

NLWJC- Kagan

Counsel - Box 005 - Folder 009

Civil Justice Reform EO [1]

Kentley Shaffer

ABA Hearing  
Delegates

Remember  
it not here

Feb 5<sup>th</sup> speech  
theme problem-solvers,  
not problem-  
Talk at ADR at  
same time.  
514-2704<sup>10</sup>

**THE WHITE HOUSE**

**WASHINGTON**

**February 5, 1996**

**MEMORANDUM FOR MARY ELLEN GLYNN**  
Deputy Press Secretary

**FROM: ELENA KAGAN**  
Associate Counsel to the President

**SUBJECT: PRESS RELEASE ON EXECUTIVE ORDER**

Attached is a draft press release that the Department of Justice would like the White House to issue announcing an executive order signed today on civil justice reform. Could you give this to the appropriate person to release? The counsel's office would like to keep DOJ happy on this one. Thanks very much.

## DRAFT RELEASE

WHITE HOUSE PRESS OFFICE

TODAY PRESIDENT CLINTON SIGNED EXECUTIVE ORDER NO. ----- ,  
"CIVIL JUSTICE REFORM". THE ORDER REAFFIRMS CIVIL JUSTICE  
REFORMS OF PRIOR ADMINISTRATIONS AND DIRECTS GOVERNMENT ATTORNEYS  
TO MAKE THE BROADEST APPROPRIATE USE OF A FULL MENU OF  
ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES, INCLUDING BINDING  
ARBITRATION. THE ORDER ENCOURAGES ALL FEDERAL AGENCIES TO  
DEVELOP PROGRAMS THAT ALLOW LAWYERS TO WORK IN APPROPRIATE PRO  
BONO CAPACITIES. IT REQUIRES AGENCIES TO IMPROVE ADMINISTRATIVE  
ADJUDICATION AND IT ENCOURAGES FEDERAL AGENCIES TO DEVELOP SIMPLE  
METHODS OF EDUCATING THE PUBLIC ABOUT THE POLICIES AND PROCEDURES  
THAT THE AGENCIES HAVE RELATING TO CLAIMS AND BENEFITS. THE  
DEPARTMENT OF JUSTICE WILL COORDINATE IMPLEMENTATION OF THE  
ORDER.

~~THE CIVIL JUSTICE REFORMS CONTAINED IN THIS ORDER COMPLEMENT  
THOSE ESTABLISHED BY THE ATTORNEY GENERAL IN HER DIRECTIVE OF  
APRIL 1995, IN WHICH SHE INSTRUCTED ALL COMPONENTS OF THE  
DEPARTMENT HAVING CIVIL LITIGATION RESPONSIBILITY TO MAKE GREATER  
USE OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES IN CASES IN  
LITIGATION.~~

DRAFT OUTLINE/MCM/1-25-96  
REVISED 1-25-96, 4:00 P.M.  
REVISED 2-1-96, 4:30 P.M.

SPEECH TO ABA HOUSE OF DELEGATES  
BALTIMORE, MD  
FEBRUARY 5, 1996

"LAWYERS AS PROBLEM-SOLVERS"

We, as a society and as a profession, are in a time of great challenge. Individuals are isolated from one another, and mistrustful of public officials and institutions. Whether it is in the context of crime, education, or a myriad of other problems facing our nation, we lament the loss of community. One of the few common bonds we do share seems to be fear of "the other"--people who are different in race, economics, language or culture. We seem to be better at building virtual communities on the internet than strong healthy neighborhoods outside our front doors.

I believe we, as individual lawyers and as the legal profession as a whole, have a great contribution to make--and are making--to help bring people together and create community. We can help bring people together with our analytical and deal-making abilities. We can help bring people together with our negotiation and problem solving skills. It is particularly our role as problem solvers that I want to talk to you about this morning.

Roberta Ramos has eloquently praised the Navajo Peacemaker system, the original dispute resolution process based on Navajo tradition. As she has pointed out: "[T]he Navajo goal [in dispute resolution] of preserving the community and seeking peace is one our own system of justice must embrace. We, as lawyers, must embrace our role as peacemakers as vigorously as our role as advocates."

I join Ms. Ramos in urging us all as lawyers to be peacemakers and problem solvers for the well-being of our communities and the future of our nation.

We, of course are not alone, or even in the forefront of believing that the role of peacemaker holds the key to the future. Almost 150 years ago, a great lawyer by the name of Abraham Lincoln exhorted his colleagues in the following words: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the *nominal* winner is often a *real* loser - in fees, and expenses, and waste of time. As a peacc-maker the lawyer has a superior opportunity [sic] of being a good man. There will still be business enough."

We as lawyers must seek solutions to problems, not just resolution of legal issues. To do this we must start at the very beginning. Part of what we do wrong is to make the law so complex. As Winston Churchill said "we need to speak in the small old words." Each lawyer can do this as he or she advises a new client, drafts a will or contract, or files a pleading in court.

This sounds like such a small thing, but I am confident that it will raise the prestige of our profession by helping demystify the law for people and making them see lawyers and the law as the true sword and shield they can be.

A step even more profound in this direction is to scrutinize those areas of the law that do not have to be there and literally remove them. I know there are some of you here who are very interested in this concept sometimes called decriminalization. I think you are embarking on exactly the right journey. Taking nonadversarial proceedings out of court and making them administrative in nature is one example. Another is to remove the necessity of a formal power of attorney between spouses. We should turn a new eye to our statute books and weed out the unnecessary pages.

As lawyers we must work proactively to solve problems before litigation is necessary or unavoidable. We should model the skilled physician who looks beyond the patient's immediate symptoms to help him or her identify the underlying illness, treat it holistically, and prescribe preventive measures. So, for instance, it is good, but not sufficient, for a prosecutor to obtain convictions but fail to work on such issues as crime prevention. It is good, but not sufficient, for a public defender to obtain an acquittal for the client but fail to address his drug problem. Law schools and the organized bar must train and encourage lawyers to see beyond the immediate lawsuit and practice holistic and preventative law.

We must have the courage to stop short of litigation and use a more low-key method to resolve disputes particularly in the context of on-going relationships. As trusted counselors, we have a critical role to play in advising clients to mediate outside of court rather than rushing into high profile litigation. A few years ago when the Black Coaches Association was on the verge of boycotting the NCAA basketball tournament, the lawyers for the parties, with the assistance of the Justice Department's Community Relations Service, strongly advised their clients to enter into mediation to resolve the dispute. The lawyers were indispensable in fashioning a process whereby the dispute was not only resolved but the parties could continue to operate together.

We must remember that litigation is a means to an end, and not an end unto itself. Prevailing in legal arguments and obtaining judgments are sufficient only in very limited circumstances. We must always keep our eye on the ball of solving the problem that created the legal claim. We must never forget that our legal system exists to resolve disputes, not exacerbate them. A profound example of this is the Navajo-Hopi land dispute in Arizona that has been ongoing for 110 years and has been litigated in federal court since the 1950's. There are over 30 individual lawsuits, involving millions of dollars, not to mention the physical homes and religious and cultural claims of many people and two nations: the Navajo and the Hopi. For the last four and a half years, the Justice Department and the Department of the Interior have participated in a court-ordered mediation in an effort to settle the dispute--something that neither Congressional action nor court judgments and orders have been able to do. This effort has been extremely time-consuming and has called for many skills that are exactly the opposite of ones most commonly employed in litigation--building bridges and trying to understand what underlies the other parties' concerns and positions, rather than refuting them. But the effort is paying off. In the last few months there have been significant breakthroughs and all parties are confident that we are close to final resolution.

Sometimes litigation is a useful tool to focus attention on a problem or compel dialogue. Violations of procedural statutes are sometimes alleged **in the hope of temporarily stopping** some action, or to get the attention of the parties who otherwise would not sit down together to discuss a problem. But we must not allow **a dispute over procedure** to displace our basic goal of solving the underlying problem. Three years ago the City of Phoenix decided to expand its airport. The neighboring City of Tempe feared **a larger airport would bring even more unwanted noise**. It sued Phoenix and the federal government. **On the surface, the lawsuit involved the adequacy of the environmental impact statement**. However, the underlying controversy had to do with the construction of **a new runway**, the long term operation of the airport and limitations **on aircraft noise**. The court wisely referred the case to mediation. The Justice Department was **confident that the case could be won but participated in the mediation because a resolution of the lawsuit would not end the dispute between the parties**. Using **mediation**, the parties reached an agreement that involved both Phoenix, Tempe and the FAA in terms to **guide the operation of an expanded airport and the development of noise restrictions acceptable to all**.

Another example of which I am very pleased is the resolution of a lawsuit alleging civil rights violations by the Border Patrol agents in New Mexico and Texas. Again, with the very able assistance of our Community Relations Service, the plaintiffs were able to work out an agreement with the Border Patrol and INS that involved training for the 1400 border patrol agents in New Mexico and Texas giving them information about the civil rights of immigrants and the building of productive relationships with communities on both sides of the border. The goal of the agreement was not just to resolve the lawsuit, but to create an on-going problem-solving relationship among the agencies and the communities.

I hope the examples I have been using indicate to you that the Department of Justice, the lawyers for the federal government, are also trying to be problem-solvers. There is a role for us as well as for the private bar. This past year I have signed an important order **directing all of our civil litigating components to promote broader use of dispute resolution methods**. The Department is now **vigorously implementing our new ADR policy**. We are committed to solving problems raised in lawsuits; not just winning litigation. The use of ADR is encouraged in appropriate cases. All departmental litigators are being trained in ADR techniques. We will assist in training attorneys from other agencies. Our Office of Legal has issued an opinion that binding arbitration is constitutional, and this resource will be added to the menu of possible ADR techniques that may be employed for the resolution of litigation.

the Civil Rights Division of the Justice Department makes enormous efforts to help people comply with the law; enforcement through litigation is often a matter of last resort. For instance, it has an extensive program of technical assistance with regard to the Americans with Disabilities Act. In the five years since the ADA became law, the Department has distributed more than 70 million ADA publications to the public; established a toll-free information line that receives approximately 6,500 calls each month from the public; distributed public service announcements to hundreds of TV and radio stations; and provided grants to trade associations and other organizations for specially-tailored publications and videotapes on the ADA. **The Civil Rights Division is also providing mediation to resolve ADA claims, recognizing once more that use of dispute resolution techniques may provide faster, cheaper, more efficient and lasting**

resolutions of these disputes.

Another example involves CRIPA, the Civil Rights of Institutionalized Persons Act. This Act given the Department the responsibility to investigate state-run residential facilities, including nursing homes, facilities for persons with mental disabilities, juvenile detention facilities and state prisons where there are allegations of systemic, widespread conditions that violate constitutional rights. Rather than immediately initiating a lawsuit, the Civil Rights Division gains access to the facility, conducts a site visit and works with experts who assess the facility and recommend corrective action. Based on the report, the Department works with the institution to resolve the problems. In half of the 140 completed investigations, voluntary compliance has been achieved. **I am also pleased to report that the litigators responsible for these cases were among the very first in the Department to receive training in the use of ADR in their cases.**

I am very pleased to announce today that President Clinton has recently signed an Executive Order on Civil Justice Reform. This executive order reaffirms certain civil justice reform measures promoted by previous Administrations. But it also goes further: **First, the President has removed the prohibition, imposed by the previous administration, on the use of binding arbitration by federal agencies. As a result, agencies and government attorneys are encouraged to use the full measure of alternative dispute resolution techniques that are available.** Second, all federal agencies are urged to develop appropriate pro bono programs for their attorneys. Third, federal agencies are required to improve administrative adjudication by reducing delay in decision-making, facilitating self-representation where appropriate, expanding non-lawyer counseling and representation where appropriate, and investing maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible. Finally, federal agencies are encouraged to develop effective and simple methods, including the use of electronic technology, to educate the public about their claims and benefits policies and procedures. The Justice Department will be responsible for coordinating efforts by all federal agencies to implement the order. This Administration is firmly committed to improving access to justice for all persons. I believe this is most effectively done in our role as problem solvers. **the President's executive order moves us farther in that direction.**

Being peacemakers and problem solvers also means that we as lawyers must get out of our offices and into our communities. I have encouraged all Justice Department employees to volunteer in schools, community service organizations, and especially local bar association activities. Last January I sent a memorandum to all Department attorneys encouraging them to serve on bar committees designed to improve the law and the legal profession. The Department is in the process of revising its policies regarding the participation of Department attorneys in appropriate and non-conflicting pro bono activities. One aspect of this policy will be to adopt the ABA's aspirational goal that every member of the bar provide at least 50 hours of pro bono service each year.

The ABA is exemplary for its efforts to encourage attorneys to be problem-solvers in their communities. I am so very proud of the work of the Young Lawyers Division in creating courthouse waiting rooms for children; the mentor programs for at-risk youth, such as the Aspiring Youth Program in Texas; the adopt-a-school program, such as the one done by the Baltimore City State's Attorney office or the Wake County Bar Association Playground Project

in Raleigh, North Carolina; law-related education programs such as the one sponsored by the Young Lawyers Division of the Colorado Bar in the Denver metropolitan area; and peer mediation programs such as the PEACE project in the State of Wisconsin. These and so many others are invaluable efforts to put our problem solving skills at the disposal of our youth, to prevent violence and crime, and to build healthy communities.

The legal profession has important skills in real estate transactions, corporate development, and tax law to contribute to this process of community building. For instance, pro bono transactional lawyers from large firms participating in the ABA Law Firm Pro Bono Challenge have provided legal assistance to develop low-income housing for the homeless in Washington, DC. In New York City they have provided legal advice to a coalition of unemployed bakers to establish a community bakery. In metropolitan Phoenix they have opened the first privately-run free law clinic at a local supermarket where they will use their skills to assist other community development efforts.

The ABA also stands as an institution which works with other institutions, moving away from professional isolation and utilizing the strengths of a multi-disciplinary approach to problem solving. Your Commission on Domestic Violence and your Center on Children and the Law are real testaments to the importance of this kind of collaborative work. We must continue to reach out to useful models in other professions. So for instance, the public health model of epidemiology may help move us forward in identifying the causes of violence and developing strategies to prevent it.

The ABA and all individual lawyers must continue to be a voice for those who have legal needs but are not heard or helped. The empirical data gathered by your Comprehensive Legal Needs Study is so very important in this regard. Lawyers, community leaders, and public officials must pay close attention to the evidence of enormous unmet legal needs of low and moderate income persons. The Policy Recommendations based on this study are important guidelines in reshaping our professions and the institutions of the justice system to make justice more possible for all. I hope that the bar, the bench, and other branches of government will give serious consideration to these recommendations.

These policy recommendations, as well as the recommendations of the Commission on Nonlawyer Practice have urged expanded use of nonlawyers in appropriate situations. As many of you know, I have long endorsed this concept. Many of the problem areas in which there are the greatest number of unmet legal needs are also the areas that bring most people to court: domestic relations, housing, probate, and small consumer problems. We must be willing to develop ways for people to have more choice in their problem solving resources including competent and accountable nonlawyers; technology to assist in self-representation; and new partnerships between legal and nonlegal service providers.

Law schools and other educational institutions have a very important role to play. We must begin to train more lawyers who have multi-disciplinary skills, who are equipped to practice the kind of law that will meet the most pressing legal needs of our people, who have strong negotiation and mediation skills, and who know how to work cooperatively and respectfully with clients. Law schools are concerned that their graduates are not getting jobs, at the same time that

we are clearly documenting the extent of unmet legal need among low and moderate income persons. We must begin to work together as a profession, matching need with opportunity. I know that the University of Maryland School of Law Clinical Program attempts to do this very thing. It offers a model from which we could all learn. I look forward to the time when not only lawyers have this kind of expansive education, but nonlawyers as well. We must expand our thinking to a college of community advocacy that will train nonlawyers how to solve neighborhood problems before they become crimes, how to advocate for children and families, how to navigate housing and welfare bureaucracies, and how to organize to ensure safe and healthy neighborhoods.

We have much to do. But I am confident that if, together, we allow ourselves to think expansively; if we encourage each other to imagine a brighter future; if we support each other to make our own profession a community of peacemakers, we will indeed succeed.

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of litigation and use a more low key method to resolve disputes. We must remember that litigation is a means to an end and not an end unto itself. We as lawyers must get out of our offices and into our communities. We have much to do."

## DEPARTMENT OF JUSTICE

Draft: Press Release

Today in her speech to the ABA House of Delegates meeting in Baltimore, the Attorney General announced that President Clinton has signed an executive order on civil justice reform. The Justice Department will be responsible for coordinating efforts by all federal agencies to implement the order. The order reaffirms significant civil justice reform measures adopted by other administrations, and underscores the importance of using a wide range of alternative dispute resolution techniques (mediation, early neutral evaluations, arbitration) to resolve government disputes outside of the courtroom.

With an eye toward improving access to justice for all persons, the order encourages all federal agencies to develop appropriate pro bono activities for their attorneys; to improve administrative adjudication by reducing delay, facilitating self representation, expanding non-lawyer counseling, and investing discretion in fact-finding officers to encourage early appropriate settlement; and to develop simple effective methods of educating the public about policy and procedures.

Speaking about the importance of lawyers as problem solvers, the Attorney General said "we must have the courage to stop short

Kathy

WHITE HOUSE STAFFING MEMORANDUM

DATE: 2-2 ACTION/CONCURRENCE/COMMENT DUE BY: 2-2 COB

SUBJECT: Exec. Order on CIVIL JUSTICE REFORM

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McCURRY	<input type="checkbox"/>	<input checked="" type="checkbox"/>
PANETTA	<input checked="" type="checkbox"/>	<input type="checkbox"/>	McGINTY	<input type="checkbox"/>	<input type="checkbox"/>
McLARTY	<input type="checkbox"/>	<input type="checkbox"/>	NASH	<input type="checkbox"/>	<input type="checkbox"/>
ICKES	<input type="checkbox"/>	<input checked="" type="checkbox"/>	QUINN	<input checked="" type="checkbox"/>	<input type="checkbox"/>
LIEBERMAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	RASCO	<input checked="" type="checkbox"/>	<input type="checkbox"/>
RIVLIN	<input type="checkbox"/>	<input type="checkbox"/>	SOSNIK	<input type="checkbox"/>	<input type="checkbox"/>
BAER	<input type="checkbox"/>	<input type="checkbox"/>	STEPHANOPOULOS	<input type="checkbox"/>	<input checked="" type="checkbox"/>
CURRY	<input type="checkbox"/>	<input type="checkbox"/>	STIGLITZ	<input type="checkbox"/>	<input type="checkbox"/>
EMANUEL	<input type="checkbox"/>	<input type="checkbox"/>	STREETT	<input type="checkbox"/>	<input type="checkbox"/>
GIBBONS	<input type="checkbox"/>	<input type="checkbox"/>	TYSON	<input type="checkbox"/>	<input type="checkbox"/>
GRIFFIN	<input type="checkbox"/>	<input type="checkbox"/>	WALLEY	<input type="checkbox"/>	<input type="checkbox"/>
HALE	<input type="checkbox"/>	<input type="checkbox"/>	WILLIAMS	<input type="checkbox"/>	<input type="checkbox"/>
HERMAN	<input type="checkbox"/>	<input type="checkbox"/>	<u>KAMARCK</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HIGGINS	<input type="checkbox"/>	<input type="checkbox"/>	<u>Angell</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
KLAIN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<u>Clock</u>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
LAKE	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
LINDSEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

REMARKS: Please advise if you have any comment

RESPONSE:

ADVANCE



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

rec'd 10:15am  
2-2-96

THE DIRECTOR

MEMORANDUM FOR THE PRESIDENT

FROM: Alice M. Rivlin  
Director

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

SUMMARY: This memorandum forwards for your consideration a proposed Executive order that was prepared by the White House Counsel's Office. The proposed order would replace the current civil justice reform Executive order (Executive Order No. 12778) with a new order to reflect changes in legal interpretations and this Administration's policies in civil justice reform.

BACKGROUND: Executive Order No. 12778 of October 23, 1991 (E.O. 12778) directed Executive agencies and litigation counsel to take certain actions to promote the just and efficient resolution of civil claims. Among other actions, agency counsel were to: (a) give the parties in a dispute an opportunity to settle the dispute before filing a complaint; (b) make ongoing efforts to settle a case after a complaint has been filed; and (c) establish procedures to ensure that discovery requests were not unreasonable and unduly burdensome.

The proposed order would retain the actions described above, but would replace E.O. 12778 to reflect changes in legal interpretations and this Administration's policies concerning civil justice reform. Regarding changes in legal interpretations, E.O. 12778 bars the United States from entering into binding arbitration. As a result of an Office of Legal Counsel opinion, the proposed order would reverse this policy by allowing the United States to enter into binding arbitration. Further, the proposed order would eliminate a provision in E.O. 12778 that improperly limits the admissibility of certain expert testimony.

The proposed order, in line with Administration policy, would, among other things: (a) encourage agencies to develop pro bono legal and other volunteer programs to be performed by government employees on their own time; (b) delete a provision that implies a "loser pays" policy; and (c) direct agencies to review their administrative adjudicatory processes to identify and eliminate any biases in their processes.

None of the affected agencies objects to the proposed Executive order.

RECOMMENDATION: I recommend that you sign the proposed Executive order.

Attachment

EXECUTIVE ORDER

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CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to

participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal ADR methods, litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer

prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees to be performed on their own time, including attorneys, as permitted by statute, regulation, or other rule or guideline.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and

developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation, as appropriate,

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear legal standard for affected conduct;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation, as appropriate.

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of OMB and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Agency Review. The agencies shall review such draft legislation or regulation to determine that either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient

resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for

internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only.

It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order No. 12778 is hereby revoked.

THE WHITE HOUSE,



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

FAX TRANSMISSION

TO: Elana Kagan  
AGENCY/DEPT: White House Counsel's Office  
ROOM NO./BLDG. \_\_\_\_\_  
TELEPHONE: 456-7594  
FAX NUMBER 456-1647

FROM: MAC REED  
Office of the General Counsel

TELEPHONE NO.: (202) 395-5600  
FAX NUMBER NO.: (202) 395-7294

DATE: 1-19-96

NO. OF PAGES (including cover): \_\_\_\_\_

Elana,

Attached is the revised "Civil Justice Reform" Executive order. It incorporates the changes we agreed to at our last meeting and OLC changes to Section 4 (b) and (c) and the then recommended deletion of old Section 8 (c).

Please review and advise by 12:00 noon Monday January 22<sup>nd</sup>.

Thank you.  
Mac

*Handwritten notes:*  
OMB signed M  
OLC - 8:134 changes  
Walk thru OMB - sit in hall  
on an abstract  
MR-memo to Pres  
↓  
Rosen & Hart  
from at legal by  
↓  
Todd - to PR  
staff  
↓  
with in 2  
maybe couple  
of mos.  
ceremony - Pres?  
signature

**DRAFT**

## EXECUTIVE ORDER

1-19-96

3:00 P.M.

## CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to

participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer

prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

- (1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;
- (2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;
- (3) requesting early trial dates where practicable;
- (4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and
- (5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys, as permitted by statute, regulation, and other rule or guideline.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear legal standard for affected conduct, rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation, as appropriate,

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear legal standard for affected conduct;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

- (I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;
  - (J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;
  - (K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;
  - (L) sets forth the standards governing the assertion of personal jurisdiction, if any;
  - (M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;
  - (N) specifies whether the legislation applies to the Federal Government or its agencies;
  - (O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;
  - (P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and
  - (Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.
- (2) that the regulation, as appropriate,

- (A) specifies in clear language the preemptive effect, if any, to be given to the regulation;
- (B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;
- (C) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;
- (D) specifies in clear language the retroactive effect, if any, to be given to the regulation;
- (E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;
- (F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and
- (G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Agency Review. The agencies shall review such draft legislation or regulation to determine that either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards.

Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient

resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for

internal guidelines that may be issued by other agencies pursuant to this order.

Sec. 6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code.

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Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

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(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only.

It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

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(c) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order No. 12778 is hereby revoked.

THE WHITE HOUSE,

## Memorandum



Subject Civil Justice Reform Executive Order	Date December 7, 1995
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To  
Mac Reed  
Office of Management and Budget

From  
Rosemary Hart  
Karen A. Popp  
Office of Legal Counsel

As we agreed at the meeting last week, OLC has spoken with Cathy Sheafor of the Associate Attorney General's Office about certain unresolved issues relating to the Civil Justice Reform Executive Order. We have agreed that the following changes should be made to the Order.

Section 4 (b) and (c) should read (changes have been underlined):

"(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible."

"(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals."

Section 6(a) should read:

"(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code."

The paragraph at Section 8(c) should be deleted entirely.  
Please let us know if you have any questions.



PETER R. STEENLAND, JR.  
SENIOR COUNSEL  
FOR  
ALTERNATIVE DISPUTE RESOLUTION

U.S. DEPARTMENT OF JUSTICE  
ROOM 5706  
WASHINGTON, D.C. 20530

(202) 616-9471  
FAX: (202) 616-9570



U.S. Department of Justice  
Office of the Associate Attorney General  
*Alternative Dispute Resolution Program*

Washington, D.C. 20530

Mon. Nov. 13

Elena -

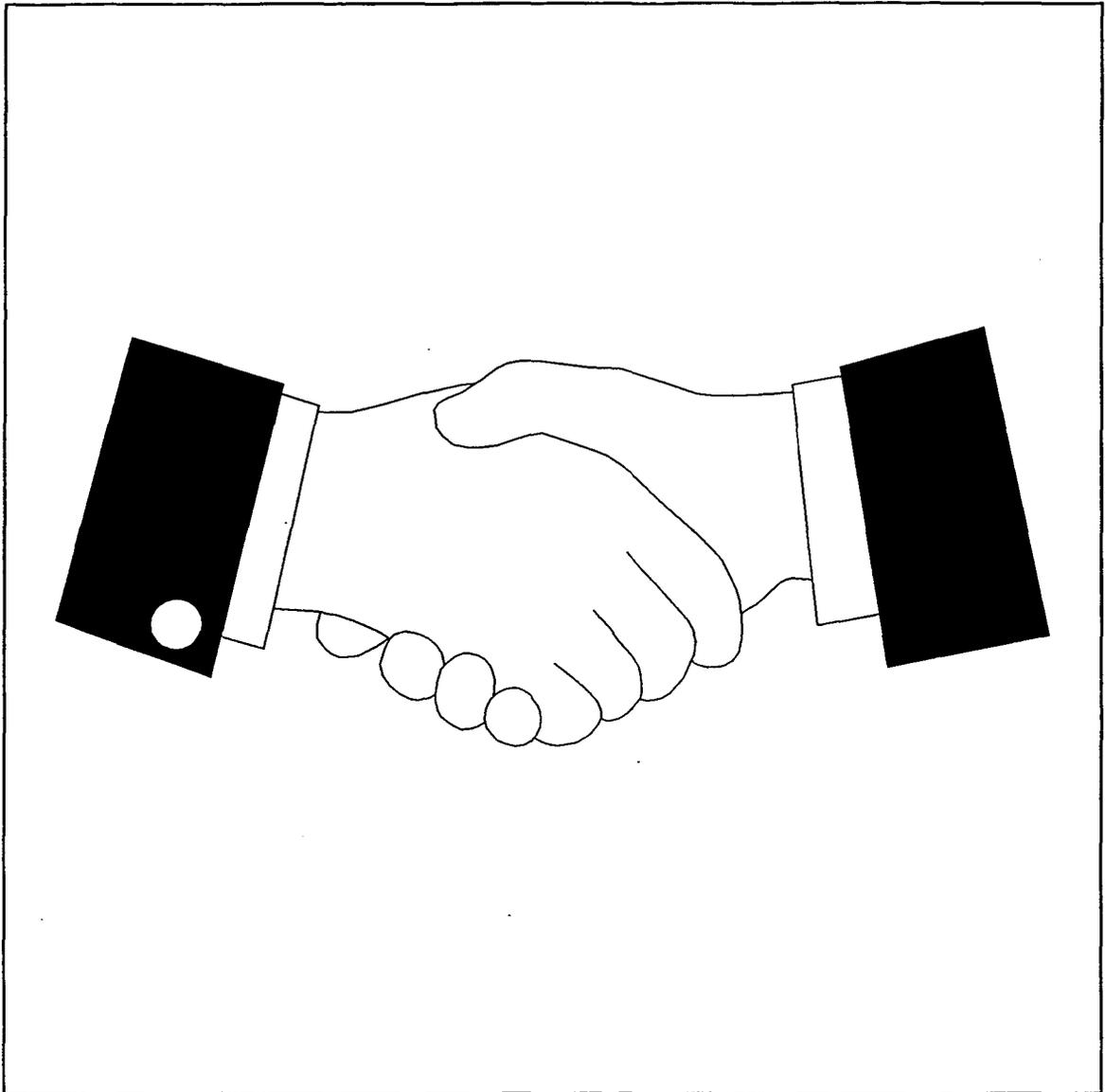
John Schmidt requested that I send you a packet of information about the Department's ADR program.

Please find enclosed: the AG's ADR order, some press releases, and an article on ADR.

Please let me know if you have any questions.

Cathy Sheator  
514-2704

# ALTERNATIVE DISPUTE RESOLUTION PROGRAM



## **ALTERNATIVE DISPUTE RESOLUTION**

**On April 6, 1995, Attorney General Janet Reno signed an Order on alternative dispute resolution (ADR). The Order requires each civil litigating component to develop case selection criteria and a policy statement on ADR by September 11, 1995. The Order also establishes the position of Senior Counsel for ADR. Peter R. Steenland, Jr. was appointed Senior Counsel on June 8, 1995. In addition, the Order directs each component to develop training programs which will introduce litigators to a broad range of problem-solving and conflict management techniques including mediation, early neutral evaluation, arbitration, and mini-trials.**

**ADR, also called "appropriate dispute resolution," can provide flexibility, creativity, and control that lawyers and clients do not enjoy in litigation. It can enhance the public's access to justice by reducing delays and costs too often associated with government litigation. And, it often produces better, more comprehensive long-term solutions to problems.**

**ADR is quickly becoming part of state and federal court systems with many districts mandating consideration of a broad range of ADR processes or requiring mediation or arbitration. Many courts have developed elaborate court-annexed and court-sponsored ADR programs which draw upon a large base of volunteer mediators.**

**At the same time, private litigants are demanding quick, efficient and comprehensive resolution of government disputes. More than 800 major companies have signed the Center for Public Resources Corporate Policy Statement on Alternatives to Litigation. The statement obliges subscribing companies to consider negotiation or ADR before pursuing litigation with other signatories.**

**The report of the Vice President's National Performance Review admonished federal agencies to expand their use of alternative dispute resolution techniques. And, over 80 federal agencies and their components have appointed dispute resolution specialists as defined in the Administrative Dispute Resolution Act, 104 Stat. at 2737. A host of those agencies are participating in a federal Shared Neutrals program for the Washington, D.C. metropolitan area, a program that provides for sharing by federal agencies of a pool of trained employees within the Executive Branch to resolve internal governmental disputes.**

**With justice for all being our goal, we will pursue efficient and expeditious appropriate dispute resolution.**

**For more information contact: Peter R. Steenland, Jr., Senior Counsel for ADR, (202) 616-9471.**

SPECIAL REPORT

# ALTERNATIVE DISPUTE RESOLUTION

*New Challenges and Directions*

## Special Rules Apply in ADR Involving Feds

*Differences Create  
Traps for Unwary*

BY ROBERT J. ROBERTORY

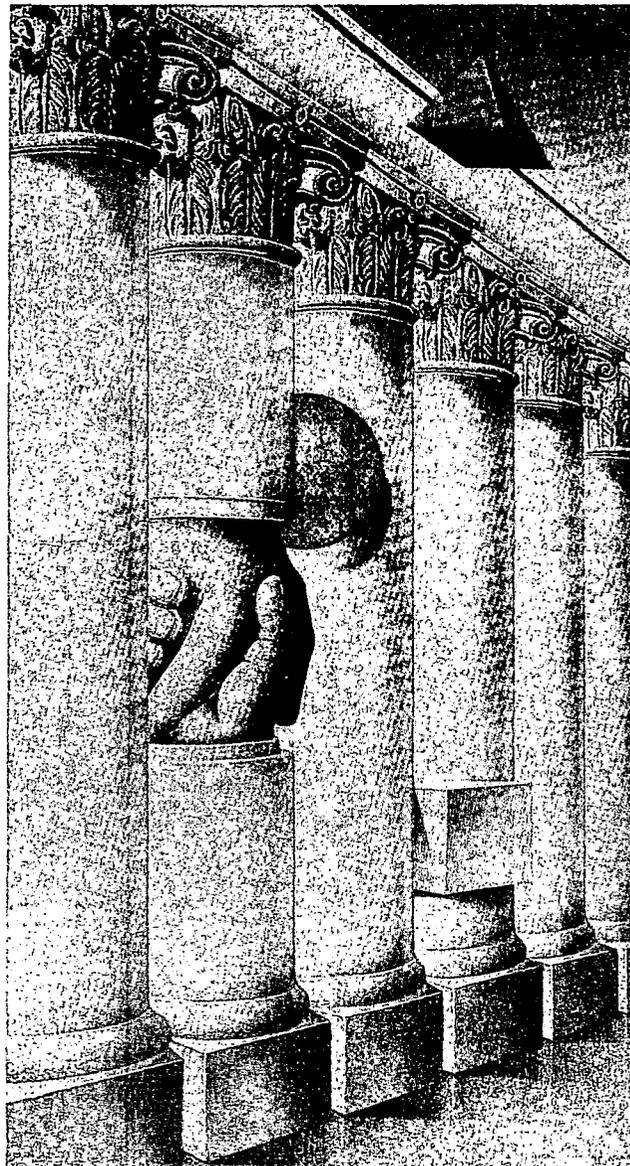
When alternative dispute resolution involves the United States as a party, certain legal constraints arise that are inapplicable to ADR involving only private parties. Some of these unique factors are discussed below.

• **Binding Arbitration.** Although the Administrative Dispute Resolution Act, enacted in 1990, removed the previous total ban on the use of arbitration by federal agencies, the statute places a limitation upon *binding* arbitration. To permit the government to escape adverse awards, an arbitration award becomes final only 30 days after it is served on the parties; during that period, the head of the agency has the power to vacate the award.

The statute makes no mention of allowing the nongovernment party to the arbitration to avoid the award within the period. Thus, any corresponding right to reject must be spelled out in the agreement to arbitrate.

So far, there has been no reported experience with agency heads exercising this power. A private party contemplating arbitration with the government therefore should carefully consider whether it is beneficial to enter into a unilaterally binding arbitration, as opposed to ADR in which it retains control to accept or to reject a particular resolution. Participation in arbitration entails virtually the same preparation, expense, and presentation effort as litigation (especially litigation before a board of contract appeals), but without the right of appeal or the right to reject a resolution if the person(s) rendering the decision should err.

• **Court-Annexed Arbitration.** The Justice Department has issued regulations, 28 C.F.R. §50.20, controlling government participation in arbitration pursuant to a



## Order Fosters ADR Involving Justice Dept.

*AG Seeks to Take  
Lead in ADR Use*

BY PETER R. STEENLAND JR.

The Justice Department is involved in about 170,000 civil justice matters each year. In fact, it is the biggest user of the federal courts. What a help it would be to an overburdened court system if the Justice Department would take the lead in implementing alternatives to litigation in a substantial number of cases.

In April, Attorney General Janet Reno signed an order that helps the Department of Justice move toward that goal. Her order established an alternative dispute resolution program that will streamline the way the department handles many civil matters. We hope this will complement and enhance the work of other jurisdictions at the state and local level that are employing ADR as an alternative to courts and judges.

ADR can resolve legal disputes through such methods as arbitration, mediation, mini-trials, and early neutral evaluation. At the federal level, ADR mechanisms have been employed successfully by the Army Corps of Engineers, Army Materiel Command, the U.S. Environmental Protection Agency, and the Federal Deposit Insurance Corporation.

One good example of how a commitment to ADR can work beneficially is the experience of the Environment and Natural Resources Division, where Assistant Attorney General Lois Schiffer has made ADR a top priority. Working with U.S. attorneys, the division has used ADR to settle environmental and natural resources litigation nationwide. Through ADR, the division has settled many complex multiparty cases faster and at less expense than is possible with conventional litigation methods. An added benefit is that the sooner a case is resolved, the sooner environmental contamination may be remedied.

# Justice Department Will Broaden ADR Use

ADR AT DOJ FROM PAGE S25

Approximately 150 of the cases the division has identified as suitable for ADR currently are in some stage of the ADR process—typically mediation. These disputes involve a wide range of cases, including Superfund cost recovery and allocations, regulatory actions, penalties, condemnations, and natural resource management decisions. The division's first significant use of ADR was in 1992 when a court-ordered mediator played a pivotal role in attempts to settle a Navajo-Hopi land dispute. The division expanded its usage of ADR in late 1993 and through 1994.

Here are some examples of the division's successful employment of ADR:

- In *United States v. Acme Solvents*, a court-appointed special master played a key role in facilitating an agreement by persuading the parties involved in the suit to agree to their share of the volume of contamination, and then to agree to pay the United States for its costs in removing the contaminants.

- In another Superfund case, *United States v. Boeing*, a mediator, in a one-day session, fashioned an agreement in principle apportioning clean-up costs between the government and the company.

- A court-sponsored mediator in *Great Gila Biodiversity Project v. Forest Service* guided discussions between the parties in a manner that fostered an understanding of the underlying concerns, resulting in an agreement that addressed those concerns and protected the interests of the agency.

These examples demonstrate how ADR can provide lawyers and their clients a flexible, creative, and efficient approach that's absent in litigation. ADR can also

*The order requires each civil litigating component to develop case-selection criteria and an ADR policy statement.*

produce quick solutions and increase public respect for the legal system by reducing delays and costs, which are too often associated with litigation. Moreover, ADR can produce models for comprehensive, long-term solutions.

#### THE PUBLIC ALWAYS LOSES

Recently, the vice president's National Performance Review Report concluded that ADR mechanisms can help agencies do more with less. The NPR also found that litigation involving the government takes years to resolve, postponing the implementation of important programs and hampering the work of government employees.

Even when the government prevailed completely, victory was sometimes an illusion because litigation was so disruptive for agencies and programs. In addition, significant sums were spent for expert witnesses and other litigation expenses. Government lawyers also were prevented from devoting more time to other cases. Thus, the public was not the victor, even when the government won.

This is why Attorney General Reno signed the order on alternative dispute resolution. Under the order, each civil litigating component is required to develop by Sept. 11 case-selection criteria and a policy statement on ADR, which includes a commitment to formulate a training plan. The order created a senior counsel position to head the ADR program.

Each civil litigating component at the department—the Antitrust, Civil, Civil Rights, Environment, and Tax divisions and the Executive Office for United States Attorneys—has spent the last three months developing workable and meaningful ways to select potential ADR cases.

#### CHANGING LANDSCAPE

We are not trying to force the use of ADR in cases where it is not appropriate: ADR is just one of many tools for our litigators to use when appropriate. Some cases need to be won or lost in their entirety. Some turn on important governmental policies requiring a judicial decision. In those cases, our advice is not to use ADR. Nevertheless, we do think that ADR should be considered in most civil cases. Our goal is to help our litigators function as efficiently and effectively as possible in the existing legal landscape—a landscape that is quickly changing to recognize the effectiveness of ADR.

ADR is swiftly becoming part of state and federal court systems. Many districts mandate consideration of a broad range of ADR processes, or require mediation or arbitration. A number of courts have developed elaborate court-annexed and court-sponsored ADR programs, which draw upon a large base of volunteer mediators. More than 800 major companies and 400 of the nation's 500 largest law firms have signed policy statements on alternatives to litigation that oblige subscribing companies and firms to consider negotiation or ADR before pursuing litigation with other signatories.

The attorney general has asked us to promote the wider use of ADR. To achieve that, we are developing incentives to encourage broader use of ADR by our litigators, including a departmental award for work in that field, and promotions for those who bring cases to a swift and efficient resolution without litigation. We have worked to develop case-selection criteria. We will train every lawyer whose practice is substantially civil in negotiations and ADR. In short, we are committed to using ADR.

It is the job of government lawyers to pursue justice. Sometimes justice comes through compromise achieved outside of the courtroom. The attorney general's order is just the first of many steps toward ensuring that Justice Department lawyers are experts in a fuller range of litigation skills, including negotiation and alternative dispute resolution. With superior use of the full range of ADR techniques, we can obtain flexibility, creativity, efficiency, control, and cost savings in the resolution of disputes.

*Peter R. Steenland Jr. is senior counsel for ADR at the U.S. Department of Justice.*

U.S. DEPARTMENT  
OF JUSTICE

# Order

[ OBD 1160.1 ]

Subject: PROMOTING THE BROADER APPROPRIATE USE OF ALTERNATIVE  
DISPUTE RESOLUTION TECHNIQUES

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1. PURPOSE. The purpose of this order is to promote the broader use of alternative dispute resolution (ADR) in appropriate cases to improve access to justice for all citizens and to lead to more effective resolution of disputes involving the government.
2. SCOPE. The provisions of this order shall apply to all Departmental litigating divisions and to all U.S. Attorneys. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of forfeiture.
3. MODIFICATION. This order expands upon but does not otherwise modify the Department of Justice's Memorandum of Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778, notice of which was published at 58 Fed. Reg. 6015-03.
4. AUTHORITY. In addition to the general authority conferred upon the Attorney General by law, specific authority to provide ADR guidance is provided by section 3 of the Administrative Dispute Resolution Act of 1990, Pub. Law 101-552, 104 Stat. 2736-37.
5. DEFINITION. As used in this order, "formal ADR techniques" include, but are not limited to, arbitration, mediation, early neutral evaluation, neutral expert evaluation, mini-trials and summary jury trials.
6. CREATION OF POSITION OF SENIOR COUNSEL FOR ALTERNATIVE DISPUTE RESOLUTION. There shall be created within the Department of Justice, the position of "Senior Counsel for Alternative Dispute Resolution." The Associate Attorney General shall designate a career employee of the Department of Justice at the Senior Executive Service level to fill this position. The Senior Counsel shall develop policy on, and promote aspects of ADR, and in furtherance of that goal shall:
  - a. Assist senior management in developing policies for the use of ADR, including revising the Department Guidance on the Use of Alternative Dispute Resolution for Litigation in the Federal Courts.

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Distribution: OBD/H-1  
OBD/F-2

Initiated By: Office of the Associate Attorney General

- b. Assist with the design and execution of ADR-related training, recordkeeping, program evaluation and reporting functions.
  - c. Provide advice and assistance to Department supervisors and employees on selecting appropriate cases for using ADR and on the application of particular ADR techniques.
  - d. Report regularly to the Attorney General, through the Associate Attorney General, on the status of the Department's ADR activities.
  - e. Represent the Department in government-wide ADR activities, including programs and projects with the Administrative Conference of the United States, the Office of Management and Budget, the National Performance Review, and the federal courts.
  - f. Advise senior management on legislation, rulemaking, and other policy matters relating to ADR.
  - g. Serve as the Dispute Resolution Specialist for the Department of Justice as defined in Section 3(b) of the Administrative Dispute Resolution Act, 104 Stat. at 2737.
  - h. Perform such other duties and functions related to the promotion of ADR as may be assigned by the Attorney General, the Deputy Attorney General and the Associate Attorney General.
7. COMPONENT ADR GUIDANCE. By September 11, 1995, each litigating division and the Executive Office for United States Attorneys acting on behalf of the United States Attorneys shall provide its attorneys with ADR guidance containing the following provisions:
- a. A policy statement by the head of the component indicating that attorneys are expected to use ADR in appropriate cases as an alternative to litigation and are to cooperate with court-annexed or court-sponsored ADR programs and with efforts to develop and evaluate such programs.
  - b. A set of criteria to be used in identifying specific cases appropriate for resolution through settlement negotiations or the use of a formal ADR technique. The component guidance should also identify ADR methods most suitable to resolving certain categories of cases, and criteria for the selection of ADR providers.
  - c. A requirement that any attorneys whose practices are substantially civil attend a comprehensive basic training program in negotiation and ADR and that all experienced attorneys handling civil matters be required to participate in periodic supplemental ADR training. The content and nature of such training shall be determined by the Senior Counsel for Alternative Dispute Resolution in consultation with the Department's training components.

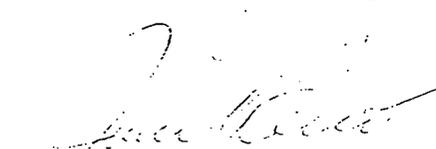
- d. A complete explanation of the internal procedures attorneys should follow in obtaining authorization and funding for the use of formal ADR techniques.

8. FURTHER RESPONSIBILITIES OF PERFORMING COMPONENTS.

- a. The components subject to this order shall coordinate with the Senior Counsel for Alternative Dispute Resolution the development of the ADR guidance, as well as their performance of related recordkeeping, program evaluation and reporting functions.
- b. The components subject to this order shall review their ADR guidance at least annually and, in conjunction with the Senior Counsel for Alternative Dispute Resolution, shall make any necessary changes.
- c. The components subject to this order, in consultation with the Senior Counsel for ADR, shall designate a person or persons with primary responsibility for coordinating the component's ADR efforts so that a network of individuals with ADR expertise is established throughout the Department. This network shall assist the Senior Counsel for ADR in developing and implementing Department ADR policies.
- d. The components subject to this order shall maintain statistics regarding its use of ADR and report those statistics annually to the Associate Attorney General. These statistics should demonstrate both the component's compliance with this order and the full extent of its overall use of informal and formal ADR techniques.

9. NO PRIVATE RIGHTS CREATED. This order is intended only to improve the internal management of the Justice Department in resolving disputes and conducting litigation. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, the Justice Department, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to offer funds to settle any case, accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to submit to binding arbitration or to alter any existing delegation of settlement or litigating authority.

10. FURTHER GUIDANCE. The Associate Attorney General shall have the authority to issue further guidance regarding the scope of this order, consistent with the purposes of this order.

  
Janet Reno  
Attorney General



# Department of Justice

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FOR IMMEDIATE RELEASE  
THURSDAY, APRIL 6, 1995

AG  
(202) 616-2771  
TDD (202) 514-1888

## ATTORNEY GENERAL ORDERS DEPARTMENT-WIDE ALTERNATIVE DISPUTE RESOLUTION INITIATIVES

WASHINGTON, D.C. -- Attorney General Janet Reno has signed an order establishing an Alternative Dispute Resolution program in the Department of Justice, saying the program would make the Department more efficient in handling some of the 170,000 civil justice matters it is involved in each year.

"In resolving civil cases through ADR, we resolve these cases more swiftly and at less cost to those involved--a result that is in everybody's interest," Reno said.

The Attorney General said each Department component will develop criteria to identify cases suitable for ADR. Congress will be asked to create a special fund to pay for the services of mediators and arbitrators in appropriate cases.

"This program meshes with efforts now under way in Congress to improve the efficiency and effectiveness of the civil justice system," Reno said.

Reno said a Senior Counsel would be appointed to head the program and that the government would, in the future, agree to be bound by arbitration rulings in appropriate cases.

Reno also announced she has authorized the delegation of authority to each U.S. Attorney to settle civil suits up to \$1 million. Previously such settlement authority was capped at \$500,000.

ADR is an alternative to litigation to resolve legal disputes through the use of arbitration, mediation, mini-trials and early neutral evaluation, among other methods.

Reno said that ADR mechanisms have been employed successfully by the Army Corps of Engineers, Army Materiel Command, the U.S. Environmental Protection Agency and the Federal Deposit Insurance Corporation.

"Major credit should be given to the Administrative Conference of the United States for its leadership in helping agencies implement the Administration Dispute Resolution Act in 1990," Reno said. "The conference has been very helpful to the Department in developing these new ADR policies."

Reno also noted the National Performance Review recommendations call for agencies to make greater use of ADR in resolving disputes.

Reno said that existing court-annexed pilot programs indicate that 5 percent to 27 percent of civil cases can be successfully diverted to ADR.

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## Memorandum



Subject  
Civil Justice Reform Executive Order

Date  
December 7, 1995

To  
Mac Reed  
Office of Management and Budget

From  
Rosemary Hart  
Karen A. Popp  
Office of Legal Counsel

As we agreed at the meeting last week, OLC has spoken with Cathy Sheafor of the Associate Attorney General's Office about certain unresolved issues relating to the Civil Justice Reform Executive Order. We have agreed that the following changes should be made to the Order.

Section 4 (b) and (c) should read (changes have been underlined):

"(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation where appropriate, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible."

"(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias on the part of the decision-makers that results in an injustice to persons who appear before administrative adjudicatory tribunals; regularly train all fact-finders, administrative law judges, and other decision-makers to eliminate such bias; and establish appropriate mechanisms to receive and resolve complaints of such bias from persons who appear before administrative adjudicatory tribunals."

Section 6(a) should read:

"(a) The term "agency" shall be defined as that term is defined in section 105 of title 5, United States Code."

The paragraph at Section 8(c) should be deleted entirely.  
Please let us know if you have any questions.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

06-Nov-1995 03:10pm

TO:            Jack M. Quinn

FROM:          Elena Kagan  
                Office of the Counsel

SUBJECT:      EO on Civil Justice Reform

*Elena*  
*John's take on*  
*my*  
*John*

1. This proposed EO probably looks more impressive than it is. Large parts of it are identical to the current EO on Civil Justice Reform. Only a handful of provisions have been amended. If you want I can send you a redlined version (which I thought OMB would circulate) making clear exactly what is different.
2. The most important change concerns the ability of the government to enter into binding arbitration. The current EO does not allow the government to enter into binding arbitration; this position reflects a longstanding OLC view that the acceptance of binding arbitration violates the appointments clause. The new EO reverses this position, based on a recent OLC analysis concluding that binding arbitration raises no appointments clause concern.
3. The proposed EO also removes certain provisions on attorneys' fees meant to discourage plaintiffs from bringing suit to enforce civil rights, environmental, and similar statutes; and it corrects the restatement of law on the admissibility of expert testimony to reflect the S. Ct.'s recent opinion in *Daubert v. Merrell Dow*.
4. Notwithstanding the cover sheet from OMB, John Schmidt's office really prepared this EO. But for some reason, John and Ab agreed that we would do the processing.
5. I know that John would like to do a lot to publicize this. He thinks the EO fits perfectly with recent ADR efforts that have been receiving a great reaction. What do you think?

*Check w/ John re what he means, what this would involve etc.*



U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

October 2, 1995

**MEMORANDUM**

**TO:** Abner J. Mikva  
Counsel to the President

**FROM:** John R. Schmidt *JRS*

**SUBJECT:** Proposed Executive Order

I am attaching for your review a proposed Executive Order to replace Executive Order No. 12778 on the subject of Civil Justice Reform. The proposed order reflects the opinion of the Office of Legal Counsel of September 7, 1995, that the Appointments Clause, U.S. Const. art. II, cl. 2, does not bar the United States from entering into binding arbitration. Among other things, the current Executive Order 12778 bars the United States from entering into binding arbitration. As we previously discussed, it is important that we modify the Executive Order so that binding arbitration can be part of the Justice Department's new ADR initiative.

The attached proposed Executive Order has been reviewed by the Office of Legal Counsel and for the most part parallels the other provisions of the Order it is intended to replace. In addition to implementing the views of the Office of Legal Counsel described above, the proposed opinion also corrects the restatement of the law set forth in Executive Order 12778 on the admissibility of expert testimony.

I have not sent this to OMB for processing. I thought it would make more sense for you to review it first. We could handle further processing if you prefer, or you could take it from here. When ready, it might make sense to give this some publicity - involving the President in our ADR effort which has been getting a great reaction.

Attachments (3)

*what does this involve?*

Telecom Mac Reed 11/9

Comments re EO

# of concerns expressed by Office of AET -  
this independence.

John Schmidt - Civil Justice EO

DOJ - ADR effort

pull basic announcement -

internal DOJ order

types of cases - put into ADR

Other agencies

here's all this good stuff we've been doing

One thing at moment - no one can do - binding arb -

→ Pres able to sign -

new issuance EO

→

elim. restraint on S.A.

concrete - beyond prior admin.

visual appeal? / personal involvement?

Some cons. Repubs - Canada -

disgusted on this issue - They like it

funny sort of constituency.

Kathy Schaefer

Peter Stephen - ADR

senior counsel.

## Mtg on EO - Civil Justice Reform

Check w/ Kathy

- to facilitate self-rep.
- also must change Lias section
- EC - preference / less than 100,000
- definition of agency
- section 8 scope

~~EXECUTIVE ORDER~~~~Executive Order 12778~~

## CIVIL JUSTICE REFORM

~~October 23, 1991~~

~~WHEREAS, the tremendous growth in civil litigation has burdened the American court system and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels;~~

~~WHEREAS, several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying deferring just compensation, and encouraging wasteful litigation;~~

~~WHEREAS, the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution, limitations on unnecessary discovery, judicious use of expert testimony, prudent use of sanctions, improved use of litigation resources, and, where appropriate, modified fee arrangements;~~

~~WHEREAS, the United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts;~~

~~WHEREAS, improving the quality of legislation and regulation to eliminate ambiguities in drafting would reduce uncertainty and unnecessary litigation; and,~~

~~WHEREAS, improving the quality of administrative adjudications would reduce the time and resources expended during the administrative process;~~

~~NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:~~

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

<sup>or other ADR</sup>  
 (b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal ~~or structured~~ ~~Alternative Dispute Resolution (ADR) process or court~~ proceeding. ~~At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims.~~ Where such the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the ~~private parties.~~

By deleting the sentence in Sec. 1(c)(1) above and inserting section 1(c)(3) we would be highlighting the importance of ADR training more than the current order.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

~~(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in alternative dispute resolution techniques.~~

By deleting the sentence in Sec. 1(c)(1) above and inserting section 1(c)(3) we would be highlighting the importance of ADR training more than the current order.

~~(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph shall be interpreted in a manner consistent with section 4(b) of the Administrative Dispute Resolution Act, Public Law 101-552, 104 Stat. 2726 (1990). Practice under Tax Court Rule 124 shall be exempt from this provision.~~

This section should be deleted because it is inconsistent with the OLC opinion on binding arbitration.

(d) Discovery. To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

~~(1) Disclosure of Core Information. In these cases where discovery will be sought, litigation counsel shall, to the extent practicable, make reasonable efforts to agree with other parties mutually to exchange a disclosure statement containing core information relevant to the dispute and to stipulate to an order memorializing such agreement. For purposes of this subsection, "core information" means the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case. This guideline to disclose core information shall not apply in cases while a dispositive motion is pending.~~

This section should be deleted because it is confusing to have these requirements in an executive order when more detailed provisions governing disclosure are contained in Rule 26. In

1993, Rule 26, subsection (a) was amended through the addition of paragraphs (1)-(4). Those amendments require parties to disclose, without awaiting formal discovery requests, basic information including names and addresses of people having information relevant to disputed facts and the location of all documents relevant to the case.

~~(2)~~ (1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

~~(3)~~ (2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

~~(c) Expert Witnesses. Litigation counsel shall make every reasonable effort to present only reliable expert testimony before a court.~~

~~(1) Widely accepted theories. Litigation counsel shall refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely accepted. For purposes of this subsection, a theory is widely accepted if it is propounded by at least a substantial minority of the experts in the relevant field.~~

~~(2) Expertise in the field. Litigation counsel shall present expert testimony only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.~~

~~(3) Expert disclosure. Litigation counsel shall offer to engage in mutual disclosure of expert witness information for those experts that a party expects to call as expert witnesses at trial, provided, and to the extent, that the other parties agree to make comparable disclosures of any~~

~~expert witnesses they expect to call at trial.~~

~~(4) Ban on contingency fees. The amount of compensation paid to an expert witness shall not be linked to a successful outcome in the litigation.~~

In Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993), the Supreme Court held that FRE 702 exclusively governs the admissibility of expert testimony and nothing in the Rule provides that general acceptance -- or "wide" acceptance, as worded here -- is a prerequisite to the admissibility of expert testimony. This section as currently written is inconsistent with the Supreme Court's opinion in Daubert. It would be unnecessarily restrictive to apply the Frye rule to the government by executive order when the Supreme Court has made clear that FRE 702 does not embody that standard. For these reasons, this section should be deleted.

~~(f) (a) Sanctions.~~ Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

~~(g) (f) Improved Use of Litigation Resources.~~ Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable; and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

~~(h) Fees and Expenses. To the extent permissible by law, in civil litigation involving disputes over Federal contracts pursuant to 41 U.S.C. 601 et seq., or in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two way fee shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations. The Attorney General shall review the legal authority for entering into such agreements.~~

Although this section just gives opposing parties the option of a two-way fee shifting as drafted it suggests a policy which supports 'loser pays.'

As the President put it in his speech to the American Society of Newspaper Editors, "loser pays' rules will keep ordinary citizens from exercising their rights in court just as a poll tax used to keep ordinary people of color and poverty from exercising their right to vote."

Sec. 2. Government Pro Bono and Volunteer Services. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

By adding this section, the President would be promoting volunteer work by lawyers and improving access to justice for all people.

*INERT as permitted by statute, reg, or other rules or guidelines*

Sec. 2.3 Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB

Circular A-19 (~~legislation~~) and Executive Order No. 12291~~866~~ (~~regulation~~), agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

EO 12291 was revoked and replaced by President Clinton with EO 12866, 58 FR 51735, (Oct. 4, 1993).

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and ~~needless~~ ambiguity.

(2) The agency's proposed legislation and regulations shall be written to minimize ~~needless~~ litigation, and

(3) The agency's proposed legislation and regulations shall provide a clear and ~~certain~~ legal standard for affected conduct ~~rather than a general standard~~, and shall promote simplification and burden reduction.

The Attorney General approved the Civil Justice Reform Working Group's recommendation that the Department of Justice develop an internal legislative checklist. The following two sections of the Executive Order have been revised to conform with that checklist that Marie Olsen in OLA was responsible for developing.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--<sup>is appropriate</sup>

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, ~~circumscribed, displaced, impaired,~~ or modified;

(D) provides a clear and ~~certain~~ legal standard for affected conduct ~~rather than a general standard~~, while promoting simplification and burden reduction and ~~a mens rea requirement if it is a criminal statute;~~

(E) specifies whether private arbitration and

*Debate*

other forms of private dispute resolution are appropriate under enforcement and relief provisions, subject to constitutional requirements;

(F) specifies whether the provisions of the law are constitutionally severable, if one or more of them is found to be unconstitutional appropriate;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands; and,

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

~~(P)~~(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget

~~(OMB)~~ and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, ~~circumscribed, displaced, impaired~~ or modified;

(C) provides a clear ~~and certain~~ legal standard for affected conduct ~~rather than a general standard~~, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; ~~and~~

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

*Agency Govt Council Riv. The aft & d shall review*  
 (c) ~~Certification of Compliance for Agency Legislation or Regulations.~~ When transmitting such draft legislation or regulation to ~~(OMB)~~ the Office of Management and Budget *Johnanne* ("OMB"), the agency must certify that ~~(i)~~ it has reviewed such draft legislation or regulation in light of this section, and that ~~(ii)~~ either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. ~~Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.~~

~~Recommendations and cost benefit analyses under subsection (d) of this section shall be included in the agency certification~~

~~required by this subsection.~~

~~(d) One Way Fee Provisions. Each agency shall review, and shall perform a cost benefit analysis on, all provisions of any legislation or regulation that the agency proposes which provide for an award for attorney's fees in favor of only one class of parties, including those statutes which require the Government to pay a prevailing private party's attorney's fees. The agency shall recommend against enactment of the fee shifting provisions of such legislation if the costs significantly outweigh the benefits, or if the legislation does not define the fees and costs covered by the statute or detail when an award of fees and costs would be appropriate. Such agency recommendations shall be presented to OMB through the Circular A 19 legislative coordination and clearance process and included in the agency certification required under subsection (c) of this section.~~

This section creates a presumption against one-way fee provisions that has the effect of discouraging plaintiffs from acting as private attorneys general under civil rights statutes, environmental statutes, etc. Since this Administration has no objection to such fee arrangements and, in fact, encourages citizen suits, we should delete this section.

Sec. 3.4 Principles to Promote Just and Efficient Administrative Adjudications.

~~(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).~~

~~(b) Improvements in Administrative Adjudication. All federal agencies must review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, [to facilitate self-representation], to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.~~

~~(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.~~

(d) Public Education. All Federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

Sec. 4-5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1 and 34 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 34 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines which ~~that~~ may be issued by other agencies pursuant to this order.

Sec. 5-6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 6-7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 7.6 Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of ~~criminal~~ forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required ~~(i)~~ in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; ~~(ii)~~ in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; ~~(iii)~~ when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; ~~(iv)~~ when the defendant is subject to flight; ~~(v)~~ when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or ~~(vi)~~ in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution and Core Disclosure Provisions. Subsections (c) and ~~(d)(1)~~ of section 1 of this order shall not apply ~~(i)~~ to any action to seize or forfeit assets subject to forfeiture, or ~~(ii)~~ to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 2, consistent with the purposes of this order.

Sec. 8.2 Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 9.10 Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 10-11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE

~~GEORGE BUSH~~  
~~WILLIAM J. CLINTON~~  
~~THE WHITE HOUSE~~  
~~October 23, 1991.~~

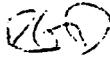
REVISED 1995



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

October 30, 1995

MEMORANDUM FOR DESIGNATED AGENCY HEADS  
(SEE ATTACHED DISTRIBUTION LIST)

FROM: Robert G. Damus   
General Counsel

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

Attached is a proposed Executive order entitled "Civil Justice Reform."

It was prepared by the White House Counsel's Office, in accordance with the provisions of Executive Order No. 11030, as amended.

On behalf of the Director of the Office of Management and Budget, I would appreciate receiving any comments you may have concerning this proposal. If you have any comments or objections, they should be received no later than close of business Wednesday, November 8, 1995. Please be advised that agencies that do not respond by the November 8, 1995 deadline will be recorded as not objecting to the proposal.

Comments or inquiries may be submitted by telephone to Mr. Mac Reed of this office (Phone: 395-3563; Fax: 395-7294).

Thank you.

Attachments - Distribution List  
Proposed Executive Order

cc: Jack Lew  
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General Services Administration

Honorable Daniel S. Goldin  
Administrator  
National Aeronautics and Space Administration

Honorable Carol Rasco  
Assistant to the President for  
Domestic Policy

Honorable Abner Mikva  
Counsel to the President

Honorable Todd Stern  
Assistant to the President  
and Staff Secretary

Honorable Jack Quinn  
Chief of Staff to the Vice President

## EXECUTIVE ORDER

### CIVIL JUSTICE REFORM

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal court proceeding. Where the benefits of Alternative Dispute

Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the parties.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in ADR techniques.

(d) Discovery. To the extent practical, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

(1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

(2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

(e) Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

(f) Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable;

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

Sec. 3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations.

Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB Circular A-19 and Executive Order No. 12866, each agency promulgating new regulations, reviewing existing regulations, developing legislative proposals concerning regulations, and developing new legislation shall adhere to the following requirements:

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity;

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation; and

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear and certain legal standard for affected conduct rather than a general standard, and a mens rea requirement if it is a criminal statute;

(E) specifies whether private arbitration and other forms of private dispute resolution are appropriate under enforcement and relief provisions; subject to constitutional requirements;

(F) specifies whether the provisions of the law are severable if one or more of them is found to be unconstitutional;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands;

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

(Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget ("OMB") and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction;

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to "OMB", the agency must certify that (1) it has reviewed such draft legislation or regulation in light of this section, and that (2) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

#### Sec. 4. Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures.

#### Sec. 5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1, 2 and 4 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 4 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines that may be issued by other agencies pursuant to this order.

#### Sec. 6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (1) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (2) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (3) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (4) when the defendant is subject to flight; (5) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (6) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution. Subsections (c) of section 1 of this order shall not apply (1) to any action to seize or forfeit assets subject to forfeiture, or (2) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000.

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 3, consistent with the

purposes of this order.

Sec. 9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE,

WILLIAM J. CLINTON

~~EXECUTIVE ORDER~~

~~Executive Order 12778~~

~~CIVIL JUSTICE REFORM~~

~~October 23, 1991~~

~~WHEREAS, the tremendous growth in civil litigation has burdened the American court system and has imposed high costs on American individuals, small businesses, industry, professionals, and government at all levels;~~

~~WHEREAS, several current litigation practices add to these burdens and costs by prolonging the resolution of disputes, thus delaying deferring just compensation, and encouraging wasteful litigation;~~

~~WHEREAS, the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution, limitations on unnecessary discovery, judicious use of expert testimony, prudent use of sanctions, improved use of litigation resources; and, where appropriate, modified fee arrangements;~~

~~WHEREAS, the United States sets an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court, and can continue to do so without impairing the effectiveness of its litigation efforts;~~

~~WHEREAS, improving the quality of legislation and regulation to eliminate ambiguities in drafting would reduce uncertainty and unnecessary litigation; and,~~

~~WHEREAS, improving the quality of administrative adjudications would reduce the time and resources expended during the administrative process;~~

~~NOW, THEREFORE, I, GEORGE BUSH, by the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3, United States Code, and in order to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states, it is hereby ordered as follows:~~

Section 1. Guidelines to Promote Just and Efficient Government Civil Litigation. To promote the just and efficient resolution of civil claims, those Federal agencies and litigation counsel that conduct or otherwise participate in civil litigation on behalf of the United States Government in Federal court shall respect and adhere to the following guidelines during the conduct of such litigation:

(a) Pre-filing Notice of a Complaint. No litigation counsel shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.

(b) Settlement Conferences. As soon as practicable after ascertaining the nature of a dispute in litigation, and throughout the litigation, litigation counsel shall evaluate settlement possibilities and make reasonable efforts to settle the litigation. Such efforts shall include offering to participate in a settlement conference or moving the court for a conference pursuant to Rule 16 of the Federal Rules of Civil Procedure in an attempt to resolve the dispute without additional civil litigation.

(c) Alternative Methods of Resolving the Dispute in Litigation. Litigation counsel shall make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.

(1) Whenever feasible, claims should be resolved through informal discussions, negotiations, and settlements rather than through utilization of any formal ~~or structured~~ ~~Alternative Dispute Resolution (ADR) process or court~~ proceeding. ~~[At the same time, litigation counsel should be trained in dispute resolution techniques and skills that can contribute to the prompt, fair, and efficient resolution of claims.]~~ Where such the benefits of Alternative Dispute Resolution ("ADR") may be derived, and after consultation with the agency referring the matter, litigation counsel should suggest the use of an appropriate ADR technique to the ~~private~~ parties. ✓

By deleting the sentence in Sec. 1(c)(1) above and inserting section 1(c)(3) we would be highlighting the importance of ADR training more than the current order.

(2) It is appropriate to use ADR techniques or processes to resolve claims of or against the United States or its agencies, after litigation counsel determines that the use of a particular technique is warranted in the context of a particular claim or claims, and that such use will materially contribute to the prompt, fair, and efficient resolution of the claims.

~~(3) To facilitate broader and effective use of informal and formal alternative dispute resolution methods, all litigation counsel should be trained in alternative dispute resolution techniques.~~

By deleting the sentence in Sec. 1(c)(1) above and inserting section 1(c)(3) we would be highlighting the importance of ADR training more than the current order.

~~(3) Litigation counsel shall neither seek nor agree to the use of binding arbitration or any other equivalent ADR technique. A technique is equivalent to binding arbitration if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique. The requirements of this paragraph shall be interpreted in a manner consistent with section 4(b) of the Administrative Dispute Resolution Act, Public Law 101-552, 104 Stat. 2736 (1990). Practice under Tax Court Rule 124 shall be exempt from this provision.~~

This section should be deleted because it is inconsistent with the OLC opinion on binding arbitration.

(d) Discovery. To the extent practicable, litigation counsel shall make every reasonable effort to streamline and expedite discovery in cases under counsel's supervision and control.

~~(1) Disclosure of Core Information. In those cases where discovery will be sought, litigation counsel shall, to the extent practicable, make reasonable efforts to agree with other parties mutually to exchange a disclosure statement containing core information relevant to the dispute and to stipulate to an order memorializing such agreement. For purposes of this subsection, "core information" means the names and addresses of people having information that is relevant to the proffered claims and defenses, and the location of documents most relevant to the case. This guideline to disclose core information shall not apply in cases while a dispositive motion is pending.~~

This section should be deleted because it is confusing to have these requirements in an executive order when more detailed provisions governing disclosure are contained in Rule 26. In

1993, Rule 26, subsection (a) was amended through the addition of paragraphs (1)-(4). Those amendments require parties to disclose, without awaiting formal discovery requests, basic information including names and addresses of people having information relevant to disputed facts and the location of all documents relevant to the case.

~~(2)~~ (1) Review of Proposed Document Requests. Each agency within the executive branch shall establish a coordinated procedure for the conduct and review of document discovery undertaken in litigation directly by that agency when that agency is litigation counsel. The procedure shall include, but is not necessarily limited to, review by a senior lawyer prior to service or filing of the request in litigation to determine that the request is not cumulative or duplicative, unreasonable, oppressive, unduly burdensome or expensive, taking into account the requirements of the litigation, the amount in controversy, the importance of the issues at stake in the litigation, and whether the documents can be obtained from some other source that is more convenient, less burdensome, or less expensive.

~~(3)~~ (2) Discovery Motions. Before petitioning a court to resolve a discovery motion or petitioning a court to impose sanctions for discovery abuses, litigation counsel shall attempt to resolve the dispute with opposing counsel. If litigation counsel makes a discovery motion concerning the dispute, he or she shall represent in that motion that any attempt at resolution was unsuccessful or impracticable under the circumstances.

~~(e) Expert Witnesses. Litigation counsel shall make every reasonable effort to present only reliable expert testimony before a court.~~

~~(1) Widely accepted theories. Litigation counsel shall refrain from presenting expert testimony from experts who base their conclusions on explanatory theories that are not widely accepted. For purposes of this subsection, a theory is widely accepted if it is propounded by at least a substantial minority of the experts in the relevant field.~~

~~(2) Expertise in the field. Litigation counsel shall present expert testimony only from those experts whose knowledge, background, research, or other expertise lies in the particular field about which they are testifying.~~

~~(3) Expert disclosure. Litigation counsel shall offer to engage in mutual disclosure of expert witness information for those experts that a party expects to call as expert witnesses at trial, provided, and to the extent, that the other parties agree to make comparable disclosures of any~~

~~expert witnesses they expect to call at trial.~~

~~(4) Ban on contingency fees. The amount of compensation paid to an expert witness shall not be linked to a successful outcome in the litigation.~~

In Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993), the Supreme Court held that FRE 702 exclusively governs the admissibility of expert testimony and nothing in the Rule provides that general acceptance -- or "wide" acceptance, as worded here -- is a prerequisite to the admissibility of expert testimony. This section as currently written is inconsistent with the Supreme Court's opinion in Daubert. It would be unnecessarily restrictive to apply the Frye rule to the government by executive order when the Supreme Court has made clear that FRE 702 does not embody that standard. For these reasons, this section should be deleted.

*I guess so,  
but some  
issues arise here.*

~~(f)~~ ~~(e)~~ Sanctions. Litigation counsel shall take steps to seek sanctions against opposing counsel and opposing parties where appropriate.

(1) Litigation counsel shall evaluate filings made by opposing parties and, where appropriate, shall petition the court to impose sanctions against those responsible for abusive practices.

(2) Prior to filing a motion for sanctions, litigation counsel shall submit the motion for review to the sanctions officer, or his or her designee, within the litigation counsel's agency. Such officer or designee shall be a senior supervising attorney within the agency, and shall be licensed to practice law before a State court, courts of the District of Columbia, or courts of any territory or Commonwealth of the United States. The sanctions officer or designee shall also review motions for sanctions that are filed against litigation counsel, the United States, its agencies, or its officers.

~~(g)~~ ~~(f)~~ Improved Use of Litigation Resources. Litigation counsel shall employ efficient case management techniques and shall make reasonable efforts to expedite civil litigation in cases under that counsel's supervision and control. This includes but is not limited to:

(1) making reasonable efforts to negotiate with other parties about, and stipulate to, facts that are not in dispute;

(2) reviewing and revising pleadings and other filings to ensure that they are accurate and that they reflect a narrowing of issues, if any, that has resulted from discovery;

(3) requesting early trial dates where practicable; and,

(4) moving for summary judgment in every case where the movant would be likely to prevail, or where the motion is likely to narrow the issues to be tried; and

(5) reviewing and revising pleadings and other filings to ensure that unmeritorious threshold defenses and jurisdictional arguments, resulting in unnecessary delay, are not raised.

~~(h) Fees and Expenses. To the extent permissible by law, in civil litigation involving disputes over Federal contracts pursuant to 41 U.S.C. 601 et seq., or in any civil litigation initiated by the United States, litigation counsel shall offer to enter into a two way fee shifting agreement with opposing parties to the dispute, whereby the losing party would pay the prevailing party's fees and costs, subject to reasonable terms and limitations. The Attorney General shall review the legal authority for entering into such agreements.~~

Why not have a voluntary provision of this sort?

Although this section just gives opposing parties the option of a two-way fee shifting as drafted it suggests a policy which supports 'loser pays.'

As the President put it in his speech to the American Society of Newspaper Editors, "'loser pays' rules will keep ordinary citizens from exercising their rights in court just as a poll tax used to keep ordinary people of color and poverty from exercising their right to vote."

This is only true if mandatory.

Sec. 2. Government Pro Bono and Volunteer Service. All federal agencies should develop appropriate programs to encourage and facilitate pro bono legal and other volunteer service by government employees, including attorneys.

By adding this section, the President would be promoting volunteer work by lawyers and improving access to justice for all people.

Sec. 2.3. Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System.

(a) General Duty to Review Legislation and Regulations. Within current budgetary constraints and existing executive branch coordination mechanisms and procedures established in OMB

*each*  
Circular A-19 (~~legislation~~) and Executive Order No. 12291~~866~~  
(~~regulation~~), agency promulgating new regulations, reviewing  
existing regulations, developing legislative proposals concerning  
regulations, and developing new legislation shall adhere to the  
following requirements:

EO 12291 was revoked and replaced by President Clinton with  
EO 12866, 58 FR 51735, (Oct. 4, 1993).

(1) The agency's proposed legislation and regulations shall be reviewed by the agency to eliminate drafting errors and needless ambiguity.

(2) The agency's proposed legislation and regulations shall be written to minimize needless litigation, and

(3) The agency's proposed legislation and regulations shall provide a clear and certain legal standard for affected conduct rather than a general standard, and shall promote simplification and burden reduction.

The Attorney General approved the Civil Justice Reform Working Group's recommendation that the Department of Justice develop an internal legislative checklist. The following two sections of the Executive Order have been revised to conform with that checklist that Marie Olsen in OLA was responsible for developing.

(b) Specific Issues for Review. In conducting the reviews required by subsection (a), each agency formulating proposed legislation and regulations shall make every reasonable effort to ensure:

(1) that the legislation--

(A) specifies whether all causes of action arising under the law are subject to statutes of limitations;

(B) specifies in clear language the preemptive effect, if any, to be given to the law;

(C) specifies in clear language the effect on existing Federal law, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(D) provides a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction and a mens rea requirement if it is a criminal statute;

(E) specifies whether private arbitration and

*always?*

other forms of private dispute resolution are appropriate under enforcement and relief provisions, subject to constitutional requirements;

*how does this connect to above encouragement?*

(F) specifies whether the provisions of the law are ~~constitutionally severable~~, if one or more of them is found to be unconstitutional appropriate;

(G) specifies in clear language the retroactive effect, if any, to be given to the law;

(H) specifies in clear language the applicable burdens of proof;

(I) specifies in clear language whether it grants private parties a right to sue and, if so, the relief available and the conditions and terms for authorized awards of attorney's fees, if any;

(J) specifies whether State courts have jurisdiction under the law and, if so, whether and under what conditions an action would be removable to Federal court;

(K) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(L) sets forth the standards governing the assertion of personal jurisdiction, if any;

(M) defines key statutory terms, either explicitly or by reference to other statutes that explicitly define those terms;

(N) specifies whether the legislation applies to the Federal Government or its agencies;

(O) specifies whether the legislation applies to States, territories, the District of Columbia, and the Commonwealths of Puerto Rico and of the Northern Mariana Islands; and,

(P) specifies what remedies are available such as money damages, civil penalties, injunctive relief, and attorney's fees; and

*repetition of above?*

~~(P)~~ (Q) addresses other important issues affecting clarity and general draftsmanship of legislation set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget

"OMB" and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

(2) that the regulation--

(A) specifies in clear language the preemptive effect, if any, to be given to the regulation;

(B) specifies in clear language the effect on existing Federal law or regulation, if any, including all provisions repealed, circumscribed, displaced, impaired, or modified;

(C) provides a clear and certain legal standard for affected conduct rather than a general standard, (while promoting simplification and burden reduction;)

*u 6 - This phrase was removed above (re legislation)*

(D) specifies in clear language the retroactive effect, if any, to be given to the regulation;

(E) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies;

(F) defines key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items; and

(G) addresses other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget and after consultation with affected agencies, that are determined to be in accordance with the purposes of this order.

*do none of the other regs above - re legislation - apply here?*

(c) Certification of Compliance for Agency Legislation or Regulations. When transmitting such draft legislation or regulation to ("OMB") the Office of Management and Budget ("OMB"), the agency must certify that (i) it has reviewed such draft legislation or regulation in light of this section, and that (ii) either the draft legislation or regulation meets the applicable standards provided in subsections (a) and (b) of this section, or it is unreasonable to require the particular piece of draft legislation or regulation to meet one or more of those standards. Where the standards are not met, the agency certification must include an explanation of the reasons for the departure from the standards.

~~Recommendations and cost benefit analyses under subsection (d) of this section shall be included in the agency certification~~

~~required by this subsection.~~

~~(d) One Way Fee Provisions. Each agency shall review, and shall perform a cost benefit analysis on, all provisions of any legislation or regulation that the agency proposes which provide for an award for attorney's fees in favor of only one class of parties, including those statutes which require the Government to pay a prevailing private party's attorney's fees. The agency shall recommend against enactment of the fee shifting provisions of such legislation if the costs significantly outweigh the benefits, or if the legislation does not define the fees and costs covered by the statute or detail when an award of fees and costs would be appropriate. Such agency recommendations shall be presented to OMB through the Circular A 19 legislative coordination and clearance process and included in the agency certification required under subsection (c) of this section.~~

*This is interesting.  
Not a "rule thru."  
Just a rest of  
justification.  
What's wrong  
w/ this?*

This section creates a presumption against one-way fee provisions that has the effect of discouraging plaintiffs from acting as private attorneys general under civil rights statutes, environmental statutes, etc. Since this Administration has no objection to such fee arrangements and, in fact, encourages citizen suits, we should delete this section.

Sec. 3-4 Principles to Promote Just and Efficient Administrative Adjudications.

(a) Implementation of Administrative Conference Recommendations. In order to promote just and efficient resolution of disputes, an agency that adjudicates administrative claims shall, to the extent reasonable and practicable, and when not in conflict with other sections of this order, implement the recommendations of the Administrative Conference of the United States, entitled "Case Management as a Tool for Improving Agency Adjudication," as contained in 1 C.F.R. 305.86-7 (1991).

(b) Improvements in Administrative Adjudication. All federal agencies must review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making, to facilitate self-representation, to expand non-lawyer counseling and representation where appropriate, and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible.

(c) Bias. All federal agencies should review their administrative adjudicatory processes to identify any type of bias that hinders full access to justice for all persons; regularly train all fact-finders, decision-makers and administrative law judges to eliminate such bias; and establish appropriate mechanisms to receive and resolve bias complaints from persons who appear before administrative adjudicatory tribunals.

(d) Public Education. All federal agencies should develop effective and simple methods, including the use of electronic technology, to educate the public about its claims/benefits policies and procedures. ✓

Sec. 4-5. Coordination by the Department of Justice.

(a) The Attorney General shall coordinate efforts by Federal agencies to implement sections 1 and 34 of this order.

(b) To implement the principles and purposes announced by this order, the Attorney General is authorized to issue guidelines implementing sections 1 and 34 of this order for the Department of Justice. Such guidelines shall serve as models for internal guidelines which that may be issued by other agencies pursuant to this order.

Sec. 5-6. Definitions. For purposes of this order:

(a) The term "agency" shall be defined as that term is defined in section 451 of title 28, United States Code, except that it shall exclude all departments and establishments in the legislative or judicial branches of the United States.

(b) The term "litigation counsel" shall be defined as the trial counsel or the office in which such trial counsel is employed, such as the United States Attorney's Office for the district in which the litigation is pending or a litigating division of the Department of Justice. Special Assistant United States Attorneys are included within this definition. Those agencies authorized by law to represent themselves in court without assistance from the Department of Justice are also included in this definition, as are private counsel hired by any Federal agency to conduct litigation on behalf of the agency or the United States.

Sec. 6-7. No Private Rights Created. This order is intended only to improve the internal management of the executive branch in resolving disputes, conducting litigation in a reasonable and just manner, and reviewing legislation and regulations. This order shall not be construed as creating any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its agencies, its officers, or any other person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order. Nothing in this order shall be construed to obligate the United States to accept a particular settlement or resolution of a dispute, to alter its standards for accepting settlements, to forego seeking a consent decree or other relief, or to alter any existing delegation of settlement or litigating authority.

Sec. 7.8. Scope.

(a) No Applicability to Criminal Matters or Proceedings in Foreign Courts. This order is applicable to civil matters only. It is not intended to affect criminal matters, including enforcement of criminal fines or judgments of criminal forfeiture. This order does not apply to litigation brought by or against the United States in foreign courts or tribunals.

(b) Application of Notice Provision. Notice pursuant to subsection (a) of section 1 is not required (i) in any action to seize or forfeit assets subject to forfeiture or in any action to seize property; (ii) in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceeding; (iii) when the assets that are the subject of the action or that would satisfy the judgment are subject to flight, dissipation, or destruction; (iv) when the defendant is subject to flight; (v) when, as determined by litigation counsel, exigent circumstances make providing such notice impracticable or such notice would otherwise defeat the purpose of the litigation, such as in actions seeking temporary restraining orders or preliminary injunctive relief; or (vi) in those limited classes of cases where the Attorney General determines that providing such notice would defeat the purpose of the litigation.

(c) Application of Alternative Dispute Resolution and Core Disclosure Provisions. Subsections (c) and (d)(1) of section 1 of this order shall not apply (i) to any action to seize or forfeit assets subject to forfeiture, or (ii) to any debt collection case (including any action for civil penalties or taxes) involving an amount in controversy less than \$100,000. ) why?

(d) Additional Guidance as to Scope. The Attorney General shall have the authority to issue further guidance as to the scope of this order, except section 23, consistent with the purposes of this order.

Sec. 8.9. Conflicts with Other Rules. Nothing in this order shall be construed to require litigation counsel or any agency to act in a manner contrary to the Federal Rules of Civil Procedure, Tax Court Rules of Practice and Procedure, State or Federal law, other applicable rules of practice or procedure, or court order.

Sec. 9.10. Privileged Information. Nothing in this order shall compel or authorize the disclosure of privileged information, sensitive law enforcement information, information affecting national security, or information the disclosure of which is prohibited by law.

Sec. 10, 11. Effective Date. This order shall become effective 90 days after the date of signature. This order shall not apply to litigation commenced prior to the effective date.

Sec. 12. Revocation. Executive Order 12778 is hereby revoked.

THE WHITE HOUSE,

~~GEORGE BUSH~~  
~~WILLIAM J. CLINTON~~  
~~THE WHITE HOUSE~~  
~~October 23, 1991.~~

REVISED 1995

TO: Mac Reed  
Phone: (202) 395-3563  
Fax: (202) 395-7294

FROM: MaryAnn Shebek  
Phone: (202) 586-1522  
FAX: (202) 586-8685

SUBJECT: Proposed Executive Order Entitled "Civil Justice Reform"

The enclosures provide comments from the Department of Energy on the subject executive order. More may be forthcoming as I have not yet received responses from all offices.

2 pages including cover sheet

COMMENTS ON PROPOSED EXECUTIVE ORDER

The proposed Executive Order on Civil Justice Reform should clarify if and when it is authorizing arbitration for resolving claims against the Government. There may be a question about the constitutionality of binding arbitration involving the Government as a party. If the drafters of the Order do not intend to clarify this matter, it would be helpful if the Order stated that it does not authorize or exclude arbitration. Without this there would seem to be an implied authorization, but it would not be clear.

The issues to be addressed by agencies formulating proposed legislation under Section 3(b) are numerous, and some of them would be quite conjectural. For example, who knows whether all causes of action arising under a law are subject to statutes of limitation? This would require knowledge of all the causes of action and statutes of limitation. Would every change in legislative wording require this laundry list? It is suggested that the requirement in Section 3(b) be changed to a requirement that agencies consider whether to specify these matters.

every year  
effort

Permit is already?

11/9/95

To: Mac Reed OMB  
fax 395-7294

From: Kathy Joyce / Dick Crone  
Dept. of Labor

Subject: proposed E.O. on  
Civil Justice Reform

DOL comments  
are attached

Attachment: 1 page

11/9/95

DOL COMMENTS/RECOMMENDATIONS ON PROPOSED  
CIVIL JUSTICE REFORM E.O.

Section 3(a)(3).

o Provides that agency's proposed legislation and regulations contain "clear and certain legal standard for affected conduct rather than a general standard." This standard contradicts the regulatory standard contained in E.O. 12866, titled "Regulatory Planning and Review," and signed by President Clinton on September 30, 1993.

Section 1(b)(8) of E.O. 12866 provides: "Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." (emphasis added)

RECOMMENDATION: Change the standard contained in proposed E.O. Section 3(a)(3) to be consistent with the E.O. 12866 standard. This same issue exists in Section 3(b)(1)(D) and Section 3(b)(2)(c) of the proposed E.O.

*Industry*