

**Calendar No. 350**

104TH CONGRESS }  
*2d Session*

SENATE

{ REPORT  
 104-245

ADMINISTRATIVE DISPUTE RESOLUTION ACT  
 OF 1995

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R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS  
 UNITED STATES SENATE

TO ACCOMPANY

**S. 1224**

TO AMEND SUBCHAPTER IV OF CHAPTER 5 OF TITLE 5, UNITED STATES CODE, RELATING TO ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS, AND FOR OTHER PURPOSES



MARCH 27 (legislative day, MARCH 26), 1996.—Ordered to be printed

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## Calendar No. 350

104TH CONGRESS }  
2d Session }

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{ REPORT  
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### REAUTHORIZING ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE FEDERAL ADMINISTRATIVE PROCESS AND FOR OTHER PURPOSES

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MARCH 27 (legislative day, MARCH 26), 1996.—Ordered to be printed

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Mr. STEVENS, from the Committee on Governmental Affairs,  
submitted the following

### REPORT

[To accompany S. 1224]

The Committee on Governmental Affairs, to which was referred the bill (S. 1224) to reauthorize alternative means of dispute resolution in the Federal administrative process and for other purposes, reports favorably thereon and recommends the bill as amended do pass.

#### I. PURPOSE

The purpose of S. 1224 is to reauthorize permanently the Administrative Dispute Resolution Act of 1990 (“the ADR Act”). That legislation has succeeded in promoting the use of cost-saving alternative dispute resolution (“ADR”) techniques in the federal administrative process. This reauthorization bill will improve the ADR Act by broadening its confidentiality protections, promoting use of binding arbitration to settle disputes, streamlining the process for hiring neutrals to participate in alternative dispute resolution, and making a number of other minor adjustments to the Act.

#### II. BACKGROUND

Over the past decades, a consensus has emerged that traditional litigation is an inefficient way to resolve disputes. Not only is litigation costly, but due to its adversarial, contentious nature, litigation often deteriorates working relationships and fails to produce long-term solutions to problems.

Congress enacted the Administrative Dispute Resolution Act in 1990 to encourage federal agencies to use consensual dispute resolution techniques, otherwise known as alternative dispute resolution or "ADR" in lieu of litigation. It has been proven that ADR saves money and helps preserve working relationships between federal agencies and parties that have matters before them. In addition, since ADR is based on reaching a consensus among parties instead of deciding which party "wins" the dispute, ADR helps to build relationships and construct lasting solutions to conflict. The ADR Act was based on the premise that the government should take advantage of these beneficial methods of conflict resolution.

By all accounts, the ADR Act has enjoyed a successful five years. Agencies are using ADR to resolve contracting disputes, discrimination and other employment claims, and regulatory enforcement matters. By reducing contracting delays and litigation costs, ADR improves the way government functions and provides tangible savings to the American taxpayer.

The Administrative Conference of the United States (ACUS) issued a comprehensive report on the ADR Act in February, 1995. Although the Conference could not estimate the total government-wide savings that have been achieved due to ADR, the report is replete with examples of large, multimillion dollar disputes that were resolved more quickly and with far less acrimony than in the past due to ADR.

#### A. CONTRACTING DISPUTES

According to ACUS, nineteen agencies are using ADR to resolve contracting disputes. The Army Corps of Engineers, for example, used ADR in 55 contract disputes from 1989-1994 and resolved 53 of them successfully. In one case, a \$55.6 million claim was settled for \$17.3 million in four days. The Department of Defense reported that it is beginning to use ADR earlier in the contracting process to avoid the development of disputes. This ADR method, known as partnering, focuses on creating cooperative working relationships and maintaining open communications between the contracting parties.

#### B. EMPLOYMENT DISPUTES

Agencies' use of ADR in resolving discrimination claims and labor-management disputes has grown rapidly in recent years. The Department of Interior attempts to mediate equal employment opportunity cases at an early stage and the Secretary credits this policy for a 43 percent reduction in formal case filings between fiscal years 1992 and 1993. The Equal Employment Opportunity Commission intends to use mediation to relieve its backlog of discrimination complaints.

#### C. REGULATORY ENFORCEMENT DISPUTES

The Environmental Protection Agency has been the leading agency in using ADR to resolve regulatory enforcement actions. Pilot programs have been instituted to test the use of mediation in civil actions under the Superfund program for cleanup of hazardous waste sites. Mediation has been used in over 30 cases under the

Clean Water Act. In addition, the Federal Deposit Insurance Corporation estimates that it saved \$9.3 million in legal fees and expenses using ADR to resolve disputes over loan workouts and creditor claims against failed financial institutions.

The Governmental Affairs Committee's 1990 report on the ADR Act noted that the government was a party in 55,000 of the 220,000 civil cases filed in federal court in 1989. While the number of cases filed rose to approximately 239,000 in fiscal year 1994, the federal government was a party in only 44,531. Although it is not known if this decrease in government litigation has been caused by increased use of ADR, this is a positive trend that will hopefully continue.

### III. LEGISLATIVE HISTORY

The ADR Act expired on October 1, 1995. On September 8, Senators Grassley and Levin introduced S. 1224, a bill to provide for permanent reauthorization of the Act. A hearing on the bill was held by the Subcommittee on Oversight of Government Management and the District of Columbia on November 29. On December 12, the Committee on Governmental Affairs unanimously reported S. 1224 with an amendment in the nature of a substitute.

### IV. SUMMARY OF THE LEGISLATION

The primary purpose of S. 1224 is to reauthorize the ADR Act. All the government agencies and private groups that have contacted the Subcommittee on Oversight of Government Management have strongly endorsed reauthorization. Likewise, all the witnesses testifying at the Senate hearing supported permanent reauthorization. As Marshall Breger, former Chair of ACUS, stated: "The ADR Act of 1990 laid the foundation for change by forcing agencies to focus on the opportunities inherent in ADR. The ADR Act should be reauthorized without a sunset provision so that the efficiencies and flexibility inherent in non-litigation resolutions can be better realized." Permanent reauthorization of the Act is warranted to continue the progress government agencies have made over the past five years incorporating ADR into their normal operating procedures.

S. 1224 also makes a number of necessary adjustments to the ADR Act in order to promote the increased use of ADR.

#### A. CONFIDENTIALITY

Concerns have been voiced by both federal agencies and private parties that the original ADR Act did not provide sufficient confidentiality protections to ADR participants. For ADR to operate effectively, a party must have complete confidence that its confidential communications with the mediator or other neutral will not be revealed to the other party or the general public. As Dr. Steve Kelman, Administrator of the Office of Federal Procurement Policy, testified, "without adequate assurances of confidentiality, contractors are understandably reluctant to engage in the kind of open discussions necessary for a successful mediation."

The original ADR Act attempted to create an environment conducive to successful ADR by prohibiting parties and neutrals from

disclosing confidential ADR communications unless the communications had already been made public, a statute required disclosure, or a court ordered the disclosure to promote law enforcement or avoid a threat to public health or safety.

The effectiveness of these confidentiality provisions was partially undermined, however, by section 574(j) of the Act, which provided that confidential ADR communications did not qualify for an automatic exemption from the Freedom of Information Act (FOIA). Due to section 574(j), documents provided to or generated by an agency in the course of an ADR proceeding could be subject to public disclosure through the FOIA. Likewise, under the original Act, the notes and records of government employees serving as ADR neutrals could be subject to a FOIA request. According to Philip Harter of the American Bar Association, “the insecurity section 574(j) produces inhibits the use of mediation in situations where it would clearly be helpful.”

S. 1224 would close this gap in the ADR Act’s confidentiality provisions by exempting confidential ADR communications from the FOIA. The bill makes clear that this exemption applies not only to communications generated by or provided to an agency, but also to communications generated by or provided to an ADR neutral, regardless of whether the neutral works for a federal agency, private company, or other third-party.

This is a narrow exemption. First, it would apply only to “dispute resolution communications,” which are defined in the Act as communications that are “prepared for the purposes of” ADR proceedings other than final agreements reached as a result of ADR. Documents that are created for other purposes do not qualify for the FOIA exemption. Second, the FOIA exemption would apply only to communications that qualify for confidential treatment under the Act. This change in the ADR Act, the Department of Justice concluded, would be “an important and beneficial step toward encouraging greater use of ADR by administrative agencies.”

S. 1224 improves the Act’s confidentiality provisions in two other ways. First, it clarifies that the Act’s confidentiality protections apply only to communications prepared for use in a dispute resolution proceeding. The original Act extended these protections to “information concerning” such communications. By deleting the phrase “information concerning,” S. 1224 eliminates a vague and unjustified extension of the Act’s confidentiality provisions. Second, S. 1224 eliminates section 574(b)(7), which removed all confidentiality protection from documents that were provided to all parties to an ADR proceeding. There appears to be no sound reason why the Act’s confidentiality provisions should not apply to such documents. By eliminating this exception, S. 1224 will promote open communication between the parties to a dispute, which is often necessary to resolve contentious issues.

The Department of justice strongly supports the bill’s confidentiality provisions, testifying that they “strike exactly the right balance . . . between the inherent needs of confidentiality in an ADR process, and the desires and entirely appropriate needs for freedom and openness in Government.”

## B. ARBITRATION "ESCAPE CLAUSE"

The original ADR Act authorized agencies to refer administrative disputes to binding arbitration. However, to accommodate a constitutional concern raised by the Department of Justice (DOJ) when the legislation was under consideration, it included an "escape clause" permitting the head of an agency to vacate unilaterally the results of an arbitration. The Act did not give such powers to private parties.

DOJ's view was that giving arbitrators the power to issue binding decisions on the executive branch of the government would violate the Appointments Clause of the Constitution because arbitrators are not appointed or subject to removal by the President. This was a minority view at the time and contrary to the testimony of ACUS, the American Bar Association, and a leading legal scholar. Nevertheless, to accommodate DOJ's concern, the legislation was amended to give the head of an agency unilateral authority to vacate arbitral awards, which deprived arbitrators of the power to issue binding decisions on the government.

On September 7, 1995, DOJ's Office of Legal Counsel (OLC) reversed DOJ's position and issued a detailed opinion concluding that federal agencies could submit to binding arbitration without violating the Constitution. OLC determined that arbitrators are not "officers of the United States" that must be appointed by the President and confirmed by the Senate because they do not occupy a "position of employment within the federal government." OLC concluded that arbitrators are "private actors who are, at most, independent contractors to, rather than employees of, the federal government."

Since the constitutional objection to binding arbitration has been removed, there is no longer any reason to reauthorize the agency "escape" clause. Over the past five years, the clause has never been invoked. More importantly, its unilateral nature has, understandably, deterred private parties from entering into binding arbitration with the government. As Charles Pou, Jr., the former Director of ACUS' ADR Program concluded, unless the "escape clause" is eliminated, "arbitration likely will never become a viable alternative for the federal government."

This would be unfortunate. Throughout the private sector, companies are saving money and reducing litigation costs by using arbitration to resolve commercial disputes instead of resorting to litigation. If we want the government to enjoy the efficiencies of the private sector, it must have the flexibility to operate as a private business, especially when the government is acting as a commercial entity. Indeed, the government achieves a double benefit when a case is resolved through arbitration rather than litigation because not only are agency litigation costs and attorneys fees reduced, but judicial resources are freed to pursue criminal cases or other civil matters.

The ADR Act ensures that the government's interest in controlling policymaking and protecting the federal budget are not compromised when matters are referred to arbitration. First, the Act is permissive—it authorizes agencies to use binding arbitration, but does not require them to do so. Consequently, as Marshall Breger testified in the 1989 hearing, "arbitration can in no way be



said to reduce accountability in agency decisionmaking because it can only be invoked with the prior, knowing agreement of responsible agency officials, who are subject to presidential supervision. Arbitration, in other words, would be employed *only if the appropriate government official wants it*.” Second, the Act enables the parties to choose the precise issues that are submitted to arbitration and enter into pre-arbitral agreements requiring that the award must be within a range of possible outcomes. Thus, the Act gives the government discretion to limit both the types of issues an arbitrator will decide and the amount of any award that might be imposed by the arbitrator. These are powers that the government does not enjoy when cases are decided by the federal courts.

In sum, the “escape clause” included in the original ADR Act has effectively precluded federal agencies from using arbitration to resolve administrative disputes and prevented substantial cost savings. In order to resurrect binding arbitration as a viable means of resolving administrative disputes, S. 1224 repeals the escape clause and all the provisions in the ADR Act related to it.

An agency’s decision to use ADR methods, including binding arbitration, to resolve disputes is not intended to impact the current operation of the judgment fund established by 31 U.S.C. 1304. The Committee understands that under current agency practice the nature of a claim determines whether it is eligible to be paid from the judgment fund, regardless of the procedures used to resolve it. The Committee intends that claims qualifying for payment from the judgment fund, such as claims decided by the Board of Contract Appeals, still qualify for payment from that fund even if they are settled through mediation or another ADR method, or decided pursuant to binding arbitration.

#### C. PROCUREMENT OF NEUTRALS

The dynamics for hiring mediators or other third-party neutrals for ADR is different from typical government procurement. Unlike ordinary government purchases, agencies choose the neutral together with a private party and then share the cost.

There is some evidence that the process for procuring neutral services from the private sector is not working. Philip Harter testified that he has waited over six months to be hired as a mediator by an agency. Indeed, it appears that the cumbersome federal procurement process has caused agencies to use government employees as neutrals instead of procuring mediators from the private sector.

One of the purposes of the Federal Acquisition Streamlining Act (FASA) of 1994 was to give agencies relief from competitive bidding procedures under certain circumstances, including the procurement of expert witnesses for use in ADR. S. 1224 amends FASA to clarify that this exemption includes the hiring of neutrals for use in ADR. This clarification is intended to encourage contracting agents in federal agencies to take advantage of the flexibility that FASA provides to expedite the process for contracting for neutrals. In addition, S. 1224 instructs the Federal Mediation and Conciliation Service (FMCS) to work with appropriate agencies, which should include the Office of Federal Procurement Policy in the Office of Management and Budget, to develop procedures for hiring neutrals

on an expedited basis. Improvements can and should be made to facilitate ADR. The governmental savings that can be accomplished through increased use of ADR should not be hindered by unnecessary reliance on federal procurement policies intended for more complex contracts.

#### D. REASSIGNMENT OF IMPLEMENTATION DUTIES

ACUS, the agency that was primarily responsible for implementing the ADR Act, did not receive funding in fiscal year 1996 to continue its operations. Consequently, S. 1224 eliminates or reassigns ACUS' ADR responsibilities.

The bill charges FMCS with the role of encouraging and facilitating agency use of ADR. FMCS will operate a library of ADR materials and serve as a clearinghouse for dispute resolution specialists. FMCS will also continue ACUS' role in federal-sector policy development by initiating and continuing inter-agency working groups and conducting training seminars. S. 1224 authorizes such appropriations as may be necessary to accomplish these important functions.

The ADR Act had directed ACUS to establish qualification standards for neutrals and maintain a roster of neutrals eligible to participate in ADR with the federal government. Neither of these projects was successful. ACUS determined that it was more useful to train agencies how to evaluate mediators instead of establishing a set of standards. In addition, the centralized roster of neutrals was used infrequently and many agencies chose instead to establish their own rosters. Consequently, S. 1224 does not reassign to another agency ACUS' standard-setting or roster responsibilities.

The responsibility for filing annual reports to Congress on agency use of ADR has also been eliminated. Since ADR programs have now been established in the covered agencies, the Committee believes annual reports would consume limited resources better spent elsewhere. Congress can play a more effective role in promoting ADR by conducting meaningful oversight than requiring agencies to file reports.

#### E. EMPLOYMENT GRIEVANCES

The original ADR Act did not authorize federal agencies to use ADR methods to resolve certain claims and grievances by federal employees, apparently to avoid complicating the multi-layered federal employee appeal process.

As John Calhoun Wells, Director of the Federal Mediation and Conciliation Service, testified, this exclusion "discouraged the use of ADR in some disputes where it might have been effective." "Access to ADR for these disputes," he concluded, "should be available, particularly if it can reduce the number of disputes or resolve them at an early stage." For this reason, S. 1224 repeals the provision that excluded federal employee complaints from the scope of the Act. ADR has been a highly effective tool for handling employment related claims in both the private and public sectors. Application of the ADR Act to employment decisions in the federal workforce would provide agencies the opportunity to stem the tide and cost of employment litigation in the federal government. This change in the law will not prejudice the interests of federal employees or un-

necessarily complicate the employee appeal process because ADR may be utilized only with the consent of both the agency and the employee. Those who wish to use the standard procedures may continue to do so.

Since the Act has not applied to this area in the past, leadership from the highest levels in each agency will be necessary to reap the benefits of ADR. This will involve direction and support from the agency head and all senior managers who supervise employees, especially directors of personnel and general counsels. It will also require planning, training, the identification and budgeting of needed funds, and a commitment to make the program work. Programs established under the Act for covered personnel actions and grievances must be implemented quickly and ensure neutrality, objectivity, and trust in the dispute resolution process.

#### F. CONTRACT DISPUTES ACT

The Contract Disputes Act requires contractors that file claims against the government in excess of \$100,000 to certify that the claims are made in good faith, the supporting data is accurate, and the amount requested accurately reflects the amount for which the government is liable. Smaller claims are exempted from the certification requirement to reduce the paperwork burden on contractors.

The original ADR Act required that any claim referred to an ADR proceeding must be certified, regardless of the amount of the claim. This requirement imposed significant paperwork burdens on small claims and discouraged use of ADR in these matters. S. 1224 would correct this inequity by providing that claims referred to ADR are subject to the same certification requirements as all other claims subject to the Contract Disputes Act.

#### G. SCOPE OF COVERAGE

S. 1224 amends the definition of "alternative means of dispute resolution" to include "the use of ombuds." Ombuds are agency employees designed to serve as neutral arbiters of agency disputes. To increase the effectiveness of the work of ombuds, the bill would extend the protections of the ADR Act's confidentiality provisions to disputes in which they serve as neutral parties.

S. 1224 also deletes the phrase "settlement negotiations" from the statutory list of ADR procedures. This deletion is necessary to clarify that agencies cannot fulfill the mandate of the ADR Act by merely engaging in conventional settlement negotiations to resolve disputes. Rather, the Act requires agencies to take affirmative steps to incorporate ADR techniques such as mediation, arbitration, partnering, and minitrials into their customary operations. As Philip Harter testified, "settlement negotiations do not fit that model."

#### H. PERFORMANCE STANDARDS AND BUDGETING

A number of witnesses at the Senate hearing suggested that a change in the "litigation culture" of agencies would be necessary to realize the full potential of the ADR Act. In other words, the incentive system for federal employees needs to be adjusted so that government lawyers and managers are rewarded for resolving disputes

consensually instead of “winning” them through an adjudicatory process.

One way that has been suggested to alter the “litigation culture” of many agencies would be to include ADR skills in the performance evaluations of agency managers and attorneys. As Marshal Breger commented: “Only when attorneys know that ADR skills are part of their job description will they include it as part of their dispute settlement armorarium. Otherwise, they will naturally view it as supplementary to their ‘main’ job—litigation.”

The Committee supports this suggestion, but declines to impose a statutory mandate in recognition of the need for agency flexibility in managing employees. Nonetheless, it is expected that agencies will modify their employee performance evaluation systems to reflect that timely and inexpensive resolution of conflicts, whether through conventional settlement negotiations or ADR, has an equal or greater value to the federal government than victories in litigation. Likewise, performance evaluations should reflect the failure of appropriate agency officials to use ADR when appropriate to avoid unnecessary litigation.

The Committee also urges agencies to take further administrative steps to integrate ADR into their normal operating procedures. In conjunction with the Office of Management and Budget, agencies should include ADR in their annual performance plans and budget for ADR training, hiring of neutrals, and other ADR related expenses. Use of ADR will result in cost-savings for agencies in the long run. Thus, agencies should be encouraged to incorporate ADR into their annual budgets, even though so doing may reflect increased short-run expenditures.

## V. SECTION-BY-SECTION ANALYSIS

### SECTION 1. SHORT TITLE

The section states that the title of the bill shall be the “Administrative Dispute Resolution Act of 1995.”

### SECTION 2. AMENDMENTS TO DEFINITIONS

Section 2 amends Section 571 of Title 5 of the United States Code, which establishes the definition of terms used in the ADR Act. The definition of “alternative means of dispute resolution” is altered to include “the use of ombuds” as well as “binding and non-binding arbitration,” but exclude “settlement negotiations.” The definition of “issue in controversy” is amended to delete the provision excluding employee grievance proceedings specified under section 2302 or 7121(c) of Title 5 from the ADR Act. This change would permit parties to use ADR to resolve these employment related disputes.

### SECTION 3. AMENDMENTS TO CONFIDENTIALITY PROVISION

Section 3 amends Section 574 of Title 5 of the United States Code, the confidentiality provisions of the ADR Act.

Subsection (a) deletes the provision that disqualifies from confidentiality protection documents exchanged between all parties to an ADR proceeding. Subsection (b) clarifies that the ADR Act’s confidentiality provisions apply only to communications prepared for

purposes of a dispute resolution proceeding by deleting provisions that had extended the scope of the confidentiality protections to “any information concerning” such communications. Subsection (c) provides that alternative confidentiality procedures established by the parties to an ADR proceeding can qualify for the Act’s new exemption from the Freedom of Information Act only if these procedures provide for the same or less disclosure than the ADR Act itself.

Subsection (d) deletes the provision stating that confidential ADR documents do not qualify for the exemption from the Freedom of Information Act established by section 552(b)(3) of Title 5. A new subsection makes it clear that confidential dispute resolution communications generated by or provided to an agency or neutral are exempt from the Freedom of Information Act.

#### SECTION 4. AMENDMENT TO REFLECT THE CLOSURE OF THE ADMINISTRATIVE CONFERENCE

Section 4 contains amendments reflecting that the Administrative Conference of the United States (ACUS) has not received funding to continue its operations and its ADR responsibilities must be eliminated or reassigned. Subsection (a) eliminates the requirement that agencies must consult with ACUS in developing policies to promote the use of ADR. Subsection (b) repeals the provision requiring ACUS to compile information concerning agency use of ADR. Subsection (c) deletes the reference to ACUS in the Labor Management Relations Act.

#### SECTION 5. AMENDMENTS TO SUPPORT SERVICE PROVISION

This section amends section 583 of Title 5 to authorize agencies to use the services and facilities of State, local, and tribal governments for the purposes of implementing the ADR Act.

#### SECTION 6. AMENDMENTS TO THE CONTRACT DISPUTES ACT

Subsection 1 amends the Contract Disputes Act to authorize contractors using ADR methods to resolve a claim against the federal government to follow the same certification procedures that are applicable to any other claim subject to that Act.

Subsection 2 amends the Contract Disputes Act to reflect the permanent reauthorization of the ADR Act.

#### SECTION 7. AMENDMENTS ON ACQUIRING NEUTRALS

Section 7 amends the sections of the ADR Act concerning neutrals. Subsection (a) amends the Federal Property and Administrative Services Act and section 2304(c)(3)(C) of Title 10, to clarify that agencies may use expedited procurement procedures when hiring neutrals for ADR proceedings. Subsection (b) amends section 573 of Title 5, which authorizes the government to use neutrals in ADR proceedings. This section now requires the Federal Mediation and Conciliation Service to take on the responsibilities formerly performed by ACUS of encouraging and promoting the use of ADR in the federal agencies and developing procedures for agencies to hire neutrals on an expedited basis. The statutory requirements for

the government to establish professional standards for neutrals and maintain a roster of eligible neutrals are repealed.

SECTION 8. ARBITRATION AWARDS AND JUDICIAL REVIEW

Section 8 repeals the provision of the ADR Act which had authorized agency heads to vacate unilaterally the results of an arbitration, and related provisions.

SECTION 9. PERMANENT AUTHORIZATION OF THE ALTERNATIVE DISPUTE RESOLUTION PROVISION OF TITLE 5, UNITED STATES CODE

Section 9 deletes the ADR Act's sunset provision, thereby permanently reauthorizing the Act.

SECTION 10. AUTHORIZATION OF APPROPRIATIONS

Section 10 creates a new section 584 in Title 5 of the United States Code authorizing such funds as may be necessary to carry out the purposes of the ADR Act.

VI. ESTIMATED COST OF THE LEGISLATION

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, February 6, 1996.*

Hon. TED STEVENS,  
*Chairman, Committee on Governmental Affairs,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1224, the Administrative Dispute Resolution Act of 1995, as ordered reported by the Senate Committee on Governmental Affairs on December 12, 1995. Enacting S. 1224 could result in some net savings to the federal government from increased use of alternative means of dispute resolution (ADR), but we cannot estimate the amount of any savings. Any improvement in the dispute resolution process would allow agencies to make more efficient use of their appropriated funds, but would affect total spending only if appropriations were reduced correspondingly. Enacting S. 1224 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

S. 1224 would make many changes and additions to the current laws relating to the application of ADR to conflicts involving the federal government. The bill would change the definition of ADR to include the use of ombudsmen and non-binding arbitration. It would also exclude the use of settlement negotiations—that is, negotiations of a complaint by an employee and his or her agency without involving a neutral party—as a form of ADR. In addition, S. 1224 would permit parties to use ADR to resolve employment-related disputes and would increase the responsibilities of the Federal Mediation and Conciliation Service (FMCS).

*Federal Budgetary Impact.* Currently, many executive branch agencies utilize various methods of ADR. Data compiled by the General Accounting Office (GAO) indicates that the use of ADR tends to result in more efficient resolutions of disputes, although such conclusions are based mainly on anecdotal evidence. Implementation of this bill likely would result in increased use of ADR

by federal agencies. If greater use of ADR leads to more efficient dispute resolution, then agencies could realize some savings, and such savings could more than offset any increased spending by the FMCS in support of ADR. However, CBO does not have sufficient information to estimate the likelihood or magnitude of such potential savings.

The bill would require the FMCS to take on some of the responsibilities formerly performed by the Administrative Conference of the United States (ACUS), which received \$1.8 million in appropriations for fiscal year 1995. Any increase in federal spending by the FMCS, however, would be subject to annual appropriations actions. Furthermore, as noted above, any additional costs from this provision could be offset by savings from enhanced use of alternative means of dispute resolution by federal agencies.

*Impact on State, Local, and Tribal Governments.* S. 1224 contains no intergovernmental mandates as defined in Public Law 104-4 and would impose no direct costs on state, local, or tribal governments. Such governments currently may resolve disputes with the Federal Government through the use of certain forms of ADR. S. 1224 would broaden the forms of ADR that are available and would eliminate the federal government's ability to nullify the results of arbitration proceedings.

State, local, and tribal governments could decide to resolve disputes with the federal government through the use of these additional forms of ADR. However, instances where ADR is used are rare and usually involve highly complex legal and regulatory issues. In those cases, savings may accrue; however, the magnitude of any savings resulting from the changes in S. 1224, in all likelihood, would be relatively small.

*Private Sector Mandates.* This bill would impose no new private sector mandates, as defined in Public law 104-4.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mark Grabowicz and John Righter, who can be reached at 226-2860, Christi Hawley, who can be reached at 226-2820, and, for state and local impacts, Leo Lex, who can be reached at 225-3220.

Sincerely,

JUNE E. O'NEIL, *Director.*

## VII. EVALUATION OF REGULATORY IMPACT

The statute is not expected to require the issuance of additional regulations by any federal agency.

## VIII. COMMITTEE VOTE

The Committee ordered S. 1224, as amended, to be reported to the full Senate by a unanimous voice vote of the Senators then present.

## IX. CHANGES TO EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 349, as reported, are shown as follows: (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## ADMINISTRATIVE DISPUTE RESOLUTION ACT

Pub. L. No. 101–552, as amended by Pub. L. 102–354

\* \* \* \* \*

### SEC. 3. [5 U.S.C. 581 note] PROMOTION OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

(a) PROMULGATION OF AGENCY POLICY.—Each agency shall adopt a policy that addresses the use of alternative means of dispute resolution and case management. In developing such a policy, each agency shall—

(1) consult with [the Administrative Conference of the United States and] the Federal Mediation and Conciliation Service; and

(2) examine alternative means of resolving disputes in connection with—

- (A) formal and informal adjudications;
- (B) rulemakings;
- (C) enforcement actions;
- (D) issuing and revoking licenses or permits;
- (E) contract administration;
- (F) litigation brought by or against the agency; and
- (G) other agency actions.

\* \* \* \* \*

### [SEC. 11. [5 U.S.C. 581 note] SUNSET PROVISION.

The authority of agencies to use dispute resolution proceedings under this Act and the amendments made by this Act shall terminate on October 1, 1995, except that such authority shall continue in effect with respect to then pending proceedings which, in the judgment of the agencies that are parties to the dispute resolution proceedings, require such continuation, until such proceedings terminate.]

\* \* \* \* \*

## TITLE 5, UNITED STATES CODE: GOV- ERNMENT ORGANIZATION AND EM- PLOYEES

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### CHAPTER 5—ADMINISTRATIVE PROCEDURE

\* \* \* \* \*



## Subchapter IV—Alternative Means of Dispute Resolution in the Administrative Process

### § 571. Definitions

For the purposes of this subchapter, the term—

\* \* \* \* \*

(3) “alternative means of dispute resolution” means any procedure that is used, in lieu of an adjudication as defined in section 551(7) of this title, to resolve issues in controversy, including, but not limited to, [settlement negotiations,] conciliation, facilitation, mediation, factfinding, minitrials, [and arbitration,] *use of ombuds, and binding or nonbinding arbitration*, or any combination thereof;

\* \* \* \* \*

(8) “issue in controversy” means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement—

“(A) between an agency and persons who would be substantially affected by the decision; or

“(B) between persons who would be substantially affected by the [decision,] *decision*;

[except that such term shall not include any matter specified under section 2302 or 7121(c) of this title;]

\* \* \* \* \*

### § 573. Neutrals

\* \* \* \* \*

[(c) In consultation with the Federal Mediation and Conciliation Service, other appropriate Federal agencies, and professional organizations experienced in matters concerning dispute resolution, the Administrative Conference of the United States shall—

(1) establish standards for neutrals (including experience, training, affiliations, diligence, actual or potential conflicts of interest, and other qualifications) to which agencies may refer;

(2) maintain a roster of individuals who meet such standards and are otherwise qualified to act as neutrals, which shall be made available upon request;

(3) enter into contracts for the services of neutrals that may be used by agencies or an elective basis in dispute resolution proceedings; and

(4) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.]

*(c) In consultation with other appropriate Federal agencies and professional organizations experienced in matters concerning dispute resolution, the Federal Mediation and Conciliation Service shall—*

*(1) encourage and facilitate agency use of alternative means of dispute resolution; and*

*(2) develop procedures that permit agencies to obtain the services of neutrals on an expedited basis.*

\* \* \* \* \*

(e) Any agency may enter into a contract with any person [on a roster established under subsection (c)(2) or a roster maintained by other public or private organizations, or individual] for services as a neutral, or for training in connection with alternative means of dispute resolution. The parties in a dispute resolution proceeding shall agree on compensation for the neutral that is fair and reasonable to the Government.

#### **§574. Confidentiality**

(a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose [any information concerning] any dispute resolution communication or any communication provided in confidence to the neutral, unless—

\* \* \* \* \*

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose [any information concerning] any dispute resolution communication, unless—

\* \* \* \* \*

(5) a court determines that such testimony or disclosure is necessary to—

(A) prevent a manifest injustice;

(B) help establish a violation of law; or

(C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential; or

(6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award[; or].

[(7) the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.]

\* \* \* \* \*

(d)(1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

(2) *To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.*

\* \* \* \* \*

[(j) This section shall not be considered a statute specifically exempting disclosure under section 552(b)(3) of this title.]

*(j) A dispute resolution communication which is generated by or provided to an agency or neutral, and which may not be disclosed under this section, shall also be exempt from disclosure under section 52(b)(3).*

\* \* \* \* \*

#### **§ 580. Arbitration awards**

\* \* \* \* \*

[(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void. Notice shall be provided to all parties to the arbitration proceeding of any request by a party, nonparty participant or other person that the agency head terminate the arbitration proceeding or vacate the award. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, advise in a decision under this subsection to terminate an arbitration proceeding or to vacate an arbitral award, except as witness or counsel in public proceedings.]

[(d)] (c) A final award is binding on the parties to the arbitration proceeding, and may be enforced pursuant to sections 9 through 13 of title 9. No action brought to enforce such an award shall be dismissed nor shall relief therein be denied on the grounds that it is against the United States or that the United States is an indispensable party.

[(e)] (d) An award entered under this subchapter in an arbitration proceeding may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. Such an award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding, whether conducted under this subchapter, by an agency, or in a court, or in any other arbitration proceeding.

[(f) An arbitral award that is vacated under subsection (c) shall not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.]

[(g) If an agency head vacates an award under subsection (c), a party to the arbitration (other than the United States) may within 30 days of such action petition the agency head for an award of attorney fees and expenses (as defined in section 504(b)(1)(A) of this title) incurred in connection with the arbitration proceeding. The agency head shall award the petitioning party those fees and expenses that would not have been incurred in the absence of such arbitration proceeding, unless the agency head or his or her designee finds that special circumstances make such an award unjust. The procedures for reviewing applications for awards shall, where appropriate, be consistent with those set forth in subsection (a) (2) and (3) of section 504 of this title. Such fees and expenses shall be paid from the funds of the agency that vacated the award.]

**§ 581. Judicial review**

\* \* \* \* \*

(b) [(1)] A decision by an agency to use or not to use a dispute resolution proceeding under this subchapter shall be committed to the discretion of the agency and shall not be subject to judicial review, except that arbitration shall be subject to judicial review under section 10(b) of title 9.

[(2) A decision by the head of an agency under section 590 to terminate an arbitration proceeding or vacate an arbitral award shall be committed to the discretion of the agency and shall not be subject to judicial review.]

**§ 582. Compilation of information**

The Chairman of the Administrative Conference of the United States shall compile and maintain data on the use of alternative means of dispute resolution in conducting agency proceedings. Agencies shall, upon the request of the Chairman of the Administrative Conference of the United States, supply such information as is required to enable the Chairman to comply with this section.]

**§ 583. Support services**

For the purposes of this subchapter, an agency may use (with or without reimbursement) the services and facilities of other Federal agencies, *State, local, and tribal governments*, public and private organizations and agencies, and individuals, with the consent of such agencies, organizations, and individuals. An agency may accept voluntary and uncompensated services for purposes of this subchapter without regard to the provisions of section 1342 of title 31.

**§ 584. Authorization of Appropriations**

*There are authorized to be appropriated such sums as may be necessary to carry out the purposes of this subchapter.*

\* \* \* \* \*

## TITLE 10, UNITED STATES CODE: ARMED FORCES

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### § 2304. Contracts: competition requirements

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(c) The head of an agency may use procedures other than competitive procedures only when—

\* \* \* \* \*

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capa-

bility to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (c) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or [agency, or] *agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;*

\* \* \* \* \*

## TITLE 29, UNITED STATES CODE: LABOR

\* \* \* \* \*

### § 173. Functions of service

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(f) The Service may make its services available to Federal agencies to aid in the resolution of disputes under the provisions of subchapter IV of chapter 5 of title 5, United States Code. Functions performed by the Service may include assisting parties to disputes related to administrative programs, training persons in skills and procedures employed in alternative means of dispute resolution, and furnishing officers and employees of the Service to act as neutrals. Only officers and employees who are qualified in accordance with section 583 of title 5, United States Code, may be assigned to act as neutrals. The Service shall consult with [the Administrative Conference of the United States and] other agencies in maintaining rosters of neutrals and arbitrators, and to adopt such procedures and rules as are necessary to carry out the services authorized in this subsection.

\* \* \* \* \*

## TITLE 41, UNITED STATES CODE: PUBLIC CONTRACTS

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### CHAPTER 4—PROCUREMENT PROCEDURES

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### § 253. Competition requirements

\* \* \* \* \*

(c) An executive agency may use procedures other than competitive procedures only when—

\* \* \* \* \*

(3) it is necessary to award the contract to a particular source or sources in order (A) to maintain a facility, producer, manufacturer, or other supplier available for furnishing prop-

erty or services in case of a national emergency or to achieve or to achieve industrial mobilization, (B) to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center, or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or [agency, or] *agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution process, whether or not the expert is expected to testify;*

\* \* \* \* \*

## CHAPTER 9—CONTRACT DISPUTES

\* \* \* \* \*

### § 605. Decision by contracting officer

\* \* \* \* \*

(d) Notwithstanding any other provision of this Act, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, United States Code, or other mutually agreeable procedures, for resolving claims. [In a case in which such alternative means of dispute resolution or other mutually agreeable procedures are used, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his or her knowledge and belief, and that amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable.] *The contractor shall certify the claim when required to do so as provided under subsection (c)(1) or otherwise required by law.* All provisions of subchapter IV of chapter 5 of title 5, United States Code, shall apply to such alternative means of dispute resolution.

(e) [The authority of agencies to engage in alternative means of dispute resolution proceedings under subsection (d) shall cease to be effective on October 1, 1995, except that such authority shall continue in effect with respect to then pending dispute resolution proceedings which, in the judgment of the agencies that are parties to such proceedings, require such continuation, until such proceedings terminate.] In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of Title 5, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the con-

tractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

