presents competing pressures from conflicting value sets. These issues are particularly common in an era when public sector organizations are asked to accomplish more but often with less resources. If, for example, a medical facility is pressed to make cutbacks solely because of financial demands, many of those trained in medical fields will immediately find themselves cross-pressured as they must deal with both with an obligation to obey the political bodies that made funding decisions and their ethics as medical professionals committed to patients' needs as a primary consideration. There are also problems of ethical feasibility if an agency has one set of public positions and a possibly contradictory set of internal operating norms. The classic case here is the situation that existed within the Los Angeles Police Department at the time of the Rodney King beating. The area of ethical feasibility will be discussed further in Chapter 13.

Finally, a manager increasingly must be alert to signals from the environment about cultural feasibility. These can come from various sources and may present tensions that must be addressed. The organizational culture of the agency or city government places clear constraints on the manager's range of possible responses to a given situation. And, since organizational cultures are slow to change, the day-to-day work of the organization must function within the limits tolerated by that culture. Of course, the agency must serve an increasingly diverse community—one in which culture counts in a variety of important ways. Thus, if they are to be effective, health departments operating in the Southwest must operate differently from those in the Northeast.

While these factors sound complex, a public manager can develop the skills over time necessary to maintain this continuing evaluation of the decision environment. That is important in all aspects of public administration, but it is especially so when one is operating informally, without the structure imposed by formal procedures. Let us turn from this very general effort to understand the decision environment to a more specific consideration of particular factors that shape informal administrative action.

## FACTORS THAT SHAPE INFORMAL ADMINISTRATIVE PROCESSES

As the term "informal process" implies, the types of administrative actions that are informal in nature are very different from one another. It is possible, however, to single out recurring factors that shape and condition informal administrative processes.

### Policy Pressures

First, there are numerous policy pressures on administrators to make greater use of informal processes and work within a framework based on negotiation. And once in that mode, it can be politically difficult to change course. Even before the emergence of the reinventing government movement and its implementation as policy during the Clinton administration, bipartisan support for the use of informal procedures, particularly alternative dispute resolution procedures, led in 1990 to the enactment of the Negotiated Rulemaking Act (discussed in Chapter 5) and the Alternative Dispute Resolution Act.[4] Both statutes lapsed for a time when Congress did not complete reauthorization before the deadline, but that problem was remedied in 1996 when the Congress enacted the Administrative Dispute Resolution Act, which made both acts permanent additions to the APA. As Professor Lisa Bingham explains it:

> [The 1996 Act] requires each agency to develop a policy on ADR, in consultation with ACUS and the Federal Mediation and Conciliation Service (FMCS), but it does not set a deadline for adopting the policy. The ADR Act directs the agency to examine ADR in connection with formal and information adjudications, rulemaking, enforcement actions, issuing and revoking licenses or permits, contract administration, litigation brought by or against the agency, and other agency actions. It also requires an agency to appoint a senior official to service as a dispute resolution specialist, with responsibility for implementation of the agency policy.[5]

Clearly, this statute, which passed with bipartisan support from both houses of Congress and the White House, not only provides specific authority for informal mechanisms and removes barriers to their use, but also very clearly encourages their application. Under §3(a)(2) of the act, each agency is to:

> . . . 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.

Moreover, the statute made decisions by an administrator to use such techniques as "settlement negotiations, conciliation, facilitation, mediation, fact finding, minitrials, and arbitration, or any combination thereof" unreviewable in court.[6] Other legislation, such as the Americans with Disabilities Act and the Civil Rights Act of 1991 supported the use of informal dispute resolution processes.

The pressure to employ informal processes came not just from these statutes but also from directives issued by the White House implementing the recommendations of the National Performance Review (NPR) with respect to regulation, administrative enforcement actions, contracting, and service delivery.[7] In its first-year evaluation of implementation of NPR recommendations, there were numerous White House references to the use of negotiated enforcement and other informal techniques as compared to the earlier practices referred to as "command and control" procedures.

Many states have implemented statutes encouraging the use of ADR. One of the earliest and most common sets of such acts is in the labor/management relations area, where mediation or various forms of arbitration are authorized in lieu of job actions. Another field at the state level in which informal techniques have been common for many years is in the area of consumer protection, in which state ombudsmen or consumer protection bureaus within the offices of state attorneys general often make use of mediation to settle disputes. More recently, many states have adopted a wider range of informal techniques as part of the so-called new public management movement.

Yet a third source of policy pressure to use informal processes comes from international agreements that set up a host of claims resolution processes for negotiated settlement of disputes.[8] These international devices stem not just from the general trend toward negotiated problem solving but also from the very practical difficulties that arise in the international context where sovereign nations often resist submitting to the jurisdiction of an international tribunal for formal decisions. Although there clearly are authoritative decisionmaking bodies established by many

agreements, such as the panel on regulation of the World Trade Organization under the General Agreement on Tariffs and Trade (GATT), there is a strong preference for negotiated approaches to action. It is also worth noting that at the same time that constitutional courts have become more important in countries that had not previously had a traditional high court such as the U.S. Supreme Court,[9] there has been a simultaneous movement to develop more and better informal options.

At all levels, from global to local, contracts very often establish in their terms processes for the resolution of disputes. While there is, at least at the federal government level, a relatively complex set of institutions and processes to resolve contract issues, it is very common these days for the parties to contracts to agree to use some form of mediation or arbitration instead.[10] Thus, many contracts provide both a legal and a policy pressure to use informal techniques. Moreover, one of the ideas behind the advocacy of public/private partnerships is to develop more positive and less narrowly legalistic working relationships. In such relationships the effort is not merely to find ways of settling disagreements but to seek to avoid them in the first place.

> In the area of procurement and government contracting, many agencies have begun to use a process called partnering. This process is intended to build a strong, collaborative working relationship between contracting parties before disputes arise, and to set up channels of communication that parties will use immediately upon the first sign of a dispute. The chief executive officer or top management of the contractor and the top public administrators responsible for the project go on a retreat, generally lasting for several days, during which they discuss their expectations for the contract and the means through which it will be executed. They set up avenues of communication and processes for handling disputes as soon as they arise. In addition, they simply get to know each other better. After the retreat, they have regular troubleshooting meetings to catch any problem early in its development. The process is one of dispute avoidance.[11]

Even so, there are often disputes over bid processes and contract awards, conflicts over costs associated with change orders (alterations made in specifications or performance terms during the performance of a contract), audit and compliance disputes, disagreements over reimbursable cost calculations, and even, in some rare cases, debarment proceedings (disciplinary actions brought to penalize contractors for serious misconduct by removing their eligibility for future contracts). Even if a contract does not specifically set forth alternative dispute resolution techniques, such approaches are commonly used to avoid the costs of formal litigation and the costs to ongoing working relationships that flow from pitched legal battles.

## Sunk Costs

In addition to policy, another factor that influences the use and implications of informal processes is the phenomenon of sunk costs. Once the point of commitment is reached by the parties involved in an informal administrative action, changes in policy or in direction are hard to make. Expended effort and fiscal resources provide inertia that is all but irresistible. Writing of the problem of plant licensing, Justice William O. Douglas once warned:

> Plainly these are not findings that the "safety" standards have been met. They presuppose—contrary to the premise of the Act—that "safety" findings can be made *after construction is finished.* But when that point is reached, when millions have been invested, the momentum is on the side of the applicant, not on the side of the public.

> The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a "white elephant" (emphasis in original).[12]

This process applies not only in adjudicative-type activities but in other areas as well. Thus, one of the concerns surrounding negotiated rulemaking is that while an agency may walk away from the table at any point or ultimately change its position in response to reactions after the consensus position is published as a proposed rule, such steps become more difficult to take the further the process moves along.

If, at some point, an agency perceives its investment to be sufficiently large, it may become the advocate for the outside group or individual involved. Taken far enough, administrators may, by virtue of perceived sunk costs, find themselves coopted by the party before the agency.

## Anticipated Costs

Another factor that influences the informal process is what might be termed "anticipated costs." That is, the costs of pursuing one's objectives through the formal administrative process may be sufficiently high that pressure is created to resolve problems informally. Such issues of anticipated cost are complicated by two additional factors. First, while the costs of formal processes are likely to be high, it is often unclear just how high they may be. For many decisionmakers, it is far better to use an informal process that may yield a compromised resolution and not a victory rather than face the risk of indeterminant costs. Second, while resources are being used to wage a protracted formal legal battle, they cannot be directed toward other more desirable opportunities. These are often referred to as opportunity costs.

Attorneys commonly see their role as practicing preventive law or fostering alternatives to formal resolution of disputes. The costs of preparation and representation for trial or formal hearings escalate dramatically. In that spirit, an attorney might attempt to convince a client who claims that an agency has wrongfully exacted several hundred dollars or more from him or her that it would be much better to settle for a negotiated compromise, and a loss of some of the funds, rather than spend more money for litigation and appeals and perhaps lose in the end anyway.[13]

## Power Law

A fourth factor is the significance of what Mark Green has called "power law."[14] For many reasons, political scientists and other academics seem to have particular difficulty with the concept of power.[15] In general, power has negative connotations and taboos, and it is, presumably, something with which nice people do not deal.

Green's study concentrated on the most prestigious Washington law firms, whose primary business is representing repeat players before different branches and departments of government, but his thesis is more broadly applicable. He argued that there are any number of individuals and organizations who use law as a tool to accomplish their ends, to achieve political power.[16] Such clients may say, as J.P. Morgan is reputed to have declared, that they do not want a lawyer who tells them what they cannot do. They want a lawyer who tells them how to do what they want to do.

Unless one goes about it in a corrupt or illegal manner, there is nothing particularly sinister in this. If, for example, one who runs a business decides to pursue

a policy and commits resources in pursuit of policy goals, he or she may be unwilling to face the loss, and perhaps the pressure, that comes from changing direction based on a mere prediction that the firm may or may not win in court should a lawsuit develop. One might more likely say something such as: "I'm committed to this position. I think I'm right and I'm prepared to use the tools at my disposal to defend my policy."

Green's analysis suggested that power law matters because it affects (1) the development of statutes; (2) the shaping of cases that will produce important precedents; (3) the adjudication of major public policy related disputes before government agencies; and (4) the development of rules and other types of policy statements issued by agencies. He argued that power law is practiced in both formal and informal ways, and suggested that informal process is by far the preferred mode of operation for these attorneys and their clients.

The practice of power law is based, according to Green, on what he termed the "Ten Commandments of Washington Law." The following is a sketch of his decalogue:

I. *Reputation*: "The impression of power is power." Reputation can come from previous government experience in a particular area, accumulated legal, political and governmental experience, and political contacts.

II. *Intelligence*: It is well to remember that many of those who practice power law came to their position of prominence by virtue of superior intellectual ability and well-developed technical skill and not through some back door to power.

III. *Reconnaissance*: Since information is power, it is at the heart of power law. The power lawyer's job is to be alert for developments that may threaten his or her clients' interests and to work with the clients to avoid the problems if it is possible to do so.

IV. *Interlocking interests*: Lawyers who begin by representing a firm often become part of the organization. This occurs as partial payment for services. The interrelationships between law firms and client organizations affect the performance of both sides.

V. *Preferential access*: Being well enough known and connected to get opportunities to make one's arguments is important. "Access without brilliance is preferable to brilliance without access."

VI. *Lobbying*: The techniques of lobbying may be far more important than litigation ability from the standpoint of one's client.

VII. *Law-writing*: Participation by an attorney in the drafting of legislation or rules offers obvious advantages of molding policy in favorable terms and less obvious advantages in recognition of prior knowledge in future contests.

VIII. *Inundation*: By sheer dint of volume, legal papers may either exhaust an opponent or else delay the agency to the advantage of one's client.

IX. *Delay*: "For those who seek to avoid regulation, no decision is often a favorable decision." Delaying tactics are frequently used tools in power law.

X. *Corruption*: It is often difficult, when the stakes are high and the ethical problems obscured, to tell when one moves from legitimate advocacy to influence peddling or worse. Some attorneys make it a practice of working close to the line on purpose.[17]

## Player Type

Perhaps more than in the formal process, it matters in the informal process whether the players are repeat players or single-shot players. Repeat players have many

more options than do single-shot players. In many cases they are able to argue technical procedural legal points as well as or better than agency personnel, and they may have more financial and scientific resources at their disposal. Small-business people or individuals who have little expertise and are not financially able to acquire the services of first-rate administrative law attorneys may have few options in their interactions with the social service, regulatory, or second-generation regulatory agencies they encounter.

In the contemporary environment, there are some interesting twists on this dynamic. For one thing, many not-for-profit organizations have become so important to state and local institutions that they have become very effective repeat players. Unlike for-profit firms, the effectiveness of not-for-profits often stems not so much from their ability to mobilize financial and legal resources as from their political importance and from the fact that governments often become dependent upon such nongovernmental organizations (NGOs) to deliver services under contract that government can no longer deliver directly.

The increasing range of international participants in administrative decisions has also become significant. Consider one example. Many state and local governments have become very active and entrepreneurial in their economic development efforts. However, a foreign government might allege before the World Trade Organization that a state or one of its subdivisions has engaged in prohibited trade practices such as creating preferences for local products or barriers to trade using excessively burdensome or arbitrary regulations. In such cases, the state or locality cannot defend itself before the WTO but must depend upon the U.S. federal government to do so whether in formal action or informal negotiations. There are similar complexities associated with issues arising under the North American Free Trade Agreement (NAFTA). Of course, these increasingly important roles for international players are arising around the world, particularly where there are efforts at regional integration as in the case of the European Union.

## Felt Need for Individualized Justice

One of the factors that tend administrative actions toward informal process and away from rule-oriented formal administrative activity is a strongly felt need for individualized treatment by those before the agency. It is one of the great problems of public administration that Weberian theories of bureaucracy dictate rule-oriented behavior, standard operating procedures for getting work done, and a dispassionate approach to that work. It is a difficulty because those who come before an agency are likely to interpret those characteristics as rule-bound, rigid, and unfeeling bureaucratic behavior. Most of us have seen or felt this reaction to bureaucracy. An administrator explains to a client that a rule precludes granting the client's request. The client says, "But you don't understand! The rule doesn't apply in my case!" and walks away shaking his or her head and complaining, not about the rule but about the callous bureaucrat who applied the rule. Hence, it comes as no surprise that the National Performance Review pointed with pride to the initiative of Occupational Safety and Health Administration (OSHA) officials in Maine who worked to negotiate inspections and enforcements with local businesses to avoid blanket application of national rules without noting that the ability to be flexible in one case means the freedom not to be flexible in another situation.

Jerome Frank, a member of the Securities and Exchange Commission and later a judge on the Second Circuit Court of Appeals, once wrote that discretionary

decisionmaking by administrators is often prompted not by the administrator's desire for discretion and informality, but because those before agencies demand individualized consideration outside of normal procedures.[18]

## The Power of the Raised Eyebrow

The perceptions of those dealing with an agency are important in another more coercive sense. The power of the raised eyebrow is the ability to cause an individual to act not by positive directive or by sanction but voluntarily, out of concern that an administrator might employ a sanction at some time in the future. Two examples are tax audits and broadcast licensing. Most people fear tax audits not because of what the Internal Revenue Service is going to do to them, but because of what the agency might possibly do. The threat of an audit may be enough to deter some taxpayers from cutting corners. A broadcaster might be concerned about FCC suggestions on adult programming or public service, not because the commission is likely to commence a formal disciplinary proceeding against the station, but because lack of cooperation might be remembered by those at the commission when it comes time for station license renewal.

One of the most effective of the raised eyebrow agencies is the Securities and Exchange Commission (SEC). Even if one thought it likely that one's case would prevail in a formal administrative proceeding, it would be dangerous to ignore SEC suggestions concerning a new securities issue. A mere hint that one is under special scrutiny by the commission could destroy the marketability of the new issue.[19] The power of the raised eyebrow is important not because of what an agency can or will do, but because of what the party before the agency believes the agency could or would do.

The significance of this power varies depending on who is involved. Obviously, repeat players are not likely to be overawed by agency authority. They are likely to know exactly what an agency can and cannot do, and are not as likely as single-shot players to be frightened by the mere possibility that an agency may institute a formal proceeding against them. In fact, the raised eyebrow can work in reverse. Administrators may be loath to take certain actions because they know that the repeat players affected might have sufficient legal, economic, and political resources to block or weaken the agency.

## The Due Process and Efficiency Models

Finally, the pressure on agencies to process their workloads also has an effect. Herbert Packer made a study of the criminal justice system which is somewhat analogous to the administrative justice system. Packer suggested that there are models of how the system works, or ought to work, which he called the "due process" and "crime control" models.[20] The due process model is based on the proposition that the task of the criminal justice system is to investigate allegations of breaches of law and enforce the law. The party involved should be accorded all due process protections beginning with the presumption of innocence. The ultimate goal is to discover the truth and achieve justice. Packer suggested that most citizens, including participants in the criminal justice system, would agree with those ideals. On the other hand, Packer suggested that what an impartial observer of the actual operation of the system sees is less like the due process model than the crime control or efficiency model, which is based on the assumption that the task of the criminal justice

system is to control crime. Crime is controlled by processing cases and achieving convictions. Given limited resources, accomplishing these goals requires efforts to improve the efficiency of case processing. In the criminal justice context, this means emphasizing informal processes such as plea bargaining.[21]

Ideally, an administrative agency's goal is to implement and administer a policy or law. It has a formal process for doing so. In reality, agencies can be overloaded, regardless of what kind of agency is involved. The efficiency model may more accurately describe the operation of such an agency. The short-term goal may be to maximize efficient processing of the docket, and pressures to use informal processes for clearing cases become intense. The *Eldridge* case study in Appendix 1 is an example of such a situation.

## ADR and the Contract Model

As this and earlier chapters have explained at some length, one of the most significant developments in the field in recent decades is the increasingly important contract model. The fact that contracts often contain requirements for informal processes was noted above, but two other factors are important influences. The first is that public managers often deal not with one or two contracts but with several or perhaps many contracts of several different kinds. A common example is the city manager who may have half a dozen or more bargaining units within the city organization, all represented by different unions, each of which has its own contract. It is normal for such collective bargaining agreements to contain a set of informal processes to be used for personnel actions and other decisionmaking. While it is certainly the desire of managers to avoid problems, it is not at all uncommon for several contracts in one organization to require different kinds of informal processes for different purposes. The same is true for other kinds of contracts. In an earlier time, there were efforts at the federal and state levels to try to impose boilerplate language (standard language that is more or less automatically included) in all contracts mandating a particular type of process. However, in an effort to improve public/private partnerships and to enhance flexibility, the effort has been made to open contract processes to negotiation. The number and variations among contract dispute resolution processes is now an important fact of life for managers, particularly those at the state and local levels.

There is another factor that has become more important as the amount of contracting and dependence of government units on contractors have increased. In the contemporary context, most informal processes involve some kind of negotiation. Lloyd Burton has observed that from the moment that negotiations begin, another factor comes into play, what he terms negotiating culture.[22] In particular, he points out that there is often a mismatch of negotiating cultures within which administrative agencies operate. This problem begins from the fact that there are usually informal rules that operate at the negotiating table that not only govern how the sides relate to each other but also have to do with the internal cultures that govern each side's internal operations. The private sector side generally operates according to standard business assumptions in which they have no responsibilities to anyone except their organization and, if it is a for-profit firm, its officers and stockholders. However, the government representatives begin from a much more complex position and must operate according to what has been called the public sector negotiating culture. Clearly, the public sector representatives must negotiate for ends and by means that are consistent with law, within the author-

ity that has been delegated to them, within the policies of the sitting government, and with a concern for the public interest. That can create what Burton has referred to as ethical discontinuities at the bargaining table. Those ethical constraints affect virtually all aspects of the negotiating process, even if the members of the public sector team never acknowledge their role.

There can also be such discontinuities for not-for-profit organizations, though their negotiating cultures may be many and varied. Some are membership organizations with established boards of directors and see their role in ways that are not all that different from for-profit firms, except that they may not be seeking a profit in the traditional sense. Others are volunteer-based organizations that are driven by strongly held religious, political, or social commitments. They often come to the table with strong advocacy tendencies, seeking to get the most for their cause and to win more than just money. Still others may represent coalitions of NGOs, an increasingly popular arrangement. They must be concerned about the causes their coalition champions, the needs of the coalition leadership, and the problems of holding the coalition together. It is not at all unusual to have coalition representatives negotiate with government, only to have members of the coalition later challenge the agreement on grounds that the coalition officers misrepresented the commitments of the groups to the government or the government's positions to the groups.[23]

Some or all of these factors may be present in the decision whether to employ informal administrative processes, and they can very clearly shape the operation of such procedures if they are pursued. For all these reasons, it is dangerous to assume that informal processes are always simple or to ignore the fact that they carry their own potential motive forces and tendencies.

## THE NATURE OF INFORMAL PROCESSES

Informal processes are just that—informal. Therefore, one cannot establish a concise and specific taxonomy of informal processes in administrative law. One can describe a few of the more common types of informal mechanisms and the general attitudes that guide the use of these and other informal techniques. The informal devices may generally be classified as preformal, filtering, or opting-out procedures.

### Preformal Processes

Preformal processes attempt to resolve problems early in the administrative process and avoid having to resort to the formal stages. The three most common approaches are informal negotiated settlements, preclearance procedures, and diversion techniques. Almost all agencies use the first of these approaches to problem solving. Informal negotiated settlements have the obvious benefit of resolving problems congenially, which allows for continued good relationships between agency clients and administrators. Preclearance procedures take different forms in different agencies. Examples are Federal Trade Commission preclearance of proposed corporate mergers where antitrust laws could be a problem, and Securities and Exchange Commission deficiency letter procedures where the SEC reviews a prospectus for a security and notes deficiencies so that they may be corrected before formal registration and marketing of the securities issue. Another type of preclearance process is the issuance of advisory opinions, which were discussed briefly

in earlier chapters. Advisory opinions are an agency's general views about how it expects to deal with certain situations that may arise. While agencies are not bound by such commentaries, it is in the interest of all concerned for the administrators to issue accurate advisory opinions and to follow them. Doing so may reduce the likelihood of formal procedures.

The third type of preformal processes are diversion programs. These devices try to move a dispute out of the track that might lead toward more formal action. The early efforts in this direction came with what was termed "court annexed arbitration."[24] The idea was that several federal district courts established local rules that required parties in some kinds of cases to submit to an alternative dispute resolution process and, however indirectly, placed pressure on the parties to use these procedures to settle their disputes and keep them out of the courts.[25] Strictly speaking, most of these programs involved mediation rather than arbitration and were mandatory rather than completely voluntary.[26] Another more recent type of diversion process is the minitrial, in which the parties bring key decisionmakers to a forum in which representatives for both sides present major elements of their evidence and arguments as if advocating in court though without the constraints of judicial proceedings. The decisionmakers can then decide whether they think it worthwhile to move toward a settlement or to take the more formal route and proceed with an adversarial process. Again, the object is to push potential parties off the track that would otherwise lead to more formal disputes and into an early settlement.

## Filtering Processes

The second major type of informal action is what can be termed "filtering action." Filtering procedures serve two purposes: (1) they attempt to eliminate unnecessary formal procedures through a fairly structured negotiating process; and (2) where cases are going to move to formal action, efforts are made to simplify those procedures by reducing the number of issues in dispute and obtaining as much agreement as those involved are willing to provide. The predominant example of a filtering procedure is the prehearing conference. Prehearing conferences in administrative law are patterned after the pretrial conference model established in the Federal Rules of Civil Procedure[27] and authorized by the Administrative Procedure Act.[28] The ALJ can call a prehearing conference to ask the parties to limit the issues to be argued, reduce the number of witnesses to be presented, and stipulate to as many of the pertinent facts as possible. The conference is also an opportunity to reach a settlement before the formal process gets under way. If no settlement can be obtained, at least the scope of the formal proceeding can be narrowed and the issues properly defined.

## Opting-Out Techniques

Finally, there are opting-out techniques, which are procedures that are often employed after a formal proceeding has begun, or when it is imminent, aimed at resolving the difficulty short of completing the formal process. One of the reasons for the use of the term opting-out is that it is not at all uncommon for the regulatory agencies to start a formal process or even to file a suit and then to consider ADR options. It is a technique for placing pressure on those at the negotiating table. These opting-out techniques are often characterized as falling on a continuum from

least to most binding, and more than one technique may be used if the parties decide, or are required by contract, to move down the continuum.[29] They include negotiation, mediation, and arbitration as well as variations of those techniques.

The difference between negotiation and the other approaches is that negotiation involves the parties directly but the other techniques employ some kind of neutral third party, either to facilitate negotiations or to issue findings and make some kind of award. In mediation, the neutral third party usually does not have the power to make decisions in the dispute but is to help the parties engage with one another in a constructive manner, even if at arm's length, or to assist the process of negotiation with the hope of achieving a settlement. The term *facilitator* is used to describe a person who serves these kinds of functions in a negotiated rulemaking proceeding because he or she facilitates the sessions of the committee (see Chapter 5).[30] The mediator is a person mutually selected by the parties, often from lists maintained by the American Arbitration Association or the Federal Mediation and Conciliation Service. Wise mediators call upon the parties to provide a contract that sets forth their responsibilities, protects the mediator from being sued or called as a witness in the event of later litigation, and ensures that information produced during settlement will be privileged and cannot be introduced later in court.

The difference between mediation and arbitration is that it is normally the case that an arbitrator issues a binding decision. There are variations on arbitration that are really intended to act like diversion processes and that produce nonbinding decisions that should encourage the parties to seek settlement.[31] However, the more common form is that the parties enter into a contract with an arbitrator, present the case to him or her, and agree to be bound by the arbitrator's decision. Again, the parties agree to the choice of the arbitrator and may establish boundaries in their agreement. Here again, the outside party normally ensures that the agreement provides protection for the arbitrator should one side or the other litigate later.

At the end of the day, the results of settlement are often turned into a consent decree. It is an agreement to cease a certain type of conduct that an agency asserts is illegal without admitting any guilt or liability and often to take a specified set of actions in the future. A consent decree may on occasion require an organization to conduct a recall of a product or change a particular practice, but it does not make the party automatically vulnerable to damage suits from private citizens. The agency gets the result it seeks, namely, a cessation of some unacceptable practices. The organization may be able to settle on terms that are less harsh than might have been imposed if the administrative process had run its course. Finally, the organization preserves all its legal options in the event that it faces future disputes. Consent decrees take their name from the fact that they are court orders entered on consent of the parties. That is, the parties ask a judge to enter a decree so that the settlement becomes an order of the court that can later be enforced, using the power of the court to hold an offending party in contempt.

In the end, while there is a growing range of sophisticated ADR techniques, informal processes are very often extremely simple and flexible. In some respects it is better to think of these procedures in terms of the attitudes that characterize them rather than in terms of specific classes of procedure. In informal processes administrators often appear to be acting more in a consultative or supervisory mode rather than in the more aggressive watchdog mold. They often settle for giving guidance to those before the agency rather than mandating specific types of conduct. Negotiation is preferred to adjudication. The informal approach works particularly well where both sides are more interested in conciliation than in confrontation.

## ADVANTAGES AND DISADVANTAGES OF INFORMAL PROCESSES

As in any area of public policy, there are significant pluses and minuses associated with the use of informal administrative processes to resolve problems. The following is a brief summary of some of the most obvious costs and benefits. Chapter 9, on administrative discretion, and Chapter 10, on regulation, will deal in some detail with specific implications of the use of informal processes.

### Advantages

The first obvious advantage to informal processes is speed. It is much easier and faster to resolve problems with a telephone call or a visit and a confirming letter than it is to proceed to formal methods. Given the number of problems on an average agency docket and the fact that formal processes can last for months and sometimes years, it is in the agency's (or city's) best interest to do things the easy way. Depending on the type of player involved (consider, for example, the Social Security disability claimants' difficulties discussed in the *Eldridge* case study), delay can be a major concern for the administrator as well as for the citizen, community group, or business that needs a decision in order to move on to their own next steps.

A related advantage is low-cost resolution of problems. As soon as a case becomes a formal proceeding, costs escalate rapidly. Many single shot–players are particularly hard-hit by legal fees and delayed benefit payments. The costs are also difficult for agencies and some repeat players to carry. Expense is a particular problem where there are lengthy administrative hearings that involve many parties and a large number of expert witnesses. Informal procedures are not without cost, but they can be quite inexpensive relative to formal approaches to problem solving. In fact, a General Accounting Office (GAO) study found that in both the public and private sectors, the effort to reduce costs and save time was a leading reason why organizations moved to create ADR programs.[32]

Related to these concerns has been a need to resolve an increasing number of disputes. Thus, the GAO found, for example, that:

> In the private sector, the number of discrimination complaints filed with EEOC grew by 43 percent between fiscal years 1991 and 1994—from 63,898 to 91,189—before beginning to decline. In the federal sector, the increase in the number of discrimination complaints filed with federal agencies was also substantial, rising by 55 percent between fiscal years 1991 and 1995—from 17,696 to 27,472.[33]

And when it is considered that, in fiscal 1995, discrimination claims that involved a hearing and a subsequent appeal to the Equal Employment Opportunity Commission (EEOC) took an average of 801 days to process,[34] the problem becomes obvious.

A fourth advantage is that informal processes may take place in a more congenial atmosphere than might be present in a formal adversary-type proceeding. And perhaps in part because of that kind of environment, the available data seem to suggest a higher level of participant satisfaction with informal processes.[35]

Related to this issue of environment and attitude is the tendency for informal processes to enhance the willingness of parties to settle. Thus, the GAO study calculated the percentage of cases resolved by ADR in the Department of Air Force at 73 percent, Postal Service (North Florida) at 74 percent, Postal Service (Southern California) at 94 percent, and Walter Reed Army Medical Center at 68 percent.

In the Seattle Interagency ADR Consortium, a group of organizations that shares ADR programs and resources, reported an 89 percent settlement rate between May 1993 and February 1997.[36]

Another strength of informal processes cited as a factor in this higher clearance rate is that ADR techniques seek to move participants away from positions and toward a recognition of interests.

> Simply stated, each disputant stakes out a position—such as a complaint of discrimination or a defense against a complaint—and hopes to win the case. But interest-based dispute resolution, which is the basis for some ADR techniques, focuses on determining the disputants' underlying interests and working to resolve their conflict at a more basic level, perhaps even bringing about a change in the work environment in which their conflicts developed.[37]

There are often more than two sides to an administrative disagreement or policy and exploration of the facets of a problem may be more relaxed and flexible in the informal setting.

A related advantage may be described in terms of game theory.[38] The use of informal processes allows those involved to more easily play a non–zero sum game. This conceptual framework assumes that interactions among political, economic, and social actors may be thought of as contests in which all the actors attempt to pursue their own best interests.[39] There are basically two kinds of games: zero sum games and non–zero sum games. In the first, there is one winner and one loser. The winnings of the winner equal the losses to the loser. In the non–zero sum game there is no absolute winner or loser. For example, in the National Football League championship, the champion is the winner of the Super Bowl. In the world Grand Prix driving championship, one driver may win the money and prestige of a particular race, but another driver may accumulate points from several races to win the overall championship. Both drivers win something. The informal process, since it is not cast in rigid adversary terms, encourages non–zero sum games. In the real world, such games are easier to play and the results are often more acceptable to all concerned than the zero sum type.

Informal processes often make it possible to resolve problems without disrupting ongoing projects or lifestyles. While negotiations are under way, it is often possible for those involved to continue in existing routines rather than face an immediate shutdown of an industrial plant or an immediate loss of income from benefits. The absence of the threat of traumatic disruption may allow for a less crisis-ridden and more reasoned approach to problems.

Finally, informal processes permit administrative discretion. Agencies can be more flexible in the informal environment than is possible once a formal procedure has been instituted. There is more room for judgment and individual consideration in the decision process.

## Challenges and Disadvantages

Between the obvious advantages described above and the intense efforts of ADR advocates to strongly encourage, and where possible mandate, informal processes, the emerging picture is that the pluses are so obvious that only a crazy person would opt for more formal alternatives, and certainly not litigation! Of course, whenever something seems so obviously right, a wise public administrator would do well to look more closely. After all, if it sounds too good to be true, as the saying goes, it

probably is. Or, more accurately, while it may be true that there are many advantages to informal processes, it is important to pay attention to the challenges and possible disadvantages that may be involved as well.

In an effort to ensure a more balanced picture, the discussion to follow will deliberately emphasize these challenges, and the reader is cautioned to keep the intentional emphasis in mind. Consider the problems that may be and often are presented by informal processes, the challenges of administering under ADR settlements, and issues arising in negotiated enforcement.

***The Downsides of Informal Processes*** One danger is that the ability of an administrator to be particularly sensitive to one individual or group before the agency implies the ability to discriminate against another.[40] The possibility of falling victim to discrimination is somewhat higher in informal proceedings than in formal proceedings because there is often little record of informal understandings or negotiations, especially where the outcome is a decision by an agency not to take action or not to enforce. It was, after all, in part in an effort to prevent or check arbitrariness that formal administrative procedures were initially instituted.

These risks grow in those settings where the use of informal techniques is not voluntary but mandated. Thus, the GAO study found that it was common in the private sector organizations studied to require employees to submit to binding arbitration as a condition of employment. That also meant that their chances on an appeal if they were dissatisfied were considerably reduced since any legal challenge was limited to a review of the arbitration, a much narrower process than would otherwise have been available in a normal lawsuit.[41] The same situation obtains in some public sector employment situations.

Second, and related to differences between the parties before the agencies, is the danger that the distinction between repeat players and single-shot players can be extremely important in the informal process. This can be true in what are termed ADR processes but can be even more of an issue in other types of informal processes that lack the structure and guidelines of ADR tools. If an administrator's concern about a repeat player's power is strong enough, the vigor with which the administrator pursues the wider public interest may be jeopardized.

Third, for reasons already established, the effects of sunk costs may subvert the objectivity of the decisionmaker and foster a combative attitude to latecomers to a particular policy discussion. The point is not that sunk costs always rule the day, because there are many examples to the contrary.[42] However, the push is strong to stay with explicit or even tacit negotiated understandings.

Fourth, related to the problem of sunk costs is the fact that, particularly in informal processes, intraorganizational or interorganizational politics may play a disproportionate role in the decision process. Bureaucratic politics and organization theory and behavior variables are almost always important in decisionmaking, but informal processes may permit these factors to play more of a role than they should.[43] And even if they do not really make a critical difference, it is common for those affected by a decision to believe they did.

Fifth, access to the formal process may be deterred. Woll and others have observed that parties with matters pending before agencies may not really be able to move the dispute to a formal proceeding even if that option is technically available. Given the expense and the time required to pursue a formal remedy, there is sometimes no practical alternative to resolving a problem through the informal channel. When that happens the spirit of free negotiation mutually conducted may

give way to a more coercive atmosphere without the protections afforded in the formal setting. And recall the previous discussion of mandatory arbitration found by the GAO study. The mere availability of access to the formal process may serve as an important check.

Sixth, the informal process provides no guarantee of openness. Closed or private proceedings may allow for more candid discussions, but they do not permit the check available in open proceedings where good records are kept and the forum is available to outsiders. Suspicions that there were backroom games can be exacerbated where negotiations are conducted in secret and where records are not available, as is common in informal processes. Much of the discussion of ADR processes focuses on employment disputes or individual discrimination claims, which are often handled in protected settings, but informal processes are used across the spectrum of administrative decisions where the interests at stake are not those of a few parties but concern the broad public interest.

Seventh, many types of informal processes provide no guidance or protection for the future for those who deal with an agency. The binding effect of advisory opinions and agency guidelines is questionable at best. Although it is in everyone's long-term best interest to establish consistent patterns of behavior and policy, it is not mandatory that an agency do so. Further, unlike formal proceedings, informal processes often do not result in any kind of formal written decision that can be referred to as precedent by others in the future. It is true that the binding effect of precedent in administrative law is more limited than in some other areas of jurisprudence. Still, such opinions are available and can be studied with some likelihood that an agency will honor its precedents. Such options are not available from many informal decision processes. Even in the case of more structured ADR procedures, while there may be a written decision, there is often no record in the common sense of the term, and an agreement at the outset that a decision in the case will not mean an admission of guilt or set a precedent for other cases.

The arguments in favor of confidentiality and against the development of complete and open records often have to do with the effort to keep costs down, processes less burdensome, and relationships among the parties relatively simple and as congenial as possible. However, as ADR techniques have developed and as the use of various informal techniques has been routinized, these assumptions about costs and relationships have come to be open to some question. First, some of these negotiated processes have themselves become relatively complex and quite expensive. Many involve third parties as facilitators, mediators, or arbitrators. Lawyers are more and more common in these settings. While negotiated processes can apparently be quite efficient for certain kinds of relatively limited problems, there really is very little systematic analysis in the public sector demonstrating how much resource savings there is in the expanded use of informal processes.[44] The cost calculation gets particularly murky if it turns out that agencies must address many individual problem resolutions for the same type of issue and still end up having to litigate for policy reasons. It was with just such problems in mind that the Congress warned in the Dispute Resolution Act that:

> An agency shall consider not using a dispute resolution proceeding if—
>
> (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
>
> (2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be

made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decision;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.[45]

Similarly, it is not always true that the use of informal techniques prevents conflict-oriented behavior. The fact is that negotiated proceedings can range across the spectrum from very cooperative processes aimed at so-called win/win solutions to extremely adversarial interactions in which the parties want as much of a zero sum win as they can get. Thus, the available evidence suggests that it is important in ADR proceedings to seek to get a dispute into settlement negotiations early, before the level of conflict rises too much and before the parties have hardened their positions, making them less willing to shift from position bargaining to interest bargaining.

Further, even if it is possible to establish a cooperative working relationship among some of the parties, the fact is that many of the disputes facing public managers involve multiple parties and multidimensional collections of issues. Among other things, that can mean that the problem is not resolved merely because a set of parties came to an agreement with an agency. Consider the case of a discrimination dispute in Memphis, Tennessee, that appeared to have been settled only to end up in the United States Supreme Court. African-American firefighters in Memphis sued the city, alleging discrimination in hiring and promotion practices. The parties settled with no admission by the city of discrimination but several commitments with respect to both hiring and promotion of minority firefighters. A year later the city announced that budget deficits required a reduction in force. The district court concluded that a last hired/first fired process would result in undermining the consent decree and ordered modifications in the city's layoff procedure to accommodate the agreement. The Supreme Court overturned the lower courts and ruled in favor of the firefighters' union. Among other reasons, the Court found that the union had not been a party to the earlier suit or settlement.[46] The city had no authority to bargain away the rights or contract provisions of the union or its members.

Even assuming that it is possible to get to agreement among the key parties, settlements can still require the participation of others who are not willing to cooperate. It may require judicial cooperation in the development of a consent agreement. The courts may refuse that cooperation, as in the refusal of the Third Circuit Court of Appeals to accept certification of a class for purposes of a settlement in the landmark asbestos claims cases.[47]

***Managing Under Informal Settlement*** As these last two examples suggest, there are complexities associated with the effort both to get to informal settlements and also to administer under those agreements. The tendency by ADR advocates has been to focus on getting an agreement and too seldom to discuss what happens afterwards.[48] Consider just a few of the more common problems.

It is sometimes not clear just who will be responsible for what aspects of implementation and enforcement of decrees. Judges have often found that the attorneys who were so active in negotiating agreements vanished after the decree was entered, leaving the judge and sometimes others involved wondering who is responsible for what. And if that is a problem early in the implementation period of an informal settlement, it can become much more complex as time passes.

For one thing, administrators now must be very alert when entering a new position to determine whether the organization is operating under any informal agreements, particularly judicially enforceable consent decrees. Consider the example of Minnesota State Prison at Stillwater. A 1977 consent decree had included a wide range of provisions covering, among other things, medical care issues.[49] In 1989 a case was brought, claiming that the prison administration was seriously in violation of that decree with the result that there were significant problems with tuberculosis among the inmates that could and should have been prevented.[50] A prisoner who was seriously ill with tuberculosis sought help but was not even tested for six months. In the interim his cell-mates and others complained that this inmate was a danger to them. The authorities moved the prisoner around from cell to cell and these other cell-mates ultimately contracted the disease. When the case was litigated, it became clear that prison employees were not even aware of the requirements of the consent decree, including the prison officer legally charged with its administration. The prison administrators thought that the prison physician was responsible for all medical care issues, but the physician was only a part-time employee who regarded himself as responsible only for acute and emergency care. No one had generated standards for the implementation of the decree, or at least no one was aware of any such policies. The medical care had been provided under state contracts, but the administrators responsible for the prison's operations were not aware of the contents of those contracts. The state official in charge of the state's tuberculosis program maintained that she had no responsibility for what happened at the prison. It should be clear that apart from whatever other problems there were in the operation of the prison, some of them stemmed from (1) a failure to implement adequately a consent decree, (2) a failure to ensure that responsible officials were educated as to the requirements of the decree, and (3) a failure to manage its provisions.

But even if the on-scene managers undertake to learn about and fulfill agency obligations under various kinds of settlements, there can be challenges. Specifically, it is not at all uncommon for legislative or executive branch officials to refuse to support consent decrees. Thus, a New York legislature once told the governor that although the executive branch had negotiated a consent decree covering conditions at a state facility for developmentally disabled children, that did not mean the legislature was obligated to support it! In other jurisdictions, legislatures have refused to support the results of arbitration on grounds that the constitutional power of appropriations rests with the legislature and cannot be delegated away to an arbitrator. Chief executives have been known to be less than sympathetic to requests from department heads for resources to implement settlements with which they disagree and to which they had not personally been a party.

Sometimes the reluctance of these key political leaders can stem from political pique, but they arise from other kinds of causes as well. Thus, it is a common belief that third parties who aid settlements or render arbitration judgements begin from a "split-the-difference" mentality for the simple reason that they are hired by the parties and have an incentive, should they wish to be hired again, not to anger one side or the other more than necessary. Another common frustration is the belief that the parties to settlements often use them to "game the system," packing far more into a consent

decree than they could ever get in appropriations bills and then insisting that the whole thing was mandated by the judge and they were powerless to stop him or her.

Sometimes the situation is even more troublesome. This arises when there are what amount to false negotiations. That can occur when, for example, the state negotiates an agreement and promptly repudiates it after it is issued. This is precisely what happened in Alabama when the governor, who had authorized a settlement, later disavowed the agreement, claimed that the attorneys representing the state had no authority to agree to the provisions involved, and went back to court seeking a stay of the decree pending an attempt to vacate it.[51] Then there is the problem that there are almost always contingency clauses included in the agreements that permit escape from its obligations under various circumstances. Consent decrees are, after all, treated like contracts. One attorney interviewed for research on a book on remedial decrees explained that he was perfectly happy to agree to many things in a settlement so long as he was able to draft the escape clause.

***Negotiated Enforcement*** One of the most important decisions that administrators make is whether, when, and under what conditions to take enforcement action. That is true whether it is a matter of enforcing existing statutes and regulations or the terms of a settlement agreement.

The Dispute Resolution Act and various executive orders encourage the use of flexible enforcement that is tailored to particular circumstances. However, as noted above, the discretion to be lenient and to tailor enforcement action to special needs in one case is also the discretion not to be flexible elsewhere. That kind of lack of consistency and uniformity can lead, and in many cases has led, to issues of equality and equity. That was one of the strong historical arguments in favor of standard-setting by rulemaking. And since enforcement discretion is presumptively unreviewable,[52] the consequences of arbitrariness can be very important and difficult to detect. Beyond that, of course, an agreement as between an inspector and a regulated firm may be mutually satisfactory but not at all in the public interest.

There is another dimension of enforcement, but of a different type. Rather than an issue of negotiating about whether or how to enforce, this is an issue of lack of enforcement of a negotiated agreement because of limiting terms in the agreement itself. It has become increasingly common for the parties to a settlement to include, in the agreement, commitments to keep the specific terms of the settlement confidential as well as to agree not to reveal any evidence about the dispute or the even to discuss the case at all. That has even become common in cases that were settled during the course of litigation.[53] These types of secrecy commitments can create very real difficulties for managers who must administer in the wake of settlements. Consider the case of sexual harassment resolutions. It is common for both the victim and the party accused to agree to enter into informal processes in search of a settlement in order to avoid public disclosure of potentially embarrassing information. It is common for settlement agreements in such circumstances to include prohibitions against disclosure of any information about the matter and to allow no formal statement of guilt or innocence. It is also common for the party accused to request that the record be expunged at a certain point in the future or upon completion of any actions required by the agreement to be completed, such as counseling or a probationary period. Clearly, these kinds of restrictions inhibit the ability of the administrator to communicate fully and effectively about an important management concern. It may also make it difficult to take formal action in the future in the event that it becomes necessary. And, not incidentally, it can make it appear as if the administrator is a party to some kind of cover-up.

There is one other complex area that has become more significant in recent years. It arises because of the expanding use of contractors not only to provide services but actually to administer programs on behalf of governmental units at all levels. One of the most common of these arrangements is where a not-for-profit administers a state program operated under federal grant support. In that situation, the program management contractor is frequently charged with purchasing goods and services and then ensuring compliance with the contracts. In effect, the management contractor makes enforcement decisions about compliance with contract terms and also about whether program participants will face some kind of adverse action for failure to meet program guidelines, whether they are generated at the federal or state level. The more levels and parties that are involved, the more complex and potentially problematic are the issues of enforcement under contract. This is an area that has received very little public attention despite the fact that it is increasingly pervasive.

This discussion of the challenges of using informal decision processes, including what are termed alternative dispute resolution techniques, is not intended to discourage their use. They are, as the Attorney General's Committee said, absolutely essential to effective management. However, it would not do to approach these tools as some of their advocates present them and to ignore the many important administrative issues that arise in their use and in the implementation of the decisions they produce. Clearly, the more these techniques are used by public managers, the more sophisticated administrators must be in integrating the issues of effectiveness, efficiency, equity, responsiveness, and responsibility.

## SUMMARY

Clearly, then, despite the preoccupation of the administrative law literature with the formal administrative process, most of the activity is informal rather than formal in nature. Many factors encourage the use of the informal process. A number of these factors, such as power law and sunk costs, also condition the operation of those informal processes.

In this chapter we noted that while it is not possible to categorize all the various forms of informal processes, they can generally be thought of in terms of preformal processes (which involve negotiation) filtering processes (which are used in connection with formal proceedings to simplify and shorten the process), and opting-out mechanisms for resolving disputes short of the full run of formal process.

There are several important advantages in using informal as against formal administrative processes, but there are also a number of dangers or shortcomings that can attend their use. The role of administrative discretion, which is so important in informal processes, is both one of the major advantages and, because of the danger of arbitrariness, one of the great disadvantages. It is to this double-edged concept, administrative discretion, that we turn in Chapter 9.

## NOTES

[1]U.S. Senate, Report of the Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, Sen. Doc. no. 8, 77th Cong., 1st sess. (1941), p. 35.

[2]Peter Woll, *Administrative Law: The Informal Process* (Los Angeles: University of California Press, 1963), p. 3. For a short summary of Woll's findings, see "Informal Administrative Adjudication: Summary of Findings," 7 *UCLA L. Rev.* 436 (1960).

[3]See Al Gore, Report of the National Performance Review, *From Red Tape to Results: Creating A Government That Works Better & Costs Less* (Washington, DC: Government Printing Office, 1993), and David Osborne and Ted Gaebler, *Reinventing Government* (New York: Penguin, 1992).

[4]Lisa Bingham, "Alternative Dispute Resolution in Public Administration," in Phillip J. Cooper and Chester A. Newland, eds., *Handbook of Public Law and Administration* (San Francisco: Jossey-Bass, 1997), pp. 548–49.

[5]*Id.*

[6]*Id.*

[7]See, e.g., E.O. 12866, "Regulatory Planning and Review," September 30, 1993; "Presidential Memorandum, Negotiated Rulemaking," September 30, 1993.

[8]See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

[9]See generally C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

[10]See W. Noel Keyes, *Government Contracts*, 2d ed. (St. Paul, MN: West Publishing, 1996), pp. 736–58.

[11]Bingham, supra note 4, at p. 552.

[12]*Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 417 (1961), Douglas, J., dissenting.

[13]See, e.g., Kenneth Culp Davis, *Discretionary Justice* (Baton Rouge: Louisiana State University Press, 1969), p. 158. See also *United Gas Pipeline Co. v. Ideal Cement Co.*, 369 U.S. 134, 136-37 (1962), Douglas, J., dissenting.

[14]Mark Green, *The Other Government: The Unseen Power of Washington Lawyers* (New York: Norton, 1978).

[15]One of the more interesting efforts to deal with the concept of power is described in James MacGregor Burns, *Leadership* (New York: Harper & Row, 1978), Part I.

[16]Burns's definition of power is a useful one for thinking about the nature and significance of power law. "On these assumptions, I view the power process as one in which power-holders (P), possessing certain motives and goals, have the capacity to secure changes in the behavior of a respondent (R), human or animal, and in the environment, by utilizing resources in their power base, including factors of skill, relative to the targets of their power wielding and necessary to secure such changes. This view of power deals with three elements in the process: the motives and resources of power-holders; the motives and resources of power recipients; and the relationship among all these." *Id.*, at p. 13.

[17]Green, supra note 14, at pp. 12–16.

[18]Jerome Frank, *If Men Were Angels: Some Aspects of Government in a Democracy* (New York: Harper & Brothers, 1942), chap. 10.

[19]Precisely for this reason, SEC personnel are prohibited from discussing such matters. That does not mean word of an investigation will not get out. The risk that someone might learn of SEC concern is a rather powerful deterrent.

[20]Herbert L. Packer, "Two Models of the Criminal Justice Process," in George F. Cole, ed., *Criminal Justice: Law and Politics* (Belmont, CA: Duxbury Press, 1972), pp. 35–52.

[21]Milton Heumann, *Plea Bargaining* (Chicago: University of Chicago Press, 1977).

[22]Lloyd Burton, "Ethical Discontinuities in Public-Private Sector Negotiation," 9 *Journal of Policy Analysis and Management* 23 (1990).

[23]Interview with the Executive Director of FCOS, The Fiji Coalition of Social Service Organizations.

[24]See A. Leo Levin, "Court Annexed Arbitration," 16 *Journal of Law Reform* 537 (1983), and Paul Nejelski and Andrew S. Zeldin, "Court Annexed Arbitration in the Federal Courts: The Philadelphia Story," 42 *Maryland L. Rev.* 787 (1983).

[25]Joe S. Cecil, "Report on the Mediation Program in the Eastern District of Michigan," Federal Judicial Center, April 1983, p. 1.

[26]See Karl Tegland, *Mediation in the Western District of Washington* (Washington, DC: Federal Judicial Center, 1984).

[27]Rule 16, Federal Rules of Civil Procedure, 1 *Moore's Rule Pamphlet* 134 (1981).

[28]5 U.S.C. 554(c)(1).

[29]See Bingham, supra note 4, at pp. 550–62.

[30]5 U.S.C. 562(4). See Bingham, supra note 4, at pp. 552–53.

[31]See Bingham, supra note 4, at p. 557.

[32]U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences With ADR in the Workplace* (Washington, DC: GAO, 1997).

[33]*Id.*, at p. 4.3.

[34]*Id.*

[35]"The Postal Service surveys found, for example, that 90 percent of the mediation users believed that the process was fair, compared with 41 percent of the participants in the traditional EEO process. Further, 72 percent of mediation users were satisfied with the outcomes of their disputes, compared with 40 percent of the participants in the traditional process." *Id.*, at p. 6.3.

[36]*Id.*, at p. 6.1.

[37]*Id.*, at p. 4.4. See also Bingham, supra note 4.

[38]Robert Lineberry provides a very useful introductory discussion of this subject in his *American Public Policy: What Government Does and What Difference It Makes* (New York: Harper & Row, 1977), pp. 30–36.

[39]Lineberry summarizes "The Prisoner's Dilemma" and "The Tragedy of the Commons," two stories that explain why it may often be difficult to know what is in one's best interest. *Id.*

[40]"The discretionary power to be lenient is an impossibility without a concomitant power not to be lenient, and injustice from the discretionary power not to be is especially frequent; the power to be lenient is the power to discriminate." Davis, supra note 13, at p. 170.

[41]*Id.*, at p. 72.

[42]Thus, for example, Louisiana Energy Services withdrew its application to build a nuclear fuel enrichment facility in April 1998, seven years and $34 million into the project. Roland J. Jensen to U.S. Nuclear Regulatory Commission, April 22, 1998. See also Christopher H. Foreman, Jr., *The Promise and Peril of Environmental Justice* (Washington, DC: Brookings Institution, 1998), pp. 128–29.

[43]See generally Graham Allison, *Essence of Decision* (Boston: Little, Brown, 1971); and Francis Rourke, *Bureaucracy, Politics and Public Policy* (Boston: Little, Brown, 1969).

[44]"Cost savings were difficult to establish. Only one company and one federal agency had performed evaluations that produced data regarding cost savings. . . . The agency that gathered data on cost savings found that, when the cost of settlement was factored in, it was unclear whether its ADR process was less costly than the traditional equal employment opportunity (EEO) complaint process." GAO report, supra note 32, at p. 1.

[45]5U.S.C. 582(b).

[46]*Firefighters v. Stotts*, 467 U.S. 561 (1984).

[47]*Amchem Products, Inc. v. Windsor*, 138 L.Ed.2d 689 (1997). See also *Ortiz v. Fibreboard Corp.* 1999 U.S. LEXIS 4373 (1999).

[48]I've dealt with this issue in greater detail in Phillip J. Cooper, *Hard Judicial Choices* (New York: Oxford University Press, 1988).

[49]See *Hines v. Anderson*, 439 F.Supp. 12 (DMN 1977).

[50]*DeGidio v. Pung*, 704 F.Supp. 922 (DMN 1989).

[51]See Cooper, supra note 48, at pp. 193–94.

[52]*Heckler v. Chaney*, 470 U.S 821 (1985).

[53]See Brian T. Fitzgerald, "Sealed v. Dealed: A Public Court System Going Secretly Private," 6 *Journal of Law and Politics* 381 (1990).