 Comp. Gen. 96 (Aug. 28, 1928) and 19 Comp. Gen 700 (Feb. 3, 1940).

98. 22 Comp. Gen 140 (July 10, 1942).

99. Supra, note 90.

100. 22 Comp. Gen. 140, 143.

conclusion seems warranted that in the absence of statutory authorization, either express or implied, officers of the Government have no authority to submit or to agree to submit to arbitration, claims which they themselves would have no authority to settle and pay."[101] He also concluded that Congress's express authorization of arbitration in some statutes, indicates that agencies generally lack the authority to submit to arbitration. The Comptroller General states, "The action of the Congress,... in authorizing the heads of executive departments to arbitrate certain specific and well defined matters might well, indicate ... that the executive branch has no general or inherent power to submit claims against the United States to Arbitration."[102] The Comptroller General's opinion of agency use of arbitration remains unchanged. The opinion is not based upon any statute, but is an inference drawn by the Comptroller General from Congress's explicit authorization of arbitration in several statutes.

The Comptroller General's most recent opinion concerning agency use of arbitration dates from 1978.[103] The Federal Trade Commission requested an opinion concerning the agency's decision to resolve a factual dispute with a contractor through binding arbitration. The Comptroller General held that such substitution for prescribed dispute resolution procedures would be improper, although an arbitrator who is in fact an appraiser is a desirable adjunct to the normal dispute resolution procedures. The Comptroller General also reiterated his position that he was approving only arbitration's use to determine the fact of reasonable value in situations in which the arbitrator did not impose any obligation on the government or leave questions of legal liability for the arbitrator's determination. The Comptroller General approved of the FTC's use of arbitration "to render a determination as to the reasonable value of work performed by the defaulted contractor ... so long as the prescribed disputes procedure and provisions for judicial review incorporated therein are not displaced."[104]

Thus, as a result of this line of holdings, the government cannot be **bound** by an agency's arbitration program unless it is specifically authorized by statute or is limited to factfinding. Absent these, an agency's arbitration must be nonbinding and hence the functional equivalent of a minitrial.

Given the erratic interpretation of the statute read to ban the appointment of arbitrators unless specifically authorized and the relatively this justification of a ban based on Congress's inclusion of specific provisions for arbitration, it seems appropriate for Congress to clarify this matter. In particular, an executive branch official should be allowed to use arbitration for making decisions within his or her authority if they believe that would be a beneficial means of doing so. Such authority would not, of course, pre-empt the existing authority of the Comptroller General and the General Accounting Office for "determin[ing] whether payments of public funds are warranted by applicable law and available appropria-

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101. 32 Comp. Gen 333, 336 (Jan. 27, 1953).

102. Id.

103. B-191484, May 11, 1978.

104. Id. at 3.

tions."[105] Thus, an arbitral award would still be subject to a determination by GAO that its terms can be lawfully met.

Article III

The courts were clearly jealous of their prerogatives during the development of administrative law, and announced the need for judicial, not administrative, resolution of important matters, especially facts.[106] The need was raised to the Constitutional level. With the growth of the administrative state, the acceptance of decisions made by agencies and a limited form of judicial review -- to ensure that the determinations are based on substantial evidence -- also grew. The early doctrines gradually died.[107] Indeed, agency decisions became sufficiently accepted that few thought much about the old tension or that only Article III courts could hear and resolve some types of issues. Interestingly, the limitation on the use of entities other than courts to resolve matters has been rekindled recently. While it does not affect most administrative arbitration, the issue has arisen and it does define the outer boundaries of what can be done in it. The new requirements must clearly be taken into account when considering whether to develop a new administrative program.

Northern Pipeline Co. v. Marathon Pipe Line Co[108] held that the Bankruptcy Act of 1978 wrongfully delegated federal judicial power to individuals who are not Federal judges. Judges appointed under the Bankruptcy Act are not guaranteed the safeguards of life tenure and irreducibility of salary deemed essential to judges appointed under Article III. The arbitration program of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) was challenged on the similar grounds that the use of an arbitrator denied the parties their right to have the issue resolved by an Article III court.[109] The Court upheld the constitutionality of private arbitrators determining the amount of compensation a second or "me-too" pesticide registrant must pay to a prior registrant when EPA uses data submitted by the first registrant in support of the second pesticide registration on the grounds that it is a "public dispute."

The Court acknowledged Congress's discretion over the adjudication of public rights over one hundred years ago:

> There are matters, involving public rights, which may be preserved in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as

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105. Steadman, Schwartz, and Jacoby, Litigation with the Federal Government (2nd Ed. 1983) at 205.

106. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); Crowell v. Benson, 285 U.S. 22 (1932).

107. Davis, Administrative Law and Government at 69; Estep v. United States, 327 U.S. 114, 142 (1946).

108. 458 U.S. 50 (1982).

109. Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

it may deem proper.[110]

FIFRA illustrates that the public rights doctrine extends to disputes between private parties. FIFRA empowers arbitrators, who are not Article III judges, to adjudicate disputes between pesticide registrants over amounts of compensation due as a result of EPA's use of previously submitted data. The Court notes that this right to compensation is statutorily based and that pesticide registrants lose any claim to compensation based upon state property law when they submit the data to EPA with knowledge of FIFRA's data use provision.[111]

Although this right to compensation concerns private parties, the Court determined that this right carries many attributes of a public right since Congress created the right as part of a comprehensive regulatory scheme governing pesticide registration intended to safeguard the public health. The Court justified Congress's delegation to arbitrators by noting it could have granted EPA the power to decide the value or compensation due but instead chose to vest arbitrators with this authority. The use of this alternative does not raise this delegation of Congress's Article I legislative authority to the level of encroaching upon judicial power so as to violate Article III.

FIFRA does provide a role for the judiciary in its regulatory framework, however. It authorizes judicial review of an arbitrator's decision in cases of fraud, misconduct and misrepresentation. In Thomas, the Court found that this scope of judicial review satisfies the need to ensure an "appropriate exercise of the judicial function" because it provides judicial protection against "arbitrators who abuse or exceed their powers or wilfully misconstrue their mandate under governing law."[112]

The Court summarized the scope of Article III limitation upon the delegation of decisionmaking power:

> Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly "private" right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. To hold otherwise would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures such as negotiation and arbitration with respect to rights created by a regulatory scheme.[113]

Thus, the public rights doctrine is a broad, flexible doctrine which authorizes the delegation of quasi-judicial, decisionmaking authority to non- Article III judges when Congress adopts innovative approaches to the resolution of disputes as part of a regulatory scheme.

The latest explication of the nature of issues that agencies, and hence

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110. Murray's Lessee v. Hoboken Land, 18 How. 272, 284 (1856).

111. 105 S. Ct. at 3335, citing Ruckelshaus v. Monsanto, 104 S. Ct. 2862 (1984).

112. 105 S. Ct. at 3339.

113. 105 S. Ct. at 3340.

administrative arbitration, can hear came as recently as the end of last term. The D.C. Circuit held the Commodity Futures Trading Commission could not resolve a counterclaim involving state law in a proceeding arising out of the same transaction that was clearly within its jurisdiction because doing so would transcend Article III limitations.[114] The Supreme Court reversed, pointing out that Article III has two purposes: one is to protect an independent judiciary from encroachment by other fora, and the second is to afford parties the right to have their controversies heard by Article III judges.

As to the first, the Court found the important factors to be considered are

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[115]

The Court sustained the agency's resolution of the state law claim on the ground that the courts would still be called upon to enforce the order; the legal rulings would be subject to de novo review; the range of issues presented is narrow; and, the scheme did not oust the courts of jurisdiction since the parties could still proceed there instead of before the agency. The Court found, therefore, that the program was not a threat to separation of powers.

With respect to whether the parties could "waive" their rights to an Article III court, the Court held in reviewing the CFTC program that

> as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.[116]

Thus, Article III does not appear to raise any limitations on the use of arbitration to resolve public disputes. Nor is it a limit for resolving private disputes so long as consent is freely given by the parties and the courts maintain at least some role in reviewing and enforcing the order.

Article III could conceivably pose some restriction on the extent to which Congress could require mandatory arbitration as a way of resolving private disputes since the very limited judicial review could be regarded as an impermissible intrusion into the prerogatives of the judiciary. That courts are called upon to enforce the otherwise private award may not be sufficient basis of judicial involvement to protect this aspect of the separation of powers requirement. The Court's reasoning in Thomas, however, that the limited review of arbitral awards

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114. Schor v. Commodity Futures Trading Commission, 740 F.2d 1262 (D.C. Cir. 1984), vacated, 105 S. Ct. 3325, reinstated, 770 F.2d 211 (D.C. Cir. 1985), rev'd, 106 S. Ct. 3245 (1986).

115. Id. at 3258.

116. Id. at 3256.

is sufficient to provide the requisite level of judicial protection necessary to meet the standards of Article III would seem to apply with equal vigor to private actions. Thus, even the mandatory arbitration of private disputes appears to meet the standard develop in Schor.

Congress has authorized the use of arbitration as a means for adjudicating disputes involving public rights in a number of statutes. For example, the Randolph-Shepard Vending Stand Act[117] grants a preference to blind vending stand operators seeking sites on Federal property. Disputes concerning this program may be submitted to an arbitration panel convened by the Secretary of Education upon request of the individual, the state agency administering the program or by the Secretary. The arbitration panel's award is reviewable in the Federal District Court as if it were final agency action under the Administrative Procedure Act.

Other instances of Congressional authorization of arbitration include CERCLA or Superfund,[118] the Flood Insurance program,[119] Department of Defense design bid competitions,[120] patent interference cases[121] and the largest federal sector use of arbitration, the Civil Service Reform Act's requirement of arbitration of employee grievances.[122]

Administrative arbitration programs have been assailed on several additional constitutional grounds. That lower courts have sustained some of the challenges indicates their potential seriousness. Properly designed and used, however, administrative arbitration fits comfortably within the constitutional framework--at least as much as agencies themselves.

Article II: Requirement for Executive Decisions

Some issues may be so intertwined with government policy that they cannot be decided by a private arbitrator. Buckley v. Valeo[123] held that the "performance of a significant governmental duty exercised pursuant to a public law"[124] can only be discharged by an Officer of the United States appointed in accordance with the Appointments Clause of the Constitution.[125] The argument has been raised as to whether a private arbitrator could be authorized to make a

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117. 20 U.S.C. Sec. 107. See discussion infra at note 132.

118. 42 U.S.C. Sec. 9612(b)(4)(G).

119. 42 U.S.C. 4083.

120. 10 U.S.C. 277(e).

121. 35 U.S.C. §135(d). An advance notice of proposed rulemaking to establish procedures for the arbitrations was published at 50 Fed. Reg. 2294 (1985).

122. See 5 U.S.C. 4303 and 7512.

123. 424 U.S. 1 (1976).

124. Id. at 140-141.

125. Article II, Section 2, Clause 2.

binding decision in a matter in which an agency must make a final, binding decision, such as in rulemaking or revoking a permit.[126] Even in the case of revoking a permit, however, it would not seem inappropriate if the parties -- the agency, the permittee, and the interested interveners -- agreed to resolve a contested issue by submitting it to arbitration.[127] Doing so would seem analogous to stipulating a factual premise of the action. The ability of the arbitral decision to withstand challenge from a non-participating third party would likewise appear to be similar to the ability of a disgruntled third party to challenge a stipulation. In both instances, the decision is made by the government official, albeit in the one he has agreed to be bound by the arbitrator's decision. The officer or government employee presumably will have made that decision on the ground that it is in the government's overall interest to arbitrate the claim as opposed to consume resources to chase the issue through a more elaborate process.

The real question would seem to concern the extent to which the non-executive branch official is called upon to make policy determinations. As the quote from Buckley indicates, it is the **significant** decisions that must be made by government employees, not all decisions. Thus, the restriction would appear to bar the arbitrator's deciding major policy questions, not the factual basis of such a decision or a mixed question of law and fact in which the norms are already relatively well developed. Not only are these areas constitutionally doubtful, they are the very areas where the utility of arbitration is limited in the first instance. The Article II limits, therefore, do not appear to be a practical concern.

Delegation to Private Parties

A closely related issue is whether there may be limitations on the ability of the government to delegate powers to a private individual or institution. As the discussion above makes clear, the use of private arbitrators to make decisions closely affiliated with the government has been upheld on several occasions.[128] Although the law on this issue is far from clear,[129] there are undoubtedly **some** limits. Thus, the more central the decision is to an issue that only the

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126. Memorandum of April 24, 1986 for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, from Samuel A. Alito, Jr., Dep. Ass't Attorney Gen., Office of Legal Counsel, Administrative Conference Recommendations on Federal Agencies' Use of Alternative Dispute Resolution Techniques.

127. Indeed, EPA is considering doing just that with respect to the permitting of hazardous waste facilities. Robinson, U.S. Environmental Protection Agency Institutes Alternative Dispute Resolution in its Enforcement Program, 18 Dis. Res. News 6 (ABA Cmte. on Dis. Res. 1986). Memorandum of December 2, 1986 to Ass't Administrators, Regional Administrators, Enforcement Policy Work Group, Draft Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Cases. The draft recognizes the statutory limitations, however, and limits the use of binding arbitration to factual situations. Id. at 4.

128. Thomas v. Union Carbide Agr. Products Co., 105 U.S. 3325 (1985); Schweiker v. McClure, 456 U.S. 188 (1982).

129. OLC Memorandum, supra note 126, citing Davis, Administrative Law Treatise 3.12 (2d Ed. 1978).

government can make, the more likely it is that an agency must be in a position to review the matter before it can be final.

As in the discussion of the need for executive branch decisions, the extent to which this is a problem would seem to be directly correlated with the extent to which the arbitrator is called upon to make policy decisions, and that is precisely the area in which the utility of arbitration is questionable. For virtually all areas in which arbitration may be attractive, therefore, it does not raise constitutional difficulties.

Due Process

The manner in which reimbursements under Medicare are determined has been criticized as denying participants due process. Part A of the program provides insurance coverage for the cost of institutional health services, while Part B is a voluntary supplementary insurance program covering a percentage of costs for other medical procedures. Both parts are administered by private insurance carriers. Under the programs, claims for payment or reimbursement are submitted to the carrier. If the request is denied, the beneficiary may request a reconsideration. HHS' Health Care Financing Administration decides the matter for Part A and a different employee of the carrier makes the decision as to Part B. Under Part A, only controversies involving more than $100 may be appealed to the Secretary and judicial review is available only if the amount in dispute is $1,000 or more. Under Part B, the decision is final and non-reviewable. Thus, under Part B, a private "arbitrator" is assigned to decide the matter, and the decision is not subject to judicial review.

The use of a private individual to make decisions that are, to some degree or another, administrative decisions is certainly anomalous. The question would logically arise whether the types of decisions that are referred to the private arbitrators are such that they should be decided by government officials. The use of the private carriers to make the decisions in Medicare Part B was challenged as a denial of due process. The District Court agreed "insofar as the final, unappealable decision regarding claims disputes is made by carrier appointees ...."[130] In applying the test of Mathews v. Eldridge,[131] the court concluded that administrative law judges must hear the appeals. The Supreme Court reversed.[132] It held that the deciding employees did not have a conflict of interest since their salaries and any resulting claims are paid by the Government, not their employers. Moreover, the nature of the decision is determined by statute and regulation. Thus, the court found there is no reason to believe those making the decisions are not qualified to perform their tasks and hence that their

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130. Schweiker v. McClure, 503 F. Supp 409, 418 (N.D. Cal. 1980).

131. 424 U.S. 319 (1976). In determining the nature of a hearing that is minimally required by due process, the court is to balance the private interest affected by the official action; the risk of erroneous deprivation of such an interest through the procedures used; and the probable value of additional procedural safeguards; against the government's interest, including the function and expense of additional or substitute procedural safeguards.

132. Schweiker v. McClure, 456 U.S. 188 (1982).

margin of error is any greater than that for administrative law judges.[133] Thus, the court has approved private schemes at least to the extent they operate under procedures specified by the agency.

The need for minimum procedural safeguards was stressed in a subsequent case[134] involving the question as to whether an oral hearing must be held for claims for less than $100 or whether a paper hearing would be sufficient. The court laid down guidelines that must be followed if the oral argument was to be avoided, especially the adequacy of notice, access to the evidence on which the decision was made, and the ability to speak with someone who knows and understands the basis for the decision.

A second answer to the seeming conflict between using private arbitrators for public decisions is that the decisions are not entirely public: While the decisions may implement an administrative program and bear an intimate connection to it, the decisions are not those of the agency and are basically for the resolution of a controversy between private individuals and organizations.[135]

Unconstitutional Taking

FIFRA was also challenged that the arbitration program constituted an unconstitutional taking of private property in violation of the Fifth Amendment. The Court rejected the challenge in Ruckelshaus v. Monsanto.[136] Monsanto alleged that EPA's use of its data for the benefit of another applicant's pesticide registration effected a taking of Monsanto's property without just compensation.[137] The district court sustained the challenge.[138] The Supreme Court reversed, finding that while Monsanto and other data submitters may have a property interest in data submitted to EPA, these companies cannot allege that a taking occurs when EPA uses this data in a manner which was authorized at the time the data was submitted.[139] The Court noted, however, that under the statutory scheme in effect between 1972 and 1978 data submitters could have a legitimate claim that documents submitted under the designation "trade secrets" between 1972 and 1978 were improperly taken when used for the benefit of other pesticide registration applicants.[140] Such an allegation would depend upon the actual amount of compensation received in arbitration. The Court found that

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133. 456 U.S. at 200.

134. Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983).

135. This is not the case in some of the Superfund cases in which a claimant disputes the Administrator's denial of liability or the amount claimed from the fund.

136. 104 S.Ct. 2862 (1984).

137. 104 S. Ct. at 2871.

138. Monsanto Co. v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (ED Mo. 1983).

139. 104 S. Ct. at 2872-2877.

140. 104 S. Ct. at 2877-2879.

Monsanto had not yet had any issue of compensation submitted to arbitration and thus no issue of taking had yet arisen.[141]

The Court held, however, that any data submitter seeking to contest an arbitrator's compensation award retains the right to challenge the amount of compensation in the United States Court of Claims.[142] The Court ruled that the Tucker Act offers a potential remedy to any data submitter whose data is used or taken by EPA for the benefit of another applicant. Thus, any data submitter who is dissatisfied with an arbitration decision may sue the United States in the Court of Claims under the taking clause on the ground that it did not receive just compensation for the use of its data.

Standardless Delegation

FIFRA has also been assailed as an unconstitutional delegation of legislative power because the statute is alleged to offer so little guidance as to the standards an arbitrator should apply in administering the data compensation program.

The Supreme Court did not address this issue in Monsanto[143] because Monsanto's claim concerning the constitutionality of the arbitration scheme was not ripe for review since it had not been subject to any arbitration. In contrast, the district court[144] had found the arbitration provision arbitrary and vague. Similarly, the district judge in Union Carbide Agricultural Products v. Ruckel-

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141. 104 S. Ct. at 2878.

142. 104 S. Ct at 2880-2882. The Tucker Act, 28 U.S.C. § 1491 provides that any individual who believes that the United States has taken his property may bring this claim for compensation before the United States Claims Court. The Tucker Act states:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort.

The Court held that in the absence of specific legislation addressing their interaction, the Tucker Act remedy and FIFRA's data compensation scheme must coexist. Thus, the Court interpreted FIFRA as "implementing an exhaustion requirement as a precondition to a Tucker Act claim. That is, FIFRA does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the statutory procedure." 104 S. Ct. at 2881.

143. 104 S. Ct. 2862 (1984).

144. Monsanto v. Acting Administrator, United States Environmental Protection Agency, 564 F. Supp. 552 (ED Mo. 1983).

shaus[145] remarked that FIFRA represents a standardless delegation of power to arbitrators.

The court in Sathon, Inc. v. American Arbitration Association[146] refused to issue a declaratory judgment as to the standard an arbitrator must apply in determining the amount of compensation due. Sathon sought a declaratory judgment to determine whether it must pay to an original data submitter a share of the cost of producing the data used or whether it must pay a share of the value of its use. The court sustained the vague criteria of "compensation," saying:

> It is up to Congress to say what standards are to be applied or to delegate this authority. There is nothing in the statute (or the regulations promulgated thereunder) relating to the standard to be applied in such proceedings or providing for judicial intervention in such matters.[147]

Another court concurred that arbitrators under this scheme are not required to apply an particular allocation formula, and that the absence of a specific standard was not unconstitutionally impermissive as a denial of due process or excessively broad delegation of authority.[148]

Conclusion: Properly Executed Arbitration Programs are Constitutional

The courts which have interpreted the Multiemployer Pension Plan Amendments Act of 1980's[149] (MPPAA) arbitration provisions thus far have been called upon to determine the Act's constitutionality and have not actually reviewed an arbitration decision under the Act. MPPAA has been upheld against assertions that its provisions violate standards of due process;[150] deny employers access to an impartial tribunal;[151] commit a taking of property without just compensa-

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145. 571 F. Supp. 117 (SD NY 1983), rev'd sub nom., Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

146. No. 83 Civ. 6019 (U.S. District Court N.D. Ill., March 30, 1984) 20 ERC 2241.

147. 20 ERC 2245.

148. PPG Industries, Inc. v. Stauffer Chemical Co., 637 F. Supp. 8 (D.D.C. 1986).

149. P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. Sec.1381 et seq.

150. See, Pension Benefit Guaranty Corp v. R.A. Gray, 104 S.Ct. 2709(1984) (Court held constitutional MPPAA's retroactive imposition of withdrawal liability.)

151. See discussion in text, Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396 (9th Cir. 1984); Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp. 724 F. 2d 1247 (7th Cir. 1983).

tion;[152] violate the Seventh Amendment's provision for trial by jury;[153] and constitute a violation of Article III of the Constitution by vesting federal judicial power in arbitrators who are not federal Article III judges.[154]

Administrative arbitration programs have been attacked on a broad range of constitutional grounds. Thus far all the challenges have been rebuffed. It would therefore appear that such a program will pass constitutional muster and can decide any issue an agency can so long as they adhere to at least minimal procedures, avoid major policy matters, and are subjected to at least some judicial review -- even the narrow standard of the Arbitration Act.

V
HYBRID PROCESS

As should be clear by now, several of the administrative arbitration programs are actually hybrids between administrative and private sector processes.[155] They typically are used to resolve issues that arise **because of** an administrative program and are administered at least in part by an agency, but they are not part of the agency itself. That is, the decision reached is not an agency order. The agency, however, is charged with defining the process to be followed. Sometimes, as in Superfund, the agency is a party, but in others, such as PBGC and FIFRA, it is not. It seems likely that prior to the interest in alternative means of dispute resolution the issues submitted to arbitration would have been resolved by the agency itself in some sort of trial type hearing. For example, prior to FIFRA's amendment, EPA made the determination as to how much compensation is due; now the arbitrator does.[156] Since the programs are so intimately connected to the agency and implement part of an agency program, they have some of the attributes[157] of agency action. Moreover, in some of the programs, the arbitration is the only forum available for resolving the matter. It is therefore unlike voluntary arbitration and more like an administrative or judicial hearing in which the process is imposed on the parties. Thus, administrative arbitration might sometimes be thought of in conceptual terms as similar to an administrative hearing.

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152. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F. 2d 1396, 1406 (9th Cir. 1984) (taking clause does not prohibit Congress from readjusting contractual relationships of private parties); accord, Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1274-1276 (7th Cir. 1983).

153. Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1511 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1277 (7th Cir. 1983).

154. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, 749 F. 2d 1396, 1404-1406 (9th Cir. 1984).

155. FIFRA, PBGC, Superfund.

156. See discussion infra at note 404.

157. E.g. judicial review for some, but not all of them.

But, these programs also have some of the attributes of private sector arbitration, such as a reduced record, a private arbitrator, the parties' having a role in choosing the person who will decide, and decisions required by rule to be reached far more quickly than is customary for administrative litigation.

The administrative arbitration programs are, therefore, to a very real extent a hybrid, having both public and private characteristics. Sometimes the two collide. The difficulty is made more confusing by no two being alike.

The Arbitrators.

Arbitrators are basically selected in one of three ways in administrative arbitration programs, although a fourth way is clearly possible. The first is the private analog in which the parties participate in selecting the arbitrator. They may agree directly on an individual to serve as the arbitrator. Barring that, and the procedure contemplated in several of the programs, the parties are tendered a list of potential arbitrators. Each party may then either strike a designated number of individuals from the list or rank those on the list according to preference. The arbitrator is then chosen from those remaining on the list or from those with the highest overall ranking.[158]

The PBGC is a fairly typical example as to how arbitrators are selected. Under the PBGC final rules, the parties shall select an arbitrator within 45 days of initiation of arbitration or at a mutually agreed time. Several comments to the proposed rule on this issue suggested allowing the parties to select the arbitrator before initiation of arbitration. PBGC rejected the suggestion because it believes that post-initiation selection will reduce the risk of jeopardizing the arbitrator's neutrality.[159]

In its proposed rules, the PBGC invited comments on the usefulness of a PBGC-maintained roster of qualified arbitrators. The PBGC agreed with the majority of comments that such a roster would duplicate those already maintained by private organizations. PBGC will not, therefore, implement the proposal.[160] The American Arbitration Association (AAA) maintains a roster of qualified arbitrators from which it makes selections after parties in dispute have had an opportunity to rank the acceptability of the candidates.[161] The PBGC noted in the preamble of the final rules, however, that plan sponsors may still maintain their own rosters without violating preselection restrictions.[162]

The PBGC rules do not state specific qualifications for the arbitrator because, after considering comments on the issue, the PBGC determined that the arbitrator would assuredly be qualified because the parties are required to select

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158. Superfund; see discussion at note 567. FIFRA; see discussion at note 416.

159. 50 Fed. Reg. 34686.

160. 50 Fed. Reg. 34679.

161. AAA rules - Section 12.

162. 50 Fed. Reg. 34680.

him by mutual agreement.[163]

Upon accepting an appointment, each arbitrator must disclose to the parties any "circumstances likely to affect his impartiality."[164] If any party determines that the arbitrator should be disqualified on the ground that he is not impartial, he must request, within 10 days, that arbitrator withdraw. If the arbitrator agrees that he is no longer impartial, he must withdraw from the proceeding and notify the parties of his reasons.[165] One comment to the PBGC proposed rule on this issue argued that disqualification would be too easy under the rule, while another argued that the rule should provide the parties with a mechanism to compel the arbitrator to withdraw. The PBGC concluded that its final rule has struck a reasonable balance.[166]

If a selected arbitrator declines appointment or, after accepting, withdraws, dies, resigns, or is for some reason unable to perform his duties, the parties shall select another arbitrator within 20 days of receiving notice of the vacancy.[167] PBGC initially proposed allowing 45 days for selecting a new arbitrator but reduced the limit because the parties will have had already identified suitable candidates during the original selection.[168] The parties may seek designation and appointment of an arbitrator in a U.S. District Court if they are unable to do so within the time limit of the rules.[169]

The second way is for the arbitrator to be a private individual who is imposed on the parties without their participating in the selection. This process is used in any of the case studies, and it is followed in the administration of the Medicare program administered by the Department of Health and Human Services.

The third means of obtaining an arbitrator is for the agency to appoint an agency official to serve that function. The CFTC and the MSPB follow this model. This is unlike the typical binding commercial arbitration, but quite similar to the non-mandatory court annexed programs. The dispute in both instances is submitted to the arbitrator only with the parties' concurrence. Thus, the parties can decide whether the nature of the dispute and their respective needs are such that this procedure is in their interest to pursue. Hence, although some of the protections normally afforded in arbitration is lacking, the parties are in a position to make the choice of whether or not to invoke the process. Indeed, the Medicare decision would indicate that the process should be fully acceptable even if imposed on the parties, so long as minimally acceptable procedures are followed in reaching the decision.

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163. 50 Fed. Reg. 34679.

164. § 2641.3(b).

165. § 2641.3(c).

166. 50 Fed. Reg. 34681.

167. § 2641.3(d).

168. 50 Fed. Reg. 34681.

169. § 2641.3(e).

The fourth means of appointing an arbitrator would be for the parties to choose from among a list of agency personnel. The Chicago office of the Merit System Protection Board are selected in this way,[170] and arbitrators for Superfund are selected from an agency approved list of private individuals.

Norms and Precedents.

Some administrative arbitration programs are directed to apply existing law and precedent.[171] In such cases, they are alternative procedures to the same end as a more formal process.[172]

Several of the programs are explicitly non-precedential, in that an arbitral decision in a matter cannot serve as resolving any issue for any purpose other than that before the arbitrator.[173] The CFTC believes the lack of precedential or res judicata effect is a positive incentive to use the arbitration process since a decision will not have a potentially damaging collateral effect.[174] Several comments on the PBGC's proposed rule indicated, however, that they thought compiling the awards would provide valuable guidance for future decisions.

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170. Adams and Figueroa, Expediting Settlement of Employee Grievances in the Federal Sector, (Report to ACUS Evaluating MSPB's Appeals Arbitration Procedure) (1985) at 31.

171. PBGC, CFTC, MSPB. Whereas the arbitrator in the PBGC is to apply existing law, the agency has noted that the regulation establishing the program does not tell the arbitrator just where or how to find it. 50 Fed. Reg. 34,681.

172. For example, in reviewing the difference between arbitration under a collective bargaining agreement and review by the Merit Systems Protection Board, the court said:

> While undoubtedly hoping to encourage employee selection of the grievance-arbitration process, Congress did not wish that choice to be made on the basis of a predictable difference in substantive outcome. To the contrary, it envisioned a system that would, as between arbitration and MSPB procedures, 'promote consistency ... and ... avoid forum shopping.'" Thus, "the arbitrator's authority can be no less than the MSPB's but also ... it can be no greater." Devine v. Pastore, 732 F.2d 213, 216 (D.C. Cir. 1984).

And see, Cornelius v. Nutt, 105 S.Ct. 2882 (1985).

173. CFTC. For example, in Superfund, 40 C.F.R. 305.51(c) provides:

> No award or decision shall be admissable as evidence of any issue of fact or law in any proceeding brought under any other provision of CERCLA or under any other provision of law. Nor shall any prearbitral settlement be admissable as evidence in any such proceeding.

174. Nelson, CFTC's New Rules: Some Innovative Approaches to Adjudication; 9 Ad. L. News 1 (1984).

Unlike the others, the FIFRA program does not provide any guidance to the arbitrator as to the norm to apply. Because of its lack of standards, it has been attacked as an impermissive grant of legislative power to the arbitrator, and at least two courts have agreed.[175] Others, however, have not.[176] The matter is likely to be raised again until a definitive resolution is made.[177] Whether permissible or not, such standardless arbitration appears inadvisable. Arbitration is generally not appropriate for developing a "common law" or other definitive norm that is to provide guidance for future conduct.[178] Without existing standards and without such a common law, decisions would run the risk of being arbitrarily ad hoc when criteria should be developed. The major issue -- whether compensation should be based on cost of developing the data or its value once developed -- is not likely to be resolved by the expertise of the administrator, nor supplied by reference to an external standard. At minimum, such a program should authorize the affiliated agency to issue rules to establish the major guidelines that will be applied.

Record and Explanation.

The Administrative Procedure Act and many of the cases imposing the requirement for "some sort of hearing"[179] rely largely on paper for minimal quality control: They require a decision to be based on a record and be explained as to what facts the decision maker believes flow from that record, as well as the conclusions of law. This process permits a reviewing court or other body to look over the shoulder of the decision maker to ensure an acceptable level of accuracy. A major advantage of arbitration is its speed and finality, with the quality control provided by other means. In it, paper is a means to the decision but largely ancillary for purposes of oversight. The nature and purpose of the "record" is therefore different in arbitration as opposed to a judicial or administrative hearing.

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175. Monsanto v. Acting Administrator, 564 F. Supp. 552 (E.D. Mo. 1983), rev'd on other grounds sub nom. Ruckelshaus v. Monsanto Co., 104 U.S. 2862 (1984); Union Carbide Agricultural Products v. Ruckleshaus, 571 F. Supp 117 (S.D.N.Y. 1983), rev'd sub nom, Thomas v. Union Carbide Agricultural Products, 105 S. Ct. 3325 (1985).

176. Sathon, Inc. v. American Arbitration Association, 20 ERC 2241 (N.D.Ill. 1984).

177. The issue was pressed in the Supreme Court in Thomas v. Union Carbide Agricultural Products Co., 1055 S. Ct. 3325 (1985) but the Court decided it

> was neither adequately briefed nor argued to this Court and was not fully litigated before the District Court. Without expressing any opinion on the merits, we leave the issue open for determination on remand.

105 S. Ct. at 3340.

178. Although addressing problems with settlements and not arbitration, the need for establishing and adhering to norms is raised by Edwards, Fiss, (1984), and Schoenbrod, all supra, note 66.

179. Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267, 1316 (1975).

Thus, for example, in most of the administrative arbitration programs that were surveyed, a full record could be generated at the request of a party but are not as a matter of course. To be sure, the arbitral decisions turn on written materials that are disgorged through some sort of discovery and introduced at a hearing but, absent a request, transcripts of the hearing are typically not kept nor are the decisions explained with the rigor of an administrative decision.[180] The decision is usually a review of the factual and legal basis of the decision, but the rules typically indicate it is to be more abbreviated.

If administrative decisions are to be fully reviewed in another forum,[181] they may need a fuller explanation and a more fully developed record than is customary in private sector arbitration. That, of course, comes at the expense of time and cost; and, indeed, subsequent review also comes at the cost of finality.

Privacy.

One of the reasons parties sometimes choose private sector arbitration is that the record and the decision itself can be kept private and confidential. To the extent the arbitration is viewed as part of an administrative program, the expectation would be that they should be accessible to the public, or conducted "in the sunshine." In those programs in which the program is a part of the agency itself and results in an agency decision,[182] the Freedom of Information Act would apply and hence the record would be subject to full public access. The others, however, do not result in an agency decision. Thus, if the agency is not a party,[183] FOIA would not apply.[184] In that case, the proceeding likely

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180. This point was emphasized by the D.C. Circuit in a case reviewing the nature of judicial review of an arbitrator's decision concerning disciplinary proceedings against a government employee:

> If arbitration becomes simply another level of decision making, subject to judicial review on the merits, arbitrators may begin to decide cases and write opinions in such a way as to insulate their awards against judicial reversal -- producing opinions that parrot the appropriate statutory standards in conclusory terms, but suffer from a lack of reasoned analysis. Such a shift from the arbitral model, in which decision makers are free to focus solely on the case before them rather than on the case as it might appear to an appellate court, to the administrative model, in which decision makers are often concerned primarily with building a record for review, would substantially undercut the ability of arbitrators successfully to resolve disputes arising out the employment relationship. Devine v. White, 697 F.2d 421, 436 (D.C. Cir. 1983).

181. See infra concerning agency and judicial review.

182. MSPB, CFTC

183. PBGC, FIFRA

(continued...)

could remain confidential absent overriding rules or statute. If, of course, the agency is a party, as in Superfund, then FOIA would apply to its records and hence likely that of the entire proceeding.

Review by the Agency.

To the extent the arbitration results in an agency order, the traditional relationship between the decision made by the hearing officer and the agency would provide for either appeal to the agency or discretionary review by the agency on its motion. One of the attributes of voluntary arbitration, however, is its finality. Thus, again, the two concepts collide in concept.

The Merit Systems Protection Board, for example, initially provided for agency review only to address harmful procedural irregularity or a clear error of law. While more review than under commercial arbitration, it was more limited than usual. In response to views of the parties that typically appear before it, the Board changed its Appeals Arbitration Procedure into the Voluntary Expedited Appeals Procedure in part to provide full appeal to the agency.

The CFTC's arbitration program provides that the agency may review a decision on its own motion to determine that it is not the result of any fraud, partiality, or other misconduct. In this case, the agency is providing the same narrow review typically accorded voluntary arbitration.

To the extent the arbitral award becomes an agency order, it would seem appropriate for the agency to have some power to review to ensure it meets minimal levels of acceptability. To ensure the benefits of expedition and finality, however, that review should be quite narrow, probably akin to the standard of judicial review under the arbitration act. Thus, an agency should review only for gross deviation from policy or procedure, which is the administrative analog of the award's being outside the scope of the arbitrator's authority.

The hybrid programs,[185] however, have no review by the agency. That is likely stems from a view that the very reason for the arbitration is that the matter is largely a private sector dispute that does not require agency action.[186]

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184. Even if a private arbitrator is retained by an agency, it would not appear that the arbitrator's records that are developed in a hearing are agency records for purposes of FOIA. They would seem analogous to records developed by a government contractor to which the government has access, in which case the Supreme Court held that they are not agency records. Forsham v. Harris, 445 U.S. 169 (1980). Moreover, if the record remain in the possession of the arbitrator, the agency is not obligated to retrieve them. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980).

185. PBGC, FIFRA, Superfund.

186. Superfund does not fit this model. Its arbitration program applies standards developed by the agency and determines the agency's liability. Thus, it is clearly not a "private" dispute. The fact that the decision is not made by

(continued...)

Hence there is no reason for the agency to be involved in reviewing let alone deciding.

Judicial Review

There are essentially three forms of judicial review of administrative arbitration decisions: none; limited, akin to traditional arbitration; and some variant of the APA's arbitrary and capricious standard.

No Review: Waiver. If parties decide to use an arbitration program to resolve an existing dispute, one component of that election could be a waiver of any right to seek the judicial review normally accorded administrative action. That is, by opting into arbitration, the parties would opt into its full ramifications, including its finality. The CFTC programs follow this approach. The Supreme Court recently sustained such waivers of judicial review on the ground that the right to have the dispute heard by an Article III court is a personal one, and hence it may be waived.[187]

The extent to which such waivers are enforceable when the election is made **before** the dispute arises is open to question, at least in some instances. The Supreme Court has held that a predispute agreement to arbitrate any claim that would arise between a securities broker and its customer is not enforceable since it could derogate rights provided by the Federal securities laws.[188] Although the case has been questioned and limited,[189] it continues to stand for some limitation on the ability of a person to sign away his or her rights to an administrative or judicial proceeding. Moreover, the Court has followed this line of reasoning in other cases. It recently held that even though some aspects of a matter may be arbitrated, an arbitral award could not preclude a judicial role in protecting the federal statutory and constitutional rights that Section 1983 is designed to

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186.(...continued)
an agency official may indicate a distrust for the ability of separation of functions doctrines to result in impartiality while still wanting to maintain enough control over the process that it will result in expeditious, acceptably decisions; the alternative would be to rely on the courts, and the agency could not set the agenda there.

187. Schor v. Commodity Futures Trading Commission, 106 S. Ct. 3245 (1986).

188. Wilko v. Swann, 346 U.S. 427 (1953).

189. See, Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985). The lower courts split as to Byrd's effect, with some holding that preenforcement agreements to arbitrate securities disputes were enforceable, Halliburton & Assoc., Inc. v. Henderson, Few & Co., 774 F.2d 441 (11th Cir. 1985), while others disagreed and continued to apply Wilko's traditional limitation, Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520 (9th Cir. 1986).

The Supreme Court has granted certiorari to resolve the matter. McMahon v. Shearson/American Express, 788 F.2d 94 (2d Cir.) cert. granted, 107 S. Ct. 60 (1986). The resolution of this case should have a significant effect on the extent to which predispute agreements to arbitrate matters involving of public policy are enforceable.

safeguard.[190] Thus, neither full faith and credit nor a common law rule of preclusion of review would permit a court to accord res judicata effect to an unappealed arbitration award.

The combined teaching of these cases is that if a dispute involves important public rights, the court may invalidate an agreement to subject them to binding arbitration and hence a party could still have the matter heard in a traditional manner.[191] In other instances, however, the agreement is enforced, and the matter is referred to arbitration, with its limited review.[192] While technically not "waiver" cases in that such an agreement would preclude judicial review altogether and arbitration has some judicial review, the cases do mark an outer boundary of the ability of parties to sign away their rights before a dispute arises.

Limited. Judicial review of traditional arbitration awards is very narrow. The United States Arbitration Act[193] directs courts to enforce the awards except (a) where it was procured by corruption, fraud, or undue means; (b) where there was evident partiality or corruption in the arbitrators; (c) where the arbitrators were guilty of misconduct in the conduct of the hearing to the extent the rights of any party were prejudiced; or (d) where the arbitrators exceeded their powers assigned under the agreement.[194]

The standard applied in FIFRA tracks this approach. It provides for judicial review only in the case of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator...."[195] The Court has acknowledged that limited judicial review is permissible[196] and has upheld it against

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190. MacDonald v. City of West Branch, 104 S. Ct. 799 (1984). See also, Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

191. Other aspects of an arbitration agreement may be enforced, however. Thus, when a securities agreement provided that "Any controversy between you and the undersigned arising out of or relating to this contract or breach thereof shall be settled by arbitration" the portion arising under the Federal law was heard by a court since the dealer assumed it would not be referred to arbitration, but that arising under state law was ordered arbitrated. Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

192. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S.Ct. 3346 (1985).

193. 9 U.S.C. § 10.

194. As "a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses M. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).

195. 7 U.S.C. Sec. 136a(c)(1)(D)(ii).

196. Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts. See, e.g., 5 U.S.C. §§ 701(a)(1), 701(a)(2); Heckler v. Chaney, 105 S. Ct. 1649 (1985); United States v. Erika, Inc., 456 U.S. 201, 206, (1982) (no review of Medicare reimbursements); Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 18 (1983) (administrative agencies can conclusively adjudicate claims created by the

(continued...)

a challenge that it constitutes a wrongful delegation of judicial power to the arbitrator.[197] The Supreme Court left open the possibility, however, that a dissatisfied data provider could sue in the Court of Claims for a "taking" under the Tucker Act.[198] Thus, the Court seems to indicate that it does not regard the arbitral award as a judicial finding, since presumably there would be no "taking" if the amount were judicially determined.[199] This may result in the anomalous result that a dissatisfied data submitter could obtain judicial review of the arbitral award by suing in the Court of Claims, whereas the data user may have difficulty securing a similar review.

Arbitrary or Capricious. The MSPB and Superfund programs both provide for "arbitrary and capricious" scope of judicial review.[200] For example, the Superfund rules provide:

196.(...continued)
administrative state, by and against private persons); Redish, Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision, 1983 Duke L. J. 197 (same).

Thomas v. Union Carbide Agricultural Products, Inc., 105 S. Ct. 3325, 3334 (1985).

197. Thomas v. Union Carbide Agricultural Products, Inc., 105 S. Ct. 3325 (1985).

198. Ruckelshaus v. Monsanto, 104 S. Ct. 2826 (1984).

199. The Court has made quite clear that arbitration is not a judicial proceeding subject to full faith and credit. Dean Witter Reynolds Inc. v. Byrd, 105 S. Ct. 1238 (1985).

200. Under the Randolph-Sheppard Vending Stand Act, 20 U.S.C. Sec. 107, blind persons who are licensed as vendors by state agencies may receive preference in obtaining vending stands on federal property. An individual who is dissatisfied with the state agency's actions may obtain a hearing on the state level. If he or she remains dissatisfied, he or she may request the Secretary of Education to establish an arbitration panel to hear the dispute. A state agency may also request arbitration whenever it believes a federal agency or department is not complying with the Act.

The arbitration is the exclusive remedy for an alleged grievance, notwithstanding Congress's saying it "may" be used. Hence someone who believes he or she has been denied such a preference must submit the complaint to arbitration before pursuing the matter in court. That is, it has been held that the arbitration is an administrative remedy that must be exhausted before a court will entertain the complaint. Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986).

While the awards are "final and binding on the parties," 20 U.S.C. Sec. 107d-1, they are "subject to appeal and review as a final agency action" under the APA, 20 U.S.C. Sec. 107d-2. Thus, the arbitrary or capricious standard applies to these arbitrations. The court in Georgia Department of Human Resources v. Bell, 528 F. Supp 17 (N.D. Ga. 1981) reviewed an award under 5 U.S.C. Sec. 706 as final agency action, as if it had been made by the agency itself.

> The award or decision of [an arbitrator] shall be binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of the [arbitrator's] discretion.[201]

The scope of review under PBGC is more complicated. One part of the statute indicates that the arbitrator's findings of fact are to be presumed correct subject to rebuttal only by a clear preponderance of the evidence.[202] This would appear to provide for de novo judicial determination of issues of law and a review of facts under a "clear preponderance of the evidence" standard. The matter is confused, however, by another section of the Act which directs that, to the extent consistent with the Multiemployer Pension Plan Amendments Act of 1980, the awards are to be enforced under the limited provisions of the United States Arbitration Act. At least one court has held that only the limited scope of review provided commercial arbitration is available.[203] Most courts, however, have interpreted the Act as providing for the broader review.

One case draws an important analogy between the arbitration and administrative agencies.[204] It argues that "judicial deference to the arbitration process [under the Act] is mandated by the same policies that underlie the principles of judicial deference to administrative agencies."[205] Thus, the decisions are reviewable, like those of an agency, to determine whether the applicable law was correctly applied and whether the findings comport with the evidence. Like an agency, the arbitrator will be someone skilled in pension and labor matters and thus likely to fashion a resolution superior to a court in matters within that expertise.

An MSPB case wrestled with the relationship between an arbitration award and the court in words reminiscent of the origins of the "hard look" doctrine:[206]

> For judicial deference to arbitral decisions to have meaningful application, the reviewing court must be confident that the arbitrator has undertaken a thorough review of each aspect of the ... action.[207]

Thus, the standard that has evolved in several of the administrative arbitration programs is for a court to review an award as if it were a decision of an agency. This standard may be appropriate in those cases where the arbitration is

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201. 40 C.F.R. Sec. 305.51; 42 U.S.C. Sec. 9612(b)(4)(G).

202. 29 U.S.C. Sec. 1401(b)(2), (c).

203. Washington Star Company. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984).

204. IAM National Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F.2d 1204 (D.C. Cir. 1984).

205. Id. at 1207.

206. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert den. 403 U.S. 923 (1971).

207. Local 2578 AFGE v. GSA, 711 F.2d 261, 267 (D.C. Cir. 1983).

mandatory,[208] in that it is the only means available for resolving the dispute. In that case, the fuller judicial review may be an important protection. Even in this case, however, the courts should recognize the benefits that were supposed to be derived from the arbitration scheme, as opposed to reliance on administrative adjudication under the APA, and hence accord deference to the arbitral award or some other form of limited review so long as there is an indication of the proper standards' being applied.[209] Perhaps, the proper standard of judicial review should be no different than that of agency action before it became more intrusive: a rational basis test.

VI
CONCLUSION WITH RESPECT TO ADMINISTRATIVE ARBITRATION

Some of the administrative arbitration programs track their private sector analogs quite closely. The Commodity Futures Trading Commission's program, for example, applies to cases where time and transaction costs probably outweigh the need for procedural rigor, and the decisions are final.[210] Other programs, however, do not fit so well. The FIFRA program, for example, has the finality normally accorded arbitration, but it would appear that at least in some instances a large amount of money would be at stake and there are no guidelines for how the decision will be made. Moreover, that lack will probably not be rectified by the expertise of the arbitrator. Some norm -- whether through statutory prescription, agency rule, or developed common law -- would be in order. Were it established, the matter would then be better suited for arbitration since it would be more a matter of accounting or otherwise applying existing criteria. In either event, the margin for error would be substantially reduced. As it stands, any need for expedition probably does not outweigh the need for a standard.

Most of the administrative arbitration programs have two significant differences between them and traditional arbitration: First, this use is not voluntary, either before or after a dispute has arisen, but rather it is the only available means of making the decision.[211] Second, the greatest difference between most of the administrative arbitrations and private sector commercial arbitration is that the arbitral award is subjected to a scope of judicial review very similar to that of an administrative action, even when the award itself is not

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208. Mandatory arbitration seems inappropriate except in those cases when the benefits of a trial type hearing are clearly and substantially outweighed by the need to (1) save time or other transaction costs or (2) have a technical expert resolve the issues. Otherwise, the "arbitration" is really stripped clean adjudication and the hallmark of arbitration -- its voluntariness -- is lost.

209. Devine v. White, 697 F.2d 421 (D.C. Cir 1983).

210. Compare this with the criteria at notes 63-67.

211. Moreover, this relationship between the courts and the arbitration is different from that of typical court annexed arbitration where there is a trial de novo before the court, sometimes with disincentives against frivolous appeals.

an agency order.[212]

Even though each program differs from the others, what seems to be evolving is a form of "administrative arbitration" in which the agency is at best passive. The adjudication -- in the form of the arbitration -- is outside the agency, but the relationship between it and the court is similar to that of the court and an agency with respect to informal adjudication. Once that is recognized, it provides a new tool for addressing a range of issues that do not need the full rigor of APA trial type hearings but more judicial oversight than customarily applied in arbitration. Most seem to contemplate that the decision itself will be relatively narrow and able to apply existing, well defined standards.[213]

Some of the other programs are only variants of the modified procedure that have been used previously.[214] In these, there is very little that is new. In the others, however, an interesting hybrid has been born that may have potential for substantial growth.

Unfortunately, "arbitration" is a sufficiently pliable term that it can be used to describe virtually any process in which a third party makes a decision. It would be helpful if there could be concurrence on some minimal criteria a program must have before legitimately being called "arbitration" even in the administrative sense. A first cut at that might be:

- abbreviated discovery;
- parties' participation in the selection of the arbitrator;
- application of a pre-existing norm that is defined by either statute or a rule issued by the implementing agency;
- once norms are applied, discretion is relatively narrow;
- strict time limits for decision;
- abbreviated decision, with a discussion of its factual and legal basis but no findings;
- limited review, Arbitration Act or designated as "arbitrary and capricious" but with a recognition of the nature of the process as defined in

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212. Some courts have said with respect to the PBGC program that the arbitration is a form of "exhaustion" of remedies that is a precursor to a judicial determination. See, e.g. Peick v. Pension Benefit Guaranty Corp., 742 F.2d 1247 (7th Cir. 1983). Even with this perspective, however, the arbitration is the assigned first step in the decision process.

213. Superfund. Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc., 749 F. 2d 1396 (9th Cir. 1984).

214. Edles, The Hearing Requirement in the 1980s, 31 Fed. Bar N and J 435 (1984).

the criteria.[215]

Since these procedures are more limited than those provided by the APA, the process should be used only where the general criteria of arbitration are met.[216]

VII
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISM

Two basic, structural forms of administrative arbitration emerge from the preceding analysis: (1) Programs that are explicitly within the agency itself and are used to resolve issues that would otherwise be decided under the customary agency processes.[217] (2) Programs that decide issues that arise because of agency action, or closely affiliated with it, but which are not actually a part of the agency;[218] while distinct, they can be viewed in some ways as "associated" with the agency. A third model of administrative arbitration -- or, more accurately, administrative dispute resolution -- is where the agency supervises a dispute resolution mechanism ("DRM") that operates as a part of a private organization.

A number of programs require, or permit, private organizations to establish a forum -- a DRM -- for reviewing complaints or other issues that arise with respect to some particular activity. The circumstances are such that if such a program were not established, the agency itself might be required to hold a hearing to resolve the matters presented. Under these programs, the agency may specify minimal procedures that must be followed by the private organization[219] and it will review how well the process is working, but it does not typically sit in review of any individual decision.

The Magnuson-Moss Warranty Act[220] for example is administered by the Federal Trade Commission and encourages warrantors to establish procedures to resolve disputes concerning warranties fairly and expeditiously.[221] The Act requires the FTC to issue rules prescribing the minimum requirements for a DRM to qualify for special treatment. If such a program is established, a complaining consumer must first turn to it before proceeding to court or other remedy.[222] A DRM is required to be independent of warrantor; have procedures that minimize

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215. Thus, the court should assure itself that the arbitrator applied the right norms and performed in accordance with the requirements, but it would not attempt to force the arbitrator to replicate either a judicial or APA trial type hearing. In either case, the benefits would be lost.

216. See supra, at notes 63-67.

217. MSPB, CFTC.

218. FIFRA, Superfund, PBGC.

219. For example, see discussion of Medicare procedures in text associated with notes 130-134, supra.

220. 15 U.S.C. §§ 2301-2310.

221. 15 U.S.C. §

222. 15 C.F.R, § 703.

burdens on the consumer; be financed by the warrantor; and be designed to achieve the basic goals of speed and fairness.[223] These programs can obviously be massively large. The Better Business Bureau, for example, operates the program for some of the auto companies and processes in excess of a quarter of a million disputes over automobile warranties per year.[224]

Programs such as these are caught in a dilemma. On the one hand the procedures used by the DRM must be sufficiently rigorous to provide confidence on the part of the users that they will receive a fair hearing. On the other hand, if the procedures are too stringent, there will be no incentive to establish them -- either because they would be too expensive to operate or because they would not offer an attractive alternative to other available means of resolving the disputes. The tension between the two needs is clear and has been the subject of controversy over the years.[225] Several states have become dissatisfied with the process and have passed "Lemon Laws" going beyond the FTC's minimal procedures.[226] The FTC has recently begun a negotiated rulemaking to review and revise its rules.[227]

What is needed for such a program is to strike the delicate balance of providing an incentive to establish a fair and effective program[228] and an incentive to use the process as opposed to others that may be available -- or to ensure that it is indeed fair and effective if those affected are forced to use it at least in the first instance.

The FTC also entered into a consent decree with General Motors in settlement of its allegation that GM had failed to notify customers of high failure rates of certain automobile components and that constituted a violation of Section 5 of the Federal Trade Commission Act.[229] Instead of fighting the matter through a trial type hearing before the agency itself and on through the courts, the Commission entered into an agreement with GM whereby it would establish a DRM -- the Better Business Bureau -- to determine whether a particular car is afflicted with the problems and what should be done to rectify the matter. Under the process, the BBB attempts to mediate an agreement between the dealer and the customer and, failing satisfaction at that point, the issue is arbitrated.

The process was criticized both on the grounds that a refund should be

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223. Appendix III.

224. Testimony of Dean Determan at ACUS Hearings, supra, note 49.

225. See, Rossi, Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms, 52 U.S.C. L. Rev. 235 (1978); Greenburg and Stanton, "Business Groups, Consumer Problems: The Contradiction of Trade Association Complaint Handling," in L. Nader, No Access to Law (1980) at 193.

226. E.g. Connecticut.

227. 51 Fed. Reg. 5205 (Feb. 12, 1986).

228. One person who is familiar with the effect of the Magnuson-Moss Act's "exhaustion" requirement argued that it was often not an incentive at all because it raised other forms of legal uncertainty and potential liability.

229. In the Matter of General Motors Corporation, Dkt. No. 9145; see Appendix III.

provided generally to **all** owners of the affected cars -- whether or not they displayed any of the symptoms -- and that the mediation entailed a burdensome extra step that would likely not prove effective since the customers had already tried and failed to reach agreement with the company. BBB has reported that nearly 90% of the cases in one test sample were settled by mediation, however.[230]

Another major example of an agency's oversight of private dispute resolution mechanisms is the Securities and Exchange Commission relationship with the DRM's of the self-regulatory organizations such as the exchanges and the National Association of Securities Dealers.[231] The Commission must approve particular rules that are adopted by the SRO's, some of which deal with their mechanisms for resolving issues that arise through their actions. The Commission deferred developing rules establishing a nationwide system for resolving disputes between broker-dealers and their customers when the industry organized the Securities Industry Conference on Arbitration which in turn drafted a Uniform Code of Arbitration. The code has been adopted by all ten of the SROs and the Commission. As of 1984, the SRO's had resolved almost 5,000 cases.[232]

Other examples of the private DRMs that are overseen by agencies are the Medicare procedures discussed above[233] and medical ethics panels in hospitals.[234]

Supervised DRMs can provide particular, specific decisions that can serve in lieu of a general regulation.[235] As a defense against what it fears may be more intrusive regulation, industry frequently argues that it will provide needed safeguards, and hence that additional regulation is not needed. Even if the industry developed a satisfactory rule, it will not be effective unless those affected by it have some opportunity to enforce it and that will likely require a means for resolving disputes that arising under the program. These would entail determining whether, in a particular instances, the rule was broken; whether it applies at all; whether it takes into account appropriate considerations; what damages someone sustained; and so on, raising all the issues that arise in an administrative program. One means of dealing with this situation is to encourage the self regulation, but require the establishment of a DRM to resolve the issues that will inevitably arise. Otherwise, either an agency or court will have to resolve the issues or the program will provide a privilege and not right, which of

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230. Testimony of Dean Determan at ACUS Hearings, supra note 49. The process has been controversial however. See, FTC, Consumer Group Clash over GM Program, Washington Post, p. E3 (October 25, 1985) which quotes the Center for Auto Safety as arguing "that the program is 'a disaster for consumers'." The Center alleged that the reviews of the program have not taken sufficient account of consumers who did not know about the program or who gave up before reaching a final resolution.

231. See Appendix III for a fuller discussion.

232. Katsoris, The Arbitration of a Public Securities Dispute, 53 Fordham L. Rev. 279, 284 (1984).

233. See text accompanying note 130-134 supra.

234. See, e.g., 50 Fed. Reg. 14,878 (1985) for regulations that implement the Child Abuse Amendments of 1984, P. L. 98-457.

235. Harter, Dispute Resolution and Administrative Law, supra, note 76.

course is very different from the regulation sought to be forestalled.

Several issues need to be considered and balanced when establishing a DRM that is overseen by an agency: What the incentives are to establish the program in the first place -- why would the private organization want to do it; what are the alternatives to doing so. Secondly, why would those affected, such as consumers, want to use it instead of some other process available. Or, if its use is mandatory, then the agency will need to assure the public that minimally acceptable procedures will be followed.[236] Finally, the agency needs to develop an enforcement mechanism by which it will oversee the execution of the processes. That generally means the agency not an individual appeal, but that it will review how well the system is working overall to determine whether the minimal procedures are being met and whether the procedures should be modified.

VIII
MINITRIALS

Its creators called it an "information exchange", but a New York Times headline writer in August 1978 found "mini-trial" to be more descriptive and the name stuck. The writer was reporting the quick settlement procedure designed by lawyers to untangle years of litigation in a patent case involving TRW, Inc. and Telecredit, Inc.[237]

The minitrial is a flexible, voluntary alternative means for the resolution of complex disputes successfully used by businesses, governments, and various interest groups. The minitrial was developed with the guiding hand of the Center for Public Resources, a non-profit organization formed in 1979 by a group of general counsel of well known Fortune 500 corporations. The new procedure has made advances in commercial and consumer dispute contexts where reduction in litigation expense is a major goal, and the idea has begun to spread to a wider segment of the bar including the government contract field. NASA, the government pioneer in the program, used a minitrial procedure to settle a multimillion dollar satellite contract dispute with Spacecom and TRW.[238] The Justice Department has run a minitrial pilot program in certain military procurement cases, and the Army Corps of Engineers has established a pilot minitrial program in several of its regions.

Minitrial Procedure.

The minitrial, sometimes referred to as a mini-hearing to indicate the relatively informal nature of the process, is a highly abbreviated litigation process in which litigants present the heart of their case to senior officials of the other party who have authority to settle. "The primary purpose of the minitrial is to

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236. What should be minimally required must necessarily depend on the nature of the questions to be resolved. Thus, they process will depend on the subject matter.

237. "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

238. 44 Federal Contracts Report 589.

set a stage and create a momentum for settlement."[239] Typically the process involves the "exchange of briefs or position papers with supporting documents, oral presentations of facts and law to senior officials of the opposing parties, some opportunity for questioning, and negotiation by the senior officials to attempt to settle the dispute."[240] An advantage of the minitrial is that it focuses the attention and energy of executives on both sides of the dispute and forces them to participate directly in the negotiated settlement. Another desirable feature of the minitrial is its flexibility: the parties can tailor the essential elements of the procedure to fit the litigation at hand.

Parties are motivated to adopt the minitrial procedure by several factors--avoidance of high litigation costs, avoidance of adverse outcomes of litigation, the need to return employees supporting the litigation to more productive activities, and the desire to maintain a reasonably cordial relationship between litigants who may wish to continue doing business together in the future.[241]

The parties typically negotiate the groundrules at the outset and often suspend or curtail discovery. This would suggest to parties, who have an eye on the possibility of suspending normal litigation and attempting the minitrial, to make a careful schedule of depositions.[242] Because the minitrial may be elected before the end of discovery, the parties should depose those individuals whose testimony will have the most substantial impact.[243]

The minitrial is wholly voluntary so the parties must genuinely want to see it used as a means of settlement for it to succeed.[244] Obviously the threshold question for the parties to consider is whether the nature of their dispute lends itself to the mini-hearing process.[245] One of the developers of the minitrial offered the following observation on the decision of whether to use the process:

> It may not be appropriate where precedent-setting issues of law and witness credibility are the central issues and where the client has made a business determination to roll the dice. It can, however, be tailored to fit most large scale disputes involving mixed questions of law and fact, particularly where issues of science and technology are important. For most large, entrenched cases, the minitrial offers a better alter-

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239. Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 17.

240. Parker, Douglas M. and Phillip L. Radoff, The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes, 38 The Business Lawyer 35, November 1982.

241. Minitrial supra 239 at 17.

242. Id.

243. "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

244. Parker and Radoff, supra note 240 at 42.

245. Olson, Dispute Resolution: An Alternative for Large Case Litigation, 6 A.B.A. Litigation Sec. J. 22 (1980). cited in Parker and Radoff, supra note 240 at 42.

native to the more common practice of one side and then the other occasionally tossing out a settlement offer.[246]

Two obviously related questions to consider are whether one side will have gained a tactical advantage if settlement is not reached and what point in the litigation process will be the most appropriate to conduct the minitrial.[247] Parties should consider that despite a failure in settlement following the minitrial, the process itself aids the parties in preparing and focusing the issues of their cases for future full-blown litigation.

If the parties decide to use the minitrial, an important consideration is whether to use a neutral advisor to moderate the discussion.[248] Most, but not all, minitrials employ a neutral advisor with special expertise (often a retired judge) to "supervise the discussion and to furnish the parties with a nonbinding evaluation of the most likely outcome of the dispute were it to wind up in court."[249] In cases of highly technical disputes, some parties have found that the introduction of a neutral advisor causes additional expense and possible delay because the advisor must become sufficiently educated.[250] In the NASA case explained below, for example, the parties never seriously contemplated using a neutral advisor.[251]

Relatively short written briefs discussing the applicable facts and law are usually exchanged prior to the minitrial.[252] More comprehensive briefs are sometimes helpful or necessary in narrowing the issues in advance of oral presentations.[253] In the NASA case, for example, the briefs were rather lengthy and also were followed by a simultaneous exchange of written questions to be responded to at oral presentation.[254]

The hearing itself usually lasts no more than two days for the parties to state their cases (excluding extraneous issues), offer evidence for their positions, and field questions.[255] Presentations can be made by lawyers, technical experts,

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246. Parker and Radoff, supra note 240 at 42.

247. Id. p. 35.

248. Id. p. 43.

249. "Alternatives to the High Cost of Litigation", CPR, N.Y., N.Y., Special Issue 1985, p. 3.

250. Parker and Radoff, supra note 240 at 43.

251. Id.

252. Id.

253. Id.

254. Minitrial supra note 239 at 13.

255. Alternatives to the High Cost of Litigation, CPR, N.Y., N.Y., Special Issue 1985, p. 3.

or a combination of both.[256] At the conclusion of the hearing, the negotiating officers go off on their own to settle the dispute, with legal advisors standing by for consultation. If they reach an impasse, and have proceeded before a neutral advisor, the parties can request an advisory opinion on the likely outcome. The advisory opinion often acts as a catalyst towards settlement.[257] With or without a neutral advisor, any deadline set by the parties can contribute to lending a sense of urgency to resolving the dispute.[258]

Use by Government Agencies.

The growing movement in corporate and consumer disputes to save time, money, and judicial resources through alternative dispute resolution techniques -- such as minitrials -- has slowly reached the government setting.[259] Exploration of the new technique should be helpful since the government has experienced the same rising litigation costs and interminable court delays as private parties. Several perceived statutory and practical obstacles have impeded the government in using creative dispute resolution methods, however. The minitrial may be particularly well suited to overcome these obstacles.[260]

One obstacle which makes government contract disputes distinct from commercial litigation is the elaborate disputes resolving statutory procedure mandated by the Contract Disputes Act of 1978.[261] The statute applies to all contracts entered into after March 1, 1979. A key provision of the statute mandates that all government contracts include dispute clauses which set forth procedures by which disagreements relating to the contract must be resolved.[262] The procedure requires the government to make a final written decision concerning the disagreement with the contractor including all the facts and legal conclusions which led the government to deny the contractor's claim.[263] Upon receipt of the government's final decision, the contractor has three options: (1) acquiesce; (2) appeal the decision to an agency board of contract appeals; or (3) sue in the U.S. Claims Court.[264]

Whether these statutory procedures are exclusive is a question which raises

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256. Parker and Radoff, supra note 240 at 43.

257. Cong. Rec. S14707 (November 1, 1985).

258. Parker and Radoff, supra note 240 at 44.

259. Crowell and Moring Discussion Paper, Alternative Resolution of Government Contract Disputes, p. 1.

260. Minitrial supra note 239 at 21.

261. 41 U.S.C. §§ 601-613 (Supp. IV 1980).

262. Minitrial supra note 239 at 19.

263. Id.

264. Id.

an impediment to the government's use of the minitrial technique.[265] For example, in Davis and Moore,[266] the Interior Board of Contract Appeals held that the government cannot submit to binding arbitration because of conflict with the statutory procedures.[267] The government's authority to settle and to devise means of settling, however, has never been doubted because in fact a basic purpose of the Contract Disputes Act was to promote more efficient resolutions of disputes.[268]

A second serious obstacle facing government use of expedited settlement is "the natural inclination of agency officials to follow the book, in resolving disputes, thereby theoretically avoiding congressional and public criticism."[269] A plethora of organizations outside the agency review and second-guess any settlement. Potential reviewers and possible critics include oversight committees of Congress, audit teams from the General Accounting Office, and the agency inspectors general,[270] as well as the general public. The use of minitrials may actually ease this problem, however. The process requires a written record clearly documenting the issues of settlement, potential litigation risks are clearly described by the legal positions set forth in the briefs, and the formality of the procedure itself may lessen criticism."[271]

A third perceived constraint unique to the federal contracts context is the question of settlement authority. Federal agencies have a rigid chain of command and settlements must often be approved by the legal, financial, procurement policy, and technical divisions of an agency.[272] Tentative settlements are often upset by subsequent internal agency review. The minitrial procedure may also obviate much of this problem. In preparation for the minitrial, the government is forced to define the authority of the negotiation and the acceptable negotiating position. The advance approval and "written authorization from the head of the agency, empowering the representative on behalf of the agency to reach a settlement, reduces the opportunities for overturning the settlement."[273]

Finally, a related problem for the government is the question of settlement funding requirements.[274] A negotiating officer for the agency obviously cannot ultimately make settlement without the funds to cover it. Minitrial requirements

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265. Id.

266. IBCA No. 1308, 81-2 BCA 91 15,418.

267. Minitrial supra note 239 at 21.

268. Id. S. Rep. No. 3173. 95th Cong., 2nd Sess. 119781.

269. Crowell and Moring, p. 1.

270. Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 21.

271. Id.

272. Id.

273. Id.

274. Crowell and Moring, supra note 259 at 6.

in some ways relieve these problems by involving senior officials who have the authority to approve "re-allotments".[275] Re-allotments can be made within the agency to cover the financial needs for a particular settlement.

Despite the putative obstacles mentioned above, the government has already begun exploring alternative dispute resolution ("ADR") techniques, such as minitrials, because of several factors relating to litigation, some unique to government and some particular to all litigants.

The most obvious catalyst for exploration of alternative resolution techniques is the rising cost of litigation and the court delays which face all private parties and with perhaps even greater force the government.[276] Disputes between agencies and their suppliers has been the natural result of an increase of federal procurement spending.[277] In fiscal year 1982, for example, 1,273 cases were filed with the Armed Services Board ("ASBCA"), the largest administrative board of contract appeals, while only 974 cases were filed the previous year.[278] Only 95 of the 1,594 pending cases in 1982 were being processed under optional expedited procedures.[279] Although the administrative appeals boards were designed as a streamlined alternative to court litigation, the costs are still substantial because of the formal procedures adopted by the boards.[280] Minitrials have resulted in substantial savings for the parties. In the NASA case, which was the first minitrial used in the context of government procurement, one estimate suggested that the savings "were probably more than $1 million in legal fees alone."[281]

Another factor making the minitrial particularly attractive to the government is related to the required procedures of the Contract Dispute Act of 1978 itself. The required disputes clause in government contracts requires that federal suppliers continue performance, notwithstanding a dispute with the government. The contractor may not stop work and immediately challenge in court an agency order or contract interpretation.[282] Another mandatory clause in all government contracts, the "changes clause", also allows the government to insist upon changes to the contract during performance.[283] Those allowable government changes would of course be considered breaches of contract in a commercial setting.[284] In exchange for those two conditional clauses, the government must pay a fair

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275. Minitrial supra note 239 at 21.

276. Crowell and Moring, supra note 259 at 2.

277. Id.

278. Id.

279. Id.

280. Id., at 3.

281. Eric D. Green, Boston University Law School Professor in 44 Federal Contracts Report 591, September 23, 1985.

282. Crowell and Moring, supra note 259 at 4.

283. Id.

284. Id.

amount for additional work.[285] Problems arise, however, when the government does not consider one of its directions as being a "change" in the contract. The contractor must continue to perform and leave for later the question of who will bear costs.[286] An efficient, expedited resolution of the dispute by minitrial settlement will lessen the adversarial roles between the government and its supplier -- "a phenomenon that serves the ongoing business relationship of the parties to government contracts."[287]

When and for Which Cases, Should the Government Consider Using Minitrials?

In its pilot program for using minitrial techniques to resolve disputes, the Justice Department has directed government attorneys that cases selected for minitrial should be at an early stage of litigation.[288] The cost savings of a minitrial held after discovery has already been completed may not be significant.[289] In addition, the case should probably involve more than $250,000 to justify expenditure of at least a full day's time of high-level company executives and government officials.[290]

The minitrial technique lends itself well to cases involving highly technical concepts and disputes involving mixed questions of law and fact.[291] The NASA case was a good candidate to test the minitrial for this reason. The government also may wish to consider using the minitrial method in cases involving classified defense contracts. The informal settlement can be conducted without an evidentiary hearing in open court that might be harmful to the national security.[292]

The minitrial is likely less appropriate where witness credibility is a major factor. The technique is also probably not justified in cases where questions of law can quickly be resolved through summary judgment.[293] Finally, the minitrial would not be extremely effective for the government in litigation undertaken to implement policy.[294]

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285. Id.

286. Id.

287. Minitrial Successfully Resolves NASA-TRW Dispute, The Legal Times, Monday, September 6, 1982, p. 19.

288. 44 Federal Contracts Report 591.

289. Id., at 589.

290. Id., at 590.

291. Id.

292. Crowell and Moring, supra note 259 at 8.

293. Id.

294. Oliver, Dale E., Crowell and Moring, Alternative Dispute Resolution in Government Litigation; Remarks before the First Judicial Conference of the United States Court of Appeals for the Federal Circuit, p. 1.

The following is a brief review of two government cases successfully resolved through use of minitrial techniques.

NASA Minitrial.

The first reported use of the minitrial technique to resolve a government contracts dispute was in 1982 when NASA, Space Communications Co. (Spacecom -- prime contractor), and TRW, Inc. (TRW -- the subcontractor) settled a multi-million dollar technical dispute.[295] The dispute involved one of NASA's communications satellite programs.

Nature of the Dispute. In December 1976, NASA awarded a major satellite contract to Spacecom for the production of a tracking and data relay satellite system (TDRSS) and related services to be provided over a ten year period.[296] The satellites were to be deployed in orbit by a space shuttle and provide a telecommunications link to an earth station.[297] The contract had an initial price of $786 million.[298]

TRW, Inc., the principal subcontractor, was responsible for providing system engineering, building the communication satellites and providing the necessary software.[299]

By the fall of 1981, the commencement of the TDRSS services had been rescheduled because of delays in production of the space shuttle; the contract price had nearly doubled because of the delays and program changes; and several contract disputes had arisen between Spacecom and NASA.[300] The disputes, ultimately resolved by the minitrial, arose when NASA issued two letters of direction to the contractors in early 1979. The letters sought to obtain for NASA certain capabilities that it believed were within the scope of the contract.[301] Spacecom and TRW maintained that the instructions constituted new work which entitled them to increased compensation.[302] Spacecom and TRW appealed the final decision of the contracting officer to the NASA Board of Contract Appeals. The consolidated appeal was one of the largest ever filed with the Board.[303] These appeals commenced the litigation.

Scope of Litigation. The litigation involved a series of complex issues

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295. 44 FCR 590.

296. Minitrial supra note 239 at 13.

297. 44 FCR 590.

298. Parker and Radoff, supra note 240 at 37.

299. Minitrial supra note 239 at 13.

300. Parker and Radoff, supra note 240 at 37.

301. 44 FCR 596.

302. Minitrial supra note 239 at 13.

303. 44 FCR 596.

relating to the interpretation of the TDRSS performance specification in a variety of highly technical respects.[304] "The merits of the issues involved intricate questions of computer capability, electronics, and the laws of orbital mechanics, as well as traditional questions of contract interpretation."[305]

The complaint and answers were filed in September 1979 and February 1980, respectively.[306] Shortly after discovery began, the parties suspended the proceedings for three months to pursue traditional settlement negotiations.[307] Settlement failed. The parties renewed litigation and engaged in massive document discovery involving the reproduction of approximately 33,000 pages of government files and 72,000 pages of the contractors' files.[308]

Depositions commenced in the summer of 1981.[309] Although the contractors sought 11 depositions and the government sought 43, only 5 depositions actually took place.[310] By September, the highly technical examinations of the witnesses "consumed 3100 pages of transcript."[311] The widening scope of discovery required the Board to push back the hearing date several times and it was estimated that trial was still at least a year away.[312]

In the fall of 1981, Spacecom approached NASA with the suggestion to undertake settlement discussion again. The parties agreed on a minitrial after certain preconditions were set by the parties: (1) the contractors would submit a cost proposal with a breakdown of the six major issues of appeal; (2) each side would give written authority to settle to an appointed negotiator; (3) deadlines and rules of conduct would be agreed upon; and (4) discovery would be suspended during the minitrial.[313]

Motivations to use the Minitrial. First, both parties were concerned with costs. They had already found it necessary to conduct detailed discovery and anticipated substantial additional discovery. The parties had proposed calling for the depositions of forty-five additional government and contractor witnesses over the next ten months.[314]

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304. Parker and Radoff, supra note 240 at 37.

305. Id., p. 38.

306. Id.

307. Minitrial supra note 239 at 13.

308. Parker and Radoff, supra note 240at 38.

309. Id.

310. Minitrial supra note 256 at 13.

311. Parker and Radoff, supra note 240, at 38.

312. Minitrial supra note 239 at 13.

313. Id., p. 13.

314. Parker and Radoff, supra note 240 at 38.

Second, the parties were motivated to tighten the schedule. A trial date was not even in sight with delays attributable to the complexities of the case, problems in coordination between the prime and subcontractor, the difficulty of securing people for litigation who were also needed in the TDRSS program, and the shortage of people allocated to the case by the government.[315]

A third concern of both NASA and the contractor was the uncertainty of result. Both parties were aware that the difficulty of making a clear, comprehensive and persuasive presentation of such complex issues created an unusual uncertainty in the outcome.[316]

Another motivation for the minitrial was the parties' need for continued cooperation. Litigation can strain business relations between parties. In this case, the parties were required to continue working together to deploy the satellite successfully, a national asset. They also wanted to release key personnel from the litigation process to resume channelling their energies into the program.[317]

Finally, the parties felt the need to address the merits and involve senior officials. Spacecom realized that previous settlement discussions had not addressed the merits of the issues nor involved face-to-face meetings of senior management.[318] It felt that NASA's willingness to invest such time and money into discovery suggested that NASA was persuaded that the government's case was meritorious.[319] The contractors felt that a settlement could only be reached if, through a minitrial, senior management of NASA was exposed to the contractor's best case and both parties were able to address the merits.[320]

The Procedure. Before proceeding, the parties agreed that:

- Litigation would be stayed during the minitrial,[321] but would resume if no settlement were reached.
- The contractors would submit a formal claim covering cost of performance and proposed allocation of cost of each legal issue.[322]
- The parties would simultaneously exchange briefs setting forth their factual and legal positions. All cited documents were to be included in

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315. Crowell and Moring, supra note 259 at 8.

316. Parker and Radoff, supra note 240 at 39.

317. Id.

318. Id.

319. Id.

320. Id.

321. Id., p. 40.

322. Id.

appendices.[323] No reply briefs would be filed.

- Shortly after the briefs were exchanged, each party would submit questions to be addressed by the other during its oral presentation.[324]

- The trial was to be one day. Each side was to have three hours to make a presentation and could use whatever combination of lawyers and engineers it thought appropriate in making the presentations.[325]

- Presentations were to be made to senior officials representing each party. An associate administrator of NASA and the director of Goddard Space Flight Center for NASA; a VP of TRW and the president of Spacecom, for the contractors. Only senior officials would ask questions.[326]

- Settlement negotiations would then begin.

In the actual minitrial, the oral presentations were made exclusively by lawyers.[327] Also, the parties chose not to use a neutral advisor because of the complex technical issues in dispute.[328]

Settlement negotiations began the day after the hearing "behind closed doors" at NASA headquarters.[329] Only the four principal negotiators directly participated in the negotiations but had advisors and legal counsel stand by to discuss positions.[330] The parties had agreed to a groundrule of limiting the settlement negotiations to a single day but decided that an additional day was justified by the progress made. The parties settled after their second day of face to face meetings and reached agreement on the claim as well as unrelated disputes.[331] All claims and related issues amounted to well over $100 million.[332]

Army Corps of Engineers Use of the Minitrial

In the last two years, the Corps of Engineers has used the minitrial

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323. Id. NASA submitted a 64 page brief with a 43 document appendix, while the contractor's brief consisted of 81 pages and an appendix of 79 documents.

324. Minitrial supra note 239 at 13.

325. Id.

326. Id.

327. Id.

328. Crowell and Moring, p. 10.

329. Parker and Radoff, p. 41.

330. Minitrial supra note 239 at 17.

331. Id.

332. Id.

procedure twice to resolve construction contract claims.[333] Spokesmen for the Corps have said that the type of case most suited for a minitrial is one involving a "highly complex factual dispute in which the contractor's arguments have some merit."[334] The Corps looks for cases in which there is a possibility that a board of contract appeals will sustain the contractor's position where there is room for the government to settle.[335]

Industrial Contractors. The Corps first used the minitrial to reach settlement on a $630,000 construction contract claim.[336] The claim was made by Industrial Contractors, Inc. that the government had "improperly accelerated performance on its construction contract."[337] The parties agreed to use a minitrial. The contractor's president and the Corps' division engineer each presented his claim in three and one half hours.[338] Following an appraisal of their cases by a neutral advisor, former Claims Court Judge Louis Spector, the parties settled after 12 hours of negotiation.[339]

Tenn-Tom. The second case in which the Corps successfully used the minitrial technique to resolve a dispute involved a $61 million construction claim by Tenn-Tom Construction.[340] The Corps awarded a contract to construct part of the Tennessee-Tombigbee Waterway, to Tenn-Tom, a joint venture of Morrison--Knudsen Co., Brown and Root, Inc., and Martin Eby Construction Co.[341] The contract was for excavation of 95 million cubic yards of earth.[342] The dispute arose when the contractor sought a $44 million equitable adjustment based on alleged differing site conditions. The contractor had experienced performance difficulties because of drainage problems on site.[343] After receiving written denial of the claim by the contracting officer, the joint venture appealed to the Corps of Engineers Board of Contract Appeals,[344] increasing the claim to $61 million due to interest.

The parties agreed to a minitrial and chose Professor Ralph Nash, a GW

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333. 44 FCR 502; 43 FCR 257.

334. 44 FCR 502.

335. Id., p. 503.

336. 43 FCR 257 in Id.

337. Id.

338. Id.

339. Id.

340. In Re Tenn-Tom Construction, memorandum of settlement agreement, 8/23/85. 44 FCR 502.

341. 44 FCR 500.

342. Id.

343. Id.

344. Id.

professor, as a "neutral advisor."[345] The trial was held in Cincinnati on June 12-14, 1985.[346] The principal officers for the parties were J. K. Lemley, Senior Vice President of Morrison-Knudsen, for the contractors, and Division Engineer Brig. Gen. Peter J. Offringer, for the Corps.[347] The parties presented their cases on consecutive days, with a third day devoted to presentation of evidence concerning quantum and for remaining questions.[348] By agreement, the parties reconvened on June 27, for presentation of further evidence and more questions. They settled the next day.[349] The government agreed to pay Tenn-Tom $17.25 million in exchange for a release of all prime contractor and subcontractor claims under the contract.[350]

IX
SETTLEMENT TECHNIQUES

Agencies use a variety of techniques that are less structured and less formal than minitrials to encourage the settlement of contested issues. The unifying principle of all the processes is that the parties make the decision themselves through a negotiated agreement. That is, these procedures are unlike arbitration[351] where someone makes a decision and imposes it on the parties.

Need for Structure to Facilitate Settlements

Settlements happen all the time. Most, no doubt, occur by "doing what comes naturally." While successful in resolving many cases, an ad hoc approach does not recognize settlement as a specific process that can result in both more and better settlements.[352] Explicit recognition of their potential by the development of procedures to induce them in appropriate situations[353] and to provide

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345. Id. at 503.

346. Id.

347. Id.

348. Id.

349. Id.

350. Id.

351. To a very real extent, however, non-binding arbitration is a settlement techniques since the parties return the authority to make the final decision after award.

352. Testimony of Erica Dolgin of Environmental Protection Agency at ACUS Hearing supra note 49. Ms. Dolgin observed that settlements have a life span -- a beginning, a middle, and an end -- and that the procedures and skills required for each phase may differ.

353. While it should be unnecessary to point out, but given the enormous attention paid recently to managing dockets and using ADR techniques as a means of reducing the backlog of trials, it bears emphasizing that not all

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for the participation of those who would be affected can help agencies handle their caseloads and make fully satisfactory decisions with fewer resources than would a more formal process. It is, therefore, helpful to establish procedures to enhance the settlement process. Moreover, settlement procedures can help alleviate problems peculiar to the government in settling cases.[354]

As in any bureaucracy, the distance between those on the line and those with decisional authority can be a major inhibition to negotiating a settlement. The employee who is handling a particular matter may lack guidance as to the agency's policies concerning settlement, and hence may be reluctant to engage in discussions simply because he or she is unclear whether the agency has the power to settle[355] or as to what would be acceptable.[356] Or, as a result of the same

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353.(...continued)
cases can or should be settled. The thesis of this paper is that trials are one, but only one, means of making decisions, and that other techniques may be more appropriate in particular circumstances. ADR techniques are a positive means of resolving important issues, not a second best alternative to the "real thing."

Formal decisions become public goods that guide future conduct and provide a means of ensuring that the public welfare is achieved. For example, if someone was the victim of severe discrimination, the public may demand a full vindication of the violation of the public's standards, even though the individual may be willing to settle for less. There is, therefore, some public policy against settlement, although its full reach and reason is not always clear.

The result, however, is that agencies and parties should always consider the matter in perspective and recognize that some issues should be resolved in a formal, public manner because they involve issues transcending the immediate parties. See Edwards, Fiss, and Schoenbrod, supra note 66. On the other hand, there seems to be no particular reason for believing a federal judge is the only one able to pronounce justice in such cases and that properly structured and supervised settlements may often do a better job of rectifying the problem.

354. Rosin, EPA Settlements of Administrative Litigation, 12 Ecology L. Q. 363 (1985).

355. Former Attorney General William French Smith observed,

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

Smith, Alternative Means of Dispute Resolution: Practices and Possibilities in the Federal Government, 1984 Mo. J. of Dis. Res. 9, 21.

356. Richard Robinson, Director, Legal Enforcement Policy Division, Environmental Protection Agency, testified at the ACUS Hearings that settlement techniques are not used frequently because there are too many layers involved in getting permission to use a new approach and, even if granted, the official
(continued...)

phenomenon, a proposed settlement may be subjected to multiple layers of review within the agency.[357] In that case, those with whom the agency is negotiating may be reluctant to be forthcoming since the tentative agreement may be upset as it wends its way through the agency. People negotiate to reach a binding resolution of the controversy. Hence, if the agreement that was crafted after days of pressing discussions does not have a fairly good chance of being accepted, parties have a significantly lessened incentive to bargain.

These problems with settlement can be addressed by providing those who would normally negotiate with the public with guidelines as to the agency's policies concerning settlements.[358] Another means of addressing similar problems is for the agency to make lines of authority clear and provide a means for involving policy-level officials in the decisions as they mature, so that once the agreement is struck there is a reasonable likelihood that it will be upheld.

Another inhibition to settlements -- one certainly **not** limited to government -- is that the parties become overly convinced of the strength of their respective cases. Since each believes he or she has a winner, and hence a high BATNA, they also see little to be gained in settling, unless of course the other side sees the light and capitulates. That is not conducive to settlement. Thus, another aid in the settlement process is to provide some sort of "reality check" on all parties. This is some means of helping a party assess the strength of its case in a relatively honest, straight forward way so that they can put its settlement potential into perspective. The minitrial, for example, is designed to use a neutral advisor who will render an informal, non-binding opinion should the executives fail to negotiate an agreement.[359]

Yet another problem facing government officials in settling cases is debilitating second guessing.[360] Direct negotiation among those affected customarily

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356.(...continued)
is likely to feel he or she will not receive enough credit for using a new approach. Thus, it is easier and safer to stick with traditional litigation. Indeed the government has never used ADR in an enforcement case.

357. See discussion supra at note 272.

358. Testimony of Kay McMurray, Director, Federal Mediation and Conciliation Service, at ACUS Hearings, supra note 49.

The Attorney General recently issued guidelines to executive branch agencies concerning settlements. It cautions agencies against yielding future discretion in settlements and provides examples of the types of settlements the Department of Justice will oppose. While perhaps negative in tone, it does provide agencies with guidance they can take into account when initiating settlement discussions. It is far better to know of the limitations at the early stages of negotiation than having a fully developed tentative agreement knocked down.

359. See discussion supra at note 33.

360. Those who manage the government's litigation may also be reluctant to use informal dispute resolution processes because of a fear that they will be
(continued...)

relies on the parties' self interest for its integrity; indeed, the ability of those affected to actually make the decision is one of the most attractive aspects of direct negotiations. Thus, whether or not the agreement is a "good deal" for any one party can be judged by comparing it to that party's goals and what might have occurred if some other process for reaching a decision were followed. The difficulty with using direct negotiations when the government is a party is that the government's own goals may sometimes be unclear. Thus, for example, it may not be clear in the abstract whether a settlement was wise under the circumstances because the government's case was weak, or the official wanted to achieve some other end,[361] or whether the settlement inexplicably gave too much away. The potential for second guessing an official can have a debilitating effect on negotiations in some controversial areas. In that case, it may be that the agency would want to establish a panel of senior officials or a group of neutral advisers,[362] publish the settlement in the Federal Register for comment,[363] or some other means to ensure the integrity of the decision and to curtail pernicious second guessing.

Overview of Techniques[364]

The Environmental Protection Agency drafted, but has not published rules to encourage the negotiation of test rules under the Toxic Substances Control Act by providing procedures leading to a "consent agreement" that will have the effect of an EPA rule.[365] The proposal provides "EPA intends to use enforceable consent agreements to accomplish testing where a consensus exists among EPA, affected manufacturers and/or processors, and interested members of the public concerning

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360.(...continued)
criticized. For certain issues, such as public health and safety, the perception remains with some that private, informal hearings are inadequate, and that public officials who allow such hearings may be abusing their power.

Smith, supra note 355, at 21.

361. There is always the possibility that someone will attack a settlement as motivated by the government official's seeking beneficial employment or otherwise currying the favor of the one with whom he or she is settling.

362. See, Railway Labor Act, § 2, Ninth; Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

363. The Department of Justice and the Federal Trade Commission publish notices concerning proposed mergers.

In addition to providing information for the agency's consideration, the publication can also help diminish allegations of backroom deals since the world at large will know that the decision is being made and what its contours are.

364. See Appendix I for a survey of settlement techniques used by administrative agencies.

365. Draft of August 7, 1985 of a notice of proposed rulemaking.

the need for and scope of testing."[366] Procedures have also been recommended for using negotiation to resolve complex Superfund matters.[367] EPA has issued guidelines for settling enforcement actions.[368]

The Federal Energy Regulatory Commission uses as "settlement judge" to help the parties settle a case.[369] The Chief Judge has the authority to designate an ALJ who is not assigned to a case to meet with the parties in an effort to clarify and narrow the issue and to see if they can settle the matter. The settlement judge does not have the authority to impose a decision, and because the judge is not the one who will try the case, the parties are likely to feel freer to be more direct and open in attempting to reconcile their differences. One judge indicated that he was able to review the file and provide a fairly accurate appraisal of the case for certain types of matters, and that had a salutary effect on the parties by putting their case into perspective. To an extent, the settlement judge acts a bit like a mediator and a bit like the neutral adviser in a minitrial by giving his reaction to the case.

Agencies have also established a number of explicit mediation programs. The Secretary of Commerce mediates disputes under the Coastal Zone Management Act between a federal agency and the affected costal zone state.[370] The Office of Ocean and Coastal Resources Management mediates several disputes per year between state agencies and federally licensed activities. Complaints over age discrimination are mediated by the Federal Mediation and Conciliation Service,[371] and the Equal Employment Opportunity Commission seeks to reconcile differences over unlawful employment practices.[372] The Grant Appeals Board of the Department of Health and Human Services provides a "two track approach," one of which is mediation; this process is the subject of a separate, comprehensive study by the Administrative Conference.

The criteria for determining whether an issue is likely to be resolved through negotiation were developed in ACUS Recommendation 82-4.[373] While the recommendation itself focused solely on the prospects for negotiating regulations, the criteria are applicable to issues of public policy generally. Briefly stated, the criteria for deciding when a matter would lend itself to a negotiated solution

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366. Id.

367. ACUS Rec. 84-4; Anderson, Negotiation and Informal Agency Action: The Case of Superfund, 1985 Duke L. J. 261 (1985).

368. See, e.g., 50 Fed. Reg. 5034 (1985).

369. Appendix I.

370. Appendix I.

371. For a discussion of FMCS's non-labor activities generally, see Barrett, The FMCS Contribution to Non-labor Dispute Resolution, Monthly Labor Review 31 (August 1985).

372. 29 CFR § 1601.24.

373. Harter, Negotiating Regulations, supra note 1, Perritt, Negotiated Rulemaking in Practice, 5 J. Pol. Ana. & Mgt. 482 (1986).

are:[374]

- The number of interests that must participate in the discussions at any one time is limited to approximately 15-25; others can be accommodated by means of "teams" or caucuses".

- Each interest is sufficiently organized that individuals can be selected to represent it during negotiations, or several individuals together can span the range of interests.

- The issues are mature and ripe for decision; that is, they are sufficiently crystallized that the parties can focus on them directly.

- There is a realistic deadline; this may be an agency commitment to move forward on its own if sufficient progress has not been made in the negotiations.

- No party will have to compromise an issue fundamental to its very existence.

- The outcome is genuinely in doubt, in that no party can achieve its will without incurring an unacceptable sanction from some other party; thus, the parties have reached a stalemate or an impasse.

- The parties will commit themselves to negotiating in good faith (which is not to say that they have to agree to yield whatever other tools they have at their disposal to achieve their ends).

Many of these provisions have direct applicability to deciding whether it would be appropriate to settle a pending matter.

X
CONCLUSION: WHERE DO WE GO FROM HERE?

A prestigious panel of the American Bar Association, following an extensive study, found severe shortcomings in the administrative process:

> We share the general view that many administrative procedures are too slow, costly and cumbersome. As a result, vital economic interests concerned with capital formation, plant modernization and business expansion are severely handicapped, and reforms necessary for the protection of workers and consumers are too long postponed. These delays and excessive costs have resulted, in considerable part, from the fact that administrative procedures, initially developed as a safeguard

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374. Harter, Regulatory Negotiation: An Overview, Dispute Resolution Forum, (Jan. 1986) at 4. See also, Cormick, The "Theory" and Practice of Environmental Mediation, 2 Envtl Prof. 24 (1980); Susskind & Weinstein, Toward a Theory of Environmental Dispute Resolution, 9 B.C. Envtl Aff. L Rev. 311 (1980); Raiffa, The Art and Science of Negotiation (1982).

> against the threat of regulatory abuse, have come to mimic the judicial process, with inadequate regard for the flexibility available under existing statutes. Improved procedures will serve all citizens, both as consumers and producers.[375]

Former Attorney General William French Smith echoed these concerns in terms of direct impact on the Federal Government:

> Increased use of adversarial procedures in the courts and administrative process has had serious consequences. Regulatory proceedings have become more lengthy and complex as a result of conflict between the government and private parties, and have all too often led to unnecessary and wasteful regulations. Moreover, lawsuits involving the government have become more numerous. The number of lawsuits in which the United States was a party grew by more than 155% in the last decade: from 25,000 new lawsuits a year in 1970 to 64,000 new lawsuits a year in 1980. The accompanying costs to the government have increased at an even greater rate, with legal expenses of federal agencies estimated to have more than tripled in the decade of the 70's. In a time of fiscal constraints, the government simply cannot afford these costs.[376]

Even without the shortcomings of an excessive reliance on trial type procedures, alternative means of dispute resolution may have positive benefits beyond alleviating caseloads and resulting delay. Another prestigious, diverse panel found in its report to the Department of Justice concerning courts but in terms equally applicable to agencies:

> Society cannot and should not rely exclusively on 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.[377]

The increased use of the full range of alternative means of dispute resolution by administrative agencies can, in appropriate circumstances, help address these problems. As former Attorney General Smith has also observed, "Federal officials have just begun to recognize the potential of alternative dispute resolution processes and only recently have they tried to apply these processes in resolving controversies in which the government is a party."[378]

Several things appear necessary to increase the beneficial use of dispute resolution techniques by Federal agencies. First is simply an explicit recognition

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375. American Bar Association, Commission on Law and the Economy, Federal Regulation: Roads to Reform (1979) at 92.

376. Smith, supra note 355, at 10; footnotes omitted.

377. Paths to Justice, supra note 24, at 1.

378. Smith, supra note 355, at 11.

of their existence and potential. Second is the development of procedures and processes -- sometimes relatively fully developed and other times more conceptual and ad hoc -- to tailor the general processes to the specific agencies and programs. Third is an outreach to make members of the private sector comfortable with the potential of the new procedures. This was clearly demonstrated for example when the Chicago regional office of the Merit Systems Protection Board engaged in a conscientious outreach effort to make its constituents aware of its program, and that office had by far the widest use.[379] Fourth is the systematic sharing and evaluation of the experience with the new forms so that they can be adjusted to meet legitimate needs and a fuller understanding of their appropriate use developed.

The administrative process itself was in large measure born as an alternative means of dispute resolution -- a way other than courts for making important societal decisions. It is singularly appropriate, therefore, that it should be responsive to various forms of dispute resolution that are gaining broad acceptance in the civil sector. These processes can help administrative agencies fulfill their original potential. We are on our way in recognizing their role. That alone is a major first step towards broader, more successful use.

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379. Adams, supra note 170, at 10-11, 65-67, 85, 92.

APPENDIX I
SURVEY OF DISPUTE RESOLUTION METHODS USED IN THE ADMINISTRATIVE PROCESS

This survey is a rough "catalogue" of the uses agencies currently make of alternative means of dispute resolution. It is based on three sources: (1) Agencies' responses to a questionnaire developed in conjunction with the Office of the Chairman of the Administrative Conference and circulated to the agency members of the Conference. (2) A review of all references in the United States Code to the terms "arbitration, mediation, conciliation, negotiation, or informal." (3) Programs that have come to our attention informally.

It excludes for the most part programs dealing solely with labor relations, which to a very real extent are the most rich in their use of ADR techniques. They are not included because they so closely resemble their private sector counterpart and are basically a special case.

Department of Commerce.

Office of Export Enforcement. Under the Export Administration Act of 1979 50 U.S.C. Appendix 2410 the Office of Export Enforcement (OEE) issues an initial contact letter informing a party of its intention to issue a charging letter. The party may discuss the proposed charges with the OEE and attempt to reach a pre-charging letter settlement. This method is used approximately 50% of the time and results in settlement of the dispute 95% of the time. This settlement is governed by regulations at 15 C.F.R. 388.17(b). If the dispute is not resolved, the charging letter is issued. The consent agreement which results from this process is reviewed by the Deputy Assistant for Export Enforcement.

Office of Anti-Boycott Compliance. This office uses the procedures followed by the Office of Export Enforcement in all of its disputes.

National Oceanic and Atmospheric Administration. The Office of the Secretary conducts a mediation of coastal zone management disputes under the Coastal Zone Management Act 16 U.S.C. 1451 et seq. Under the Act, the Secretary of Commerce is authorized to mediate disputes between a federal agency and a coastal state concerning a coastal management program. The Act also authorizes the Office of Ocean and Coastal Resources Management to mediate where a state agency intends to object to a federally licensed activity. The mediation must be agreed to by all parties. It is used once or twice a year. The mediation is governed by 15 C.F.R. part 930, subpart G. See also, 15 C.F.R. 930.124. If the mediation is not agreed to or fails, all parties have recourse to the courts. If informal mediation fails, formal appeal may be taken to the Secretary of Commerce.

The National Oceanic and Atmospheric Administration also administers the Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 et seq. with implementing regulations at 15 C.F.R. part 980. Under this Act, U.S. companies seeking licenses to mine manganese must resolve all disputes involving overlapping mine sites. The administrator of NOAA may resolve these conflicts applying principles of equity. Under 15 C.F.R. 970.302 the administrator will encourage companies to resolve the conflicts voluntarily. The NOAA will then review any subsequent voluntary agreement. This method of dispute resolution has been used one time.

Personnel Law Division. The Division conducts arbitration of employee grievances under the Civil Service Reform Act, 5 U.S.C. 7121. Arbitration has been used approximately eight times a year and is governed by regulations in 29 C.F.R. 1404 and Collective Bargaining Agreements.

Federal Emergency Management Agency

The agency uses alternative methods of dispute resolution in two instances. (1) FEMA uses arbitration under the Urban Property Protection and Reinsurance Act, 12 U.S.C. 1749(b). The procedures are set forth in 44 C.F.R. 56.37. No cases have been brought under this Act to date. (2) FEMA uses standard dispute resolution techniques in such matters as equal opportunity cases, adverse actions, performance ratings, and Merit Systems Protection Board cases.

Commodity Futures Trading Commission.

See Appendix II. The Commodity Exchange Act encourages private sector mechanisms for dispute resolution in requiring designated contract markets and registered futures associations to provide a voluntary equitable procedure through arbitration or otherwise, for the settlement of customers' claims and grievances against any member or employee. See 7 U.S.C. 7A(11),21(b10). There is currently no limitation on the monetary value of claims which may be subject to arbitration. The Commission recently amended its rules under 17 C.F.R. 170.8, 180.2 to encourage the use of arbitration as a means of dispute resolution. See 48 Fed. Reg. 22136.

Consumer Product Safety Commission.

Under the Federal Hazardous Substances Act, 15 U.S.C. 1266, the Commission must provide any person alleged to have violated the Act appropriate notice and opportunity to present his views either orally or in writing prior to the Commission's referring a case to the U.S. Attorney for criminal prosecution. The Commission is also required to use informal dispute resolution procedures under 5 C.F.R. 752.404 in the settlement of any employee disputes.

Department of Agriculture.

Packers and Stockyard Division. Private parties may file complaints under the Packers and Stockyards Act. See 7 U.S.C. 181 et seq. This complaint is filed in the field offices of the Packers and Stockyards Administration. The office will investigate the complaint and the regional supervisor may then express his opinions to the parties orally or by letter as to whether respondent may be liable to pay the complainant. After this process, if the parties wish to litigate, the case is referred to the Office of General Counsel for a reparation proceeding. Records of the numbers of such mediations which have not been followed by reparation cases have not been kept in recent years. In fiscal year 1974, the number of mediation cases was approximately 600 which far exceeded the number of formal reparations proceedings.

Natural Resources Division. The agency conducts agency-initiated methods of dispute resolution under the National Forest System. The procedures for

dispute resolution include appeals of decisions of forest officers under 36 C.F.R. 211.18. This is a broad informal appeals process which is applied in approximately 300 cases annually. Other rules of procedure include 36 C.F.R. 228.14 which is an appeals process available to mineral operators aggrieved by decisions in connection with the regulations governing locatable minerals and 36 C.F.R. 292.15 which is an appeals process for owners of private land within the Sawtooth National Recreation Area. A line officer of the Forest Service resolves disputes in each of these specified procedures.

Department of Defense.

The vast majority of dispute resolution mechanisms within the Department of Defense are not conducted pursuant to the APA. The following are the responses of the component agencies within the Department of Defense which use alternative forms of dispute resolution.

Army Corps of Engineers. The Corps of Engineers uses an intervening management level review to attempt to resolve contract disputes that would otherwise have to be resolved by resort to trial-type hearings before the Engineers Board of Contract Appeals. This informal review is called Division Review of Final Contracting Officer Decisions Made at the District Level. This review involves a document review and an informal hearing held by the division engineer or his deputy at which both the contracting officer and the contractor appear and present their views and arguments. The division review informal hearing process is used at the option of the division engineer. The process is used in about 1/4 to 1/2 of all contract dispute cases. There are no formal rules of practice or procedure for this review process. The hearing is informal and within the sole discretion of the division engineer who presides at these informal hearings. If the dispute is not resolved the Engineers Board of Contract Appeals holds a more formal hearing and subsequently renders its decision.

Armed Services Board of Contract Appeals. All the appeals to the ASBCA may potentially result in hearings, however, ASBCA Rule 11 allows the parties to submit their case on a documentary record without a hearing. Additionally ASbcA Rule 12 provides for a faster decisionmaking process on truncated proceedings where the amount in controversy is $50,000 or less.

Office of Dependent Schools. The Department's regulations governing the education of handicapped students in a DOD dependent school make mediation a prerequisite to a due process hearing to resolve a dispute between the parents of a handicapped student and school authorities. 32 C.F.R., Section 57, Appendix II, para. C2. School administrators who are usually not from the handicapped student's own school serve as mediators. If the mediation is unsuccessful, the parents or the school may petition for a due process hearing.

Department of Education.

Division of Research & Improvement, Vocational Education and Rehabilitation. The Randolph-Shepard Act, 20 U.S.C. 107 et seq. provides for the use of arbitration in the resolution of disputes concerning blind persons' priority in the operation of vending facilities on federal property. Blind vendors who are still dissatisfied with state action arising from the operation or administration of the program after being provided a full evidentiary hearing by the state may request the Secretary of Education to convene an arbitration panel to resolve the dispute.

The three member arbitration panel issues binding decisions that are considered final agency action. The Rehabilitation Services Administration has developed procedures for convening panels and conducting arbitration. The procedures are contained in a policy issuance program instruction, 1SA PI 7817. They provide for a formalized evidentiary hearing including oral argument, examination, and cross-examination, as well as submission of written briefs. Disputes are handled through this arbitration mechanism whenever requests to convene panels are received. The RSA reviews panel decisions for consistency with federal law and regulations.

Department of Energy.

The Department of Energy's adjudications are non-APA adjudications. In one instance, however, DOE uses an alternative method of dispute resolution.

Economic Regulatory Administration. The administration generally employs informal administrative procedures in authorizing applications to import or export natural gas. These procedures include the use of public conferences, pre-hearing conferences, oral and written presentations, and opportunities for reply comments. The Economic Regulatory Administration almost always uses informal mechanisms in its consideration of natural gas import and export authorizations. Procedures are governed by 18 C.F.R., Chapter 1, but new rules have been proposed. The agency decides which procedures will be applied. The ERA administrator acts as the decisionmaker in the process. The ERA also, in certain instances, has required opposing parties to meet privately to resolve certain problems or to obtain additional factual information. Under this private sector mechanism, the ERA establishes the time-table under which parties will meet. This private sector mechanism has not been used frequently.

Federal Energy Regulatory Commission. Approximately 80% of the Commission's caseload is resolved through negotiated settlements without appointment of an ALJ. However, a settlement judge may be appointed when informal discussions have not been fruitful but one or more parties believes it is possible to settle the case. Settlement judges were appointed in seven cases in fiscal year '83. The settlement judge is appointed pursuant to 18 C.F.R. 385.603.

In addition, the Commission staff engages in a form of mediation in developing environmental conditions on licenses for hydroelectric generating plants. It also uses a form of mediation among interested parties in developing environmental impact statements and developing nationwide plans.

Nuclear Waste. The DOE is required to resolve disputes concerning the siting of nuclear waste repositories through a written agreement with the affected state or Indian tribe, arrived at through negotiation or arbitration. See 42 U.S.C. Section 10131 et seq.

Department of Health and Human Services.

Within the Department of Health and Human Services, the Public Health Service, the Health Care Financing Administration, the Office of Human Development Services, and the Office of Community Services provide for a variety of non-APA adjudications. Informal dispute resolution, where it exists, has no predetermined procedures or personnel.

The Health Care Financing Administration, however, is required under 45 C.F.R., Section 201.6(c) to pursue informal efforts to resolve disputes with a state, before instituting a formal hearing. In addition, all the agencies with which the Health Care Financing Administration deals attempt to informally resolve disputes with grantees prior to the commencement of formal proceedings.

HHS is also required to publish regulations to provide for appropriate investigative, conciliation and conference procedures for the resolution of age discrimination suits in federally assisted programs. See 42 U.S.C. Section 6101.

The Departmental Grant Appeals Board of HHS has established a mediation program. The process was modeled on one established by EPA which created a program in 1979. HHS's rule provides that the Board in consultation with the parties may suggest the use of mediation techniques and will provide or assist in selecting the mediator. The mediator may take any steps agreed upon by the parties to resolve a dispute or clarify the issues. The results of mediation are not binding upon the parties unless they so agree in writing. The Board will also provide people trained in mediation skills to aid in resolving a dispute that is not pending before the Board itself. At least seven cases have been heard under this process.

Department of Housing and Urban Development.

Bid protests under National Housing Act Contracts, 12 U.S.C. Section 1701 et seq, 42 U.S.C. 3535(d) and 24 C.F.R. Part 20 Subpart C, may be decided by the HUD Board of Contract Appeals upon written submission of the protestor and procuring agent. This procedure is followed in all cases of bid protests under a National Housing Act Contract. The procedure is used in approximately 8 cases per year.

The Fair Housing Act of 1968, 42 U.S.C. Section 3601 et seq directs the secretary to attempt to resolve all complaints under the Act through informal methods of conference, conciliation or persuasion.

Department of Transportation.

Urban Mass Transportation Administration. The Department's Disadvantaged Business Enterprise Regulations require an UMTA recipient who is unable to meet a 10% goal to meet with a UMTA administrator to discuss how best to meet that goal. The UMTA currently is considering the possibility of encouraging private parties with complaints against UMTA recipients to try to resolve those disputes locally before involving UMTA.

Office of Civil Rights. The Office uses alternative methods of dispute resolution in considering participation by minority business enterprises in Department of Transportation programs. Any firm which believes that it has been wrongly denied certification as a minority business enterprise may file an appeal with the Department of Transportation. This appeal is governed by regulations in 49 C.F.R. 23.55. The Secretary of Transportation serves as fact finder over these cases with delegation to the Departmental Director of Civil Rights. Approximately 180 cases are handled per year in this program.

The DOT also encourages recipients of financial assistance to establish procedures for hearing appeals of denials of minority business enterprise certifica-

tion. These recipients are usually local or state governments. This non-federal mechanism is not widely used. Perhaps less than 10 recipients have established their own procedures for hearing these appeals. The recipients who have established such a procedure address a rather high number of cases -- possibly 150 to 200 per year. The Department of Transportation does not monitor the operation of these hearings. Businesses denied certification maintain the right to file an appeal with the Department when they are dissatisfied with the results of recipient's hearings.

National Highway Traffic Safety Administration. Where the agency believes civil penalties may be appropriate for violations of the Motor Vehicle Information and Cost Saving Act, 15 U.S.C. 1981-1991, or the Federal Motor Vehicle Safety Standards promulgated under the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1392, NHTSA has developed procedures for informal resolution without resort to an agency hearing. The procedures are not incorporated by the agency in its regulations. Generally the agency sends the manufacturer a notice letter advising it of the agency's view that a violation exists and of the possible liability for civil penalties. This letter informs the manufacturer that it has the opportunity to submit data to use in arguments that would show that the violation did not occur and/or that there is a reason to mitigate the amount of the penalty. The agency then considers the information submitted by the manufacturer and arrives at what it views as an appropriate civil penalty amount. Further negotiations may proceed before the final figure is established. From August 1982 to August 1983 the above procedures have resulted in the collection of $146,000 in penalties for 11 standards enforcement cases and a total of $9,000 for nine odometer cases.

Environmental Protection Agency.

In the area of hazardous wastes, Section 3013 of RCRA authorizes EPA to issue orders requiring parties to conduct testing or monitoring of hazardous waste sites or facilities. Section 106 of the Superfund authorizes EPA to issue orders requiring parties to take action necessary to protect the public from the dangers associated with the release of hazardous substances. Recipients of either type of order may take advantage of the opportunity to informally confer with the agency concerning the terms of the order. There are no set procedures governing the conduct of the proceedings. In 1983 there were 15 Section 3013 orders and 26 Section 106 orders issued. The selection of presiding officers for this proceeding has not been standardized.

Under the Superfund Act any claim against the fund rejected by the President is to be heard by a member of a Board of Arbitrators. 42 U.S.C. Section 9612. An arbitrator's decision may be appealed to a Federal District Court but may only be reversed if found to be arbitrary and capricious.

Arbitration is also authorized by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 which requires the use of arbitration to establish the compensation due for one applicant's use of prior submitted data in an application for registration of a pesticide. 7 U.S.C. Section 136(a).

Equal Employment Opportunity Commission.

Under 42 U.S.C. Section 2000-e-5(b) the EEOC is authorized to attempt to eliminate alleged unlawful employment practices by informal methods of con-

ference, conciliation and persuasion.

Federal Communications Commission.

The FCC uses several agency initiated alternatives to dispute resolution.

Paper hearings. Under 47 U.S.C. Section 309e, the FCC may conduct paper hearings in situations where there are competing applicants for low power television service. To date, none have been conducted. The rules of practice governing these hearings are found at 47 C.F.R. Section 1.241a. If the Commission cannot resolve the controversy, a regular trial-type hearing is conducted.

Expedited hearings. Under 47 U.S.C. Section 309e the Commission may conduct expedited hearings involving basic qualifying issues for competing applicants for cellular radio service facilities. The FCC reports that this procedure basically involves strict adherence to a hearing schedule already prescribed by the rules. The rules governing this expedited hearing are found in 47 C.F.R. Section 22.916 and Section 22.917.

The FCC also provides for private sector mechanisms for some licensees who are encouraged to resolve electrical interference problems without the Commission's intervention. Absent industry cooperative efforts the resolution of these interference issues would trigger agency proceedings. The agency does not keep detailed information about the exact measures taken by communications industries in private sector negotiations. The agency also does not review measures negotiated and placed into effect through private action. The agency's Field Operations Bureau does monitor and reinforce the effectiveness of these measures.

Federal Election Commission.

Under 2 U.S.C. 437(g), if upon investigation of a complaint or upon its own initiative the FEC concludes a violation of federal campaign laws has occurred, the FEC has 30 days to make every effort to conciliate a resolution of the violation. Any resulting conciliation agreement will conclude the FEC's interest in the matter. If informal dispute resolution methods fail, the FEC may file a civil action.

Federal Labor Relations Authority.

Title VII of the Civil Service Reform Act of 1978 established the Federal Service Impasses Panel as an entity within the FLRA. This panel is to provide assistance in resolving negotiation impasses between federal agencies and exclusive representatives of federal employees. The Impasses Panel is not required to use any particular procedure in the resolution of negotiation impasses. The Panel has broad authority to fashion procedures appropriate to resolve disputes and does so on a case-by-case basis. The following are the most often used procedures.

Factfinding. Factfinding involves a hearing before a Panel member or a Panel designee the purpose of which is to establish a complete record of the issues in dispute and the positions of the parties. This involves a trial-type hearing after which the Panel issues its own settlement recommendations or it may issue a binding decision.

Written submissions. This procedure does not involve a hearing. The parties exchange written statements of position and supporting evidence and may subsequently exchange rebuttal statements. After consideration of the written material the Panel may make recommendations for settlement or issue a binding decision.

Arbitration. The Civil Service Reform Act of 1978 authorizes the parties to voluntarily submit their dispute to an independent arbitrator after the procedure has been approved by the Panel.

Med-Arb. When med-arb is used a neutral is given the authority to both mediate the dispute and make a binding award on those issues not resolved during the mediation. This procedure often leads to a resolution without the neutral having to issue a decision.

The Federal Service Impasses Panel makes the decision as to which procedures will be used to resolve a dispute. To date, factfinding has been directed 14 times, written submissions have been employed 42 times, outside arbitration has been recommended in 14 cases and the med-arb procedure has been used in 20 cases. The Impasse Panel's regulations governing factfinding hearings can be found in 5 C.F.R. Parts 2470 through 2472. There are no published rules or procedures applicable to the other procedures. Factfinding hearings are held by a panel member or a panel designee. There is no designated representative when written submissions are used. Outside arbitration is conducted by a panel designee or a person chosen by the parties. Each of these procedures will result in a final and binding decision unless the parties have negotiated a settlement.

Federal Maritime Commission.

The Commission uses several alternative methods for resolving disputes without resorting to formal hearings.

The Commission uses an informal procedure for adjudication of small claims -- those claims for less than $10,000. The proceeding is conducted under the APA by a settlement officer and by the Secretary of the Commission. The record consists of written evidence and arguments. The decision of the settlement officer is not subject to appeal by the parties but may be reviewed by the Commission on its own motion. The parties, however, may seek review in federal court. The regulations governing this informal procedure are found at 46 C.F.R., Section 502.301.

The Commission uses a shortened adjudicatory procedure conducted before an ALJ. The proceeding is limited to the submission of memoranda, facts and arguments. The parties must consent to this procedure which is used frequently.

The Commission has also used a non-adjudicatory fact finding investigation. These investigations are conducted by agency personnel designated by the Commission. The regulations for this investigation procedure are found at 46 C.F.R., Section 502.281.

The Commission also has a conciliation service. The regulations are found at 46 C.F.R., Section 502.401. This conciliation service is rarely used. This dispute resolution mechanism is applied when all parties consent to the conciliation service. The parties must also consent to any opinion developed as a result of the conciliation service.

The Commission also develops compromise agreements in its application of civil penalties. The Commission's Bureau of Hearing Counsel is authorized to assess penalties, enter into negotiations and reach a compromise with the person involved and to obtain payment of the penalty. Any compromise agreement is executed between a party and the Director of the Bureau of Hearing Counsel. The regulations covering this procedure are found at 46 C.F.R., Section 505.4. If agreement cannot be reached on the terms of a civil penalty, the matter is referred to the Commission for a formal proceeding.

The Commission also oversees two private sector mechanisms for dispute resolution. First, the Commission oversees a self-policing mechanism used by shipping conferences or other rate-making associations under Section 15 of the Shipping Act of 1916 found at 46 U.S.C. Section 14. Under this mechanism a neutral body investigates alleged violations of agreements by members of the conferences or rate-making associations and determines if fines are merited. All conferences or rate-making associations of more than two members are required to employ such self-policing mechanisms and to report to the Commission periodically on their activities. The Commission does not generally review decisions of the neutral bodies.

Second, shippers may also file complaints with conferences and other rate-making bodies concerning the rates and practices of the conferences. The procedure is required by Section 15 of the Shipping Act, 46 U.S.C. Section 814 and by 46 C.F.R. Part 527. If the conference does not respond favorably to a request, the complaining party may file a formal complaint with the Commission.

Federal Mediation and Conciliation Service.

The function of the Federal Mediation and Conciliation Service is to assist parties to labor disputes through conciliation and mediation. The Service is utilized in disputes which significantly affect Commerce. FMCS mediates complaints brought under the Age Discrimination Act.

Federal Reserve System.

The Federal Reserve System processes consumer complaints against state member banks and forwards any complaints it receives against other creditors or businesses to the appropriate state or federal enforcement agencies. In 1982 the System received 2,840 complaints of which 1,226 were against state member banks. The Federal Reserve banks respond to these complaints in writing. The Federal Reserve Board monitors the complaint resolution process by periodically reviewing complaint investigations and responses and complaint handling activities of the Federal Reserve Banks.

Federal Trade Commission.

See Appendix III.

General Accounting Office.

The GAO provides an alternative to trial-type dispute resolution in its Bid Protest Forum which is described in 4 C.F.R. Part 21. This Forum handles

approximately 1,000 cases each year. An attorney with GAO writes the initial draft decision. All final decisions are signed by the Comptroller General.

The GAO uses alternatives to trial-type hearings in settling doubtful claims and in considering advance decisions. See 31 U.S.C. Section 711, 31 U.S.C 3529 and 31 U.S.C. 3702. The agency chooses when to use alternative procedures. Such procedures were used in fiscal year 1982 in rendering approximately 1,000 advance decisions and in determinations of accountable officers' liabilities. In the claims area the GAO handled 1,000 waiver requests, 7,241 claims by the U.S. and 2,400 claims against the U.S. The procedures are set forth in 4 C.F.R. Ch. I, parts 22, 30-35, 53, 91-93, Ch. II, parts 101-105. Claims are handled by claims examiners, with appeals taken to attorneys in the Office of General Counsel. Individuals dissatisfied with GAO actions may appeal to the courts.

Interstate Commerce Commission.

Most of this Commission's cases are decided through its modified procedure whereby the agency decides a case exclusively on written submissions under the APA. The Commission's Office of Proceedings prepares all modified procedure decisions.

Merit Systems Protection Board.

See Appendix II.

National Mediation Board.

The Railway Labor Act, 41 U.S.C. Section 151 et seq. created the Board to settle railroad/employee disputes. If mediation fails, the Board is to induce the parties to enter arbitration. Arbitrators are selected under procedures found in 45 U.S.C. Section 157.

Nuclear Regulatory Commission.

The NRC has experimented with the use of informal procedures in its licensing proceedings. On several occasions the Chairman of the Atomic Safety and Licensing Board Panel has selected a member of the Panel to act as a presiding officer. This presiding officer may allow parties to present oral arguments at his discretion. An order may be issued by the Commission based upon written comments received by the presiding officer. Regulations have not yet been developed to govern this type of informal dispute resolution. The Commission's authority to conduct these informal proceedings is found in 42 U.S.C. 2239.

Office of the Federal Inspector, Alaska Natural Gas Transportation System.

This agency oversees the construction of the Alaska Natural Gas Transportation System. The agency employs informal dispute resolution mechanisms in its determination of rate-based decisions and in its investigation of claims of racial discrimination. The procedures are set forth in 46 Fed. Reg. 51726 and Enforce-

ment Procedures for Equal Opportunity Regulations, 10 C.F.R. Part 1534. The agency attempts to resolve disputes through conciliation, however, if matters are not resolved the Federal Inspector has the final decision.

Pension Benefits Guaranty Corporation.

The PBGC has an appeals board which has the discretion to grant an oral hearing, however no such hearing has ever been held. The board handles approximately 250 cases per year. The board's procedures are found at 29 C.F.R. 2606.52 et. seq.

The PBGC has two alternatives to the appeals board, reconsideration and informal review. An aggrieved party may request reconsideration of a PBGC staff decision. This reconsideration will be undertaken by a person of higher authority than the original decisionmaker. The procedures for reconsideration are found at 29 C.F.R. 2606.31 et seq. The decision to request appeal or reconsideration depends upon the type of determination made. The PBGC makes over 900 reconsiderations per year. A person dissatisfied with the result of a reconsideration may sue in court.

The second informal procedure used by the PBGC is an informal review process under 29 C.F.R. Section 2606.1(c).

See discussion in Appendix II.

Postal Rate Commission.

The Postal Rate Commission currently follows a complaint case procedure set forth in 39 C.F.R. Section 3001.85. The Commission, however, has a proposed rulemaking [check status] which would amend its current procedure to include a provision that would allow the Commission to use informal inquiry methods to resolve complaint cases. Under this proposal, the Commission may choose to conduct a preliminary investigation before filing a formal answer in a complaint case. Under this proposal, a Commission employee would act as a facilitator of a pending dispute. If the informal inquiry method did not resolve the dispute, a formal complaint case would proceed.

Railroad Retirement Board.

The board's adjudications are non-APA adjudications. The agency, however, has proposed using a board of real estate appraisers in resolving disputes concerning a value of a home under the Railroad Retirement Act. See 45 U.S.C. Section 395.8(d). The board has also considered using a similar mechanism to resolve benefit disputes under the Rock Island Railroad Transition and Employee Assistance Act, 45 U.S.C. Section 1001 et seq.

Securities and Exchange Commission.

The SEC does not employ any alternative methods of dispute resolution. However, the Commission does in 17 C.F.R. 202.5C provide for a procedure by which the subject of a Commission investigation may submit a written statement to the Division of Enforcement explaining why no enforcement action should be

brought against him.

Additionally, the SEC has encouraged the security industry's self-regulatory organizations to adopt a uniform code of arbitration. This arbitration is available for resolution of certain disputes between broker/dealers and their customers. The Commission also relies on the self-regulatory organizations to discipline their members for violations of security laws and the regulatory organization's own rules. This practice is authorized by Sections 6(b)6, 15a(b)(7) and 19(g)(2) of the Exchange Act of 1934.

APPENDIX II
CASE STUDIES OF ADMINISTRATIVE ARBITRATION

Federal Insecticide, Fungicide and Rodenticide Act.

The Federal Insecticide, Fungicide and Rodenticide Act[380] authorizes the Environmental Protection Agency to use data received from one applicant for a pesticide registration in support of another applicant's request for registration. The Act requires the applicant which benefits from the use of another's data to compensate the original data submitter for its use.[381] FIFRA's 1978 amendments[382] mandate the use of arbitration to resolve disputes between pesticide manufacturers concerning the amount of compensation owed.

EPA's use of previously submitted data in support of subsequent "me-too" or "follow-on" pesticide registration applications was first authorized by statute in 1972[383] in the Federal Environmental Pesticide Control Act,[384] which amended FIFRA to convert it from a licensing and labelling statute into a comprehensive regulatory scheme governing the use, sale and labelling of pesticides.[385] These 1972 amendments created the data use provision which requires an applicant to compensate an original data submitter for the benefit derived from the use of its data.[386] Originally, EPA was to determine the proper amount of compensation due in cases in which the parties could not negotiate a price.[387] However, Congress amended FIFRA in 1978, restructured the data compensation system and

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380. Pub. L. No. 80-104; 61 Stat. 163 (1947), codified as amended 7 U.S.C. § 136 et seq.

381. § 3(c)(1)(D); codified at 7 U.S.C. § 136a(c)(1)(D).

382. Federal Pesticides Act, Pub. L. No. 95-396; 92 Stat. 819 (1978).

383. Federal Environmental Pesticide Control Act, Pub. L. No. 92-516; 86 Stat.977 (1972).

384. See Ruckelshaus v. Monsanto, 104 S.Ct. 2862 (1984).

385. As enacted in 1947, FIFRA was primarily a licensing and labelling statute. Under the Act, each pesticide had to be registered with the Secretary of Agriculture prior to sale. The Act required a manufacturer seeking a pesticide registration to supply the Secretary with information necessary to support the claims made on the label. The Act prohibited the Secretary from disclosing a manufacturer's formula but was silent concerning the Secretary's obligation in regard to health and safety data submitted with an application. The 1972 amendments expanded FIFRA to regulate the use, sale and labelling of pesticides. Congress added an environmental criterion to the requirements for a pesticide registration. Since 1972 the administrator of the Environmental Protection Agency must find that a pesticide will not cause unreasonable adverse affects on the environment before registering a new pesticide.

386. § 3(c)(1)(D); 86 Stat.

387. Id.

prescribed the use of binding arbitration to resolve disputes concerning the amount of compensation one applicant should pay to another for the use of its data.[388]

Congress's reason for establishing binding arbitration for resolution of these disputes is not entirely clear.[389] Although the data compensation provisions were the subject of much debate, the central issues involved what data would be compensable and the duration of any compensation period accorded to original data submissions.[390] The legislative history does not explicitly reveal why Congress instituted binding arbitration. Congress was concerned that the resolution of the controversies that had developed over the existing compensation scheme was consuming too many agency resources. It, and EPA, felt that these decisions did "not require active government involvement, [but rather should] be determined to the fullest extent practicable, within the private sector."[391] The notion of using binding arbitration emerged as a compromise between the data suppliers and the data users.[392]

It operates only if the parties have failed to agree on an amount of compensation or to a procedure for reaching agreement. Thus, the legislation primarily encourages the parties to resolve a dispute over compensation through private agreement and authorizes binding arbitration only as a last resort.[393]

FIFRA grants original data submitters a right to compensation when data is used for the benefit of another applicant within fifteen years of the original data submission.[394] Under the Act, any applicant who will benefit from EPA's use of

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388. 7 U.S.C. § 136a(c)(1)(D).

389. U.S. Congress, House Joint Committee on Conference, to accompany S.1678, a bill to amend the Federal Insecticide Fungicide and Rodenticide Act, 95th Congress 2nd Session, H. Report 95-1560, September, 1978; U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 7073 a bill to extend the Federal Insecticide Fungicide and Rodenticide Act, 95th Congress, 1st Session, H. Report No. 95-343; U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 8681. 95th Congress 1st Session, H. Report No. 95-663.

390. U.S. Congress, House, Committee on Agriculture, Report to accompany H.R. 7073, 95th Congress 1st Session, H. Report No. 95-343, p. 3.

391. Statement of Sen. Leahy, floor manager of S. 1678, 123 Cong. Rec. 25709 (1977). See the description of Congress's concern in Thomas v. Union Carbide Agr. Products Co., 105 S. Ct. 3325, 3329-3330 (1985).

392. Hearings on Extending and Amending FIFRA before the Subcommittee on Department Investigations, Oversight, and Research of the House Committee on Agriculture, 95th Cong., 1st Sess., 522-523 (1977) (testimony of Robert Alikonis, General Counsel to Pesticide Formulators Assn.).

393. 7 U.S.C. § 136a(c)(1)(D)(ii).

394. § 3(c)(1)(D) divides the data EPA may use into three categories, data supplied to EPA before 1969, data supplied after 1969, and data supplied after 1978. The Act permits EPA to use data supplied prior to 1969 in its

(continued...)

data submitted less than fifteen years earlier by another applicant must make an offer to compensate the original data submitter for this use. If after ninety days the new applicant and the original data submitter have not reached agreement on the amount and terms of compensation either party may submit the dispute to arbitration by filing a request with the Federal Mediation and Conciliation Service.[395] Participation of both parties is compelled since an original data submitter who fails to participate forfeits its right to compensation and any new applicant who fails to participate will be denied registration.[396]

For the purpose of complying with FIFRA, the Federal Mediation and Conciliation Service has adopted the roster of commercial arbitrators of the American Arbitration Association as well as AAA's FIFRA arbitration rules.[397] Requests for arbitration are forwarded directly to the AAA which notifies the other party of the request.[398] Unless the parties agree to a different procedure, AAA selects an arbitrator from the AAA roster after each party has reviewed a list of potential arbitrators and rated these individuals by degree of acceptability.[399] Unless the parties specify otherwise, a single arbitrator hears each dispute.[400] Neutrality is the central qualification for serving as an arbitrator.[401] Each person appointed as a neutral arbitrator must disclose to AAA any circumstances which could affect his impartiality including any financial interest, bias or past relationship with any of the parties.[402] AAA determines whether an arbitrator is or is not neutral.[403]

394.(...continued)
consideration of any application for registration without the permission of the original data submitter. This data submitter is not entitled to any compensation for the use of its data. EPA may use data supplied to it after 1969 in its consideration of any other manufacturer's application so long as the benefitting applicant makes an offer to compensate the data submitter for the use of its data. The third category of data is that which is supplied to EPA after September 30, 1978. FIFRA guarantees that the applicant who submits data after September 30, 1978 will have exclusive use of this data for a period of ten years. At the end of this ten year period this data submitter will be entitled to compensation for the use of its data for a period of five years. See, § 3(c)(1)(D)(iii).

FIFRA also provides for the use of binding arbitration to resolve the question of compensation when pesticide registrants agree to share the cost of supplying EPA with any additional data requested and are unable to agree on the amounts of contribution. 7 U.S.C. § 136a(2)(B)(iii).

395. 7 U.S.C. § 136a(c)(1)(D).

396. Id.

397. 29 C.F.R. § 1440.1(b).

398. 29 C.F.R. § 1440.1(a).

399. 29 C.F.R. § 1440.1 Appendix Sec. 6.

400. 29 C.F.R. § 1440.1 Appendix Sec. 9.

401. 29 C.F.R. § 1440.1 Appendix Sec. 5.

402. 29 C.F.R. § 1440.1 Appendix Sec. 11.

AAA's determination is appealable to FMCS whose decision is conclusive.[404]

Once the arbitrator is selected, the claimant or person seeking compensation has 60 days in which to file a statement detailing the amount claimed and the reasons to support the claim.[405] The other party then has 60 days to respond.[406] The parties may move for discovery through written interrogatories or requests for production of documents.[407] The arbitrator grants requests designed to produce relevant evidence and allows discovery to a degree, "consistent with the objective of securing a just and inexpensive determination of the dispute without unnecessary delay."[408] The arbitrator is empowered to order depositions upon a showing of good cause.[409] The arbitrator may arrange a prehearing conference in which the parties appear before him to consider the possibility of settling the dispute, narrowing the issues, obtaining stipulations or otherwise expediting the disposition of the proceeding.[410] At the hearing, the claimant presents his case followed by the respondent.[411] The claimant must carry the burden of coming forward with evidence to support his claim.[412] The arbitrator decides each issue based upon a preponderance of the evidence.[413] Any party may request that a stenographic record of the hearing be kept and designated the official transcript of the proceeding.[414] After the hearing, the parties may submit written briefs supporting their position and the arbitrator may at his discretion permit oral argument on these briefs.[415]

The arbitrator must issue a decision after the proceeding has closed.[416] This decision must contain findings of fact and conclusions of law with reasoning covering all issues in dispute in the case. The decision must also contain a determination concerning any compensation due.

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403. Id.

404. Id.

405. 29 C.F.R. § 1440.1 Appendix Sec. 13(a).

406. 29 C.F.R. § 1440.1 Appendix Sec. 13(b).

407. 29 C.F.R. § 1440.1 Appendix Sec. 23.

408. 29 C.F.R. § 1440.1 Appendix Sec. 23(a).

409. 29 C.F.R. § 1440.1 Appendix Sec. 23(b).

410. 29 C.F.R. § 1440.1 Appendix Sec. 24.

411. 29 C.F.R. § 1440.1 Appendix Sec. 26.

412. 29 C.F.R. § 1440.1 Appendix Sec. 28.

413. Id.

414. 29 C.F.R. § 1440.1 Appendix Sec. 29.

415. 29 C.F.R. § 1440.1 Appendix Sec 30.

416. 29 C.F.R. § 1440.1 Appendix Sec. 32.

Parties involved in cases in which the disputed amount is $25,000 or less may opt for resolution of their dispute through an expedited procedure.[417] Under this procedure the claim proceeds to hearing within thirty days without discovery or the submission of briefs. The arbitrator's decision consists of short summary findings of fact and conclusions of law.

FIFRA provides that an arbitrator's decision is final and conclusive.[418] The decision is reviewable in court only in the case of "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator. . ."[419] This narrow scope of judicial review is typical of the level of judicial review available in commercial arbitration.

The arbitration provision has sparked a host of constitutional challenges that are reviewed above.[420]

Pension Benefit Guaranty Corporation.

The Multiemployer Pension Plan Amendments Act of 1980[421](MPPAA) amended the Employee Retirement Income Security Act of 1974[422] (ERISA), to impose liability upon any employer that withdraws from a multiemployer pension plan.[423] MPPAA requires pension plan sponsors and withdrawing employers to arbitrate disputes over the amount of an employer's withdrawal liability.[424]

As originally enacted, ERISA permitted employers to withdraw from multi-employer plans free of any future liability so long as the plan did not terminate within five years of that employer's withdrawal.[425] The employer's obligation to the plan ceased upon withdrawal. However, the plan itself remained liable to pay the benefits which had been promised to that employer's employees during the period of participation. MPPAA created withdrawal liability to prevent employers from withdrawing and leaving the plan obligated to pay the benefits from a

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417. 29 C.F.R. § 1440.1 Appendix Sec. 22.

418. 7 U.S.C. § 136a(c)(1)(D)(ii).

419. Id.

420. See discussion in text at notes 114-119; 154-165.

421. P.L. No. 96-364, 94 Stat. 1217, codified at 29 U.S.C. § 1381 et.seq.

422. P.L. No. 93-406, codified at 29 U.S.C. § 1001 et. seq.

423. A multiemployer pension plan is one which is maintained under one or more collective bargaining agreements and covers employees of two or more employers. Employers contribute to the plan fund at rates specified in their agreements. These contributions are paid into a pooled fund which is administered by a board of trustees composed of employer designated and union designated members.

424. 29 U.S.C. § 1401.

425. 29 U.S.C. § 1001.

reduced pension fund pool.[426] Upon an employer's withdrawal from a plan, MPPAA requires the plan sponsor to determine the extent of the withdrawal liability.[427] Any dispute that arises concerning any determination made by the plan sponsor is resolved through arbitration.[428]

MPPAA's legislative history does not reveal why Congress instituted compulsory arbitration to determine a withdrawing employer's liability to the plan sponsor.[429] The bill which originally passed the House[430] did not contain an arbitration provision. The Senate passed a bill[431] in the form of a substitute to the House bill. This Senate bill contained an arbitration provision. There is no Senate Report. The House amended the provision to affect the level of judicial review, and this was accepted by the Senate. The Conference Report is silent concerning the arbitration provision.[432]

The Act directs the Pension Benefit Guaranty Corporation to promulgate rules governing the conduct of the prescribed arbitration.[433] The PBGC published a proposed rule on July 7, 1983.[434] PBGC received 20 comments and incorporated many of the suggestions in the final rule which was published on August 27, 1985. PBGC resolved conflicting suggestions by determining which views best fulfilled the statutory mandate to establish "fair and equitable procedures."[435] Prior to the rules' becoming effective, employers and plan sponsors arbitrated their disputes under Multiemployer Pension Plan Arbitration Rules jointly sponsored by the International Foundation of Employee Benefit Plans and the American Arbitration Association.[436] The new rules apply to arbitration proceedings initiated, pursuant to Section 42221 of the Act, on or after September 26, 1985.[437]

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426. U.S. Congress, Committee on Conference, 96th Congress H. Rept. 96-1343.

427. 29 U.S.C. § 1381-1399.

428. 29 U.S.C. § 1401.

429. U.S. Congress, Committee on Conference, 96 Congress H. Rept. 96-1343; House, Committee on Education and Labor, H. Rept. 96-889.

430. H.R. 3904, May, 1980.

431. S. 1076 July, 29, 1980.

432. H. Rept. 96-1343.

433. 29 U.S.C. § 1401(a)(2).

434. 48 Fed. Reg. 31241 (July 7, 1983).

435. 50 Fed. Reg. 34679 (August 27, 1985).

436. The Multiemployer Pension Plan Rules are sponsored by the International Foundation of Employee Benefit Plans and administered by the American Arbitration Association. The rules became effective on June 1, 1981, and are available from the AAA.

437. 50 Fed. Reg. 34683 (August 27, 1985).

In lieu of the PBGC's final rules governing arbitration, disputing parties may also use other plan rules procedures if they are consistent with the PBGC rules[438] or if they are approved by the PBGC in accordance with procedures set forth in § 2641.13.[439] The PBGC will approve the alternative procedures if the proposed rules will be substantially fair to all parties involved and if the sponsoring organization is neutral.[440]

Under the Act and the PBGC final rules,[441] either of the parties may initiate arbitration within the 60 day period beginning on the 121st day after the date on which the employer requested reconsideration, or if the plan sponsor responds earlier to the request, within 60 days after the employer receives the notification of reconsideration. The parties may jointly request arbitration for 180 days after the plan sponsor has notified the employer of the contractual liability and demanded payment.[442]

The arbitrator's powers and duties are, with a few exceptions, the same as an arbitrator conducting a proceeding under Title 9 of the U.S. Code.[443] The rules require the arbitrator to follow existing law, as discerned from pertinent authority.[444] The regulation does not, however, tell the arbitrator exactly where settled law is to be found.[445]

The final rules differ from the proposed rules in that they do not paraphrase the statutory presumptions that the arbitrator must make as set forth in Section 4221(a)(3) of the Act. The PBGC agreed with several comments that it was superfluous and omitted the paraphrase from the final rules.[446]

Under MPPAA, a plan sponsor's determinations are presumed correct unless it is shown by a preponderance of evidence that a determination is unreasonable or clearly erroneous.[447] Withdrawing employers criticized this presumption, arguing that plan sponsors have an incentive to find large amounts of liability and thus are not impartial and do not deserve a presumption favoring their determinations. For example, in Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc,[448] Thompson contended

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438. § 2641.1.

439. 50 Fed. Reg. 34686 (August 27, 1985).

440. § 2641.13(d).

441. § 2641.2(a)(1)(2).

442. 29 U.S.C. 1401 (a)(1).

443. § 2641.4(a).

444. § 2641.4(b).

445. 50 Fed. Reg. 34681.

446. 50 Fed. Reg. 34681.

447. 29 U.S.C. § 1401(a)(3)(A).

448. 749 F. 2d 1396 (9th Cir. 1984).

that the trustees of the plan sponsor have an interest in establishing a large liability and therefore the presumption favoring their determination constitutes a denial of the employer's right to resolution of disputes before an impartial tribunal.[449] The court rejected this contention, finding that trustees do not have an institutional bias and rather have a fiduciary duty to assess withdrawal liability neutrally and reasonably.[450] The court also noted that MPPAA carefully prescribes the methods for computing liability and allows trustees discretion solely in the selection of the specific method of computation to apply in a particular case. The court held the exercise of this limited discretion insufficient to impugn the impartiality of the trustee's determinations.

The PBGC has included discovery provisions in the final regulation based largely upon the views expressed in the comments. Discovery provisions were not part of the proposed regulation. The PBGC believes that fairness will often require that discovery be available to the parties due to the nature of the withdrawal disputes.[451] The arbitrator controls the scope of discovery.[452]

The arbitrator also has discretion as to the admissibility of evidence. The proposed rules had qualified the arbitrator's discretion, however, by requiring conformity to the legal rules of evidence if the rights of the parties would be prejudiced otherwise. The PBGC omitted the qualification from the final rules because it agreed with several comments that such a requirement was unnecessary, would invite appeals based on technicalities, and would put non-lawyer arbitrators at a disadvantage.[453]

Although the arbitrator may call a prehearing conference under the final rules,[454] the PBGC is not authorized to do so as it suggested in the proposed rules. Several comments objected to the proposed authorization because it would too deeply involve PBGC in an essentially non-governmental arbitration.[455]

The arbitration hearing date must be no later than 50 days after the arbitrator accepts his appointment, unless the parties agree to proceed without a hearing as allowed under 2641.4(c).[456] The proposed time limit of 30 days had been criticized by the comments so the provision has been extended in the final rules. If the parties cannot agree on a date within a 15 day period after the arbitrator's acceptance, the arbitrator has 10 additional days to set the date.[457]

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449. The denial of the right to an impartial tribunal violates the Fifth Amendment right of due process.

450. 749 F. 2d at 1404-1406.

451. 50 Fed. Reg. 34631.

452. § 2641.4(2).

453. 50 Fed. Reg. 34681.

454. § 2641.4(b)

455. 50 Fed. Reg. 34681.

456. § 2641.5(a).

457. § 2641.5(a).

The parties may appear in person or by counsel and will be subject to the arbitrator's order if they fail to appear or file documents in a timely manner.[458] A stenographic or taped record of the proceeding will be made upon the request and expense of any party.[459] The arbitrator must establish a procedure to allow each party full and equal opportunity to present his claims and proofs, cross-examine witnesses and file a brief.[460]

The arbitrator may reopen proceedings for good cause at any time after the close of the hearing and before the final award is rendered.[461] Although the proposed rule required the consent of both parties, the PBGC agreed with several comments which objected to giving the parties the power to frustrate the reopening.[462] The final rule, therefore, does not contain the consent requirement.

The arbitrator must make a written award within 30 days of the close of proceedings.[463] The close of proceedings is marked by either the date the hearing was closed, the date the last brief or reply brief was filed, the date the reopened proceedings were closed, or if the parties waived a hearing, the date on which final statements and proofs were filed.[464]

Two comments objected to the time limits on the arbitrator to render an award because they were unreasonably short and ambiguous. The PBGC clarified the ambiguity by explicitly defining what marks the closing of proceedings but did not adopt the time limit suggestions. The PBGC believes that the limits are adequate because it is the duty of the arbitrator to make sure before he accepts the appointment, that he will be able to render awards promptly after the close of proceedings.[465]

The arbitrator's final award must include a factual and legal basis for the his findings, adjustments for amount and schedule of payments, and a provision for an allocation of costs.[466]

The requirement in the final rules that the arbitrator state a factual and legal basis for his award is a slight revision from the proposed requirement that the arbitrator explicitly characterize his statements as "findings of fact" or "conclusions of law." Some comments argued that non-lawyer arbitrators would be burdened by making the proper categorization. The AAA also criticized the need for the arbitrator to make conclusions of law and noted, in fact, that the Federal

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458. § 2641.5(c).

459. § 2641.5(d).

460. § 2641.5(e).

461. § 2641.6(a).

462. 50 Fed. Reg. 34682.

463. § 2641.7(b).

464. § 2641.7(c), (d), and (f).

465. 50 Fed. Reg. 34682.

466. § 2641.7(a)(1), (2), and (3).

Arbitration Act does not require it. The PBGC agreed that the requirement is of little value and, therefore, made clear in the final rules that the arbitrator need only state a factual and legal basis for the award.[467]

After the final award has been rendered, the plan sponsors are required to make copies of the awards available to the PBGC and contributing employers.[468] One comment suggested that the PBGC publish and index awards. Although the PBGC lacks the resources to comply with the suggestion, it does agree that the awards should be made public.[469]

The arbitrator's award is reviewable in a United States district court.[470] The scope of judicial review of the award is not clear under the statute, however. MPPAA § 4221(b) contains two distinct references concerning judicial review of an award.[471] § 4221(b)(2) authorizes any party to bring an action in a district court in accordance with 29 U.S.C. § 1451 to enforce, vacate, or modify an award. 29 U.S.C. § 1451 provides that a party adversely affected by the Act may bring an action in a district court "for appropriate legal or equitable relief or both." This provision for review is modified by § 4221(c), which provides that in any proceeding under § 4221(b) an arbitrator's findings of fact will be presumed correct subject to rebuttal only by a clear preponderance of evidence. Thus § 4221(b)(2), modified by § 4221(c) appears to authorize de novo review of all issues of law and review of factual findings under a clear preponderance of the evidence standard. This has been the conclusion of most courts which have interpreted the MPPAA arbitration provision.[472]

The provision for judicial review described above is confused by § 4221(b)(3). This section provides that to the extent consistent with MPPAA, arbitration proceedings are to be enforced as an arbitration carried out under the United

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467. 50 Fed. Reg. 34682.

468. § 2641.7(g).

469. 50 Fed. Reg. 34682.

470. 29 U.S.C. § 1401(b).

471. Id.

472. See, Board of Trustees of the Western Conference of Teamsters Pension Plan v. Thompson Building Materials, 749 F. 2d 1396, 1400 (9th Cir. 1984) (Court interpreted MPPAA as prescribing de novo judicial review of questions of law, while arbitrator's findings of fact are presumed correct unless rebutted by a clear preponderance of evidence.); see also, Peick v. Pension Benefit Guaranty Corp., 742 F. 2d 1247 (7th Cir. 1983) (Court rejected contention that MPPAA denies employers their right to access to courts stating that, "Arbitration is ... merely the first step in resolving conflicts arising under the Act." 742 F. 2d at 1277. The court viewed MPPAA as providing a means for encouraging parties to settle dispute and not as a means for reaching a final determination.); see also I.A.M. National Pension Fund Benefit Plan C v. Stockton TRI Industries, 727 F. 2d 1204(D.C. Cir. 1984) (Court analogized MPPAA arbitration to administrative agency action and determined the scope of review to be equal to that accorded to administrative adjudications).

States Arbitration Act.[473] The Arbitration Act provides very limited judicial review, applicable only in cases of fraud, partiality and misconduct. To date at least one appellate court has interpreted § 4221(b) as authorizing only the limited scope of judicial review provided in the United States Arbitration Act.[474]

The courts which have interpreted MPPAA's arbitration provisions thus far have been called upon to determine the Act's constitutionality and have not actually reviewed an arbitration decision under the Act. MPPAA has been upheld against assertions that its provisions violate standards of due process;[475] deny employers access to an impartial tribunal;[476] commit a taking of property without just compensation;[477] violate the Seventh Amendments provision for trial by jury;[478] and constitute a violation of Article III of the Constitution by vesting federal judicial power in arbitrators who are not federal Article III judges.[479]

Commodity Futures Trading Commission Reparations Procedures

The Commodity Exchange Act of 1974[480] established a reparations procedure by which individuals alleging injury under the act as a result of a violation caused by a registered commodities trading professional could adjudicate their claim within the Commodities Futures Trading Commission. The Act offers this reparations procedure as an alternative to civil litigation or resort to a privately sponsored dispute resolution mechanism.

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473. The Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502 (D.C. Cir. 1984).

474. 9 U.S.C. § 1 et seq.

475. See, Pension Benefit Guaranty Corp v. R.A. Gray, 104 S.Ct. 2709(1984)(Court held constitutional MPPAA's retroactive imposition of withdrawal liability).

476. See discussion in text, Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396 (9th Cir. 1984); Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502(D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp. 724 F. 2d 1247 (7th Cir. 1983).

477. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc, 749 F. 2d 1396, 1406 (9th Cir. 1984) (Taking clause does not prohibit Congress from readjusting contractual relationships of private parties); accord, Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1274-1276 (7th Cir. 1983).

478. Washington Star Company v. International Typographical Union Negotiated Pension Plan, 729 F. 2d 1502, 1511 (D.C. Cir. 1984); Peick v. Pension Benefit Guaranty Corp., 724 F. 2d 1247, 1277 (7th Cir. 1983).

479. Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, 749 F. 2d 1396, 1404-1406 (9th Cir. 1984).

480. Pub. L. 93-463.

The reparations procedure has processed approximately 1,000 claims each year since its inception in 1976.[481] From the outset, however, CEA's reparations procedures frequently resulted in long delays and backlogs.[482] Because the procedure was not providing for expeditious, inexpensive resolution of claims as intended, Congress amended the reparations provision in 1982 to grant CFTC the power to promulgate rules, regulations, and orders necessary to provide for the efficient and expeditious administration of reparations claims.[483] Under this authority, CFTC issued reparations rules, completely revising the reparations procedures originally established by CEA.[484] CFTC's current rules create a three track decisionmaking procedure including a voluntary decisional procedure analogous to commercial arbitration, a summary decisional procedure for claims of up to $10,000 and a formal decisional procedure for claims exceeding $10,000.

A person who believes he has been injured due to a registrant's violation of the Act may apply for reparations by filing a complaint with the proceeding clerk of CFTC's Office of Proceedings.[485] This complaint must contain a description of the relevant facts under which the alleged violation has occurred, a claim for damages, and an election of one of the three decisional procedures. The Office of Proceedings initially reviews the complaint and either serves it upon the named registrant, terminates the complaint, or returns it to the complainant for correction of deficiencies.[486] The Office of Proceedings may terminate a complaint only if it raises claims which are not cognizable in a reparations proceeding.

Upon receipt of a complaint a registrant must file an answer within 45 days.[487] The answer must contain a detailed statement of the facts which constitute the ground for a defense, any counterclaims, and an election of a decisional procedure. The answer also may include a motion for reconsideration of the determination to forward the complaint under which the registrant may request a review of the complaint for any patent defects such as a statute of limitations defense. The complainant is permitted thirty days in which to reply to any counterclaim.[488] The failure to answer a complaint or reply to a counterclaim acts as an admission of the allegations and waives a party's right to a decisional procedure.[489] The Office of Proceedings may designate a proceedings officer to enter findings of fact and conclusions of law, including a reparations award against a non-responding party. A default order so entered will become a

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481. Raisler, Nelson, and Wright, CFTC Reparation Rules Offer Novel Adjudication Angle, Legal Times, April 16, 1984.

482. Id.

483. Pub. L. 97-444, 96 Stat. 2308, 7 U.S.C § 18(b).

484. 49 Fed. Reg. 6602-6644.

485. 17 CFR § 12.13.

486. 17 CFR § 12.15.

487. 17 CFR § 12.18.

488. 17 CFR § 12.20.

489. 17 CFR § 12.22.

final order of the Commission unless set aside within thirty days.[490] Within thirty days, a proceeding officer may set aside a default order upon a party's showing that it has a reasonable likelihood of success on the merits and that no prejudice would result from proceeding to the merits of the claim. Once thirty days have passed and a default order has become a final order of the Commission, the proceeding officer may only set it aside if, in addition to showing reasonable likelihood of success and that no prejudice would result, a party establishes that the order was obtained through fraud, mistake, excusable neglect or that the Commission lacks jurisdiction. In either case, the proceeding officer's decision may be appealed to the Commission.

Parties may pursue discovery under each of the three decisional procedures through requests for production of documents, serving depositions on written interrogatories and requests for admissions.[491] Parties may seek all relevant subject matter not subject to a privilege, except that tax returns and personal bank account records are discoverable only upon a showing that such information cannot be obtained by other means. A party served with a discovery request may seek to limit discovery through a motion for a protective order by the Office of Proceedings. In each of the three decisional proceedings discovery must be completed within a period of sixty days after the Office of Proceedings notifies the parties of its commencement.

In the first year following institution of the new rules, from April 23, 1984, to April 30, 1985, CFTC received 441 complaints.[492] The number of complaints increased over the last six months so that CFTC projects that it will receive approximately 500-550 complaints in fiscal year 1985. Of the 441 complaints received under the current rules, 125 have been forwarded for a hearing, 254 remain pending in the Complaints Section of the Office of Proceedings and 62 have been terminated through settlement (28) or due to a complainant's failure to correct deficiencies or because the claim is barred by the statute of limitations or other patent defense.

Among the 125 cases forwarded for hearing, 56 have been pursued through the formal decisional proceeding, 46 through the summary decisional proceeding and in 23 cases the litigants have elected the voluntary proceedings.

As of June, 1985, 6 of the 56 cases following the formal proceedings have been completed. These 6 cases were all resolved through settlement on the average of 119 days after the case was forwarded from the Complaints section. No case under the formal decisional proceedings has yet concluded through judgment.

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490. 17 CFR § 12.23.

491. 17 CFR Subpart B §§ 12.30-12.36.

492. The statistics detailing the Commission's experience under the new reparations rules are taken from a Commodities Futures Trading Commission Staff Document in the form of an Informational Memorandum to the Commission from Executive Director Molly G. Bayley, "Report to the Commission on the Operation of the New Reparations Rules," June 11, 1985. In addition to the cases processed under the new reparations rules, from April 23, 1984 to April 30, 1985, the Commission also processed 320 reparations cases which had been filed prior to April 23, 1985, under the old reparations rules.

Under the summary proceedings, judgments have been reached in 4 cases out of the 46 forwarded to a judgment officer. In addition, one case was settled and another was resolved through a judgment against one party and settlement with the other parties. These case have concluded on an average of 47 days after the cases were forwarded from the Complaints section of the Office of Proceedings to the Hearings section.

Of the 23 cases following the voluntary proceedings, five have been decided by judgment officers. These decisions have been reached an average of 40 days after the cases were forwarded to the judgment officer.

In June, 1985, 254 cases were pending in the Office of Proceedings. Approximately 80 percent of these cases had been in the Office for less than six months and more than 50 percent had been in the Office for less than three months. The length of the time pending before a case is forwarded for a hearing is attributable in part to the time lags in waiting for respondents' answers and to the time spent waiting for complainants' to correct deficiencies in original complaints.

The voluntary decisional proceeding is patterned after commercial arbitration.[493] This procedure is adopted only upon the consent of both the complainant and the registrant. Under this procedure the parties waive any right to an oral hearing and any right they may have had to receive written findings of fact, Commission review or judicial review.[494] Upon the election of the voluntary proceeding, the Office of Proceedings appoints a judgment officer, who is an employee of CFTC to hear the claim.[495] This judgment officer hears all motions concerning discovery and upon close of discovery makes an award on the basis of the written documents submitted.[496] The judgment officer's final decision contains a brief conclusion concerning any alleged violation or counterclaim and an award of damages without any finding of fact.[497] No damage award may exceed the amount requested as damages by a party in its pleading. The judgment officer's decision is final; it may not be appealed to the Commission or to a court although it may be enforced in a United States district court.[498] Despite this finality, the Commission, upon its own motion, may review an award to determine that it is not the result of any fraud, partiality or other misconduct.[499] The judgment officer's conclusion concerning a registrant's violation of the Commodity Exchange Act is not a Commission finding for purposes of denying or revoking a person's registration under the Act; it is considered a final Commission order however for all other purposes and thus may have res judicata effect.

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493. 49 Fed. Reg. 6611; 17 CFR Subpart C, §§ 12.100-106.

494. 17 CFR § 12.100(b).

495. 17 CFR § 12.26(a).

496. 17 CFR § 12.101.

497. 17 CFR § 12.106.

498. 17 CFR § 12.106(d).

499. 17 CFR § 12.403(b).

The summary decisional procedure is available for resolution of reparation claims of $10,000 or less.[500] In this proceeding, as in the voluntary proceeding, a Commission employee known as a judgment officer serves as decisionmaker.[501] The judgment officer plays a very active role in the summary procedure which primarily resolves disputes based upon written documentation.[502] The judgment officer rules upon discovery related motions, may conduct predecision conferences between the parties and additionally, on occasion may permit oral testimony either in person in Washington, D.C. or through a telephonic hearing.[503] Oral testimony may be received only after a party shows that oral testimony is "necessary or appropriate to resolve factual issues which are central to the proceeding."[504] The judgment officer has discretion to limit the issues upon which oral testimony will be received. At the close of the evidence, the judgment officer must issue an initial decision containing brief findings of fact and determinations of all questions of law including an award of damages.[505] Upon receipt of the judgment officer's initial decision, either party may appeal to the Commission. If no appeal is taken, or is not taken within 30 days and if the Commission does not review the decision upon its own motion, the judgment officer's decision becomes a final decision of the Commission.[506]

On appeal, the Commission reviews briefs filed by the parties and may at its discretion hear oral argument.[507] The Commission is not bound by the findings or determinations made by the judgment officer although it may summarily affirm an initial decision which is substantially correct.[508] The Commission remains free to make any findings or conclusions it deems warranted on the basis of the record developed. The Commission's decision is appealable to the United States Court of Appeals under § 14 of CEA where its findings of fact are conclusive if supported by substantial evidence.[509]

The formal decisional procedure is the most detailed of the reparations proceedings and is available for resolution of claims exceeding $10,000.[510] Under this proceeding an administrative law judge presides over a trial-type hearing and decides all claims, while a proceedings officer handles prehearing motions includ-

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500. 17 CFR § 12.26(b).

501. Id.

502. 49 Fed. Reg. 6613.

503. 17 CFR § 201.

504. 17 CFR § 12.209.

505. 17 CFR § 12.210.

506. 17 CFR § 12.210(d).

507. 17 CFR § 12.401.

508. 17 CFR § 12.406.

509. 7 U.S.C. § 18.

510. 17 CFR § 12.26(c).

ing ruling upon all discovery motions.[511] A proceeding officer's decisions are appealable to the ALJ assigned to the case.[512] Either the proceeding officer or the ALJ may preside over a prehearing conference for the purpose of narrowing the issues for hearing or encouraging settlement or the use of the voluntary decisional procedure.[513]

An administrative law judge presides over the hearing[514] and has the power to dispense with oral testimony concerning any factual issues that can be resolved solely through review of submitted documentary evidence.[515] However, as a rule, administrative law judges are expected to allow the opportunity for full oral hearings.[516] At the hearing, the parties may conduct direct and cross-examination and introduce any documentary evidence which is relevant, material and reliable.[517] All hearing proceedings are recorded and transcribed under the supervision of the ALJ.[518] At the close of the hearing the ALJ may request the parties to file proposed findings of fact and conclusions of law.[519]

At the conclusion of the proceeding, the ALJ issues an initial decision containing findings of fact and conclusions of law.[520] The ALJ's decision becomes a final decision of the Commission unless a party appeals to the Commission within thirty days or the Commission itself moves to hear the case.[521] The Commission's power to review an ALJ's decision is the same as its power to review initial decision's developed in the Summary Decisional Procedure. The Commission receives briefs and at its discretion hears oral argument and ultimately may make any findings or conclusions which it determines are warranted by the record. A decision of the Commission is reviewable in the United States Courts of Appeals under § 14 of the CEA where the Commission's findings of fact are conclusive if supported by substantial evidence.[522]

Superfund Arbitration.

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511. 17 CFR §§ 12.300-12.304.

512. 17 CFR § 12.302.

513. 17 CFR § 12.303-304.

514. 17 CFR § 12.304, 312.

515. 17 CFR § 12.311.

516. 49 Fed. Reg. 6616.

517. 17 CFR § 12.312(d).

518. 17 CFR § 12.312(f).

519. 17 CFR § 12.312(g).

520. 17 CFR § 12.314.

521. 17 CFR § 12.314(d).

522. 7 U.S.C. § 18 (1982).

The Comprehensive Environmental Response, Compensation and Liability Act[523] (CERCLA or Superfund) relies upon arbitration to resolve conflicts arising from the Environmental Protection Agency's Administrator's determinations of claims asserted against CERCLA's Hazardous Substance Response Trust Fund.[524]

The Superfund Act created a Trust Fund to pay for the clean up of hazardous waste spills and disposal sites.[525] The Trust Fund may be used to pay the federal government's costs to clean up hazardous waste sites, the costs incurred by any person responding to actual or threatened hazardous substance releases and the costs incurred by a state or federal agency in restoring, rehabilitating or replacing natural resources harmed as a result of a hazardous substances release.[526] A person who has responded to a hazardous substance release or a state responsible for restoring natural resources harmed by a release may assert claims against the fund whenever they have not recovered from any other potentially liable party. EPA may award claims for response costs incurred by any person so long as the costs were expended in compliance with the National Contingency Plan of the Clean Water Act and were preauthorized by EPA. EPA may pay the costs incurred by a state acting as trustee of natural resources so long as they were expended either in accordance with a plan developed under CERCLA or in response to an emergency.

Upon presentation of a claim, the EPA administrator, must attempt to negotiate a settlement and if unsuccessful, make an award from the fund or deny the claim.[527] The administrator must submit denied claims for arbitration.[528] A claimant may request arbitration of an award the claimant finds unsatisfactory.[529]

Under CERCLA, the President must establish a Board of Arbitrators to hear claims.[530] The members of this Board must be selected in accordance with procedures utilized by the American Arbitration Association. CERCLA authorizes an arbitrator to conduct informal public hearings and issue written decisions.[531] The Act provides for judicial review of arbitrators' decisions in a United States district court. The district court is to uphold an arbitrator's decision unless it finds that decision constitutes an "arbitrary or capricious abuse of the members'

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523. Pub. L. 96-510; 94 Stat. 2767 (1980); 42 U.S.C. 9601 et. seq.

524. The arbitration provision is found in Sec. 112(b)(4).

525. 42 U.S.C 9631-33.

526. CERCLA Sec. 11i(a).

527. CERCLA Sec. 112(b)(2)-(3).

528. CERCLA Sec. 112(b)(3).

529. Id.

530. CERCLA Sec. 112(b)(4)(A).

531. CERCLA Sec. 112(b)(4)(B)-(D).

discretion."[532]

The Environmental Protection Agency issued a proposed rule to establish procedures for the conduct of arbitration on March 8, 1985,[533] followed by a 60-day comment period. EPA made minor alterations to the rule and published the final rule on December 13, 1985.[534] The rule provides that the EPA Administrator will appoint the members of the Board of Arbitrators.[535] The Administrator will screen applicants for membership to the Board by evaluating such criteria as background in hazardous substances or administrative procedures.[536] In compliance with CERCLA, the Administrator will forward the names and qualifications of those applicants he selected to the American Arbitration Association (AAA).[537] If the applicant meets the requirements of AAA, his name will be returned to the Administrator for possible appointment to the Board.[538] Board members will receive three year appointments and serve at the pleasure of the Administrator. Board members may be removed for any reason the Administrator deems appropriate except that a member may not be dismissed during the pendency of a claim in the absence of a showing of bias, personal or financial interest. The total number of arbitrators or board members will be determined by the Administrator.

A member of the Board may arbitrate a claim in one of two situations: (1) whenever the Administrator denies a claim; or (2) whenever a person dissatisfied with an award requests arbitration. The arbitrator may only make awards which are compensable from the Fund under CERCLA's complex scheme. Thus the arbitrator may not award claims which would reverse EPA decisions concerning the preauthorization of claims under the National Oil and Hazardous Substances Contingency Plan and may not award costs for the harm caused to natural resources unless the costs are distributed under a plan developed under CERCLA or were expended in response to an emergency.[539]

The proposed rule limits the arbitrator's role to fact finding.[540] In deciding a claim, the Board must apply legal standards as prescribed by EPA in the "summary of applicable standards and principles" which EPA must develop for each claim.[541] The rule also directs the Board to accord "substantial deference to EPA

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532. CERCLA Sec. 112(b)(4)(G).

533. 50 Fed. Reg. 9586.

534. 50 Fed. Reg. 51196.

535. 40 CFR 305.20(a).

536. 40 CFR 305.20(b).

537. 40 CFR 305.20(b).

538. Id.

539. See 40 CFR 305.21.

540. 50 Fed. Reg. 51198.

541. 40 CFR 305.21(g).

decisions as reflected in the administrative record."[542] Additionally, the rule absolutely prohibits the Board from reviewing an Administrator's decision to deny a claim whenever that decision is made "based on competing priorities for the expenditure of Fund monies."[543] Finally, claims by other federal agencies are not eligible for adjudication by the Board.[544]

The Administrator must submit all denied claims to the American Arbitration Association within five days.[545] The Administrator must include with this denial an explanation of the decision, a statement of the legal standard applicable to the claim, any other supporting documentation which EPA deems necessary to explain the reason for denial and, if known, the identity of any potentially responsible parties. At this time the Administrator may also request AAA to use expedited procedures to hear any claim involving $20,000 or less.[546]

A claimant dissatisfied with the Administrator's award may initiate arbitration by submitting the claim to AAA within 30 days of the Administrator's decision.[547] The claimant's submission must include an explanation of the matter and amount in dispute, and the remedy sought. The claimant must also include a copy of the Administrator's decision, any supporting documents the claimant deems necessary to support its claim and the identity of any potentially liable parties, if known.[548] Within 5 days of receipt of a claim, AAA must notify the other party of the dispute's existence by sending that party a copy of the claim.[549]

Once the claim has been submitted, AAA will distribute to the parties a list of potential arbitrators drawn from the Board of Arbitrators.[550] After the parties have an opportunity to rate these members in order of preference, AAA will invite the parties to accept one arbitrator from the list to hear the claim. If the parties do not agree upon an arbitrator, AAA may appoint a member to hear a claim. Arbitrators must immediately disclose to AAA any circumstances likely to affect impartiality including any bias or personal or financial interest or past relationship with the parties, their counsel, or any potentially responsible party.[551] AAA will share this information with the parties but retains sole discretion to decide whether an arbitrator should be disqualified due to bias or interest.

The responding party to an arbitration has seven days after receipt of the

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542. 40 CFR 305.21(h).

543. 40 CFR 305.21(f).

544. 50 F.R. 51199.

545. 40 CFR 305.30(a).

546. 40 CFR 305.30(b).

547. 40 CFR 305.30(a).

548. 40 CFR 305.30(c).

549. 40 CFR 305.30(d).

550. 40 CFR 305.31.

551. 40 CFR 305.32.

notice of the claim to file an answer.[552] If arbitration is initiated by a claimant, EPA must file a statement detailing the applicable legal standards and principles governing the dispute. Either party may file an amended pleading after arbitration has been initiated, however, once the arbitrator has been appointed new claims may only be added with the arbitrator's consent.[553] Whenever an amended pleading is filed, the other party has seven days from the date of receipt of such pleading in which to file an answer.

Either the arbitrator or the parties may request a prehearing conference.[554] At such a conference the parties are expected to arrange for the exchange of information, including witness statements, exhibits and documents, and to stipulate to uncontested facts in an effort to expedite the proceeding. Arbitrators may encourage further settlement discussions during the prehearing conference to expedite the arbitration proceedings.[555] The hearing must take place at a site selected by the administrator with due consideration to any requests by the claimants and it must occur no more than 60 days after the arbitrator's appointment.[556] The arbitrator is responsible for making a full record of the hearing proceedings. The hearing consists of direct examination of witnesses, cross-examination and the submission of documentary proof. The parties may offer any evidence they wish, subject to reasonable limits established by the arbitrator. The arbitrator may receive the evidence of witnesses by affidavit, interrogatory, or deposition. If the arbitrator determines that an inspection or investigation is necessary, the arbitrator may request that the Administrator conduct an investigation or inspection under CERCLA § 104(b). The administrator decides whether or not to go forward with such an investigation or inspection.

The arbitration may even proceed in the absence of any party, who after due notice fails to be present, fails to obtain an adjournment, or fails to have evidence presented on his behalf. The party will be deemed to be in default and the arbitrator will require the party who is present to submit such evidence necessary for the arbitration to make an award.[557]

After the parties have completed their presentations the arbitrator may close the hearing, or request the submission of briefs or additional documents.

The arbitrator must make his decision within 90 days of the submission of the claim to the Board.[558] This period may be extended upon consent of all parties or by the Administrator when a large number of claims arising from a single incident or set of incidents have been consolidated for hearing. The arbitrator's decision must be written and contain a full statement of the basis and rationale for the arbitrator's determination.

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552. 40 CFR 305.40.

553. 40 CFR 305.40(b).

554. 40 CFR 305.41.

555. 40 CFR 305.41.

556. 40 CFR 305.42.

557. 40 CFR 305.42(i).

558. 40 CFR 305.43(a).

Expedited procedures are used to resolve claims that do not exceed $20,000, unless the Administrator demands full procedures.[559] In addition, the parties may consent to the use of expedited procedures to resolve claims of more than $20,000. The $20,000 figure refers to the amount in dispute between the claimant and EPA, regardless of the amount of the original claim.[560] The expedited procedures differ from the full arbitration procedures in that the parties agree to receive all required notices by telephone, followed by written confirmation. In addition, the arbitrator selection process is streamlined in that AAA submits a list of five potential arbitrators to each party from which each party may strike two. AAA will then appoint an arbitrator who will serve, subject to any finding of partiality, bias or interest requiring disqualification. The hearing must commence within 60 days of the selection of the arbitrator. Most expedited cases will be heard within one day. The arbitrator's decision is due five days after the close of the hearing unless the parties agree to an extension.

The arbitrator's decision, whether rendered under the full procedures or under the expedited procedures, may be appealed to the United States district court in the district in which the arbitration took place.[561] CERCLA instructs the courts that an award or decision of a member of the Board is binding and conclusive and is not to be overturned except in cases of arbitrary or capricious abuse of the member's discretion. CERCLA further provides that the arbitrator's decision is to have no collateral effect. An arbitrator's award is not admissible as evidence of any issue of fact or law in any other proceeding under CERCLA or any other provision of law.[562]

Finally, § 305.52 of the final rules includes additional miscellaneous provisions. Parties to arbitration must make objections, whether oral or written, at the earliest possible opportunity or will be deemed to have waived the right to object.[563] The final rules also forbid the Administrator, the parties and other interested persons from engaging in ex parte communication with the arbitrator.[564]

Merit Systems Protection Board.

Background. Congress passed the Civil Service Reform Act of 1978 (CSRA or Act),[565] to promote a more efficient "civil service while preserving the merit

559. 40 CFR 305.50(a).

560. 50 Fed. Reg. 51200.

561. CERCLA Sec. 112(b)(4)(G); 40 CFR 305.51(b).

562. Id.

563. 40 CFR 305.52(a).

564. 40 CFR 305.52(b).

565. 5 U.S.C. §§ 1101-8911 (Supp. IV 1980).

principle in Federal employment."[566] The Act abolished the Civil Service Commission and replaced it with the Merit Systems Protection Board (MSPB or Board). Under the CSRA, the Board is an independent, quasi-judicial regulatory agency created to protect the Federal merit systems from political abuse and to resolve employee grievances within the systems.[567]

To resolve employee grievances, the MSPB began with a formal appeals procedure (FAP) established under the CSRA. The Board, however, examined alternatives to the FAP because of Congressional interest in expediting the personnel actions subject to the Board's appellate jurisdiction.[568] Illustrative of Congressional intent is the Senate report, accompanying CSRA, urging the MSPB to develop alternative methods for resolving appealable matters including "suitable forms of conciliation, mediation, arbitration, and other methods mutually agreeable to the parties."[569]

In 1981, a new chairman of MSPB, familiar with "expedited arbitration" as used by unions, began to focus discussion on that procedure as interest in it increased during the Air Traffic Controllers (ATC) union strike. The appeals from the strikers, terminated from federal employment, eventually increased threefold the FY 81 caseload of the MSPB.[570] With the assistance of the Administrative Conference of the United States (ACUS), the MSPB began development of what became the "Appeals Arbitration Procedure" (AAP). The AAP, later modified as the "Voluntary Expedited Appeals Procedure" (VEAP), is an alternative to the more formal appeal procedure (FAP). The Board's objective was to design an informal, simplified, less costly system to adjudicate routine, non-precedential appeals while preserving fair, impartial forums. The Board's expectations are reflected in its statement of goals and objectives:

- The system will not only be fair and fast, but also one which is recognized and accepted as such by employees and agency management.
- It will encourage the informal resolution of disputes in the proceeding, including settlement by agreement between the parties.
- It will cover as many kinds of appealable matters as are feasible for resolution through the more informal process.
- It will improve the timeliness and cost-effectiveness of the process leading to the resolution of disputed personnel actions.

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566. S. Rep. No. 969, 95th Cong., 2d Sess. 2, reprinted in 1978 U.S. Code Cong. and Ad. News 2723, 2724 (hereinafter, S. Rep. No. 969).

567. S. Rep. No. 969. The powers and functions of the MSPB are set out in 5 U.S.C. § 1205 (Supp. IV 1980).

568. Pub. L. 95-454, 92, Stat. 1111 (1078).

569. S. Rep. No. 969.

570. In Fiscal 1981, the MSPB issued 5,610 decisions at the regional level as part of the regular caseload and received 10,356 Air Traffic Controller Appeals. U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions In FY 1981, December 1982 cited in Adams, supra note 170.

- It will exclude sensitive cases requiring more intense adjudicative proceedings, based on the nature, gravity and complexity of the issues involved.

- It will preserve the parties' rights to limited Board review of major procedural and legal errors in the arbitration award.[571]

The MSPB introduced its proposal for the AAP in October 1982 to Federal agencies, unions, bar associations, and public interest groups.[572] Comments were requested and received in December 1982. MSPB modified the plan after reviewing comments and distributed a new version, Bulletin No. 12, for public comment on January 13. MSPB received comments on Bulletin No. 12 through January and February and published interim final rules effective in the Federal Register on March 18, 1983, announcing the introduction of appeals arbitration (AAP), and a pilot study of the procedure to be conducted in four MSPB regions.[573] Comments were invited through July 1, 1983. The preamble to the interim rules did not discuss the comments MSPB received nor reasons for changes from the earlier drafts.

Several important revisions of the early proposals were included in the interim final rules.

MSPB originally took the position that the AAP would only be available to those appellants who were not members of a certified collective bargaining unit. The major concern of union comments was that it would be "discriminatory" and "anti-union" to only provide AAP to non-union members. In the interim final rules, MSPB extended AAP eligibility to include the union appellants. Perhaps the most important revision from the agency's viewpoint was the proposal in Bulletin No. 12, and retained in the interim rules, to allow agencies a choice in whether AAP would be used. Originally, agencies would have been required to participate in AAP if the Regional Director so directed. All but one agency commented that agency agreement should be necessary. Unions still favored unilateral election of the AAP by the employee.[574] MSPB compromised in Bulletin No. 12 in proposing that if an employee elected AAP, the final decision would be made by the Regional Director after review of the petition for appeal and the agency's response.

Another revision involved the parties' right to petition the full Board for a review of the initial decision. Initially MSPB proposed that the Board would not reconsider any AAP case with the exception of those requested by the Office of Personnel Management. Other appellants could file civil suits from the arbitration decision with a Circuit Court of Appeals or with the U.S. Court of Claims. Both agencies and unions, in their comments, objected to the lack of appeal to the Board. In Bulletin No. 12, the MSPB proposed a change allowing either party to

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571. Merit Systems Protection Board, 48 Fed. Reg. 11399.

572. The packet was entitled Voluntary Arbitration: An Alternative to Resolution of Employee Appeals.

573. 48 Fed. Reg. 11399. The four MSPB cities were San Francisco, Chicago, Seattle, and Denver. Dallas later joined the pilot program.

574. Lawson, Roseann, Evaluation of the Merit Systems Protection Board's Appeals Arbitration Procedure, p. 11.

file a petition for review to the full Board if the party could (1) demonstrate harmful procedural irregularity in the proceedings before the arbitration, or (2) demonstrate clear error of law.[575] The interim rules retained this change.

Appeals Arbitration Procedure. The election of the AAP begins with the agency's notice of proposed action. The notice explains to the employee his right to appeal and his option of using the FAP or AAP. The employee has 20 days to appeal and has two chances to request appeals arbitration; first, at the time of filing a petition for appeal, or, second, within 10 days from the date of the Board's order of acknowledgement to the agency. The agency has 15 days from the date of the Board's order to consent or decline to use AAP. Upon consenting, the agency must file a designation of representative form and a summary of facts and legal issues raised in the appeal. Final decision to process the case under AAP or the FAP is left to the regional director after review of the petition for appeal and the agency's response. The regional director or his designee retains the right to convert the case to a formal appeals procedure (FAP), at any time prior to issuance of the arbitration award, in the event circumstances warrant.[576]

If the appeals arbitration procedure is granted, the regional director will appoint an arbitrator, on a rotating basis, from a panel of presiding officials who are designated for the new procedures and have received special training.[577]

The initial role of the presiding official is that of mediator; to explore the potential for a settlement and to encourage the parties to settle the case voluntarily. If an informal settlement cannot be reached, the presiding official will assume the role of arbitrator and proceed with the hearing if one has been requested. The parties may still reach a voluntary settlement agreement at any time until the issuance of an arbitration award.[578] If the parties voluntarily resolve the dispute without an award, the settlement agreement is final and binding and the appeal will be dismissed with prejudice. If the terms are recorded and signed, they will be made part of the arbitration record and the Board will retain jurisdiction to ensure compliance with the agreement. If the settlement is not recorded, the Board will not retain jurisdiction to ensure compliance.[579] The presiding official has the authority to take all necessary action to conduct a speedy, fair, and impartial hearing and, unless expressly provided otherwise in the regulations, to follow the regulations under 5 CFR Part 1201, Subpart B.[580]

Unique to the AAP is the requirement of both parties to file a Joint

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575. The formal appeals procedures (FAP) uses the less restrictive review standard: "contrary to law, rule or regulation."

576. § 1201.201(a)(b)(c).

577. 48 Fed. Reg. 11399. The training of presiding officials and regional directors for the four pilot study sites was held at MSPB headquarters in Washington, D.C. on March 14 and 15, 1983, three days prior to the introduction of the program.

578. § 1201.216(a).

579. § 1201.216(b)(1)(2).

580. § 1201.204 (C)(D).

Arbitration Record (JAR) with the purpose of bringing the parties together to narrow and focus the issues in dispute. The JAR is to be filed within 30 days from the date of the Board's order of acknowledgement and should include a statement of issues, witness lists, a request for hearing and two possible dates for the hearing.[581] Informal discovery will usually precede preparation of the JAR. While the rights to formal discovery are waived by the parties in electing to use the AAP instead of the FAP, the parties have the duty to include all known relevant materials with their submissions.[582]

Either party may request a hearing which is to be held at the employment site and must be scheduled within a 15-day period following the due date, or receipt, of the JAR.[583] The AAP hearing is similar to but more informal than that under the FAP. Formal rules of procedure do not apply but may be liberally construed and used as a guide to admissibility of evidence, motions, filings of briefs, etc.[584]

Agencies are required to make their employees available as witnesses when requested by the presiding official.[585] The arbitrator may also request the production of additional information or witnesses if needed for resolution of the matter.[586] In the event a party fails to cooperate, the presiding official may impose appropriate sanctions.[587]

Unlike the Formal Appeals Procedure, MSPB keeps no official transcript of the AAP hearing, although the parties may provide for an unofficial one with use of a tape recorder or court reporter.

The record is closed at either (a) the conclusion of the hearing or, if no hearing has been convened, (b) on the date set for receipt of submissions of the parties. The presiding official has discretion to accept additional evidence or arguments after the closing of the record if it can be shown that the new and material evidence was not available prior to closing of the record.[588]

The presiding official is to issue the arbitration award no later than 30 days from the date the JAR was received by the Board, (60 days from the date of the acknowledgement order) which is half the time allowed under the FAP.[589] If no hearing was conducted and settlement was not reached, the presiding official is to

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581. § 1201.202(c).

582. 48 Fed. Reg. 11400.

583. § 1201.205(a)(c).

584. 48 Fed. Reg. 11400.

585. § 1201.206(a).

586. 48 Fed. Reg. 11400.

587. § 1201.213.

588. § 1201.215(a)(b)(c).

589. § 1201.204(b).

issue a written decision within 15 days after the record is closed.[590] The decision is to be briefer in scope than it is under the FAP due to its non-precedential character and reliance on the joint record. It is to include a summary of the basic issues, findings of fact and conclusions of law, a holding affirming, revising or modifying the appealed action, and an order of appropriate relief.[591] The award will become final after 35 days if no petition for review is filed.[592]

Under the interim rules, the Board would grant only a limited review of the decision of the presiding official. By electing the AAP, the parties waived their right, which was available under the FAP, to petition for review on grounds of new and material evidence.[593] The Board would only grant review of a petition which established: (a) demonstrated harmful procedural irregularity in the proceedings before the arbitrator, or (b) clear error of law. The Board will issue a final decision no later than 15 days from the close of the respondent's filing deadline. The appellant retains the right under the AAP to file an appeal of the final order or decision of the Board with the U.S. Court of Appeals.[594]

Voluntary Expedited Appeals Procedure. In response to early evaluation findings, the MSPB made several modifications to the AAP in July 1984, before the pilot study was completed. First, the name of the AAP was changed to "the voluntary expedited appeals procedure" (VEAP) to reduce the confusion of the AAP with labor arbitration and to emphasize the parties' right of choice. Second, the MSPB also changed the standard of review of VEAP decisions to be uniform with those of the FAP to ensure fairness regardless of forum. Finally, the MSPB extended the time allowed for its final decision on a petition for review from 15 to 35 days to conform to that permitted by FAP.[595]

Evaluation of Appeals Arbitration. The success of the AAP program can be measured by using the MSPB's statement of goals and objectives for the AAP as a basis for evaluation. It reflects an interest in providing federal employees and agencies with a more expeditious, less costly means of resolving personnel disputes while also affording a fair, impartial forum for hearing these disputes. From the MSPB perspective, employee rights should be balanced against the efficiency of the system.[596] The MSPB would also measure success by the

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590. § 1201.217.

591. § 1201.217.

592. § 1201.217.

593. The waiver requirement was dropped in July, 1984 as a result of the AAP's modification.

594. § 1201.221.

595. The provisions for judicial review are found in 5 U.S.C. § 7703.

596. Meeting of Roseann Lawson and Paul D. Mahoney,, Assistant Managing Director for Management, MSPB, April 19, 1983. Cited in Lawson, Evaluation of the Merit Systems Protection Board's Appeals Arbitration Procedures, Part II - Introduction, p. 19.

number of parties who use the procedure time after time.[597]

At the onset of the program, agencies and appellants shared the concern that procedural and substantive equity might be affected in an expedited procedure and would measure success by fairness to the parties. They would consider the procedure a success if the elements of "due process" were preserved while ensuring that the outcomes remain consistent to those of the more formal procedure.[598] One attorney, who represented employees, believed that to be successful and fair, decisions of presiding officials should reflect the facts and issues raised in the JAR and in the proceedings.[599] Another commentator suggested that the AAP will be successful if it is attractive and workable for inexperienced representatives and pro se appellants.[600] Another appellant's attorney believed that for the AAP to be a success, the presiding officials' awards should withstand judicial review.[601] Finally, from the Congressional perspective, the AAP would be labeled successful if the procedure could get away from the confrontational mode that exists at present and if the procedure could reduce costs.[602]

A study evaluating the AAP pilot program was conducted by the Public Policy Program of the George Washington University under contract with the Administrative Conference of the United States. The study was conducted to evaluate the success of the AAP in achieving the objectives mentioned above. It focused on measures of timeliness, cost effectiveness, equity and fairness. The following is a summary of the study's findings and recommendations.

The study applied a classic evaluation model by treating all AAP appeals cases as members of the experimental group matched against a control group consisting of similar FAP cases in the same regional site. The FAP cases used in matching were chosen from those that were eligible for the AAP but instead followed the FAP. The guidelines used for matching encouraged selection of FAP cases which would have used roughly the same resources if converted to AAP.[603] The study intended to isolate the true effects of the AAP.

The matching process began on July 1, 1983, in the four MSPB regions, and

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597. Paul Trayers, Labor Counsel, MSPB at MSPB Training Session, March 15 and 16, 1983. Lawson, p. 19.

598. Adams, supra note 170 at 37.

599. Interview with Joseph Gebhardt, attorney practicing before the Board, May 2, 1983. Lawson, p. 19.

600. Edward Passman, attorney practicing before the Board in April 18, 1983 article in Federal Times. Lawson, p. 20.

601. Interview with Joseph B. Scott, attorney practicing before the MSPB, May 18, 1985. Lawson, p. 20.

602. Interview with James Cowen, Chief Counsel, Subcommittee on Civil Service and General Services, Senate Government Affairs Committee at the time of the debate and passage of the Civil Service Reform Act. Mr. Cowen was the minority counsel to the Subcommittee. Lawson p. 21.

603. Adams, supra note 170 at 41.

then after October 1, 1983, in the Dallas region which joined the pilot program late. The matching stopped on March 31, 1984. Fifty-four appeals cases formed the experimental groups.[604]

The data used to develop the measures of the AAP's timeliness, cost-effectiveness, and equity and fairness were drawn from administrative records and surveys. The observed differences between the two groups in the four measures of success were tested statistically to determine if they reflect differences due to the appeals procedures used or merely differences due to random error.[605] The statistical findings were supplemented by field observations of the implementation of the AAP.

Implementation of the AAP. The study assessed how faithfully the design of the AAP program had been followed in the field and examined departures from the design to measure the impact on the program's success.

The results were mixed. The MSPB found that it could increase the number of parties exposed to AAP by being flexible in allowing parties to use the AAP even after the election time expired. As a consequence, however, the presiding officials and the parties themselves felt extra pressure to meet the 60 day schedule.[606] The MSPB was also flexible in solving the logistical problems of creating a JAR by allowing the parties to submit separate statements.[607]

The presiding officials varied in their emphasis on their roles as mediators in effectively facilitating voluntary settlements.[608] The study group has recommended more extensive training of the presiding officials.

The study also found that the regions applied different AAP eligibility standards. San Francisco, for example, was very strict in accepting the expediting appeals cases and in closing the appellants' ten-day window for electing AAP. The study group has recommended setting a uniform standard closer to the more flexible one applied in Chicago and Dallas.[609] The experience in Chicago indicated that persistent outreach efforts by MSPB officials also can significantly increase the number of agencies and appellants electing to use the AAP. During the 18 month study, only 102 appeals, just over two percent, of 4,475 appeals filed, were processed under the AAP and VEAP. Chicago handled 59.3% of the total.

Timeliness and Cost-Effectiveness. The study found that the AAP is

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604. The distribution of appeals was as follows: Chicago - 32, Dallas - 4, Denver - 1, San Francisco - 15, and Seattle - 2.

605. The statistical procedure employed was a "pair wise test of mean differences for correlated samples" from T. H., Wonnacott and R. J. Wonnacott, Introductory Statistics, 2nd ed., New York: John Wiley and Sons, Inc., 1972, pp. 171-173. Adams, supra note 170 at 58.

606. Adams, supra note 170 at 92.

607. Id. at 62.

608. Id. at 92.

609. Id.

unequivocally more expeditious than the FAP. The AAP cases in the pilot study were processed in less than half the time of their matched FAP cases.[610] Also, the odds of cases reaching voluntary settlement are one out of seven, which is better than twice those in similar FAP cases.[611]

For the MSPB, the AAP is clearly cost-effective at a savings of over 40 percent per case. The agencies have also found the procedure to be less costly in cases where travel was required, where a hearing was requested and witnesses called, and when there was an interest in voluntary settlement.[612] The savings for the appellants was difficult to judge due to the variance among the appeals observed. The difference from the FAP is not statistically significant for that group.

Equity and Fairness. The study focused on whether the gains of cost-effectiveness and time came at the expense of equity and fairness in both substance and procedure. These issues were examined using data drawn from administrative records and mail survey of experimental and control groups.

One of the most important concerns of agencies and appellants was whether the AAP decisions would be consistent with those under the FAP. The study made an indirect test by describing the likelihood that the appeals decision would support the initial agency decision in matched AAP and FAP cases. No difference in the outcome was observed.[613]

Another measure of equity was whether AAP was more accessible to appellants who wished to represent themselves. The results do not point to pro se appellants' ready adoption of the AAP where only 25% of the experimental (AAP) group involved pro se appellants compared to 39% pro se appellants in the control group and 29% pro se appellants in a larger group of FAP cases in the five study sites.[614] The study recognizes that appellants have strong incentives under both procedures to employ counsel.

Another measure of equity is the parties' continued willingness to use the AAP. While the evidence does not indicate a steady increase in the number of appeals adjudicated under the AAP, it does show a continued willingness to use the procedure. In Chicago for example, at least seven agencies consented to use the AAP a second time after using it once.[615] The reason the overall number of cases adjudicated under the AAP remained low was that many of the agencies were reluctant to try the AAP at all. Throughout the pilot study, agencies in three study sites for example consented to use the AAP in little more than ten percent of the appeals eligible whereas appellants consented in no fewer than 25%

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610. Id. at 95.

611. Id. at 96.

612. Id. at 121.

613. Id. at 120.

614. Id. at 127.

615. Id. at 130.

of the cases.[616]

Both the appellants and the agencies who used the AAP were also relatively satisfied with the fairness of the various procedural steps of the AAP. The first procedural step examined was the preparation of the Joint Arbitration Record which is unique to the AAP and intended to bring the sides together to reduce and focus the areas of dispute. The presiding official's response was that the JAR worked "reasonably" well despite initial logistical problems. The agencies and appellants also agreed that the JAR expressed all the important facts and issues but more so from the agency's perspective than the appellants'.

Initially, the parties had expressed concern about the AAP's requirement that they waive their rights to formal discovery which is available, if necessary, under the FAP. The parties' response to the study's questionnaire revealed that less than half of the appellants felt they were able to obtain the information needed to prepare the JAR while six out of ten agency representatives either agreed or strongly agreed that they were able to get the needed information. In comparison to the responses from the FAP group, the AAP fared well although the difference is not statistically significant.[617]

The parties were also satisfied with the use of the informal hearing under the AAP. There is no significant difference in satisfaction between the AAP and FAP in this respect. This response is consistent with the presiding officials' observations that they had already considered the FAP hearings to be rather informal.

Finally, there was some concern that fairness might be sacrificed in the expedited schedule that parties are required to follow in presenting their case. Although the parties responded favorably to the question of whether the AAP allowed enough time for presenting an appeal, their satisfaction is significantly less than the parties appealing under the FAP.[618]

The study found that the parties' general perception was that the AAP was fair and equitable. Seventy-six percent of the appellants strongly agreed or agreed that the AAP was equitable and eighty percent of the agency representatives reached the same conclusion.[619] A comparison of these responses to the responses from the control group showed no statistical difference in the level of the parties' satisfaction.

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616. Id.

617. Id. at 136.

618. Id. at 141.

619. Id. at 142.

APPENDIX III
AGENCY OVERSIGHT OF PRIVATE DISPUTE RESOLUTION MECHANISMS

Securities and Exchange Commission Oversight of Self Regulatory Organizations

The Securities and Exchange Commission oversees the activities of the national securities exchanges and the over the counter securities markets. The SEC's relationship with the exchanges is referred to as self-regulation oversight. As one commentator notes:

> Under a commonly held perception of this relationship, the exchanges and the National Association of Securities Dealers (NASD) supervise their respective markets while the Commission asserts its reserve power only if the SRO's (self-regulatory organizations) initial exercise of authority is inadequate.[620]

In an often quoted passage William O. Douglas, one-time Chairman of the SEC and later Supreme Court Justice describes the relationship between the exchanges and the SEC:

> The exchanges would take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used.[621]

This general description of the SEC's role in the regulation of securities markets may understate the central position the SEC actually holds in the field of securities regulation. Although the emphasis is upon self-regulation, the SEC plays more than a residual role. The SEC's power over this self regulation is clearly set forth in the Securities Reform Act of 1975. This Act sanctioned the Commission's broad authority over the exchanges. An exchange must apply to the Commission to register as a national securities exchange.[622] The Commission is also empowered to "abrogate, add to, and delete from the rules of a self-regulatory organization as may be necessary to insure the fair administration of the SRO and to insure compliance with the Securities Exchange Act."[623] The Commission must also receive notice of all disciplinary actions taken by SRO's against their members and is empowered to review these actions. The Commission may also review denials of membership or participation in an SRO. Finally, the Commission may suspend, revoke, censure or impose limitations upon the activity of an SRO if it finds "after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply" with the Securities Exchange Act or rules promulgated under it, or the SRO's own rules.

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620. David A. Lipton, The SEC or the Exchanges: Who Should Do What and When? A Proposal to Allocate Regulatory Responsibilities for Securities Markets, 16 UC Davis LR 527, 528 (1983).

621. Id. quoting W. Douglas, Democracy and Finance 82 (1940) (speech delivered on May 20, 1938).

622. 15 U.S.C. 78s(b)(1).

623. 15 USC 78s(c).

The Commission also may at its discretion conduct investigations to determine whether any person has violated, is violating or is about to violate any provision of the Security Exchange Act, its rules or the rules of a National Securities Exchange. The Commission may not, however, seek an injunction or mandamus order against any person for violation of a rule of a national securities exchange unless that exchange is unable or unwilling or otherwise has not taken such action.[624] Thus the Commission has significant power with which to exercise oversight over the self-regulatory organizations.

An example of the interaction between the Commission and the exchanges is the experience of the SEC's encouragement of the use of arbitration for the resolution of disputes between registered broker-dealers and their customers. Binding arbitration clauses are not enforceable with respect to Federal Securities laws,[625] but the Commission has strongly endorsed the use of "fairly administered arbitration procedures as the most cost effective means of resolving certain disputes between broker-dealers and their customers."[626]

On June 9, 1976, the Commission invited comments concerning the development of a nationwide dispute settlement procedure for resolving disputes between registered securities broker-dealers and their customers.[627] The Commission sought to establish a uniform system for resolving disputes involving small claims to be administered by the SROs. The Commission explained "this system could provide for the efficient and economical disposition of grievances and should not be burdensome, complex or costly to the investor; in other words, the system could function in a manner similar to a small claims court." The Commission anticipated that "a streamlined dispute grievance procedure will increase the effectiveness of existing arbitration facilities made available by the American Arbitration Association, The American, Boston, Cincinnati, Midwest, New York, Pacific and Philadelphia Stock Exchanges, the Chicago Board Options Exchange, and the National Association of Securities Dealers." The comments received by the Commission were to be placed in file No. S7-639.

On November 15, 1977, the Commission requested comments on a proposed dispute resolution mechanism prepared by the SEC's Office of Consumer Affairs. The Office of Consumer Affairs recommended a three part integrated nationwide system for complaint processing and resolution of investor disputes after concluding that "existing mechanisms for resolving such controversies viz. litigation and industry sponsored arbitration could be more responsive to the needs for investors."[628] The first stage of the mechanism recommended by the Office of Consumer Affairs consists of requiring brokerage firms to establish a system for the receipt, processing and disposition of investor complaints. The firms would be required to keep records of this system and periodically report on the system to the Commission and the SROs. The second stage would consist of the creation of a uniform mediation/arbitration program. This program would be administered by an independent organization which would attempt to mediate all disputes and

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624. 15 U.S.C. 78a.

625. See, Wilco v. Swann, 346 U.S. 427 (1953).

626. Securities Exchange Act Release No. 19813, May 26, 1983.

627. Securities Exchange Release No. 12528.

628. Securities Exchange Release No. 12974.

provide arbitrators for disputes where mediation is unsuccessful. This stage would include a streamlined arbitration process for resolution of disputes of less than $5,000. The third stage concerns claims of less than $1,000. These claims would be decided by a network of small claims adjusters on the basis of written submissions.

On April 26, 1977 in Securities Exchange Act Release No. 13470 the Commission deferred direct action on the development of arbitration procedures in response to the securities industry's self-regulatory organizations' decision to establish a conference to consider the implementation of a nationwide investor dispute resolution system. The Commission states "Although the Commission does have extensive authority over the self-regulatory organizations, their rules and procedures, it is of the view that it would not be useful at this time to interpose itself in this area since the industry has manifested its intention to take affirmative action." The SRO's organized the Securities Industry Conference on Arbitration (SICA) which drafted a Uniform Code of Arbitration which has been adopted by all ten of its self-regulatory members and approved by the Commission.

The simplified procedures established by SICA may be applied in any dispute between an investor and a broker-dealer in which the claim involves an amount of $2,500 or less. A person with a claim commences this process by filing a claim letter, a submission agreement (an agreement to submit to arbitration and to abide by its decision), and a $15 deposit with the Director of Arbitration of an SRO. The Director of Arbitration notifies the respondent of the claim and allows the party twenty days in which to file an answer and/or counterclaim. The Director also selects an arbitrator to hear the dispute from a roster maintained by the sponsoring SRO. The arbitrator may request that two additional arbitrators be empaneled to hear any dispute. The parties will be notified of the name(s) and affiliations of the arbitrator(s). Each party may request that an arbitrator be disqualified if the party has cause to believe the arbitrator cannot make a fair and impartial award.

Once selected, the arbitrator will make a decision and grant an award on the basis of the written submissions of the parties unless the investor requests or consents to an oral hearing. The arbitrator may require the parties to submit additional documentary evidence. The arbitrator's decision need not detail the reasons for an award and this decision is final.

This example illustrates the relationship between the SEC and the self-regulatory organizations. The SEC proposed the establishment of uniform arbitration procedures for the administration of small claims, but deferred governmental action when the SROs undertook to institute a program themselves.

Federal Trade Commission

The Federal Trade Commission encourages the development of informal dispute settlement procedures to resolve disputes concerning written warranties as well as disputes concerning matters within the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act. The use of informal dispute settlement procedures to resolve warranty disputes is encouraged in the Magnuson-Moss Warranty Act[629] The FTC also encourages the use of informal dispute settlement procedures through the use of consent orders under Section 5

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629. 15 U.S.C. §§ 2301-2310.

of the FTC Act. The most significant effort in this area involves the consent order approved in the case.[630]

Informal Dispute Settlement Under the Magnuson-Moss Warranty Act. The Magnuson-Moss Warranty authorizes the establishment of informal dispute settlement procedures by one or more warrantors to resolve disputes concerning written warranties. The Act states, "Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."[631] The Act directs the Federal Trade Commission to issue rules prescribing the minimum requirements for an informal dispute resolution mechanism. These rules appear at 15 CFR Section 703. A warrantor who complies with the Act and the rule promulgated under it may make resort to the mechanism a condition precedent to a civil suit under the Act. The Commission is authorized to review these mechanisms. The Conference Report makes clear, however, that this authority is not intended to preclude the courts from "reviewing the fairness and compliance with FTC rules of such procedures."[632]

The Federal Trade Commission issued its Informal Dispute Settlement Procedure Rule on December 31, 1975.[633] The Commission noted, "the intent of the Act is to provide for a fair and expeditious settlement of consumer warranty disputes, through informal mechanisms established voluntarily by warrantors."[634] The rule seeks to "avoid creating artificial or unnecessary procedural burdens so long as the basic goals of speed, fairness and independent participation are met."[635]

Under the rule, a warrantor must inform a consumer of the existence of the mechanism on the face of the warranty. This notice must include the name and address or toll-free telephone number of the mechanism. The notice must inform the consumer that the mechanism is a prerequisite to a suit under the Magnuson-Moss Act but is not a prerequisite to any other legal remedy.

The warrantor must provide a consumer with either a form to file with the mechanism or a toll-free telephone number to call in the event a dispute arises.[636] The warrantor must also provide the consumer with a description of the mechanism procedures.[637] A warrantor is free to maintain its own wholly internal complaint resolution procedures in addition to establishing a mechanism under Magnuson-Moss so long as consumers are not required to seek redress from

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630. In the Matter of General Motors Corporation, Docket No. 9145 (1983).

631. 15 U.S.C. § 2310(a)(1).

632. Consumer Products Warranty and FTC Improvements Act: Conference Report to accompany S.356, December 18, 1974, p. 26.

633. 40 Fed. Reg. 60190 (1975).

634. 40 Fed. Reg. 60193.

635. 40 Fed. Reg. 60193.

636. 16 CFR 703.2(c)(1).

637. 16 CFR 703.2(c)(3).

this internal process.

The cost of the mechanism is to be borne by the warrantor. The Commission's rule prohibits warrantors from charging consumers a fee for use of the mechanism.[638] This prohibition satisfies the concerns raised in the House Committee Report which states, "informal dispute settlement procedures must also prohibit saddling the consumer with any costs which would discourage use of the procedures."[639] The Commission's prohibition on charging a fee for use of the mechanism has been criticized as encouraging frivolous complaints.[640] The Commission adopted this position, however, because, 1) the warrantor may compel a consumer to use the mechanism prior to suing under the Act, and 2) the decision of the mechanism is non-binding.[641]

A mechanism established under the Act must function independent of the warrantor's control.[642] The rule requires that a mechanism be "sufficiently insulated" from a warrantor's control or influence but does not prescribe the structure of the mechanism. The majority of the decisionmakers in a given dispute must be persons "having no direct involvement in the manufacture, distribution, sale or service of any product."[643] The rule also includes the general obligation that "members [of the mechanism] shall be persons interested in the fair and expeditious settlement of consumer disputes."[644]

The minimum operating procedures for a dispute settlement mechanism are set forth in 16 CFR 703.5. The mechanism must first notify both parties upon its receipt of a complaint. The mechanism is further directed to "investigate, gather, and organize all information necessary for a fair and expeditious decision."[645] In the event that information obtained from the parties is contradictory, the mechanism must offer each party the opportunity to submit a written rebuttal or explanation. The mechanism may allow oral presentations only in disputes where both the warrantor and the consumer consent. The rule does not require the mechanism to offer this option nor does it prescribe the form of oral presentation which may be offered.

The mechanism must issue a decision within 40 days of receiving a complaint. This time limit may be extended if the delay is attributable to the consumer. The mechanism decision is non-binding. Upon making its decision, the mechanism must determine the extent to which the warrantor will abide by its

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638. 16 CFR 703.3(a).

639. House, Committee on Interstate and Foreign Commerce, Consumer Product Warranties and FTC Improvements Act, Report to accompany HR 7917, June 13, 1974, p. 40.

640. 40 Fed. Reg. 60204.

641. Id.

642. 16 CFR 703.3(b).

643. 16 CFR 703.4(b).

644. 16 CFR 703.4(c).

645. 16 CFR 703.5(c).

terms and inform the consumer of this fact. The mechanism must also monitor the performance of the parties and keep statistics of the number of disputes resolved and the degree of warrantor compliance.

The informal dispute settlement mechanism authorized by Magnuson-Moss is a voluntary procedure. A warrantor who establishes a mechanism may, however, make resort to it a prerequisite to a lawsuit under Magnuson-Moss. Although the mechanism decision is non-binding, it is admissible in court.[646]

Informal Dispute Settlement Under Section 5 of the FTC Act. The FTC has begun to encourage the establishment of informal dispute settlement procedures under its authority granted in Section 5 of the Federal Trade Commission Act to prevent businesses from pursuing unfair or deceptive trade practices. A principal example of this effort is a recent agreement reached between the FTC and General Motors (GM). In 1983 the Commission approved a proposed consent agreement with General Motors Corp. (GM) settling In the Matter of General Motors Corporation.[647] The complaint filed by the FTC in August, 1980 alleged that GM violated Section 5 of the FTC Act by failing to notify customers of serious problems or defects in its products. The complaint defines serious problems or defects as "the occurrence or likely occurrence of an abnormal number of failures or malfunctions of a component, or group of components or systems where such failures or malfunctions are costly to correct or may substantially affect the quality, reliability, durability or performance of a motor vehicle."[648] The complaint lists three components as illustrative of the existence of defects in GM motor vehicles. Specifically, the complaint alleged defects existed in 1) the THM 200 transmission, used in five to six million automobiles since 1976, 2) the camshaft used in fifteen million 305 and 350 cubic inch V-8 engines since 1974, and 3) the fuel injection pumps and fuel injectors used in half a million diesel engines since 1977. The complaint alleges GM knew or should have known of the existence of problems or defects in its products and failed to notify consumers of these facts. The failure to disclose the existence of serious problems or defects is alleged to constitute an unfair or deceptive act or practice in or affecting commerce in violation of Section 5 of the FTC Act.

Under Section 5 of the Act after the Commission issues a complaint a hearing is held to allow the party to show why the Commission should not issue an order compelling the party to cease and desist from the violation charged. The Commission's decision is reviewable by the U.S. Court of Appeals; findings of fact, however, if supported by evidence are conclusive. After the practice has been determined to be unfair or deceptive and a cease and desist order has become final, the Commission may seek consumer redress under Section 19 of the Act. Under this Section the Commission may commence a civil action against a party subject to a cease and desist order and obtain consumer relief if a court is persuaded that the act or practice involved is one which a reasonable man would have known under the circumstances was dishonest or fraudulent. In such a situation a court may grant relief as it finds necessary to redress injury to consumers resulting from the deceptive act or practice. Section 19(b) states, "such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages,

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646. 15 U.S.C § 2310(a)(3), 16 CFR 7035(j).

647. Docket No. 9145.

648. Complaint, p. 1.

and public notification" of the deceptive act or practice. In the case of the General Motors agreement, the Commission chose to forego this litigation option in favor of the settlement agreement.

Under the consent order signed by the Commission, GM agreed to establish a nationwide arbitration program to settle customer complaints concerning GM powertrain components, including transmissions, camshafts and fuel injection systems. This arbitration program expands upon an existing arbitration program, the Council of Better Business Bureau's National Mediation/Arbitration program in which GM has participated since 1981. The program established under the consent order modifies BBB's existing arbitration program in several fundamental respects. Under BBB's existing program, upon receiving a consumer complaint the BBB staff contacts the business involved in the dispute and attempts to resolve the dispute through mediation between the consumer and the business. If mediation fails, the parties may agree to enter into binding arbitration. The consumer pays no fee for participation in the program. The mediation/arbitration steps remain the same under the FTC consent order except that under the consent order the arbitration result is binding only upon GM; the consumer remains free to reject this result and seek compensation in court.

Arbitrators are drawn from the rolls of BBB's trained volunteer arbitrators. The consumer and GM each receive a list of 5 potential arbitrators whom they must rank in order of preference. BBB then appoints the individual with the highest mutual rating as arbitrator. Under the consent agreement GM must strike from consideration any arbitrator who has heard three or more disputes involving the components specified in the order. This situation should not arise however as it is BBB's practice to limit its arbitrators to no more than two cases for the same division of GM. This serves to avoid unfair selection advantage.[649] Technical experts may be provided by the BBB to assist the arbitrator in making a decision. The parties, however, remain free to bring their own technical experts to testify at the arbitration.

The arbitrator is to render a decision within 10 days. The BBB states that "decisions by the arbitrators, who represent a cross section of their communities, will be based on standards of consumer expectation rather than legal or engineering standards."[650] The decisions are intended to reflect the consumers conception of fairness.

GM agreed to submit all complaints concerning powertrain components to this arbitration process. Arbitration will be offered initially in 39 cities, however BBB is prepared to administer GM cases in all of its 156 Bureaus.[651] This program is open to all individuals with complaints concerning GM powertrain components, regardless of whether the consumer still owns the automobile.

GM agreed to notify by direct mail all those who have complained either to the FTC, a state agency or GM about a specified component of the existence of

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649. Comments of Council of Better Business Bureaus, FTC Docket No. 9145, p. 2036.

650. Comments of Council of Better Business Bureaus, FTC Docket No. 9145, p. 2026.

651. Letter from Dean W. Determan, BBB Mediation/Arbitration Division to Carol Crawford, FTC Bureau of Consumer Protection, June 17, 1983, FTC Docket No. 91455, p. 1740-1.

the arbitration program. GM also agreed to publicize the arbitration program in full page advertisements in national magazines to appear initially twice and later three times each year. GM will also maintain a toll-free telephone number to provide information concerning this program. The consent agreement binds GM for a period of eight years.

In addition to agreeing to submit all powertrain component disputes to the BBB's arbitration process GM also agreed to make its product service publications (PSPs) available to consumers for the next eight years. PSP's are notices and articles distributed to GM dealers and employees which describe repair and maintenance procedures for GM vehicles. These documents may help consumers identify the source of problems they have experienced with GM cars. GM also agreed to prepare an index of these previously internal documents and to make the index and the documents themselves available to the public. These indexes will begin with the model year 1982. Under the consent agreement GM also agreed to publicize the availability of the PSP's in the same manner as it will publicize the existence of the arbitration process. GM is permitted to charge consumers for each PSP ordered in accord with a price scale established in the consent order. Consumers may also obtain subscriptions of all PSPs for a given model year, beginning in 1984, at a cost not to exceed a reasonable cost or the cost charged to GM dealers.

The Federal Trade Commission and GM also developed "Background Statements" or fact sheets which consumers may submit to an arbitrator. A separate background statement was prepared to address the THM 200 transmissions, camshafts and lifters, and diesel fuel injection systems. The purpose of these statements is to provide arbitrators with a general background of the dispute involving these specific powertrain components.

This consent agreement has been described as the best alternative available by which the Commission may obtain redress for consumers who purchased GM cars with powertrain defects. The Commission's rejection of GM's offer to establish this arbitration program would have left GM car owners awaiting resolution of the FTC's complaint against GM through litigation -- a process estimated to take up to ten additional years. As FTC Commissioner Patricia P. Bailey comments, "the settlement offers the commission the fastest and indeed the only feasible way to redress the injuries suffered by many GM owners. Our sole alternative is continued litigation which would take until at least the end of the decade to resolve."[652] Commissioner George W. Douglas agrees with Commissioner Bailey noting "while the settlement is not perfect -- as is true of any negotiated agreement -- it nevertheless provides an immediacy of relief and a far higher degree of certainty for a much wider range of injured consumers than the Commission could expect to secure through litigation."[653] The GM consent agreement was criticized by FTC Commissioner Michael Pertschuk. He argued that despite the attractiveness of several of the features of this program, arbitration which resolves consumer disputes on an individual case-by-case basis is inappropriate in a situation where "there is proof of systematic defects common to an entire class of similarly situated consumers."[654] Commissioner Pertschuk contends "the only rational and equitable remedy for the common injury suffered

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652. Statement issued April 26, 1983.

653. Statement issued November 16, 1983, FTC Docket No. 9145, p. 2722.

654. Statement issued, April 26, 1983.

in a case like this is automatic compensation for damages, not standardless mini-trials pitting individual consumers against the largest company in the world."[655] He would have preferred the Commission settle the case by obtaining direct automatic refunds for consumers as had been obtained in several cases in the past. Commissioner Pertschuk notes however that GM refused to agree to any direct redress program in settlement negotiations.

The majority of FTC Commissioners believes GM's establishment of a private dispute resolution mechanism designed to speedily resolve disputes, coupled with the increased disclosure of information contained in GM's PSPs and the availability of FTC/GM background statements afforded the Commission the best opportunity for providing GM car owners with a viable remedy for injuries suffered as a result of purchasing defective GM cars. The Commission preferred this consent agreement to the alternative of pursuing resolution of the dispute through protracted litigation.

During the 60 day public comment period which followed the Federal Register's publication of the consent agreement the Commission received comments from consumers, consumer advocates, GM, the Council of Better Business Bureaus, state attorneys general and other interested parties. GM defends the consent order as a reasonable negotiated compromise to a suit the FTC had little chance of winning. Initially GM notes the long delays and difficult course the Commission would have to pursue in order to obtain consumer redress through litigation. The Commission would have to win in an administrative proceeding under Section 5 of the FTC Act, succeed through appeal, then file suit in a U.S. District Court under Section 19 for consumer redress and succeed through that appeal. GM contends that the FTC's Section 5 case is grounded in a novel ill-defined legal theory. The FTC alleged GM committed an unfair or deceptive trade practice in violation of Section 5 by failing to disclose to consumers the existence of abnormally high rates of failure in certain of its products. GM comments "exhaustive legal research of this theory corroborates that neither the Commission nor any court has ever announced a duty to disclose abnormal failure rates."[656] GM contends that even if this theory were accepted by the Commission and the courts it has a strong factual defense with which to prove that its products performed satisfactorily.

GM argues that an FTC effort under Section 19 of the Act, which is necessary to obtain consumer redress, has less chance for success than a case under Section 5. GM points out that in order to succeed under Section 19 the Commission must prove to a court that GM's failure to disclose failure rates constitutes conduct which "a reasonable man would have known under the circumstances was dishonest or fraudulent." GM concludes that such a judgment would be difficult to obtain where the Commission relies upon a legal theory being applied for the first time which consists of vague terms such as the failure to disclose the existence of abnormal failure rates. Finally, GM explains its motivation for settling the case as resulting from a desire to resolve a lawsuit which has generated a great deal of adverse publicity.

The attorneys general of 29 states filed a joint comment concerning the FTC/GM consent agreement. The attorneys general focused on several aspects of this agreement rather than upon the relative merits of settlement versus litiga-

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655. Statement issued November 16, 1983, FTC Docket No. 9145, p. 2716.

656. FTC Docket No. 9145, p. 2198.

tion. Their comments criticize the notification procedures provided in the agreement, the mediation stage required in the BBB program, and the use of arbitration to resolve these disputes.

The agreement requires GM to notify individuals who have registered complaints with either the FTC, a state agency or GM of the existence of the arbitration program. The attorneys general contend that notice should be sent to all owners of record. They criticize the order's national advertisement requirement as lacking specificity. GM may comply with this requirement by explaining and promoting the arbitration process without mentioning the allegations of the FTC complaint or the specific products named in the complaint.

The attorneys general also criticize the BBB requirement for mediation prior to arbitration. They view this step as excessive. The comment states "most owners who have complained about defects have already failed to resolve their disputes by dealing with GM's zone managers. To require them to repeat this once-failed process may strike some consumers as a frustrating waste of time. Consequently, they may well decide pursuing remedies is not worth the trouble."[657] The attorneys general also criticize the current rate at which BBB resolves disputes through mediation (ninety percent). They felt that such a high percentage of dispute resolution through mediation, in the absence of set parameters for relief, indicates that personal factors such as a consumer's sophistication or perseverance rather than the merits of a case determine whether a consumer receives redress.

Finally the attorneys general criticize the use of arbitration to resolve a large number of suits alleging common or systemic defects. They argue that the background or fact statements prepared by GM with the FTC fail to provide enough information to insure any uniformity in the resolution of disputes.

The Council of Better Business Bureaus' comments to the consent order report the results of a study concerning 180 completed arbitration cases concerning GM components specified in the order. One-half of these cases concerned the THM 200 transmission, one-half concerned camshafts and one case involved a diesel fuel injection failure. These arbitrations account for approximately 11% of all complaints filed with BBB concerning these components. The remaining 89% of these complaints were resolved through mediation. The BBB has no data on the result of the mediations. Data on mediations will be kept under the terms of the consent order. In arbitrated cases consumers received awards in 54% of the cases. BBB reports that 43% of these awards were for the full amount of the repair bill. The average award to the consumer in a transmission case was $348 and in a camshaft case $363. Reasons cited by arbitrators for not finding in favor of the consumer include the car being too far out of warranty (39 cases), poor maintenance (31 cases), and the lack of proof of repairs or maintenance (24 cases).[658]

The Center for Auto Safety also filed comments with the FTC concerning the consent order. The Center criticized the use of arbitration to resolve these disputes, the background statements prepared by GM and the FTC, BBB's capacity to handle the number of complaints which may be filed, and the dates from which

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657. FTC Docket No. 9145, p. 1893.

658. All statistics taken from comments submitted by Council of Better Business Bureaus, FTC Docket No. 9145, p. 2039-40.

GM's product service publications will be made available. The Center also noted a further drawback to the agreement. According to the Center for Auto Safety, GM has entered into negotiations with several GM consumer groups, particularly owners of GM diesel motor vehicles. The Center reports for example that a consumer group, Dieselgate, negotiated a claims procedure with GM which has handled over 2,000 claims and resulted in payments to consumers averaging more than $1,000. The Center reports at least two other groups, Lemon on Wheels (NY), and DOGMAD (CA), have also processed hundreds of claims each. The Center predicts that the consent order will crowd out these successful private efforts as GM will direct all claims to the BBB program.

Despite the variety of criticisms levelled at the consent agreement the Commission approved it on November 16, 1983. The Commission's responses to those who filed public comments stress the substantial and immediate benefits the agreement provides. It cautions critics to weigh the imperfections of the redress mechanism established by the consent order against the prospect of litigating the case an additional seven to ten years.