



Office of the Attorney General
Washington, D. C. 20530

January 9, 2017

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On May 1, 1998, the President directed the Attorney General to coordinate interagency efforts to promote the use of alternative dispute resolution in the Executive Branch and to report to him periodically on that work. The Attorney General submitted reports on these efforts in 2000 and 2007.

With this letter, I am transmitting an updated Report entitled, "2016 Report on Significant Developments in Federal Alternative Dispute Resolution." The Report is the product of a collaborative effort of Executive Branch agencies and, in particular, of the Federal Interagency Alternative Dispute Working Group Sections. The Report outlines the significant growth that has occurred in federal use of alternative dispute resolution since 2007. It also describes the positive results of federal use of alternative dispute resolution, including cost savings, increased workforce productivity, and the promotion of the efficient delivery of services.

The Report concludes that alternative dispute resolution is often a useful tool, but is not necessarily appropriate for all cases. Since the interests of the United States often are unique and may involve many interested parties, federal officials must resolve cases in ways that will not undermine important positions, jurisdictional defenses, or policy interests. However, federal agencies are finding that, in appropriate cases, alternative dispute resolution is a cost-effective and time-efficient option which can give parties control over the outcome and involve stakeholders in decisions that affect them.

Respectfully,

A handwritten signature in blue ink that reads "Loretta E. Lynch".

Loretta E. Lynch

2016 REPORT ON SIGNIFICANT DEVELOPMENTS IN FEDERAL ALTERNATIVE DISPUTE RESOLUTION

EXECUTIVE SUMMARY

Congress has promoted the use of Alternative Dispute Resolution (ADR) across the federal government through the *Administrative Dispute Resolution Act of 1996*¹ (ADRA) after concluding that ADR can offer prompt, creative, efficient, and sensible resolutions to claims by and against the government. In the ADRA, Congress encouraged federal agencies to use ADR – an umbrella term encompassing a myriad of processes – to resolve disputes and required them to adopt ADR policies. The Act also encouraged agencies to develop and refine ADR techniques including more traditional processes such as mediation and arbitration as well as a host of new dispute resolution processes involving a collaborative and consensual approach to problem solving. Over the past twenty years, ADR programs have matured; this report describes four significant trends in federal ADR over the past decade.

First, agencies are using ADR earlier. During the initial years following the passage of the ADRA, federal agencies used ADR (generally mediation) most frequently as an alternative to formal adjudicative processes once parties are already in litigation or administrative proceedings. More recently, federal use of ADR has matured to address disputes *before* formal adjudicative processes are initiated. Earlier use of ADR allows agencies to prevent disagreements from escalating into intractable disputes that distract from agency missions and also helps agencies to address the root causes of any systemic problems.

Second, agencies have expanded the ADR palette to include new and tailored dispute resolution processes. While mediation is still a frequent choice as an ADR technique, agencies have learned that a single ADR method does not fit all situations. Through offering a broader spectrum of ADR resources, federal agencies provide parties an opportunity to determine and select the best process to address unique issues, challenges, and parties.

Third, agency ombuds offices have grown significantly both in number and type. Ombuds programs provide a range of benefits to agencies, including an independent, impartial, and confidential resource for resolving concerns – whether individual or widespread. Ombuds also provide a path to resolve systemic issues before they evolve into formal complaints by facilitating crucial discussions with stakeholders and recommending solutions directly to agency leadership.

Fourth, agencies have expanded the use of technology in ADR services. With agency offices spread across the United States and around the world, modern technology has significantly expanded access to ADR programs – both services and training. Rapid electronic responses in disputes in regulated industries – such as shipping, where time is of the essence – can prevent quickly mounting damages and preserve the effective flow of commerce.

These trends exemplify how ADR has become a vital tool in providing the public with a government that is both more accessible and effective.

INTRODUCTION

In 1998, a Presidential Memorandum directed the Attorney General to convene and lead an Interagency Alternative Dispute Resolution Working Group (Working Group) to promote and facilitate the use of ADR in the Executive Branch and to report periodically on that work.² The Attorney General and the Working Group have since submitted two reports: an initial report in 2000 when federal ADR was still in its infancy and a second report in 2007, which described the growth of federal ADR and analyzed the results, benefits and future of ADR.

The Working Group meets bi-monthly to share expertise and best practices in dispute resolution throughout the Executive Branch. The group also facilitates ADR training and program development for agencies seeking to initiate or expand existing programs.

This report details the evolution of federal ADR since 2007. The Working Group and the Department of Justice (DOJ) surveyed federal agencies during the spring of 2016 about their ADR programs. This report synthesizes submissions from 47 agencies³ and is divided into two parts. The first part outlines ADR trends and benefits across the government. The second part contains specific examples of these trends in programs across five subject-matter areas:

- Workplace;
- Federal Procurement;
- Administrative and Regulatory Actions;
- Litigation; and
- Environmental Disputes.

Following the report, Appendix II includes more detailed descriptions of agencies' ADR programs.

I. ADR TRENDS AND BENEFITS

A. Earlier use of ADR prevents disputes.

ADR has matured into a prevention as well as a dispute resolution process. In the past, agencies used ADR primarily in reaction to ongoing conflict. There has been a significant shift in favor of using ADR earlier to prevent disputes.⁴ Many agencies have expanded programs and policies to promote the earlier use of ADR in all subject-matter areas and, in some cases, through pro-active conflict management. For example, the recently updated Department of Defense (DoD) ADR policy specifically promotes the use of ADR to resolve disputes “at the earliest possible stage of the conflict and at the lowest possible organizational level,” regardless of the subject matter.⁵

Early dispute resolution enables agencies to resolve disagreements before they escalate into contests that drain agency resources and impede agency work. Earlier intervention also provides a valuable opportunity to discover systemic problems and pro-actively respond to underlying causes. Conflict impairs agency functioning, so early recognition of problems can provide a crucial opportunity to address needed changes.

B. Customized ADR processes are more successful.

Over the past ten years, federal ADR programs have dramatically increased their use of a broader range of ADR processes and collaborative tools. With more customized responses, agencies are better equipped to address and resolve a broader range of issues and problems – both individual and systemic – at all stages of conflict.

Mediation – in which a third party neutral directly assists the parties in the conflict – is still the ADR process of choice in many contexts, particularly in cases ripe for adjudication either in federal court or before administrative tribunals.⁶ However, agencies are increasingly expanding their use of ADR processes by tailoring the process to fit the particular dispute, such as: by adjusting the timing and purpose of an ADR intervention; by including other participants beyond the parties in conflict; or by offering the parties a choice of ADR processes.

In addition to expanding the types of ADR processes used, agencies have expanded the application of ADR to cover broader ground. Agencies have expanded their use of ADR beyond specific disputes involving individually impacted parties and are incorporating ADR methods as tools for achieving their mission. Agencies are using a variety of consensual and collaborative processes to engage multiple and varied constituents in open dialog about policy and regulation using techniques such as focus groups, surveys and consensus building through stakeholder discussions.

C. Federal ombudsmen effectively address individual and systemic issues.

Another trend over the past decade has been the significant expansion in the type and number of federal ombuds offices.⁷ Federal ombuds programs are varied across the government depending upon how each office is structured. In some instances, Congress has dictated the function and authority of an ombuds office⁸ and, in other cases, agency leadership has defined the parameters.⁹ Some ombuds offices are external facing (addressing concerns from constituents outside of the agency) and others are internal facing (addressing concerns of employees and constituents inside the agency).

Despite the variety in implementation, most ombuds programs share key elements: direct access to agency leadership; independence; impartiality/neutrality; and confidentiality. Access to leadership simplifies effecting solutions and alerts management to recurring or systemic issues within the agency; and independence and confidentiality protections encourage forthright reporting without danger of retaliation. These trends and attributes of federal ombuds office are discussed at length in a recent comprehensive study undertaken by the Administrative Conference of the United States (ACUS).¹⁰

D. Agencies use technology to provide and support ADR.

Technology has exponentially expanded access to federal ADR programs. Not only has it broadened the services which can be offered to geographically distant stakeholders – such as telephonic mediation for parties or availability of online training – but it allows for a faster agency response when time is of the essence, for example in resolving a transportation or

shipping dispute where any delay would generate significant expenses. Electronic data reporting has also enabled agencies to analyze trends or problems in their practices and address needed changes. Because ADR processes are largely rooted in consensual and collaborative problem solving, agencies have embraced online platforms to share resources such as training materials or tasks such as collective document drafting.

II. EXAMPLES OF PROGRAMS

A. Workplace

Effective workplace conflict management programs can reduce the number of formal grievances, complaints, or legal actions filed by employees, which drain time and agency resources. The breadth of disputes covered within the workplace has significantly increased to include not only Equal Employment Opportunity (EEO) claims,¹¹ but also whistleblower claims, labor-management disputes, harassment claims, and a myriad of other workplace issues, such as employee satisfaction, performance evaluation, and everyday communication challenges. The groups covered under workplace programs have also expanded significantly to cover (in addition to current employees) contractors, former employees, and applicants for positions with the agency. Today, there is tremendous variation in federal workplace ADR programs depending on location within the agency organizational structure; types of workplace issues addressed; types of dispute resolution processes offered; and the source of ADR professionals used in the program. Workplace ADR programs have expanded the tools available to both address individual concerns of agency employees and more broadly preserve a primary focus on institutional mission.

Early Use of ADR. Current workplace ADR programs show that addressing problems and disputes early significantly decreases the time required later to untangle multiple layers of misunderstanding and conflict and that a conflict-competent workforce is better able to resolve conflict without the need for formal ADR processes. Resolving these issues early also decreases the number of formal complaints lodged and pursued.

Many agencies have found that while conflict may be an inevitable part of any workplace, it can provide an opportunity for both individual and organizational growth. Training in dispute resolution helps managers and employees manage conflict proactively, resulting in reduced turnover and absenteeism; better sharing of institutional knowledge; and more acknowledgement of diverse perspectives and greater innovation. Development of familiarity and comfort with dispute resolution processes yield other benefits: a conflict competent workforce increases the likelihood that decision makers will receive more candid feedback from key employees early enough to take timely appropriate corrective action.

Agencies have instituted conflict management training programs for employees and management to learn to handle conflict competently and positively. For example, the National Aeronautics and Space Administration (NASA) provides training in recognizing the source of conflict, developing constructive responses to conflict, and communicating effectively and positively in a climate of strong emotions. Some of these conflict management courses address issues such as preparing for effective employee feedback; bullying in the workplace; and implicit bias. Training is also provided in individual sessions in which employees and managers are coached in appropriate conflict management techniques. Some agencies have expanded even further to

apply dispute management on a broader and systemic scale in addition to managing individual employee conflicts. Agencies have created policies and procedures to promote the frank and robust discussion of diverse views about important agency decisions, thereby providing an opportunity to consider divergent viewpoints and cultivate innovation. These processes have improved an agency's ability to carry out its mission by fostering employee engagement and supporting effective decision making.

The Nuclear Regulatory Commission (NRC) uses a multi-tiered system to manage different views about furthering the agency's mission. The system provides increasing levels of formality to air differences of opinion. They have established an open door policy which enables an employee to initiate a confidential meeting with any manager to discuss any work-related matter of concern, with strong protection from possible retaliation. Another process permits agency employees to proffer and document diverse views while reviewing agency policies or practices. A third program encourages professionals to share their judgments even where they differ from the prevailing staff view, to disagree with a management decision or policy position, or to take issue with a proposed or established agency practice involving technical, legal, or policy issues. NRC leadership believes that these processes benefit the agency by providing multiple, voluntary channels for expressing different views and supporting a culture of transparency by making agency records of differing views available to the staff and the public.

Similarly, the Defense Intelligence Agency (DIA) developed an integrated conflict management system that supports a culture in which employees are accountable as problem solvers and conflict is considered an opportunity to learn about and value different viewpoints. The DIA program provides a wide array of assistance from a staff of trained neutrals who offer services including mediation; facilitated conversations; climate assessments and organizational facilitation; education and training workshops; and conflict coaching to promote and support this framework. In organizational facilitation, for example, neutrals solicit confidential views from team members and later provide requesting managers with a report and recommendations about how to address the team members' concerns. These integrated systems support a culture in which employees are accountable as problem solvers to ensure efficient and effective agency business.

Customized ADR Processes. Agencies have developed tailored ADR processes which more effectively address the varied types of disputes they encounter. Some agencies have pooled resources to maximize dispute resolution options and others have expanded the traditional ADR processes to include flexibility where needed.

Agencies have collaborated in developing programs to more effectively manage active disputes by developing shared rosters of trained volunteer neutrals in order to provide early intervention by a skilled mediator who is independent from the agency of the complainant. They have shared trained neutrals from a variety of agencies so that each agency can provide their own employees a choice of neutral. The Department of Health and Human Services (HHS) manages the administration of the largest of the shared neutral programs in terms of the number of agencies served; there are similar programs run by the Federal Executive Boards (FEB) which are located across the country. The Federal Mediation and Conciliation Service (FMCS) also provides neutrals to other agencies under a cost-sharing agreement among participating agencies. Several agencies, including DOJ¹², the Department of Treasury (Treasury)¹³, the Environmental

Protection Agency (EPA), the Department of Agriculture (USDA)¹⁴, the Department of Interior (DOI), the Department of Homeland Security (DHS)¹⁵, DoD¹⁶, and the Federal Election Commission (FEC) have created their own cadres of internal, collateral-duty neutrals.¹⁷

The Office of Special Counsel (OSC) offers traditional mediation to resolve cases in which federal employees file complaints alleging prohibited personnel practices, such as whistleblower retaliation or violations of protections for military personnel.¹⁸ When necessary, however, mediators can involve a neutral and independent subject-matter expert to help parties evaluate the strength of their claim and explore realistic options in resolving disputes.

Agencies have also customized their use of traditional ADR processes by utilizing, in addition to mediation, facilitated discussions and climate assessments to address conflict prevention and resolution, recognizing that the resolution of some conflict requires working with a larger segment of the workplace population. The National Archives and Records Administration's (NARA) workplace ADR program utilizes office-wide facilitations to help entire offices in having critical, difficult conversations in individual, small-group and large-group settings. Through the facilitation process, staff can improve communication skills and learn how to better resolve difficult issues. Employees and managers who engage in facilitation report that the ADR process helped to resolve long-standing conflicts and improved the workplace environment.

The Federal Labor Relations Authority (FLRA) provides labor-management groups with a professional facilitator to provide guidance in developing a structure and ground rules before launching important discussions or formal mediation of grievances. This sort of assisted preparation helps parties remain focused on relevant issues and promotes a more effective dialog and dispute resolution process.

The DoD's Washington Headquarters has increased its use of "sensing sessions." Sensing sessions are voluntary meetings in which a trained neutral facilitator helps parties – generally employees – to voice their concerns. Issues commonly discussed in these sessions include employee morale, leadership cohesion, job satisfaction, and the overall EEO health of the organization. One facilitator guides the discussion and ensures that the participants have a respectful and productive exchange of ideas, while a second co-facilitator, transcribes unattributed information to management. The goal of the session is to provide employees with a safe platform to communicate freely and to provide management with honest feedback in a manner that protects the anonymity of the employees.

<p style="text-align: center;">ADR Processes</p> <p>The DHS Federal Emergency Management Agency (FEMA) ADR office increasingly offers more systemic and organizational ADR processes, in the form of team-building, management workshops, climate assessments, facilitation of working groups, appreciative inquiry dialogue facilitation, public engagement, and dispute management systems design.</p>

Agencies have also expanded traditional ADR processes to meet particular needs in specific situations. For example, through a joint working group, the National Air Traffic Controllers Association and the Federal Aviation Administration (FAA) developed a neutral evaluation program tailored to a negotiated grievance process. Through the program, a neutral with subject matter expertise provides parties with a non-binding evaluation which educates the parties about the strengths and weaknesses of their respective cases and better equips them to engage in

productive negotiations. The program promotes collaboration and focuses the parties on problem solving rather than simply the dispute.

Ombuds Offices. There has been significant growth in the number of federal ombuds offices and programs devoted to workplace issues. Over the past ten years, new workplace ombuds programs have been created or expanded at the Federal Deposit Insurance Corporation (FDIC), the U.S. Patent and Trade Office (USPTO), DoD¹⁹, DOI, DOJ, the Department of Energy (DOE)²⁰, and the Department of State (DOS).²¹

Federal workplace ombudsman programs typically complement the formal dispute resolution programs (EEO, whistleblower or grievance) available within agencies. Visits to the ombuds office do not rule out use of the formal options. Although each office is different, the hallmarks of internal ombuds offices are neutrality, independence, confidentiality, and informality or flexibility, in addition to the ability to address systemic issues by reporting those issues directly to agency leadership.

Ombuds

In 2016, USPTO created an ombudsman office for resolving workplace issues. The office, like many other internal facing ombuds offices, provides education about all ADR processes; advocates for using a dispute resolution process; identifies systemic problems and proposes strategies to improve them; assists in developing proactive practices to improve morale and productivity; and provides leadership coaching services.

Technology. More agencies are using technology to provide ADR and support workplace ADR programs. Many agencies now conduct ADR sessions over the phone or through a video teleconference.²² These technologies allow agencies to provide ADR more quickly and at a lower cost than if neutrals traveled to every ADR session – especially when the parties are in remote locations. HHS and the National Mediation Board (NMB) each provide examples. Parties have reported a high level of satisfaction with video teleconferencing mediations at HHS. NMB uses an online web-video platform to conduct arbitration hearings and grievance mediations synchronously and uses a text-based platform to conduct arbitrations and grievance mediations asynchronously.

ADR Technology

Over the past ten years, NMB has developed several important web-based resources, including: the Knowledge Store (an outward-facing online information resource that contains an archive of arbitration awards, representation determinations, representation decisions and other related information); and Online Dispute Resolution (parties use web-based conferencing software to hold bargaining sessions from distant locations or online brainstorming software during face to face sessions to manage information and make the meetings more efficient).

Agencies are also using software and other secure database programs to centralize the reporting of ADR usage, providing agencies up-to-date data, which can allow agency leadership to pro-actively address systemic workplace issues. The NMB, DoD, USDA, and the Department of Veteran’s Affairs (VA) have each made substantial investments in this resource. NMB, for example, is one of the first federal agencies to have all of its integrating information and communication technology based in the cloud. Furthermore, the Army, Air Force, USDA and VA have each developed electronic case management and reporting systems to better track use of and results of ADR.

Finally, agencies have invested in technologies to train wider audiences – some of which are dispersed worldwide. Examples include: Air Force (monthly ADR webinar program); USDA

(webinar); DOS (E-Gov-e-training provider); FMCS (online webinars); the Navy (video teleconferencing training sessions, web-based trainings, and DVD's); HHS (online training); and the National Labor Relations Board (NLRB) (online training module).

B. Federal Procurement

ADR is an integral part of the federal procurement process from the initial bidding through performance and completion of the contract, sometimes extending over many years. Annually, the executive branch spends a trillion dollars in some four million contracts for goods, services, and construction projects to support vital agency missions; disputes are inevitable.²³ Maintaining productive business relationships between agencies and their contracting partners at every stage of the procurement process to achieve mutually beneficial goals is critically important – especially in ongoing construction and other infrastructure projects. Today, the government successfully resolves most federal contract and procurement disputes through some form of ADR.²⁴ These tools preserve projects and relationships in millions of contracts, provide enormous cost savings, and minimize disruptions to agency missions. Additionally, ADR allows the parties to develop creative options for resolving issues which couldn't be imposed in an adjudication and resolve global issues beyond the claims involved in a particular case.

Early Use of ADR. The best protection against disputes that erode critical business relationships is an agreement – as early as possible – to work cooperatively and effectively to resolve issues as they arise. The Federal Acquisition Regulation (FAR) which governs all federal contracting and procurement was amended in 2011 to advise agencies to use ADR early and address protests at the lowest possible agency level.²⁵

Early in the contracting process, bidders who have not been awarded a contract – “disappointed bidders” – sometimes claim that the request for proposals or review process for the award of the contract was flawed. These unsuccessful bidders sometimes initiate lawsuits or administrative complaints which can delay the contracting process. Some agencies²⁶ have developed programs to address these types of disputes early and effectively by offering a timely and frank exchange between the losing bidder and the agency about the weaknesses of the unsuccessful bid. Previously, agencies offered disappointed bidders only a superficial debriefing that provided little explanation for the agency's decision²⁷ and disappointed bidders were forced to bring formal lawsuits in order to discover the particulars about the agency's decision in awarding the bid elsewhere. Today, through improved and detailed debriefings in appropriate cases, agencies can provide disappointed bidders with an evaluation of their proposals, suggestions for improving the proposals, and the basis for the selection decision and contract awards. The improved debriefings programs decrease formal and lengthy protest proceedings and increase improved subsequent bids.

The Army Corps of Engineers pioneered a program of establishing an early commitment to a strong partnership between the governmental institutions and their contracting businesses in construction contracts. This process is now an established early ADR technique routinely used by federal agencies. Such partnering agreements – generally initiated immediately after awarding a contract – provide parties with a neutral facilitator who helps stakeholders lay the groundwork for a team-based approach: identifying those responsible for resolving each potential issue and

setting conditions for attempting resolution before the issue can be elevated for a formal resolution process or adjudication.

The Navy and its contractor partner received several prestigious construction awards for successfully using a partnering process in a contract to remodel a pediatric intensive care unit at the Naval Medical Center in San Diego, California. In addition to completing the project in half the time required for similar projects, the partnership achieved its project goals by following the resolution procedures set out in its partnering charter. The Bureau of Prisons (BOP) successfully used partnering in a construction project to expand the size of the Coleman Prison. Before beginning construction, representatives from BOP, the architecture firm, general contractor, and major subcontractors attended a meeting in which they discussed each stakeholder's needs and goals, practiced problem solving as a group, and agreed to common goals. The partnering process, which included frequent meetings of the project team, enabled the parties to complete the fast-track construction project on time with very few issues elevated to top management.

Contracting disputes are best resolved by avoiding them altogether by refocusing the parties on the agency's mission, the need for business certainty and the opportunities for mutual gain by planning in advance how to address disputes which may arise during the contract execution phase.

Customized ADR Processes. Agencies are also expanding other ADR processes and tailoring dispute resolution to fit specific and often unique circumstances. For example, agencies are now required by the Office of Management and Budget (OMB) to use a new, more cooperative, and less adversarial process for resolving audits of government grants to private entities called "cooperative audit resolution."²⁸ This dispute resolution technique was originally developed at the Department of Education (ED) for monitoring financial management in federal grants to educational institutions. This process promotes a cooperative, problem solving approach to the audit function and provides a corrective – rather than punitive – experience in instances where lack of training or experience and weak internal controls – rather than fraud – is the cause of the audit finding.

Dispute resolution can be more effective when parties agree – in advance – to use ADR as soon as issues arise. Some agencies will agree in an initial contract to setting up a dispute review board in which both sides agree in advance to a decision rendered immediately upon a conflict surfacing by a board of experts designated in advance. Some pre-dispute agreements also stipulate a panel of experts for particular systems in a construction project – such as HVAC, plumbing or electrical work – so that when technical issues arise, experts are ready to review and adjudicate disputes. Through partnering, stakeholders are better equipped to work together collaboratively to solve problems that will inevitably arise during contract performance.

Partnering Programs

The Navy used partnering to repair a seawall and construct a massive maintenance facility for nuclear-powered aircraft carriers. Through the procedures developed by the Navy and its contracting partner, the partnership completed the project without any formal claims, ahead of schedule, and under budget.

Partnering Programs

BOP developed a partnering program as a part of a larger effort to improve the quality of its construction projects, streamline the design and construction schedules, and alleviate unwanted adversarial relationships with contractors.

Often, agencies and contractors agree to a multi-tiered ADR process through which the parties work through a series of graduated resolution processes ultimately to adjudication if they cannot come to a mutually agreed resolution. For example, one Defense Logistics Agency (DLA) standard contract requires parties to agree to first try resolving disputes with unassisted negotiations, but to use ADR processes if the negotiations are unsuccessful and adjudication as a last resort.²⁹ Other agencies utilize tiered discussion clauses which provide for an initial lower level of review among peer employees who have the most personal knowledge of the facts involved. If the issue remains unresolved after a specified period of time, a second layer of review is required before ultimately elevating the dispute, if necessary, to agency leadership to address. The theory behind such clauses is that employees have incentive and means to resolve differences among themselves rather than involving management in the dispute. Both the National Institutes of Health (NIH) and Army utilize tiered discussion clauses in their Cooperative Research and Development Agreements.

Many agencies are relying heavily on mediation but have customized services according to the needs of the parties or the issues in the case. The FAA Office of Dispute Resolution for Acquisition (ODRA), the Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA) provide ADR and adjudication for contract disputes, small business challenges, and public-private competitions. Parties consensually resolve a high number of contracting disputes each year through ADR processes provided by these adjudicative bodies. These administrative law judges are trained and highly skilled neutrals who afford the parties sophisticated, often hybrid forms of ADR, such as evaluative mediation, non-binding arbitration, and facilitated partnering, for resolution of disputes before adjudication. Parties negotiate and agree to the timing and specific characteristics of a mediation or other ADR process, before the process begins.

Because relationships are so fundamental to successful execution of the myriad contracts the federal government uses, ADR also serves as an essential communication tool in addition to a dispute resolution process. ADR is often helpful even where the parties do not reach a global or final settlement of the dispute, including, for example: narrowing the issues in dispute, repairing relationships through effective communication strategies; and/or creating innovative solutions that may not have been available through litigation.

Ombuds Offices. Some agencies have recognized the value in having an independent and impartial ombuds to serve as liaison between the agency and the public to address fairness in the acquisition and grant making process. The National Oceanic and Atmospheric Administration (NOAA) recently created an acquisition ombudsman with a charter that upholds the crucial elements of ombuds practices.³⁰ NOAA's Ombudsman, with both internal and external functions, facilitates communication with client programs, industry, academia, and the public. Ombudsman engagements may take place during different phases of the acquisition and grants

ADR in Contract Litigation

At Army's request, ASBCA neutrals helped parties settle a case with claims totaling more than \$2.0 billion dollars relating to a contract to overhaul dated technology systems. The parties ultimately consolidated multiple claims and counterclaims into one ADR proceeding. The ADR process included two co-neutrals, joint sessions, presentations, and evaluative caucuses. The settlement included a payment to the contractor and a five-year contract extension, in exchange for rights to the contractor's intellectual property, which was developed to support the contract.

cycles – both pre- and post- award. The Ombudsman addresses issues that arise during the acquisition and grants process by gathering information about the scope and context of a concern, determining the reasonableness of a particular process or decision, and making recommendations for improvements in policies and processes. The Ombudsman conducts outreach to educate stakeholders and serves as an advisor to agency leadership. When ombuds offices – in charter and in practice – have a mandate of impartiality, confidentiality and independence, they are in the best position to gain the trust of all stakeholders.

C. Administrative and Regulatory Actions

ADR programs in administrative and regulatory matters – such as permitting issues or enforcement of agency regulations – address a different set of challenges. The constituency in these matters is oftentimes broader and more diverse than in other areas and the disputes often cover a longer period of time. Resolution of disputes in this arena is less likely to be binary and must address multiple viewpoints from diverse stakeholders.

ADRA included encouragement for agencies to use the process of negotiated rulemaking which provides stakeholders and the agency an opportunity to engage in dialogue about a proposed set of regulations, such as: balancing competing stakeholders’ interests; setting conditions for phasing in a new regulation; gauging feasibility of enforcement of a proposed regulation; and determining potential penalties involved in enforcement. Agencies have found that when stakeholders are engaged in the development of policies and processes directly impacting them, the regulations adopted tended to be better crafted rules as well as more smoothly implemented.

Agencies continue to use negotiated rulemaking to engage stakeholders in the process of developing the best possible agency regulations and of reducing potential legal challenges to those regulations. ED and the Department of Transportation (DOT) have each recently used this important ADR tool. ED is actively engaged in a negotiated rulemaking to develop regulations regarding State assessment systems to implement amendments to the Elementary and Secondary Education Act. DOT is currently negotiating the terms of a proposed rule on a variety of provisions that would enhance air transportation for persons with disabilities, including airlines’ web and kiosk accessibility. Agencies have found that rules developed by stakeholder consensus are easier to implement and reduce the likelihood of litigation challenging an agency’s action. Additionally, negotiated rulemaking proceedings, transparent and open to the public, require a balanced representation of stakeholders who are willing to negotiate in good faith and to support creativity and collaboration among diverse interest groups.

Early Use of ADR. The resolution of many cases prior to launching a formal investigation enables agencies to resolve disputes more quickly and economically and to preserve resources for cases which require enforcement litigation. NRC offers ADR at several different junctures: initially, before it initiates an investigation and again if the investigation leads to an enforcement action. Likewise, the Federal Energy Regulatory Commission (FERC) has increased its use of early ADR, both before complaints have been filed, and, if complaints have already been filed, before cases are set for a hearing. Parties with issues before FERC may work with a staff mediator, an administrative law judge, or a technical subject matter expert to provide a non-binding early evaluation of the merits by a neutral third party.

Customized ADR Processes. There are a number of ways in which agencies are expanding the application of traditional and cutting-edge ADR processes to address more varied administrative and regulatory disputes. The HHS Centers for Medicare & Medicaid Services (CMS) offers several levels of administrative review when CMS denies payments for services or supplies. A new ADR program brings providers or suppliers together with CMS to discuss options for settling appealed Medicare claims. Settlement agreements typically include some revised payment for billed claims and a withdrawal of the appealed claims – enabling health care providers to focus their attention on health care rather than pursuing a lengthy administrative process for appeals. FEC promotes compliance with federal election law by encouraging settlements outside of the traditional enforcement and litigation processes through a combination of negotiation and mediation. NARA simplifies – and often accelerates – the process of requesting records under the Freedom of Information Act (FOIA) by serving as a liaison between agencies and FOIA requesters, and, using hybrid ADR techniques, helps requesters to narrow their focus and agencies to determine realistic time frames for compliance.³¹

Agencies are better equipped to address multi-party, multi-issue challenges when they engage early with broad stakeholder groups. Agencies such as EPA, NRC and the DOT have increased their use of large group facilitation tools in leadership summits or open citizen forums. The EPA held a Climate Leaders' Summit in 2013 to both educate and lay groundwork for future climate change initiatives and collaboration across agencies. Additionally, DHS frequently uses consensus-building facilitation tools to help states, tribes, and other stakeholders to rebuild properties destroyed during major disasters.

FMC provides ombuds, rapid response mediation, facilitation, and arbitration to resolve shipping disputes or challenges. FMC resolves widespread issues by implementing targeted education and outreach initiatives after proactively collecting and analyzing data regarding dispute trends. For example, the agency noted a growing trend of disputes involving yacht transportation services provided by various ocean transportation intermediaries and responded by issuing an alert with recommendations to yacht owners and brokers in order to educate them about how to avoid problems when shipping yachts. The agency also published an article with general information and tips about how to avoid challenges and disputes in a trade association publication.

Ombuds Offices. Ombuds programs are designed to assist agencies' administrative and enforcement activities by monitoring the effectiveness of agency review processes. The ombuds programs engage with both internal and external constituents: they use outreach to understand the concerns and interests of consumers, industry, and other external stakeholder groups and can internally provide an early warning mechanism for the agency by highlighting issues for leadership which may require immediate action.

Independent ombuds offices with access to management are particularly well suited to preventing widespread systemic problems by engaging in outreach with the regulated community and providing recommendations to senior agency leadership. These ombuds programs are designed with inherent flexibility in order to ensure that the agency's constituents are well and fairly represented. In fiscal year 2015, the Consumer Financial Protection Bureau (CFPB) Ombudsman's Office held its first Ombudsman Forum, inviting trade groups with which the

office had engaged in outreach for a four hour, confidential session to discuss process issues previously shared with the ombuds office over time. The ombuds office facilitated the conversations to further inform the work of its office. After the event, the office provided unattributed feedback to the agency and summarized the feedback and participants' recommendations in the office's public annual report. The Forum illustrated the flexibility inherent in the ombudsman role and in the creative tools available to the ombudsman practitioner. The forum underscored the value of the ombudsman as a place to share concerns and consider solutions as an independent, impartial, and confidential resource.

Ombuds offices also effectively resolve issues raised by individual constituents. ED's ombuds for student aid uses informal dispute resolution processes to address complaints about Title VI financial aid programs. The ombuds employs a collaborative approach in working with institutions of higher education, lenders, guaranty agencies, loan services and other participants. The program staff conduct fact-finding and reviews student loan data and records to facilitate communication and promote resolution of disputes.

Ombuds offices devoted to enforcement and regulatory matters handle a variety of tasks:

- resolve process issues impacting large stakeholder groups early and before they evolve into resource intensive complex litigation matters;
- serve as an early warning mechanism so regulatory issues – can be addressed before regulated entities incur major financial repercussions;
- facilitate discussion internally across the agency to assess systemic problems;
- educate constituents who contact the agency to better understand their options; and
- engage all stakeholders in the process of developing solutions, so the solutions are more likely to meet needs of a broader spectrum of those affected.

Technology. New applications of technology enable stakeholders to lodge complaints more efficiently and allows agencies to resolve those complaints more effectively. Over the past ten years, FERC, FMC, and Surface Transportation Board (STB) have expanded their dispute resolution services to include the real-time, telephonic resolution of regulatory disputes. FERC has also provided dedicated toll-free helplines and email boxes to optimize citizen or business access to the complaint process.

Agencies have harnessed technology to provide early and innovative ADR applications to help the regulated business community function more effectively. Three agencies – STB, FMC and FERC – have each developed rapid response ADR services using telephonic dispute resolution. These cutting-edge ADR processes allow agencies to rapidly address and resolve regulatory issues early on and before they become costly and entrenched disputes. The new services create immediate tangible results as parties are able to obtain immediate satisfaction of their needs (e.g., ensuring that continuous flow of cargo and/or obtaining delivery of cargo) rather than waiting to litigate the matter for monetary damages.

D. Litigation

Since Congress mandated in 1998 that all federal district courts develop an ADR program available to civil litigants, the number of cases in which DOJ litigators use ADR each year continues to grow.³² In a 12-month period ending June 30, 2011, 49 federal district courts referred 28,267 cases to ADR. Each of the ninety-four federal district courts and the majority of courts of appeals have their own ADR programs and related rules that govern the use of ADR. The federal courts mirror the trend of customization – 36 percent of the district courts offer multiple forms of ADR processes. Federal court ADR services may be provided by judicial officers, staff from the court’s ADR unit, panel neutrals, or private neutrals.³³ ADR may be mandatory, encouraged, or optional.³⁴ Judicial mediation or settlement conferences have been – and continue to be – the most commonly used settlement processes in litigated cases.³⁵

The broad of spectrum of benefits reported from settling cases short of adjudication include:

- achieving better and more customized relief than what an adjudication can provide;
- saving time and money for litigants;
- reducing time cases spend on court dockets;
- avoiding the impact of an adverse precedent;
- improving communication between parties and increasing understanding of issues;
- narrowing issues for trial;
- making progress toward policy objectives; and
- narrowing discovery issues.³⁶

One notable development over the past few years involves a variety of new initiatives in federal courts to improve *pro se* litigants’ access to justice by helping them to better understand and benefit from mediation and settlement conferences.³⁷ Some courts, such as the U.S. District Court for the District of Rhode Island, have requested volunteers from its panel of *pro bono* attorneys to provide limited-appointment-representation for a mediation or settlement conference.³⁸ The U.S. District Court for the Northern District of California developed *Pro Se* Prisoner Early Settlement Program, which involves the temporary appointment of volunteer counsel for mediation before a Magistrate Judge.³⁹ Having counsel available at these informal resolution processes has improved understanding of the process, strengths and weaknesses of the case, and realistic evaluation of the value of the case.⁴⁰

<p style="text-align: center;">Case Settlement</p> <p>In 2014, the Attorney General awarded a team of attorneys from the Environment and Natural Resources Division an award for their work on claims over highway rights-of-way. The team of attorneys negotiated a creative three-sided resolution of the first of dozens of lawsuits and it served as a model of cooperation among government entities and environmental interests, and established a foundation on which to build further agreements.</p>
--

Adopting a more tailored application of ADR processes has been recognized as a valuable improvement by the United States Court of Federal Claims through a recent change in their ADR procedures.⁴¹ In 2016, the court ended its practice of ADR automatic referral and replaced it with a more flexible procedure in which the parties and the assigned judge in each case will work together to determine whether a case should be referred to ADR, and, if so, who should serve as the neutral. The court has recognized that the parties are intimately familiar with their case and are in the best position to determine how and what will help in resolving the issues.

E. Environmental Disputes

Environmental collaboration and conflict resolution (ECCR) has continued to grow since a 2005 policy – later strengthened in 2012 – promoted the use of ADR and established annual reporting requirements.⁴² The Udall Foundation’s U.S. Institute for Environmental Conflict Resolution (Udall Foundation) assists federal agencies and other stakeholders in addressing environmental disputes through ADR processes such as assessments of current conditions and facilitated collaboration among constituents. The Udall Foundation supports ECCR efforts by convening quarterly forums and coordinating the annual reports.⁴³

Agencies and stakeholders have become more focused on addressing environmental disputes as early as possible to minimize continuing pollution or degradation of natural resources.

ECCR processes have become increasingly tailored to the needs of the parties and the issues in a particular dispute, currently focusing less on traditional mediation, and more on assessing conflicts and designing collaborative processes for interested parties to address and resolve those conflicts. DoD components, including the Air Force and Navy, use a number of ADR techniques including partnering and collaborative groups to address environmental disputes. Partnering teams typically include representatives from federal agencies, state governments, local officials, and other interested groups who work with a facilitator to craft creative and cost effective restoration processes that address as many interests as possible. The Navy and the Marine Corps partner with states and EPA to manage cleanup programs when military installations – or parts of installations, such as landfills or former rifle ranges – are closed. The Navy used partnering to remediate a landfill at the Naval Surface Warfare Center in Dahlgren, Virginia. Partnering enabled the team to effectively resolve particularly challenging tasks (i.e., screening for unexploded materials and consolidated waste) and construction surprises to complete the project on schedule and within the original budget. The Navy currently participates in 41 facilitated partnering teams that oversee restoration efforts at 1,155 environmental restoration sites. Through partnering, the Marine Corps accomplished the cleanup of a former rifle range at the Quantico Base. There, the project involved a diverse group of stakeholders because the former range site was adjacent to a religious institution and the main administration building.

ECCR

The Army Corps of Engineers (Corps) regularly uses early ECCR. Collaborative tools are used to ensure that the interests of multiple public stakeholders are addressed in Corps decision-making and that ADR tools are used to proactively prevent and minimize conflicts as early as possible – as soon as conflict emerges. The Corps engaged in an ECCR process with the U.S. Fish and Wildlife Service and a multi-party stakeholder committee to study the social and economic impact of efforts to recover endangered species in and around the Missouri River. A private neutral and a facilitation team from the Udall Foundation helped the stakeholders use a structured decision making process to reach a consensus on the objectives and metrics for the study.

Agencies have also shifted their focus downstream, to address how the interested parties might work together to address current issues and future issues that might arise. This is an important extension of the collaborative part of ECCR. Today, attention is frequently focused as much on implementing an agreement jointly as it is to reaching the agreement in the first place.

Over the past ten years, agencies have increased their capacity for ECCR by investing in training, building ECCR infrastructure, establishing procurement mechanisms, and evaluating the success of ECCR.⁴⁴ For example, the FAA released a desk reference for its National Environmental Policy Act procedures that outlines coordination and consultation practices for each environmental category (i.e., water, air, biological impacts, etc.) to ensure that stakeholders are notified early in the environmental process and that their concerns are heard and addressed prior to creation of a final document. The reference specifically encourages early coordination with stakeholders.

Multi Stakeholder ADR Processes

In 2015, EPA worked with Native American tribal groups, Oregon's environmental regulators, and citizens to develop a revised water quality standard to protect fish consumers in the state. The group engaged a professional facilitation team to design, convene, coordinate, and facilitate discussions around water quality and health concerns over fish consumption. The project had three distinct phases and each one included an opportunity for people with diverse interests to come together, review information, and share perspectives and data about what might work to reduce toxins. At the end of a four-year process, the parties agreed to a new set of water quality standards which were designed to protect the most vulnerable populations, particularly tribes and communities relying on subsistence fishing for their primary source of food.

CONCLUSION

ADR has come of age in the past decade. Agencies across the government have embraced change, studied results and developed innovative programs to maximize the benefits for the public. The impact of ADR continues to be significant: providing access to swift and fair justice through dispute resolution tools in disputes involving the government. In the 1990's the Executive Branch and Congress displayed foresight in promoting a new concept in effective government which encouraged cooperation, transparency and collaborative problem solving. New, forward thinking legislation enabled federal agencies to respond more directly and efficiently in managing disputes with the government. Since then, federal agencies have dramatically expanded their use of ADR into a multi-faceted, flexible, and valuable tool for preventing and resolving a broad spectrum of conflicts and for diagnosing weaknesses in agency structures and culture. The result is a more pro-active, effective, collaborative, and transparent federal government; a more productive and satisfied federal workforce; a more efficient procurement process; and a problem-solving perspective to a myriad of conflicts, all of which improve the functioning and accessibility of government and directly benefit the public.

¹ Pub. L. No. 104-320 (*amending* Pub. L. No. 101-552 (1990) and Pub. L. No. 102-354 (1990)), 5 U.S.C. §§ 571-581 (2011).

² Presidential Memorandum, *Designation of Interagency Committees to Facilitate and Encourage Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking* (May 1, 1998).

³ Appendix I contains a complete listing of the federal departments and agencies that contributed to this report. The Working Group website can be found at <https://adr.gov>.

⁴ See *2007 Report for the President On the Use and Results of Alternative Dispute Resolution in the Executive Branch of the Federal Government: Giving the American People Better Results and More Value* (April 2007) (https://www.adr.gov/pdf/iadrsc_press_report_final.pdf) at pages 113-114 (noting that in 2007, only a few agencies had developed early intervention programs, including: Department of Transportation; Federal Energy Regulatory Commission; Department of Interior; DOJ; and U.S. Institute for Environmental Conflict Resolution).

⁵ DoD issued *DoD instruction 5145.05: Alternative Dispute Resolution (ADR) and Conflict Management* on May 27, 2016; <http://www.dtic.mil/whs/directives/corres/pdf/514505p.pdf>.

⁶ For example, mediation continues to be the ADR tool of choice for specific ADR programs within DOJ (for cases in active federal litigation); Office of Special Counsel (for resolving whistleblower allegations); National Labor Relations Board (in formal administrative cases), and Civilian Board of Contract Appeals (in contract and procurement cases).

⁷ The Coalition of Federal Ombudsmen, formed in 1996, and comprised of federal ombudsmen, has grown – since its inception – from 11 to 109 members. Coalition membership grows when ombudsman programs are created within agencies, when ombuds offices expand by hiring additional ombudsmen, or when agencies add ombudsman services to sub-agencies within their structure, granting easier access for employees and the public to ombudsmen. See Coalition of Federal Ombudsman membership list at: <http://federalombuds.ed.gov/federalombuds/history.html> (last visited August 25, 2016).

⁸ For example, Congress mandated the establishment of an agency ombudsman within the Consumer Financial Protection Bureau to “act as a liaison between the Bureau and any affected person with respect to any problem that such party may have in dealing with the Bureau, resulting from the regulatory activities of the Bureau; and assure that safeguards exist to encourage complainants to come forward and preserve confidentiality.” 12 U.S.C. § 5493(a)(5), Dodd-Frank, § 1013(a)(5). For another example, Congress established a Citizenship and Immigration Services Ombudsman within the Department of Homeland Security to assist individuals and employers in resolving problems with the agency, to identify problems in dealing with the agency, and to propose changes in administrative practices. 6 U.S.C. 101 et seq., Homeland Security Act of 2002, § 452.

⁹ For example, internal ombudsman offices have recently been established by agency leadership at the Department of Commerce, U.S. Patent and Trademark Office (launched in 2016), at the Federal Deposit Insurance Corporation (launched in 2009 as a pilot and permanently in 2012) and at the Department of Energy (launched in 2012).

¹⁰ ACUS commissioned a research project to study federal agencies’ use of ombuds and released a final report and proposed recommendations regarding best practices for federal ombuds on November 14, 2016. See ACUS, *Revised Project Outline: The Ombudsman in Federal Agencies*, (November 25, 2015) (citing Ginsberg & Kaiser, 2009) at 2; and *The Ombudsman in Federal Agencies –Report*, (November 14, 2016) (<https://www.acus.gov/research-projects/ombudsman-federal-agencies-0> (last visited November 29, 2016)).

¹¹ Agencies each report their use of ADR in relation to informal and formal EEO complaint stages, using the Equal Employment Opportunity Commission (EEOC)’s Annual Federal Equal Employment Statistical Report of Discrimination Complaints (EEOC Form 462). However, over the past decade, agencies have increasingly offered ADR options for workplace disputes that are not being pursued as EEO complaints. And, as noted in the section above, many agencies have increasingly offered ADR techniques at the earliest stages of conflict – to avoid conflicts from becoming entrenched disputes that require formal ADR processes and to better understand and proactively respond to systemic issues.

¹² The DOJ Mediator Corps was created in 2009. The program currently has a corps of 130 collateral duty mediators, who provide ADR services for informal and formal EEO disputes, as well as Federal Bureau of Investigation (FBI)-specific whistleblower cases.

¹³ Treasury’s Shared Neutrals Program helps agency employees to resolve workplace disputes (EEO and non-EEO matters) through mediation, facilitation, coaching, and training. The program retains a pool of

trained and certified neutrals who serve on a collateral-duty basis. Neutrals must maintain their skills by continuing to mediate and by meeting annual training requirements (8 hours of refresher training). Neutrals empower their colleagues to improve their working environment by responding appropriately to conflict and by resolving conflict at the earliest possible stage. In FY 2015, the program conducted 252 mediations and resolved 133 (53%).

¹⁴ The USDA Early Resolution and Conciliation Division created a collateral-duty “Resolving Official Cadre” to resolve EEO complaints. The Resolving Officials have authority to resolve EEO complaints. The Resolving Official Cadre is representative of USDA senior officials at the GS-15 and SES levels representing each agency.

¹⁵ DHS established its shared neutrals program in fiscal year 2015 to provide agency employees with internal ADR practitioners for EEO-related ADR programs.

¹⁶ The Service Branches and other DoD Components train internal personnel to serve as collateral-duty neutrals in EEO and non-EEO workplace disputes. For instance, the Air Force, and the Defense Logistics Agency use internal personnel as collateral-duty mediators.

¹⁷ The FEC recently began training internal personnel to serve as collateral-duty conflict coaches.

¹⁸ Agency officials are prohibited from retaliating against employees for whistleblowing under 5 U.S.C. § 2302(b)(8) and from discriminating against employees based on their current or past service in the military, or their intent to join the military (or retaliating against service members for attempting to enforce their rights under the act) under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA).

¹⁹ A number of DoD agencies have established ombuds offices to address employee concerns including DIA which created a workplace ombuds office in 2015.

²⁰ The DOE Office of the Ombudsman was created in March 2012.

²¹ In 2010, the DOS appointed its first full-time Ombudsman. The Office of the Ombudsman now has a total of eight staff members, including five Associate Ombudsman and an Attorney Advisor. The office provides a full spectrum of ADR services including option discussions, climate assessments, conflict coaching, facilitated conversations, mediation, training, and more to address informal workplace conflicts. Ombuds offer employees an unbiased and confidential perspective on workplace issues and provide information about the processes, policies, and available resources

²² Agencies that reported conducting ADR processes telephonically, or via video or web-based conferencing technologies include: DoD, HHS, Departmental Appeals Board, ADR Division, Department of Veteran’s Affairs Office of Resolution Management, FMCS, FLRA, and National Mediation Board.

²³ www.USASpending.gov (last visited October 16, 2016), using “Advanced Search” with filters for fiscal year 2016, “contracts” or “grants” and federal executive agencies (excluding the Library of Congress and the Judicial Branch), the Executive Branch had entered into 3,854,561 contract transactions and 967,953 grants in fiscal year 2016, totaling \$1,031,608,512,189. The same search yielded the following data for previous fiscal years: fiscal year 2015: 4,409,478 contract transactions and 950,448 grants totaling \$1,055,856,036,937 fiscal year 2014: 2,624,763 contract transactions and 1,006,225 grants totaling \$1,048,328,012,626; fiscal year 2013: 2,599,990 contract transactions and 974,293 grants totaling \$984,146,979,179.

²⁴ ADR Roundtable, ABA Annual meeting, August 9, 2014, Comments by the Alternative Dispute Resolution Committee of the Public Contract Law Section; *ADR for Contracts, Grants, and Cooperative Agreements*, prepared for the Symposium on Federal Alternative Dispute Resolution, March 19, 2012. <https://www.acus.gov/sites/default/files/documents/D1-Acquisition-Contracting1.pdf>.

²⁵ In addition to authorizing the use of ADR for contract disputes and appeals, the FAR was amended in 2011 to require all parties to “use their best efforts to resolve concerns raised by an interested party at the contractor level through open and frank discussions.” See 48 C.F.R. §§ 33.103, 33.210 and 214 (2011).

²⁶ The Department of the Air Force, the DOE, and the FAA provide some examples of agencies that offer improved or enhanced debriefings that go beyond the traditional debriefing. More information about these debriefing programs can be found at <https://www.adr.gov/adrguide/ch08.html>.

²⁷ See FAR 15.506.

²⁸ The OMB regulations require federal agencies to use cooperative audit resolution for the auditing of federal grant-making programs. 2 C.F.R. § 200.513; 78 Fed. Reg. 78590 (December 26, 2013) (to be codified at 2 C.F.R. §§ 200, 215, 220, 225 and 230).

²⁹ More information about ADR clauses can be found with the second edition of the Electronic Guide to Federal Procurement Alternative Dispute Resolution at <https://www.adr.gov/adrguide/ch05.html>.

³⁰ NOAA formally established the acquisition and grants ombudsman program in 2016 (the program was initially created as a pilot program in 2015). The program's charter provides that the ombudsman will be neutral and independent, and that the ombudsman will not disclose confidential information unless required by law or court order.

³¹ ACUS studied the use of ADR to resolve FOIA disputes. *See* <https://www.acus.gov/recommendation/resolving-foia-disputes-through-targeted-adr-strategies>.

³² The Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315 (1998).

³³ The local federal court rules relating to ADR vary from district to district. A compendium of the local District Courts' ADR rules can be found at www.justice.gov/olp/compendium-federal-district-courts-local-adr-rules.

³⁴ *Id.*

³⁵ U.S. Courts: Dispute Resolution in Federal Courts: New Study to Look at How It's Working, <http://www.uscourts.gov/news/2014/01/23/dispute-resolution-federal-courts-new-study-look-how-its-working> (published January 23, 2014).

³⁶ The Use and Benefits of Alternative Dispute Resolution by the Department of Justice at <https://www.justice.gov/olp/alternative-dispute-resolution-department-justice>.

³⁷ Jerome B. Simandle, *Enhancing Access to ADR for Unrepresented Litigants: Federal Court Programs Provide Models for Helping Pro Se Parties – and the Justice System*, Dispute Resolution Magazine, Summer 2016 at 7-12.

³⁸ *Id.* at 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The new rules for the U.S. Court of Federal Claims may be viewed at <http://www.uscfc.uscourts.gov/alternative-dispute-resolution>.

⁴² In fiscal year 2014, federal agencies reported 444 ECCR cases in which they either directly sponsored or participated in a process sponsored or convened by another agency or entity. *See* https://udall.gov/documents/ECRReports/2014/FY2014ECCRReportSynthesisFINAL_15_1027.pdf.

⁴³ More information about the Udall Foundation's role in supporting federal ECCR can be found at <https://udall.gov/OurPrograms/Institute/Leadership.aspx>.

⁴⁴ Furthermore, between FY 2008 and FY 2014, there was a steady increase in the total of reported ECCR cases year-to-year, ranging from 2%-9%. *See* https://udall.gov/documents/ECRReports/2014/FY2014ECCRReportSynthesisFINAL_15_1027.pdf.