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ALTERNATIVE DISPUTE RESOLUTION IN THE FEDERAL GOVERNMENT: A VIEW FROM CONGRESS

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INTRODUCTION

A great deal of examination and experimentation with Alternative Dispute Resolution (ADR) is underway, and Congress has joined the fray. In introducing a number of bills in recent years, Congress has put forth the notion that ADR may be a good idea. This movement is a healthy response to a recognition of the shortcomings in the civil justice system. Adjudication through the federal court system is both slow and expensive. The Administrative Office of the United States Courts reported that it generally takes four years to resolve a civil dispute that goes to trial in our federal court system,[1] while the me-

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1. The Administrative Office of the United States Courts reports that it takes 47 months, or 3 years and 11 months, to resolve 90% of all civil cases. *Annual Report of the Director of the Administrative Office of the United States Courts*, table c-5, at 210 (1986).

dian period of time is 19 months.[2] Resolution of civil disputes through government agencies employing administrative law judges is also slow and cumbersome.

Testimony before the Senate Judiciary Committee, citing a survey of government agencies employing administrative law judges or their equivalent, revealed the average times for the processing of complaints before administrative law judges: the National Labor Relations Board in fiscal year 1986 averaged 767 days, or 25.6 months; the Social Security Administration in fiscal year 1986 averaged 421 days, or 14 months; the Federal Labor Relations Authority averaged 467 days, or 15.5 months; and the Department of Labor averaged 393 days, or 13.3 months, in black lung cases alone.[3] In fact, these figures are shorter than the time actually required in that they do not include the time required for judicial review of the administrative law judges' decisions.

Alternative dispute resolution has been lauded as the solution to this judicial and administrative backlog. The Federal Judicial Center reports that court-annexed arbitration substantially reduces the proportion of cases that ultimately go to trial.[4] The incidence of trial among cases mandatorily referred to arbitration in the Eastern District of Pennsylvania and the Northern District of California was reduced by fifty percent.[5] A more dramatic finding drawn from the same study indicates that fewer than two percent of the cases referred to arbitration in the Eastern District of Pennsylvania in 1979 ever came to trial.[6] In addition, the use of ADR accelerates the pace towards final termination of the case. In one district cited by the Federal Judicial Center, cases reaching final disposition within one year of filing increased from thirty-six to fifty percent.[7]

It is important to note that ADR procedures have also been well received by both the bench and bar. More than half of all counsel surveyed agreed that arbitration programs in which they have participated resulted in more rapid termination of their cases.[8] Evidence

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2. *Id.*

3. *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987) [hereinafter *Hearings*] (testimony of Wm. Bradford Reynolds, Asst. Att'y Gen. U.S. Dept. of Justice).

4. E. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 7-16 (Federal Judicial Center rev. ed. 1983).

5. *Id.* at 32-35.

6. *Id.* at 32.

7. *Id.* at viii.

8. *Id.* at ix.

also pointed to litigants' satisfaction with the quality of justice dispensed in ADR proceedings.[9]

I. CONGRESSIONAL CONCERNS

Having praised the ADR experiment, it is necessary to examine some of the questions and the concerns that have arisen in Congress in response to ADR proposals. Certainly the goals of ADR are worthy, *viz.* reducing the time and cost of resolving civil disputes as well as facilitating an informal mechanism that is more responsive to the unique needs of the participants.[10] Expedient, cost-effective solutions must not, however, sacrifice fairness, justice, and constitutionality.[11] Given the truncated procedures associated with ADR, not every type of civil dispute is conducive to ADR resolution.[12] Various methods of ADR have long been used in areas as disparate as labor mediation,[13] commercial arbitration,[14] consumer disputes, and even divorce mediation[15] as well as parent-child disputes.[16]

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9. *Id.*

10. *See* Millhauser, *In Choosing ADR, the People as Well as the Problem Count*, NAT'L L.J., April 6, 1987, at 15, 17-18 (addressing importance of ascertaining litigants' underlying interests, as well as emotional and personality issues affecting dispute).

11. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE 207 (1971) (stating that greater economic and social benefits are not sufficient reason for accepting less than equal liberty or justice). Feinberg, *Justice, Fairness and Rationality*, 81 YALE L.J. 1004 (1972) (discussing conflicting views on relations between justice and utility); Higginbotham, *The Priority of Human Rights in Court Reform*, 74 F.R.D. 134, 135 (1976) (stressing that certain disputes cannot be justly resolved by means other than traditional litigation since concerns about constitutional human rights issues outweigh concerns regarding cost-effectiveness and efficiency); *see also* I. BERLIN, TWO CONCEPTS OF LIBERTY IN FOUR ESSAYS ON LIBERTY 118-72 (1969).

12. *See* Higginbotham, *supra* note 11, at 135-36 (cautioning that certain disputes involving human rights cannot be justly resolved by means other than traditional litigation); Millhauser, *supra* note 10, at 17-18 (advising that litigant's underlying concerns and personality may preclude use of ADR).

13. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 189 (1985) [hereinafter GOLDBERG] (stating that arbitration has been used to resolve labor disputes in United States since early part of twentieth century).

14. *See id.* (stating that arbitration has been used to resolve commercial disputes since latter part of nineteenth century).

15. *See, e.g.*, Gaughan, *Taking a Fresh Look at Mediation*, 17 TRIAL 39 (1981) (stating that mediation has proven successful in resolving divorce disputes); Pearson & Thoennes, *Mediation and Divorce: Benefits Outweigh the Cost*, 4 FAM. ADVOC. 26 (1982) (supporting use of mediation in divorce disputes); Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725, 1743-49 (1984) (advocating mediation as particularly effective method of resolving divorce disputes).

16. *See, e.g.*, E. VORENBURG, A STATE OF THE ART SURVEY OF DISPUTE RESOLUTION PROGRAMS INVOLVING JUVENILES (American Bar Assoc., Dispute Resolution Papers Series No. 1, 1982) (citing study indicating that mediation plays important role in juvenile justice field); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668

1. *Utility*

Most commentators agree that ADR is particularly useful for disputes between parties that have an ongoing relationship and want to preserve this continuing relationship.[17] Such cases necessitate an expeditious and amicable method of resolution. For example, in commercial contract disputes that are submitted to arbitration by a panel of experts in the industry, the individuals familiar with the trade practices can resolve the disputes probably better than anyone else. Arbitration or negotiation offers the parties a great advantage by allowing the parties to control the process and the solution, with the assistance of a neutral third party.[18]

Alternative dispute resolution can be particularly effective where the services of an expert are necessary.[19] In many cases, the participants in ADR are free to search for creative solutions to the problem that gave rise to the dispute, and such solutions may be far more novel and effective than a remedy a court may have authority to provide. For example, in the mini-trial held by Texaco and Borden, the parties resolved the breach of contract claim and antitrust counterclaim, both totalling hundreds of millions of dollars, by negotiating the entire contract for the supply of natural gas.[20] Both parties claimed a net gain by using this method. In contrast, a court could

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(1986) [hereinafter Edwards, *Alternative Dispute Resolution*]; Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Janes, *The Role of Legal Services Programs in Establishing and Operating Mediation Programs for Poor People*, 18 CLEARINGHOUSE REV. 520 (1984); Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78 (1985); Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1 (1985).

17. When a continuing relationship exists between the parties, an expeditious and amicable method for resolving the dispute is needed. For example, commercial contract disputes have long been submitted to arbitration by a panel of experts in the industry. The American Arbitration Association now handles close to 10,000 of these types of disputes per year. Sander, *supra* note 16, at 5.

Another example of this kind of an ongoing relationship exists between unions and industry. The effectiveness of ADR in maintaining the ongoing relationship is evidenced by the fact that more than 95% of all collective bargaining contracts contain a provision for final and binding arbitration. GOLDBERG, *supra* note 13, at 189.

18. Harter, *Points on a Continuum: Dispute Resolution Procedures and the Administrative Process*, 1 ADMIN. L.J. 1, 4, 8 (1987) (explaining arbitration and negotiation processes).

19. Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 12-13 (National Institute for Dispute Resolution 1983) [hereinafter *Paths to Justice*] (discussing advantages of arbitration with reference to expertise of arbitrator).

20. *See Texaco-Borden Antitrust Mini-Trial Sets Record, Alternatives to the High Cost of Litigation*, March 1983, at 1, 3; *see also* Johnson, Masri & Oliver, *Minitrial Successfully Resolves NASA-TRW Dispute*, Legal Times, Sept. 6, 1982, at 13, col. 1.

not have ordered the parties to renegotiate. At best, a judge or jury could only have compromised on the amount of damages awarded the "winner."

It is not uncommon for an ADR program to be limited to cases in which the amount in controversy does not exceed a specified dollar amount. Cases involving a lower dollar limit are thought to be more suited to ADR because they generally have less public significance.

2. *Public Policy*

Perhaps the most serious concern raised is whether the truncated procedures, which appear efficient, are truly appropriate for disputes that have a significant public impact.[21] The public policy issues in this particular context have assumed diverse forms. Does the ADR resolution have the effect of altering or formulating public policy? Should the award be vacated because the arbitrator has granted a remedy, such as punitive damages,[22] which public policy declares to be beyond the power of arbitrators to award? Has the arbitrator manifestly regarded applicable legal doctrine? Did the arbitration hearing comply with statutorily prescribed standards? What is the appropriate precedential value of a resolution through alternative mechanisms? Certainly the goals of reducing costs and time associ-

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21. The public impact issue has been carefully examined by a number of authors. *See, e.g.*, Edwards, *Alternative Dispute Resolution, supra* note 16; Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

Some agency functions may not be delegated to private individuals because they involve the "performance of a significant governmental duty exercised pursuant to a public law." Buckley v. Valeo, 424 U.S. 1, 140-41 (1976).

22. In examining whether an arbitrator may award damages, specifically punitive damages in an ADR proceeding, it is useful to distinguish between voluntary and involuntary proceedings. There is no impediment to the arbitrator in a voluntary proceeding imposing equitable relief, such as a permanent or temporary injunction or restitution. Nor does the seventh amendment preclude the parties from voluntarily agreeing to submit their dispute to an arbitrator who could impose punitive damages. In these circumstances, both parties have waived any seventh amendment right that could otherwise have been asserted. It could also be questioned whether such a proceeding is consistent with article III of the Constitution. The voluntary participation of private litigants in a proceeding outside the jurisdictional confines of the federal judiciary does not automatically insulate it from article III attack. *See* Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3257-58 (1986). The Court in *Schor* emphasized that the strictures of article III (unlike the protection of the seventh amendment) cannot be waived by the consent of the parties. *Id.* However, the voluntary ADR is likely to survive article III scrutiny given that a similar administrative scheme was upheld in *Schor* primarily because of its voluntary nature. *Id.* at 3260.

ated with resolving conflicts are goals within the public interest.[23] But particularly in the case of mandatory arbitration, a balance must be struck between the competing interests of efficiency and public policy concerns.[24]

In resolving disputes between individual parties, the neutral third party must not render decisions that conflict with or have the effect of making public policy. Public issues should be decided by public officials who are, in turn, responsible to the citizenry. It is important to preserve the role of institutions that have been entrusted with the task of promulgating public policy because they are ultimately responsible to the public for the manner in which they discharge their particular duties or functions.[25]

3. *Seventh Amendment*

In addition to the concerns involving appropriate public policy, significant constitutional questions have been raised.[26] For example, does the use of alternative procedures infringe upon the right to trial by jury, equal protection, or even due process? In examining whether ADR violates the seventh amendment right to a jury trial, it should be noted that a federal ADR program that provides additional pretrial procedures, but does not deny the litigant the opportunity to have his case decided by a jury, does not influence jury deliberations, nor make admissible the substance of an arbitration award, creates no seventh amendment question. For example, where the added pretrial procedure involves court-annexed arbitration, the award will precede the opportunity for a jury trial. The requirement of a pretrial procedure in itself does not constitute denial of trial by jury, in light of the Supreme Court's holding that the seventh amendment does not require that the jury make the initial determination of the facts.[27]

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23. Phillips & Piazza, *The Role of Mediation in Public Interest Disputes*, 34 HASTINGS L.J. 1231, 1232-33 (1983) (discussing economic motivation in public interest sector and avoidance of delays in litigation).

24. Agencies Use of Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-3(c) (1987) (suggesting when Congress should consider mandatory arbitration and its appropriateness).

25. *See Paths to Justice, supra* note 19, at 23-26 (generally discussing public policy and public interest).

26. *See* Harter, *supra* note 18, at 25-27 (explaining that administrative arbitration programs have been challenged on due process grounds).

27. In Capital Traction Co. v. Hof, 174 U.S. 1 (1899), the Court noted that the seventh amendment "does not prescribe at what stage of an action a trial by jury must . . . be had; or what conditions may be imposed upon the demand of such trial, consistently with preserving

In other words, a seventh amendment challenge to ADR in connection with a court-ordered procedure is a question of degree. Thus, the question remains to what extent may a right to a jury trial be burdened or restricted and yet still satisfy the seventh amendment? It is not uncommon for certain incentives and disincentives, involving limitation of remedy or additional fees, to accompany a decision designed to encourage the choice of an alternative procedure instead of a trial. Some may suggest that such incentives, if excessive, might have the effect of denying or unacceptably chilling the right to a jury trial. In examining this question, some courts have balanced the benefits and the burdens in order to determine the reasonableness of required procedures,[28] while others have indicated that the burdens do not violate the seventh amendment or similar provisions of state constitutions unless they effectively preclude trial by jury.[29]

A different seventh amendment concern arises in the context of ADR within agency jurisdiction.[30] The interpretation of seventh amendment requirements in this context is difficult indeed. The Senate Judiciary Committee examined this question closely during six days of hearings before the Constitution Subcommittee.[31]

Much of the ambiguity associated with the interpretation of the seventh amendment with regard to agency resolution of disputes involves the Supreme Court's decision in *Atlas Roofing Co. v. Occupa-*

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the right to it." *Id.* at 23. In *Hof*, the Court noted a number of state court decisions upholding statutes which allowed trial by jury for the first time on appeal. *Id.* at 23-30.

In Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442 (1977), the Supreme Court stated "[t]hat [the Seventh] Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases . . . ." *Id.* at 443. "Furthermore, there are the remaining cases where the Court expressly held or observed that the Seventh Amendment did not bar administrative factfindings." *Id.* at 456; *see, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Block v. Hirsh, 256 U.S. 135 (1921).

28. *E.g.*, Kimbrough v. Holiday Inn, 478 F. Supp. 566, 570-71 n.11 (E.D. Pa. 1979).

29. *See In re* Smith, 381 Pa. 223, 231, 112 A.2d 625, 629, *appeal dismissed*, 350 U.S. 858 (1955).

30. *Cf.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977) (seventh amendment held not to prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum); Curtis v. Loether, 415 U.S. 189, 194 (1974) (held seventh amendment inapplicable in administrative proceedings where jury trials would be incompatible with entire concept of administrative adjudication) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937)); Pernell v. Southall Realty, 416 U.S. 363 (1974) (seventh amendment guaranteed a right to a jury trial); Colgrove v. Battin, 413 U.S. 149 (1973) (jury of six satisfied seventh amendment); Galloway v. United States, 319 U.S. 372 (1943) (seventh amendment held not to deprive federal courts the power to direct a verdict for insufficiency of evidence).

31. *Hearings*, *supra* note 2.

tional Safety and Health Review Commission.[32] The Court addressed the issue of "whether, consistent with the Seventh Amendment, Congress may create a new cause of action in the government" with provisions for civil penalties and enforcement in an administrative agency where there is no right to jury trial.[33] *Atlas Roofing* has been interpreted as holding that Congress may circumvent the requirement of a jury trial guaranteed by the seventh amendment so long as the legislation enacted creates a new cause of action with new remedies enforceable in an administrative agency.[34] Under this reasoning, the seventh amendment requires only that jury trials be preserved in suits at common law, but when a new cause of action is statutorily created, the right to a jury trial no longer exists. Others who examine this question suggest that the interpretation of arbitration under *Atlas Roofing* is faulty because it has the effect of stripping the substance from the seventh amendment insofar as it relates to administrative procedure.[35] This latter interpretation renders the seventh amendment meaningless as a protection for a civil

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32. 430 U.S. 442 (1977).

33. *Id.* at 444.

34. *Id. See generally Hearings, supra* note 3. In *Atlas Roofing*, the Court held that the seventh amendment does not prohibit Congress from assigning adjudication of certain statutory rights to an administrative forum, even if a jury would have been required under the seventh amendment had Congress assigned adjudication of the same rights to a federal court.

> At least in cases in which 'public rights' are being litigated—e.g., cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the seventh amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.

Atlas Roofing, 430 U.S. at 450; *see also* Tull v. United States, 107 S. Ct. 1831, 1835 (1987); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Block v. Hirsh, 256 U.S. 135 (1921).

35. *Atlas Roofing*, 430 U.S. at 442. The Court in *Atlas Roofing* distinguished between "private rights," which could not be transferred to administrative proceedings, and "public rights," which may be appropriate to such proceedings.

> Our prior cases support administrative factfinding in only those situations involving 'public rights,' e.g., where the government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases are not at all implicated.

Id. at 458; *see also* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982). The Court has never clearly outlined what distinguishes a public right from a private right. "The distinction between public rights and private rights has not been definitively explained in [the Court's] precedents." *Id.* at 69. However the factors considered in determining the public rights doctrine include the recognition that the nature and historical backdrop of the federal right at issue are quite significant in determining whether a statute which substitutes an alternative tribunal for article III courts impermissibly encroaches on the independence and authority of the federal judiciary. The Court has sought to prevent Congress from usurping the constitutional prerogatives of courts, some instances juries, by removing from article III tribunals matters which are theirs to resolve. On the other hand, the Court has perceived no plausi-

jury trial, because Congress need only enact a new cause of action to defeat the civil jury trial requirement, even if a similar action would have been brought at common law.

It should be noted, however, that the Supreme Court's recent decision in *Tull v. United States*[36] may shed light on this matter. In *Tull*, the Supreme Court interpreted the seventh amendment as guaranteeing a jury trial to determine liability in government actions seeking civil penalties, as well as injunctive relief, if an examination of the nature of the action and of the remedy sought demonstrates that it is more analogous to suits at common law than it is to cases that were traditionally tried in courts of equity.[37] The statute at issue in this case was the Clean Water Act of 1977,[38] which presented a cause of action quite distinct from any presently available at common law. Although the *Tull* reasoning would appear to be applicable to administrative procedure, this case was brought in district court where the debate centered around the question of whether a jury trial rather than a bench trial was required.[39] The Court has not specifically spoken as to the applicability of the *Tull* reasoning to administrative adjudication. Given the confusion in applicable case

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ble threat to an independent judiciary or trial by jury from non-article III resolution of matters that are committed to the political branches.

> The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency.

Id. at 68; *see also* Thomas v. Union Carbide Agric'l Prods. Co., 473 U.S. 568, 596 n.1 (1985) (Brennan J., concurring); Crowell v. Benson, 285 U.S. 22, 50 (1932); *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929). Congress distinguishes cases that are inherently judicial because they involve traditional rights governing "the liability of one individual to another," *Crowell*, 285 U.S. at 51, which may not be removed from adjudication in the federal courts absent extraordinary circumstances, while those involving disputes "between the government and others" may permissibly be committed to agency adjudication, *Ex parte Bakellte Corp.*, 279 U.S. at 451.

36. 107 S. Ct. 1831 (1987).

37. *Id.* at 1835.

38. Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1266, 1281-1299, 1311-1328, 1341-1345, 1361-1376 (1982)).

39. *Tull*, 107 S. Ct. at 1834. A footnote in *Tull* which cites *Atlas Roofing* mentions the seventh amendment with respect to administrative proceedings.

> The Court has also considered the practical limitations of a jury trial and its functional compatibility with proceedings outside of traditional courts of law in holding that the Seventh Amendment is not applicable to administrative proceedings. . . . [T]he Court has not used these considerations as an independent basis for extending the right to a jury trial under the seventh amendment.

Id. at 1835 n.4. The meaning of this footnote is unclear, but it appears to indicate that *Tull* is not meant to signal a reexamination of the principles underlying *Atlas Roofing*.

law, however, it is not surprising that the Senate has discussed the meaning of the seventh amendment as it applies to administrative dispute mechanisms.

4. *Other Constitutional Issues*

Constitutional challenges to ADR based on either equal protection or due process grounds are unlikely to succeed.[40] While many litigants have challenged ADR programs on equal protection grounds, such challenges have been uniformly unsuccessful. Courts typically have applied a "rational basis" test in such cases because they failed to find either suspect classifications or restrictions on fundamental rights.[41] The courts have found that ADR procedures bear a rational relationship to the legitimate state objective of reducing court congestion, reducing court delay, and reducing costs to litigants. Similarly, due process arguments are unlikely to succeed given the minimal delays and modest additional costs that accompany ADR programs.[42]

While a constitutional challenge alleging equal protection or due process violations may not succeed in court, it should be noted that Congress is frequently preoccupied with an examination of new alternative dispute procedures from the perspective of fairness.[43]

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40. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."), *quoted in* Mitchum v. Purvis, 650 F.2d 647, 648 (5th Cir. 1981); *see also* Harter, *supra* note 18, at 25-27 (discussing due process concerns); Perritt, *"And the Whole Earth Was of One Language"—A Broad View of Dispute Resolution*, 29 VILL. L. REV. 1221, 1323-24 (1983-84) (explaining that compulsory dispute resolution generally comports with procedural due process guarantees).

41. *See, e.g.*, Woods v. Holy Cross Hosp., 591 F.2d 1164, 1173 n.14 (5th Cir. 1979) (classifications created by the Florida Medical Malpractice Law requiring use of a medical panel and subsequent admission of panel's findings, were constitutionally permissible under a rational basis standard of equal protection analysis); Kimbrough v. Holiday Inn, 478 F. Supp. 566, 576 (E.D. Pa. 1979) (local experimental rule requiring compulsory, non-binding arbitration as a prerequisite to jury trials in certain civil litigation of less than $50,000, was constitutionally permissible under the equal protection clause); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (medical malpractice provision requiring malpractice actions to be submitted to a medical liability review board before action is heard in court held to not deny equal protection); Attorney Gen. of Maryland v. Johnson, 282 Md. 274, 312, 385 A.2d 57, 78 (1978) (Maryland malpractice claims statute held constitutional because it did not foreclose appeal to law courts), *appeal dismissed*, 439 U.S. 805 (1978); Pendergast v. Nelson, 199 Neb. 97, 111, 256 N.W.2d 657, 668 (1977) (prelitigation procedure may be established).

42. *See* Edwards, *supra* note 16, at 669-70 (discussing problems that ADR seeks to address).

43. *See, e.g.*, Aldana v. Holub, 381 So. 2d 231, 238 (Fla. 1980) (Florida rules of medical mediation procedure permitted an arbitration board to declare a mistrial); Attorney Gen. of

Members of Congress are loath to trade a loss in justice for any level of economic gain or efficiency.[44]

Another possible constitutional challenge to ADR involves a separation of powers concern associated with the fact that ADR may employ private parties to resolve issues involving federal programs that otherwise would be decided by executive officers or the courts.[45] However, no serious constitutional concern is raised by most ADR programs, despite the influence of private parties, as long as final authority is left with government officers, and the private party is neutral and unbiased.[46]

Concerns that ADR mechanisms could conflict with constitutional principles or subvert public policy can be largely alleviated by establishing clear parameters within which such mechanisms may operate. A private neutral party may apply policy in specific civil disputes, so long as the activities of the neutral party are controlled by an executive branch officer who is executing principles of public policy established by Congress.[47] If arbitration is utilized as an alternative to more formal agency review by an administrative law judge, the powers exercised by the arbitrator should be limited and well-defined by that particular agency.[48]

Maryland v. Johnson, 282 Md. 274, 291, 385 A.2d 57, 71 (1978); Pendergast v. Nelson, 199 Neb. 97, 103, 256 N.W.2d 657, 663-64 (1977).

44. *Compare* Harter, *supra* note 18, at 4 (explaining arbitration process) *with* Behre, *Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts*, 1 PUB. CONT. L.J. 66, 70-72 (1986) (examining costs and benefits of arbitration as ADR method).

45. *See* Harter, *supra* note 18, at 26-27 (discussing separation of powers concern as it relates to ADR). Agencies are generally thought to be best situated to weigh alternative procedures. Deference has been given to agency choice of procedure, whether the issue is statutory authorization, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), or constitutionality, Mathews v. Eldridge, 424 U.S. 319, 349 (1976). For an examination of the public/private distinction which is frequently raised in this context, see *supra* note 34.

46. While the case law has been somewhat inconsistent in its analysis of the appropriateness of private party decisionmakers, generally, delegations to private deciders are in jeopardy if the decider has an interest in the outcome. For a comprehensive review of the law with regard to private deciders, see Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975).

47. Harter, *supra* note 18, at 279.

48. *See generally* GOLDBERG, *supra* note 13, at 7-10 (describing dispute resolution process and third party involvement).

5. *Limitations*

Recommendation 86-3, proposed by the Administrative Conference of the United States, urges administrative agencies, where not inconsistent with statutory authority, to adopt ADR techniques for resolving a broad range of civil disputes.[49] The Administrative Conference, however, raised the concern that arbitration is not appropriate in every instance.[50] Arbitration should not be utilized where a definitive or authoritative resolution of the matter is required or desired for its precedential value, or where maintaining consistency with other decisions is of prime importance.[51] Moreover, ADR is not appropriate in cases affecting public policy or when a full public record is needed.[52] In such cases, a more formal proceeding is required. Generally, ADR could best be used as a voluntary alternative, appropriate only where the dispute does not involve the establishment or implementation of major new policies or precedents, where the matters to be resolved will not have precedential effect beyond the immediate parties, and where the dispute can be resolved by reference to an ascertainable norm such as a statute or a rule.

II. CONGRESSIONAL DEBATE: INCORPORATION OF ALTERNATIVE DISPUTE RESOLUTION

Specifically, it would be helpful to outline the debate associated with two issues examined by the Senate Judiciary Committee that involve ADR. The first is the careful examination of two bills that would amend Title VIII of the Civil Rights Act in an effort to improve the enforcement of fair housing.[53] The second is inquiry of the settlement procedure of the Product Liability Reform Act.[54]

1. *Alternative Dispute Resolution and Fair Housing Reform*

The clear goal of fair housing reform is to increase an individual's access to remedies guaranteed by the Fair Housing Act,[55] while preserving procedural fairness for both complainants and respondents in

49. Agencies' Use of Alternative Means of Dispute Resolution, 1 C.F.R. § 305.86-3 (1987).
50. *Id.* at B(5)(b)(1)-(5).
51. *Id.* at B(5)(b)(1)-(2).
52. *Id.* at B(5)(b)(4)-(5).
53. Congress has held six days of hearings on Fair Housing during the 100th Congress. *See generally Fair Housing: Hearings Before the Subcommittee on the Constitution, Senate Committee on the Judiciary*, 100th Cong., 1st Sess. (1987).
54. Product Liability Reform Act, S. 2760, 99th Cong., 2d Sess. (1986).
55. 42 U.S.C. §§ 3601-3619, 3631 (1982).

fair housing disputes.[56] Under existing law, an individual whose complaint cannot be resolved through conciliation is remitted to filing a private action in federal court. In an attempt to address the needs of individual complainants, one proposal would channel all individual complaints which could not be resolved through informal methods and did not involve an issue of zoning or land use law, to an administrative law judge.[57]

Despite the good intentions of its sponsors, serious concerns have been raised as to whether the administrative bureaucracy envisioned in this proposal[58] would actually result in a speedy, inexpensive, and effective redress of individual housing disputes. In hearings on this issue, evidence was presented regarding the extensive backlogs associated with administrative adjudication through Administrative Law Judges, indicating that such judges would not offer a speedy dispute resolution.[59] In contrast, an alternative proposal for fair housing reform supported by the present Administration would provide a speedy ADR mechanism for resolving housing disputes.[60] Proponents of the Administration's proposal outline many reasons why individual fair housing disputes are particularly suited to ADR resolution. Meaningful relief must be timely and inexpensive for a claimant denied a lease to an apartment because of race, sex, religion or handicap. Moreover, in such situations a continuing relationship is likely to exist between the parties, so that an informal, more amicable resolution would be desirable. The prospect of a prolonged administrative review process is likely to deter such a claimant, since under this process individual relief may not be realized until many months later, if at all.

While the Administration's approach recognizes the appropriateness of ADR for individual claims, it distinguishes cases that are of general public importance.[61] In the absence of adequate state or lo-

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56. *See Hearings, supra* note 3 and accompanying text.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* Under this proposal, a four-pronged assault on housing discrimination is envisioned. The first resort in every discrimination complaint that arises in a state or locality with an adequate fair housing law should be the state or local authority. The number of states certified by HUD as having fair housing laws substantially equivalent to the federal law has risen since 1977 from 22 to 35, and the number of localities so certified has reached 67. *Id.* Because existing law requires HUD to refer complaints to these jurisdictions before it attempts to resolve them, the percentage of HUD's complaints handled at the state and local levels has increased in recent years. *Id.* This practice of permitting state and local agencies to handle housing complaints should continue.

cal law, the Administration's bill shifts responsibility to the federal government to provide individuals with the opportunity for effective redress.[62] In this context, court adjudication remains the appropriate method for resolving disputes involving the larger and more complex "pattern and practice" cases, land use cases, matters involving non-legal questions, and issues of particular public importance. As to all other matters, if the Department of Housing and Urban Development fails to conciliate a dispute within a certain time, the parties will be given a choice between either voluntary or mandatory arbitration or the filing of a private lawsuit in a court of law.[63] The use of ADR in such cases would provide a streamlined and voluntary arbitration option that would give the parties the final resolution of their dispute within a very short, prescribed time frame. Because the parties will have agreed to the process, the Administration argues that it will be possible to simplify the proceedings without running afoul of constitutional constraints.[64]

It should be noted, however, that members of the Judiciary Committee are examining this concept of the bill carefully. Given the seventh amendment concerns discussed earlier, some members believe that a trial *de novo* must be available at the close of ADR should the parties request it. The seventh amendment question is particularly relevant here because the Fair Housing Proposals would establish, for the first time, an administrative remedy for civil rights violations, an area commonly associated with principles of constitutional law.[65]

2. *Alternative Dispute Resolution and Settlement Procedure of Product Liability Reform Act*

The second debated issue involving an ADR procedure, the Product Liability Reform Act,[66] was examined by the Senate Judiciary Committee during the 99th Congress.[67] This proposal contained an

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62. S. 867, 100th Cong., 1st Sess. (1987).

63. *Id.*

64. *Hearings*, *supra* note 3 and accompanying text.

65. Doubtless, a fast, and therefore meaningful resolution will prove attractive to complainants. In fact, the administration has suggested providing an incentive to encourage respondents to participate in these ADR proceedings, whereby relief awarded by the arbitrator in voluntary arbitration would be limited to injunctive relief and attorneys' fees. This would leave the award of punitive damages or large civil penalties as available relief only if the parties proceed to mandatory arbitration or to court.

66. S. 2760, 99th Cong., 2d Sess. (1986).

67. *Product Liability Reform Act: Hearings on S. 2760 Before the Senate Comm. on the Judiciary*, S. 2760, 99th Cong., 2d Sess. (1986) [hereinafter *Product Liability Hearings*].

expedited settlement procedure utilizing ADR which has been reintroduced in the 100th Congress.[68] Proponents of this bill believe that it can alleviate the inefficiency, unpredictability, and unfairness that plagues the current product liability system.[69] During the hearing, testimony was presented indicating that the cost of litigation in the product liability arena, including attorneys' fees, is between $15 and $19 billion per year and that persons who have been seriously injured may be forced to wait as long as five years before receiving any compensation.[70] The sponsor of the bill believes that any meaningful system of product liability reform must include a mechanism for resolving disputes expeditiously, short of full scale litigation.[71]

Under this proposal, parties to a potential product liability case are presented with incentives to resolve their dispute outside the courtroom. A claimant may include an offer of settlement in his complaint,[72] or the defendant may propose a settlement offer to the claimant that is limited to the claimant's net economic loss plus dignitary loss of $100,000, if appropriate.[73] If the parties agree to settle, they are bound by the court's determination as to any dispute involving net economic loss and dignitary loss,[74] if found to be appropriate. Such disputes would be resolved by the court on an expedited basis, unless the parties agree to be bound by determinations made pursuant to any other voluntary ADR procedures established or recognized under state law.[75]

However, if the defendant rejects the claimant's settlement offer and the claimant later receives damages in excess of the settlement offer amount at the conclusion of a lawsuit, the defendant must pay the claimant's court costs and attorneys' fees up to $100,000 incurred after the date the settlement offer was rejected.[76] Moreover, if a defendant makes a settlement offer which is rejected by the claimant and the claimant later prevails against the defendant in court, the damages available to the claimant are limited to the claimant's net economic loss, in addition to non-economic loss not to exceed $250,000, if dignitary loss is determined to be appropriate.[77]

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68. S. 688, 100th Cong., 1st Sess. (1987).
69. *Product Liability Hearings, supra* note 67, at 1.
70. *Id.* at 280.
71. *Id.* at 281.
72. Product Liability Reform Act of 1986, S. 2760, 99th Cong., 2d Sess. § 201(b).
73. *Id.* at §§ 201(c), 204(c)(1).
74. *Id.* at § 201(g).
75. *Id.*
76. *Id.* at § 203(a).
77. *Id.* at § 204(a)(1).

While significant support was expressed for the concept of using ADR to alleviate the product liability crisis,[78] concern was raised as to the use of caps as an incentive to induce an expedited resolution of the claim. Alternative dispute resolution is acknowledged as an excellent mechanism of reducing both costs and excessive time that currently characterize product liability disputes. Therefore, ADR is lauded as offering a positive solution in the product liability arena. However, the use of caps in conjunction with ADR is perceived by some to serve a great injustice to the process.[79]

In short, a number of significant issues were raised during congressional analysis of the ADR provisions in both the fair housing and the product liability proposals. The benefits of ADR were recognized and lauded. Alternative dispute resolution in both the fair housing and product liability contexts can provide a mechanism for resolving disputes that is speedy, economically efficient and tailored to the needs of individual plaintiffs. However, the limitations of such devices were also recognized. Alternative dispute resolution should be voluntary and utilized in accordance with carefully established statutory policy under the supervision of executive or court officers. Further, some members have indicated that the opportunity for a trial *de novo* should be available in the event the parties are dissatisfied with the arbitrator's decision. Finally, during the debate on product liability legislation, members expressed concern that incentives to induce parties to utilize ADR, such as placing caps on recovery should the parties fail to resolve their dispute in an alternative setting, should not be so burdensome as to compromise the fairness of the process.

CONCLUSION

Efforts of the Administrative Conference of the United States and others in exploring the increased usefulness of ADR for resolving civil disputes should be applauded. As recent studies have indicated, ADR will be of tremendous advantage to claimants in reaching a timely, inexpensive resolution to their disputes. Just as importantly, when ADR is used in appropriate cases and is responsive to constitutional concerns in accordance with established public policy and executive supervision, it will provide justice in resolving these claims.

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78. *Product Liability Hearings, supra* note 67, at 285.

79. *Id.* at 91.