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## Differing Visions - Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts

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# DIFFERING VISIONS — DIFFERING VALUES: A COMMENT ON JUDGE PARKER'S REFORMATION MODEL FOR FEDERAL DISTRICT COURTS

*Judge G. Thomas Eisele*

*"Justice, sir, is the great interest of man on earth."*

Daniel Webster, September 12, 1845

## I. INTRODUCTION

I have been asked to respond to, and comment on, Judge Parker's article in this edition of the SMU Law Review. But it is not feasible to discuss his radical proposals for changing our federal courts without speaking of the actions being taken by the whole court-annexed, mandatory ADR movement. That movement presently proceeds with a grand array of initiatives, the ultimate effect of which, if successful, will be to change dramatically our system of civil justice. More importantly, it will effectively deny the inhabitants of this country their traditional right to a due process, evidentiary-based, trial before an Article III judge or before a jury in accordance with equal protection principles, that is to their traditional "day in court." Judge Parker's article serves to make that point dramatically. In the past, the tactic of the mandatory ADR proponents appears to have been to move forward slowly and incrementally, even surreptitiously, in order not to shock the "traditionalists" into action. Judge Parker, with commendable frankness, criticizes this approach, calling out for revolutionary change to a new "reformation model of civil dispute resolution."<sup>1</sup> He states that current ADR programs and procedures, though promising, are inadequate to resolve the civil litigation system's problem of cost and delay.<sup>2</sup> His new model of civil dispute resolution would be public and taxpayer-supported and would contain "an array of litigation tracks," which he repeatedly states will produce "speedy, affordable, fair and reliable decisions."<sup>3</sup> The old involuntary

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Ed. note: SMU LAW REVIEW invited Judge Eisele to write this article as a response to another article published in this issue. See Judge Robert M. Parker & Leslie J. Hagin, "ADR" *Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. REV. 1905 (1993).

1. Robert M. Parker & Leslie J. Hagin, "ADR" *Techniques in the Reformation Model of Civil Resolution*, 46 SMU L. REV. 1905 (1993) [hereinafter Parker].

2. *Id.* at 1901-11.

3. *Id.* at 1905.

ADR advocates staunchly argued that their mandatory ADR diversions did not deny litigants their right to a real trial before a judge or a jury because, at the end of those costly and prejudicial diversions, the parties could still demand a trial *de novo* as a matter of right. Judge Parker one-ups them by having the decisions made by his various ADR tracks carry a "presumption of finality."<sup>4</sup> To him this means that the party or parties requesting a real trial after the ADR track decision would have the burden of demonstrating to a judge at an exemption hearing, through a "cost/benefit analysis, the need to expend *additional* litigant and judicial resources on their cases."<sup>5</sup> Judge Parker would bring his ADR tracks to the front line of civil dispute resolution and would relegate real trials to "alternative," seldom-used, status.<sup>6</sup> Or, as he puts it, "the traditionally routine form of civil dispute resolution [translation: a real trial before a judge or jury] ascends to its appropriate place as the institutionally exceptional."<sup>7</sup>

I will identify both the real and the stated reasons for mandatory court-annexed ADR programs and the need and justifications thereof; trace briefly the history of the court-annexed ADR movement; discuss the politics of this controversy; evaluate the results of such programs; examine Judge Parker's proposals in context; and spell out my reasons for opposing them. Finally, I issue an appeal to the lay citizenry, the bar, the judges, the new Administration, and the Congress to rise up and say "NO" to this alien intrusion into our United States District Courts — those special places that have served this nation so well over the past two centuries.

## II. THE NEED AND JUSTIFICATION: IS THERE A CRISIS?

The standard today by which we in the judging business are to measure our success is cost and delay. Each district court in the United States has been called upon to formulate a "cost and delay reduction plan."<sup>8</sup> Let us look at the delay question. Judge Parker notes that in 1960 it would have taken district courts nine months to dispose of all of their pending cases whereas in 1989 the figure had risen to 11.7 months.<sup>9</sup> Now look at more recent figures and trends.<sup>10</sup> In 1985 the total case filings in all U.S. District Courts came to 299,164; in 1986, 282,074; in 1987, 268,023; in 1988, 269,174; in 1989, 263,896; in 1990, 251,113; in 1991, 241,420; and in 1992, 261,698. So in a period of seven years the total filings have fallen from 299,164 to 261,698. The number of civil filings per judgeship fell from 476 in 1985 to 379 in 1990 — a period when the number of judgeships remained

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4. *Id.*

5. *Id.* (emphasis added).

6. Parker, *supra* note 1, at 1905.

7. *Id.*

8. 28 U.S.C. § 417 (Supp. II 1990).

9. Parker, *supra* note 1, at 1907 (citing, JUDICIAL CONF. OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE REPORT 5 (Apr. 2, 1990)).

10. For the following figures, see Administrative Office of the U.S. Courts, Federal Court Management Statistics (1992) [hereinafter Administrative Office] (on file with SMU Law Review). The year cited will be the 12 month period ending June 30 of that year, so, for example, "1992" will be for the year ending June 30, 1992.

constant at 575. In 1991 the number of judgeships increased to 649 and the number of civil cases per judgeship fell to 320. For 1992 the figure is 350.<sup>11</sup>

We are frequently told that our criminal dockets are interfering with our civil dockets, and this has certainly been true in a few of our federal districts. But the number of felony filings per judgeship only increased from forty-four in 1985 to fifty-eight in 1990. In 1992, that number fell to fifty-three. The total filings per judgeship, criminal and civil, have been lower than they were in 1991 (372) in only two years since 1975. And the *weighted* filings per judgeship have likewise fallen in the past five years from 461 in 1986 to 405 in 1992.<sup>12</sup>

So there is not much support for the oft-repeated assertions that "federal court system has entered a period of crisis;"<sup>13</sup> that our courts are "on the verge of buckling under the strain;"<sup>14</sup> that "our courts are swamped and unmanageable;"<sup>15</sup> or, as stated by Magistrate Judge Wagner before the House Committee last May, that our courts are faced with "burgeoning civil case dockets"<sup>16</sup> — the very assertions being used to justify turning to these mandatory ADR programs. The actual figures and trends simply do not support such doomsday hyperbole.

On the issue of delay we find, as always, that a few district courts are having considerable trouble moving their dockets, but overall we find the same median time from filing to disposition in civil cases (nine months) for each year from 1985 until 1992.<sup>17</sup> And the period between issue and trial in 1992 (fourteen months) is the same as it was in 1985.<sup>18</sup> A Rand Corporation study<sup>19</sup> confirms that the rhetoric about unconscionable and escalating delays in processing and trying cases in the federal district court system is nothing more than myth:

Another finding of the Rand study was that "the aggregate performance of the federal district courts had remained remarkably stable during the 1970s and 1980s, despite a substantial increase in caseload during that period." Nationwide, according to the report, "delay was about the same in 1986 as it was in 1971" and there was little evidence "to support the view that time to disposition has been lengthening." The conclusion, says Dungworth, "is a surprise to most people."<sup>20</sup>

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11. *Id.*

12. *Id.*

13. Judge Irving R. Kaufman, *Reform for a System in Crisis, Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REVIEW* 1, 1 (1990) (Judge Kaufman is the former chief judge of the United States Court of Appeals for the Second Circuit.).

14. *Id.*

15. Judge Richard A. Enslin, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 *N.M. L. REV.* 1, 1 (1988).

16. H.R. Rep. No. 102-1085, 102d Cong., 2d Sess. (1992).

17. Administrative Office, *supra* note 10.

18. *Id.*

19. TERRENCE DUNGWORTH & NICHOLAS M. PACE, *RAND, THE INSTITUTE FOR CIVIL JUSTICE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS* (1990).

20. Ellen J. Pollock & Edward Felsenthal, *Rand Corp. Study Shows that Federal Civil Cases Rarely Go to Trial*, *CHI. DAILY L. BULL.*, 1990, at 3.

So overall there is no crisis or emergency in our federal district courts which requires a panic reaction by the Congress. Nor is there any reason for the Congress or the Judicial Conference to be giving up on our civil trial system which, I submit, is the best in the world.

### III. BACKGROUND OF COURT-ANNEXED ADRs

*"My greatest concern with the federal courts is the ability of the courts to guarantee due process while dispensing justice in a timely manner."*

Presidential Candidate Bill Clinton<sup>21</sup>

This year, 1993, will be a crunch year for our federal courts. Decisions in the offing could dramatically change the role and function of those courts and, in the process, undermine some very fundamental rights which have traditionally been enjoyed by the inhabitants of this country. This is because of the confluence of lobbying efforts on behalf of those associated with the court-annexed mandatory ADR movement.

What is the history of this movement? Why are we in the federal court system being surfeited with these court-annexed ADR programs? I can only give you my personal opinion. It is because Chief Justice Warren Burger attended the Pound Revisited Conference back in 1976 on the "Causes of Popular Dissatisfaction with the Administration of Justice." That conference spawned a healthy re-examination of our institutions of justice. Innovation became the name of the game. Our Chief, God bless him, came away starry-eyed, and, I submit, embraced these innovations uncritically.<sup>22</sup> You see, he appears to be convinced, perhaps by the British, that the jury system is rarely needed or useful in civil cases. But then you can get an idea about how Chief Justice Burger felt about juries by simply reading his opinions. To get on with the story, Chief Justice Burger nodded his approval of the movement and many federal judges enthusiastically signed on.

A few years ago, I attended the summer program for lawyers at Harvard. About thirty federal judges were given the opportunity to participate. One afternoon we were invited for a little get-together with Professor Frank Sanders, who decided to utilize the occasion to preach the ADR gospel. It turns out that he was at the Pound Conference, that he is one of the founding fathers of the ADR movement, and that he served as the Chair of the Standing Committee on Dispute Resolution of the ABA. I accused him of being responsible for all our troubles, but he graciously refused to take all the credit. Professor Sanders is a renowned teacher and scholar. My problem is not with the overall ADR movement that he leads, but with the movement's insistence upon annexing such programs to our federal courts.

Professor Sanders at that meeting in Cambridge told us of his vision of the future. As I understand it, he sees an immense federal building. Inside, one

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21. *Bill Clinton States Positions on the Federal Judiciary*, 76 JUDICATURE 97, 100 (1992).

22. See WARREN E. BURGER, *DELIVERY OF JUSTICE: PROPOSALS FOR CHANGES TO IMPROVE THE ADMINISTRATION OF JUSTICE* (1990). Chief Justice Burger was, in my opinion, one of the best administrators the federal courts ever had. That means that I was in agreement with *most* of his administrative initiatives.

would find sort of a cafeteria or smorgasbord<sup>23</sup> of dispute resolution mechanisms: voluntary and compulsory arbitration, specialized administrative agencies, early neutral evaluations, minitrials, summary jury trials, neutral experts, medical arbitration, and mediation and negotiation teams. And, oh yes, somewhere in the building would be a “traditional” — translate “old fashioned and outmoded” court. This, I gather, is the precursor of Judge Parker’s federal dispute resolution center.

Although certain congressional committees have been interested in the ADR movement, the Congress as a whole has not faced up directly to the issues involved in annexing mandatory ADRs to our federal district courts. The pilot court-annexed arbitration programs, commenced in three courts in 1978 and later expanded to ten courts, had no substantive legislative endorsement until 1988.<sup>24</sup> In that year proponents not only sought legislative legitimacy for the ten existing pilot programs but they also asked Congress to authorize ten additional such mandatory programs. Opponents intervened at the last minute and Congress ended up giving sanction to the ten mandatory programs and adding ten additional *voluntary* programs.<sup>25</sup> The legislative authorization for all such programs ends, effective November 1993.<sup>26</sup> Therefore Congress must act this year in order to continue these programs.

The pressure is on. Magistrate Judge John Leo Wagner, testifying before the House Subcommittee on Intellectual Property and Judicial Administra-

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23. This is not just my metaphor. No less than Chief Justice Rehnquist in his 1992 Kastenmeier Lecture at the University of Wisconsin-Madison described the issue thusly:

On one end of the spectrum is a view of future federal courts as comprehensive justice centers, offering consumers a whole menu of dispute resolution procedures. Under this view federal judges would serve as a sort of managerial maitre d', steering the litigant to the most appropriate form of dispute resolution. This would alter the traditional model wherein the federal system tolerated the excesses of the adversarial process, including long delays and high expenses. Under this new model, the system would set up incentives — for judges and litigants — to swiftly channel disputes into a whole host of alternative dispute resolution options, even though traditional adversarial justice would still be available.

This model contemplates that the majority of entrants into the federal legal system neither expect nor need extensive pre-trial procedures and a full-blown jury trial. Instead, the model posits that many litigants may have a greater need for an inexpensive and prompt resolution of their disputes, however rough and ready, than an unaffordable and tardy one, however close to perfection.

Chief Justice William Rehnquist, Address at the Kastenmeier Lecture, University of Wisconsin-Madison (Sept. 15, 1992), in 1993 WIS. L. REV. 1, 8-9. So our status as federal judges will change to “managerial maitre d’s”! What concerns me about the Chief’s statement is its aura of detached scientific objectivity — an objectivity that I acknowledge I find difficult to achieve when dealing with such fundamental rights and values. Still I appreciate his suggestion that these ADR vehicles are nothing more than rough and ready ways to clear the docket whereas traditional trials are likely to be close to perfection. I worry, however, about patronizing litigants by telling them that they have a greater need to submit their controversy to one or another of these rough and ready ADRs than they, themselves, are willing to acknowledge. Let them have their “close-to-perfection” day in court if they want it! I also do not buy into the suggestion that our traditional method of resolution is an unaffordable and tardy one.

24. See 28 U.S.C. §§ 651-658 (1988).

25. *Id.* §§ 651(a), 658(2).

26. *Id.* § 651.

tion in June, 1992, stated: "Faced with the pressures caused by burgeoning civil case dockets, courts looked to alternatives to the normal litigation route. . . . The Courts soon recognized that in addition to a docket control mechanism, ADR programs had intrinsic value; they often bring better results for litigants than trials."<sup>27</sup> Judge William Schwarzer, Director of the Federal Judicial Center also testified at that time. He requested the subcommittee to support legislation that would allow *all* federal courts to adopt local rules for court-annexed arbitration programs, either mandatory or voluntary, at the option and choice of each district court.<sup>28</sup> This tracks the recommendation of Ms. Barbara S. Meierhoefer:

In light of our generally favorable findings detailed in this report on the mandatory programs, it is therefore recommended that the Judicial Conference of the United States propose that Congress enact an arbitration provision in title 28, United States Code, authorizing arbitration in all federal district courts, to be mandatory or voluntary or a combination of both in the discretion of the court.<sup>29</sup>

It is a smart tactic for the Federal Judicial Center to call for legislation authorizing arbitration in all federal district courts "to be mandatory or voluntary in the discretion of the court."<sup>30</sup> Many federal judges who oppose mandatory ADR programs go along with legislation which would *permit* individual district courts or individual United States District Judges to adopt mandatory ADR programs on the rationale: "No one is forcing *me* to adopt such programs, so why should I object if other judges want to install them?" I suggest that such "go along" judges constitute the weak link in the defense of some very fundamental rights and principles. And I predict that, down the road, they will see the tactics of the involuntary court-annexed ADR movement change. After they succeed in getting a large number of such programs installed they will urge the Congress and the Judicial Conference to *require* them in every district court. The writing is clearly on the wall.<sup>31</sup> Indeed, one has only to look at Judge Parker's proposal to realize that that future has arrived.

The real problem with this approach, however, is that it puts the decision in the wrong hands — in the hands of us federal judges. Why should I, as a U.S. District Judge, or why should the U.S. District Court for the Eastern District of Arkansas through a vote of its judges, be permitted to install such

27. *House Studies Alternate Dispute Resolution in Federal Courts*, THE THIRD BRANCH, June 1992, at 5.

28. *Id.*

29. BARBARA S. MEIERHOEFER, FEDERAL JUDICIARY CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 13 (1990).

30. *Id.*

31. For instance, Judge Raymond Broderick concluded his article entitled "Court-Annexed Compulsory Arbitration: It Works" with the following statement. "The history of its successful operation in many state courts and the success of the experimental programs in our federal courts is convincing evidence that the time has come to consider making court-annexed compulsory arbitration an integral part of our federal judicial system". Hon. Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217, 226 (1988). And Judge Parker in his article calls upon the Congress to adopt and install his new reformation model in our federal courts. Parker, *supra* note 1, at 1932-33.

involuntary ADR programs in our court and make participation in such program or programs a condition precedent to a party's right to a traditional trial of his or her case before a jury or an Article III judge? Although I am a great believer in the value and benefits of judicial discretion, I do not believe we judges should have that power. We should stop talking about giving judges the right to impose such programs upon litigants in our courts and start talking about the rights of persons directly involved, the parties to such civil litigation.

#### IV. FEDERAL JUDGES AND ABA POLITICS

In an effort to bring the issue forward for discussion at the highest policy level of the ABA, a resolution was submitted to the Executive Committee of the National Conference of Federal Trial Judges, the operative portion of which read as follows:

NOW, THEREFORE, BE IT RESOLVED that the Conference of Federal Trial Judges this day go on record opposing the enactment by Congress of any legislation authorizing the installation of any Mandatory ADR Programs in our United States District Courts where involuntary participation in such programs is made a condition precedent to the right of litigants in civil cases to a trial before a jury or a federal judge.<sup>32</sup>

It was adopted at the *February* 1992 meeting and then scheduled for discussion before the Council of the Judicial Administrative Division at the *August* 1992 meeting in San Francisco. The day before the matter was to be taken up by the Council, however, Judge Robert Peckham, Judge William Schwarzer, Judge Stan Brotman, and Mr. Bob Landis appeared before the Executive Committee of the Conference at which time a "Request for Reconsideration" was filed by Judge Peckham supported by a ten-page brief.<sup>33</sup> Judge Peckham urged not only the withdrawal of the resolution but that it be replaced with a new resolution calling upon Congress to enact legislation permitting individual federal courts to adopt, in their discretion, local rules for either mandatory or voluntary ADR mechanisms such as mediation, early neutral evaluation, and arbitration, which were the very programs that Judge Peckham's court had installed in the Northern District of California.<sup>34</sup> Our small executive committee, in effect, "compromised." It withdrew its resolution, but did not replace it with the one recommended by

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32. Resolution of the National Conference of Federal Trial Judges (Feb. 1, 1992) (on file with SMU Law Review).

33. Memorandum from Judge Robert F. Peckham to the Executive Committee of the National Conference of Federal Trial Judges (Aug. 6, 1992) [hereinafter Memorandum] (on file with SMU Law Review). After this article was drafted, I learned of Judge Peckham's death. He was one of the giants among the federal judges of the nation, admired and respected by all. I was lucky to have had a long and cordial relationship with him. On most issues affecting the federal judiciary, we were in full agreement. This mandatory ADR issue was the exception. We simply agreed to disagree. I was hoping and expecting that he would respond to this article, defending his point of view with his usual vigor, wit and logic. He would not want or expect me to "back off," and I will not. Judge Peckham will be missed, sorely missed, by all of those who love this marvelous institution: the United States District Courts.

34. *Id.* at 1.



Judge Peckham, the total effect being that this extremely important matter will not in the foreseeable future be debated at the highest level of the ABA. That is really a shame because the ABA is sorely in need of some education on this issue — one of those “defining” issues, the outcome of which will determine the role of our United States District Courts well into the next century.

Since Judge Peckham’s alternate proposal is very similar to the positions taken by the Federal Court Study Committee and the Federal Judicial Center, it is instructive to briefly discuss his arguments as set forth in his Memorandum of August 6, 1992. He states:

The [National Conference of Federal Trial Judges’] February resolution runs counter to significant judicial developments in the field of ADR in three respects:

- I. Its wide-sweeping coverage calls for the dismantling of numerous well-established federal and state ADR procedures, despite their proven appeal to litigants, attorneys and judges.
- II. It would thwart the district courts’ experimentation with a wide range of ADR programs, thereby frustrating the spirit of the CJRA and impeding an invaluable opportunity to learn how best to design court ADR programs.
- III. It flies in the face of widespread endorsement of presumptively mandatory ADR programs by influential judicial and legal bodies, Congress and the executive branch.<sup>35</sup>

His first point is that forbidding such involuntary ADR programs would have the effect of “dismantling . . . numerous, well-established federal . . . ADR programs despite their proven appeal.”<sup>36</sup> This argument gives insight into the strategy of the ADR movement. First you install such programs on a temporary, pilot, experimental basis and then, after they have been used for sufficient period of time, you call them “well established” and, ergo, presumptively sacrosanct. And what justification do they give for continuing such programs? Nothing of more substance than “their proven appeal to litigants, attorneys and judges.”<sup>37</sup> My first answer to this contention has always been: if there is such universal acceptance of these ADR programs, why is it necessary to make them mandatory? The answer is that if they are voluntary, they will not be used. As Judge Peckham acknowledges in his memorandum, “[s]ome voluntary ADR programs have been unsuccessful in attracting participants.”<sup>38</sup> He explains:

For example, one district court has a voluntary arbitration program that provides for notification to participants in selected cases with an invitation to opt-in. The program “has been strikingly unsuccessful in attracting cases, despite a considerable effort at bar outreach. Of 1,115 cases notified thus far, only one has opted-in.” Similarly, very few cases have been “volunteered” into the ENE program in the Northern Dis-

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35. *Id.* at 1-2.

36. *Id.* at 2.

37. *Id.*

38. *Id.*

trict of California, . . .<sup>39</sup>

He tries to account for this "serious shortfall of voluntary participants" as follows:

Parties may not be aware of alternatives. Attorneys may be unwilling to advise trying "something new" for fear their advice will be faulted if the something new does not work out. And they may be wary of electing a procedure that might be construed as a sign of weakness. They may also fear disclosing their case in advance of trial or believe that, in some cases, delay serves the best interest of their clients and may therefore avoid programs that purport to speed cases to disposition.<sup>40</sup>

Let me help the good judge: Might they not simply want truth and principle vindicated and a just resolution of their case in a *judicial* forum on the merits; in sum, justice?

## V. INTRA-JUDICIARY POLITICS

On the civil side, the American justice system embodying the concept of the right to a trial before a jury or a judge, the traditional right to one's "day in court", is under merciless attack from a broad, but loose, coalition of forces composed of academics, ADR special interest groups, politicians, and, strangely enough, a few federal judges, who, because of their roles within the judiciary policy making establishment,<sup>41</sup> exercise leverage and power far beyond their numbers. Judge Parker's article is just the latest, albeit one of the most dramatic, expressions of the disaffection this group feels toward the traditional trial (before judge or jury) utilized by our federal courts for over 200 years.

The ADR folks within the federal judiciary come at this issue from all directions. Strangely, the judges dealing with the Federal Rules of Civil Procedure got into the act last year with their proposal to change Rule 16(c), which deals with the subjects for consideration at pre-trial conferences.<sup>42</sup> In a letter from Judge Sam Pointer to Judge Robert Keeton of June 13, 1991, we find the following with respect to Rule 16(c)(9):

In subdivision (c)(9) the revision amplifies the power of the court with respect to various ADR techniques. The additional sentence at the end of subdivision (c) provides that parties, or their representatives or insurers, can be required to attend settlement conferences or participate in ADR proceedings. While the court should be reluctant to order unwilling litigants to participate in such settlement efforts and proceedings, it is important that this power be recognized.<sup>43</sup>

The rule as then drafted made it clear that it was dealing with ADR pro-

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39. *Id.* at 5 (footnote omitted).

40. *Id.* (quoting MEIERHOEFER, *supra* note 29, at 120).

41. Judge Parker, for instance, is not just any district judge. He is the Chair of the very influential Committee on Court Administration and Case Management of the United States Judicial Conference.

42. FED. R. CIV. P. 16(c).

43. Attachment to letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Judge Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (June 13, 1991) (on file with SMU Law Review).

grams and it purported specifically to authorize the use of regularly summoned jurors in summary jury trials. Then proposed Rule 16(c)(9) was redrafted to identify one of the subjects for consideration at pre-trial conferences as "the possibility of settlement and the use of special procedures to assist in resolving the dispute."<sup>44</sup> Ambiguous, yes, but innocuous enough. Now read the last sentence of proposed Rule 16 which stated: "The court may require that parties, or their representatives or insurers, attend a conference to consider possibilities of settlement and participate in proceedings ordered under paragraph (9)."<sup>45</sup> If there had been no committee notes or commentary no one would likely have appreciated the scope and significance of the proposal. There is nothing in the proposed language which would suggest that it is intended to empower federal district courts to require parties in civil cases to submit to any of a variety of mandatory court-annexed ADR programs that the judge might think up as a condition upon those parties' right to a trial before a jury or before a judge. But when we refer to the committee notes all doubt is expelled.

Parties should not be forced by the court into settlements, and the lack of interest of a party to participate in settlement discussions may be a signal that the time and expense involved in pursuing settlement may be unproductive. *Nevertheless, the court should have the power* in appropriate cases to *require parties to participate in proceedings* that may indicate to them — or their adversaries — the wisdom of resolving the litigation without resort to a full trial on the merits. Of course the court should not impose unreasonable burdens on a party as a device to extract settlement, such as by requiring officials with the broad responsibilities to attend a settlement conference involving relatively minor matters.<sup>46</sup>

So I wrote to Judge Keeton and inquired:

Is it reasonable that a proposed change of this importance — a change which some of us believe may unconstitutionally burden the right of civil litigants to a trial before a jury or a judge utilizing the usual due process requirements and evidentiary standards — should be put into effect by the device of a seemingly innocent change in 16(c) dealing with "subjects for consideration at pre-trial conferences?"<sup>47</sup>

I urged the members of the committee to oppose the proposed change.<sup>48</sup> I am not sure where the committee's proposal stands at the present time but the point is that the mandatory ADR movement is pervasive.

As a further indication of my paranoia on this subject, I question: Whatever happened to old 28 U.S.C. section 2072, which gave the Supreme Court the power to prescribe by general rules the practice and procedure of

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44. Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence 11 (Aug. 1991) (on file with SMU Law Review).

45. *Id.* at 12.

46. *Id.* at 14 (emphasis added).

47. Letter from Chief Judge G. Thomas Eisele, E.D. of Ark., to Judge Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (Jan. 29, 1992) (on file with SMU Law Review).

48. *Id.*

our district and circuit courts?<sup>49</sup> The second paragraph of section 2072 provided that “[s]uch rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.”<sup>50</sup> Then along came the Rules Enabling Act amendments in 1988 and that paragraph was amended to read, “such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”<sup>51</sup> This amendment was made under the rubric of a “technical change.” It was passed at the same time that the “Judicial Improvements Act” first gave substantive statutory authority for the ten mandatory court-annexed arbitration “experimental pilot” programs.<sup>52</sup> So if one wishes to venture onto this battlefield he must constantly protect his flanks.

Precious little vocal opposition to this movement has been expressed by the bench or the bar of this nation. And no one has chosen to let the common, lay citizens of this country — the ones whose rights are most directly affected — in on the conversation. So, while one can excuse the unaware general citizenry for not rising up in arms, what excuse do judges and lawyers, particularly trial lawyers, have for their strange silence in the face of this threat to rights long enjoyed and accepted by Americans? I will venture a partial explanation. Most federal judges who are not members of the Judicial Conference, or of one of its policy making committees, have traditionally felt it inappropriate to speak out on controversial issues. I suggest that those federal judges who hold back from expressing their strongly felt views at this policy making stage are doing themselves, the judiciary as a whole, the Congress, and the people of this nation a disservice.

There is little that is democratic within the Third Branch. The Chief Justice, the Judicial Conference, and even committees thereof, regularly inform Congress as to the “views of the judiciary” often without seeking the yeas and nays. Particularly this is true with respect to controversial issues.<sup>53</sup> Some will say that that is the way it should be, but I suggest that the country is not well served by this system. On major policy issues which directly affect the rights of the citizens of this country, more judges must learn to speak out. This is particularly so when the “official” spokespersons for the Third Branch are expressing views on important subjects which are contrary to those held by most, or many, federal judges. The only excuse I can think of for the silence of our trial bar is their possible ignorance of the whole debate. And that is not a good excuse.

The Directors of the Federal Judicial Center are chosen by the Board of the Federal Judicial Center headed by the Chief Justice. These directors, in turn, essentially control the “education” of federal judges and others in the

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49. 28 U.S.C. § 2072 (1982), amended by 28 U.S.C. § 2072 (1988 & Supp. II 1990).

50. *Id.*

51. 28 U.S.C. § 2072(b) (1988).

52. 28 U.S.C. §§ 651-658 (1988).

53. Take, for instance, the Sentencing Guidelines. See 28 U.S.C. § 994 (1988).

court family. So we see Professor Leo Levin who, as Director, expressed his (lukewarm?) support for these court-annexed ADR programs back in the mid 1980s.<sup>54</sup> Now we have another Chief Justice and he too *seems* to be coming down on the side of these programs, although this is not clear.<sup>55</sup> At least he appears to be encouraging experimentation with them. Judge William Schwarzer, formerly of the Northern District of California, is now the Director of the Center, and a more committed true believer one could not find. The consequence is that the debate lacks the balance which one would expect knowing how divided federal judges are on this issue. The proponents control the judicial presses, conduct the surveys and the research, and have better access to the bench, the bar, the Judicial Conference and to the Congress, and they do not seek genuine debate and discussion. Thus, we have the very conditions that often produce bad decisions. Judges should know that.

Back in 1986, the District Judges Association of the Eighth Circuit went on record "in opposition to any statute or rule of court which would permit the establishment of a court-annexed arbitration program in any district court if, under such program, parties to any civil action can be compelled against their wishes to participate therein."<sup>56</sup> Overall, however, the opposition has not been well organized or vocal.<sup>57</sup>

Why do proponents of ADRs want to annex them to our federal courts? I

54. A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985).

55. In the June 1992 issue of *The Third Branch* there is a report on Chief Justice Rehnquist's speech to the American Law Institute, part of which reads as follows:

The American Law Institute, at its annual meeting last month, heard Chief Justice Rehnquist warn that even larger judicial workloads and additional judge-ships will not be enough to keep up with the "ever-increasing demands of a litigious citizenry." "It is necessary," he said "to realize that judicial machinery is a scarce resource . . . In the future, access must be regulated to assure that this scarce resource is available, not simply on the basis of which litigant is the most ingenious or insistent, but on the basis of the greatest good for the greatest number."

*Chief Justice Addresses Federal Court Workload, Future Needs*, THE THIRD BRANCH, June 1992, at 4.

56. Resolution of the District Judges Association of the Eighth Circuit (1986) (on file with SMU Law Review).

57. *But see* Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889 (1991). In a letter to me of July 30, 1991, Professor Dayton states, "I take the position that ADR programs, including court-annexed arbitration, have not been successful in reducing expense and delay in the federal courts, and threaten many important values associated with litigation and, if necessary, trial before an Article III judge." Letter from Kim Dayton, Professor of Law, Univ. of Kan. Sch. of Law, to Chief Judge G. Thomas Eisele, E. D. of Ark., (July 30, 1991) (on file with the SMU Law Review). And Professor Carrie Menkel-Meadow is apparently having some second thoughts about how ADR programs work when annexed to courts:

In short, courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice. Lawyers may use ADR not for the accomplishment of a "better" result, but as another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage. Legal challenges cause ADR "issues" to be decided by courts. An important question that must be confronted is whether forcing ADR to adapt to a legal culture or environment may

see two reasons. First, they seek legitimacy and want to improve the reputation and status of such programs by creating the impression with the lay public that real trials and these ADR mechanisms are really part and parcel of the same thing. Second, if the court-annexed programs are voluntary, no one will use them, so they need someone — here a federal court — to *compel* participation in those programs.

## VI. BUSY-BODY COURTS

The very first sentence of Judge Parker's article confuses and worries me. It states, "This article advocates a break from the past in terms of how civil dispute resolution is conducted in this country — specifically, in the federal district courts."<sup>58</sup> If we are to break with the past, by which it is assumed he means the present, then it would be a help to have the answers to two very different questions: 1) how is the universe of dispute resolution presently conducted in this country, and 2) how is dispute resolution conducted in the federal district courts of this country, a subset of that universe? He does not discuss either question. Rather he asks us to accept on faith that the present system, whatever it is, is broken and that radical steps must be taken, not to fix it, but to replace it.

To analyze this, first consider the universe of disputes that meet jurisdictional requirements and therefore could be filed in our federal district courts. Then ask what percentage of such potential filings actually find their way into our federal courts? I do not know of any scientific study which will tell us what that percentage is, but I do not believe that any one would suggest that it would be more than 10%. Assuming only 10% of such potential claims actually end up in our federal district courts, then that would mean that 90% would have been resolved under our present system, whatever that is, *before* becoming a court case. How are those non-court disputes presently being resolved? In what percent are lawyers engaged? What are the circumstances that stop those disputes short of the courthouse door? In a way the answer is obvious. They are resolved through the myriad ways and means that civil disputes have been resolved between parties throughout the centuries: settlement, compromise, abandonment, etc. In more recent years, private parties in an effort to settle their differences, may have turned not only to lawyers, ministers, or respected neutrals, but they also may have voluntarily utilized arbitration, mediation or other ADR programs that are available on the private market.

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be counterproductive to the transformations proponents of ADR would like to see in our disputing practices.

... Thus, the debates about ADR and the legal resolutions of important policy and procedural issues affect not only ADR, but the legitimacy of the entire legal process.

Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 3-4 (1991). It is my view that we cannot "marry" trial courts, with their judicial procedures, to ADRs without damage to both, because the aims and techniques of each are so different from the other, differences not of degree but of kind.

58. Parker, *supra* note 1, at 1905.

Undoubtedly some meritorious claims have not been filed because of the size thereof, the resources of one or more of the parties, or other circumstances independent of the merits of such claim. But one thing is clear: this non-court dispute resolution system is within the private sphere and, one way or another, it is working. Government is not involved. The taxpayers do not pay the costs thereof. If I understand Judge Parker's proposal and his statements concerning the need to increase access to our courts, I believe I am correct in concluding that he is advocating that the United States nationalize this private dispute resolution system, create multi-door federal dispute resolution centers, attach them to our federal district courts, greatly expand federal court civil jurisdiction, and then invite one and all to bring their disputes to such centers, where, at the cost of the taxpayers, these disputes would be resolved by mandatory assignments to the "appropriate track" with the decisionmakers being non-judicial personnel. To ADR advocates the premise for all of this is that the parties and their attorneys do not know what is best for them.<sup>59</sup>

The second question is: How is dispute resolution presently conducted *within* the federal district courts of this country? If we are right in our hunch that not more than 10% of potential federal court disputes are actually filed in federal court, then it becomes instructive to determine how the 10% that are so filed are presently resolved. According to a Rand Corporation study, "almost 95 percent of all private civil cases filed in federal courts never reach trial, ending instead in settlements or other pretrial dispositions".<sup>60</sup>

If only 10% of the potential federal civil cases end up in court and if only 5% of those that do end up in court have to be tried, that means that only one half of 1% of such disputes will be tried before a judge or jury under the present system, in the absence of these mandatory ADR programs. These figures, in essence, set the stage for this entire controversy. The proponents want these programs in order to reduce that 5% trial rate even more, to say, 2% or 1% or zero! If there are no ADR programs 95% of our civil cases will go away before trial. If, on the other hand, you set up these ADR programs and require a majority of your civil cases to go through them, with their attendant costs, and thereby reduce the trial rate from 5% to 2%, what has been gained?

Honestly, I find the mandatory court-annexed ADR true believers a bit schizoid. On the one hand they make their case on the premise that the federal trial courts in this country are swamped — drowning in a sea of

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59. Paternalism pervades the thinking of mandatory ADR advocates. In the first footnote in his article, Judge Parker quotes from Michael Tigar's *2020 Vision*, saying that "the market behavior of legal services consumers is irrational . . . It is irrational in terms of their own interest, which is a crucial market failure." Parker, *supra* note 1, at 1906 (quoting Michael E. Tigar, *2020 Vision: A Bifocal View*, 74 JUDICATURE 89, 92 (1990)). Parties to litigation who pursue justice until the end may lose, dollarwise, more by successfully winning a final verdict than if they had settled or compromised. Does that make their decision to go to trial and get justice irrational? There are dollars, and there are values.

60. Pollock & Felsenthal, *supra* note 20, at 3.

swollen civil dockets. On that basis they argue that we can no longer afford the luxury of our traditional litigation model. Listen to their message: we simply do not have the time or judicial resources to process and try cases before judges or juries in accordance with the Federal Rules of Civil Procedure and the Rules of Evidence, i.e. in accordance with long-established judicial trial quality due process.

Then they make the different argument that we need to increase access to our courts and make them available to one and all to resolve disputes, great and small.<sup>61</sup> Traditionally, however, we find the Judicial Conference and individual federal judges urging restraint on the part of Congress in expanding federal jurisdiction. For example, we ask our legislators to make a judicial impact analysis before opening the federal courthouse door to new, possibly numerous, federal causes of action.

Let us deal with a few fundamentals. Access to our federal courts for the great bulk of civil controversies is controlled by Congress. Therefore, I submit Judge Parker is mistaken when he states that today's federal courthouse contains significant barriers to entry for most members of society. This is not so. If there are barriers there, they are Congress' doing, and within certain constitutional limits, properly so. There is little that the federal courts can or should do to increase access. Judges deal with the civil cases that have *already gained access* to our federal courts. The true access question that we are dealing with in this debate is whether federal judges are going to deny the parties to such civil cases access to their "day in court", to the right to a real trial before a real judge or a real jury in accordance with traditional due process and equal protection standards? After they come into our courthouse are we going to *block their access* to the courtroom?

When I hear Judge Parker and Judge Broderick talk about increasing access, I am reminded of the proud claim of the leaders of the old Soviet Russia that its vaunted Socialist society provided access to health and medical care for all of its citizens, and it did. But what medical and health services did this wonderful access in fact provide? Reality made a mockery of the promise. Reality will, at least eventually, override propaganda. It is my hope that we will not have to go through another ten or twenty years of mandated experimentation with these court-annexed ADRs to prove the obvious.

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61. Judge Raymond Broderick in his article quoted Judge Irving Kaufman's statement that our "federal court system has entered a period of crisis . . . with ever burgeoning caseloads" and then observed that our federal courts are "accessible only to those who could afford the high cost." Raymond J. Broderick, *Yes to Mandatory Court-Annexed ADR*, LITIGATION, Summer 1992, at 3. He also quoted Judge Griffin Bell's statement from when Bell was attorney general that court-annexed compulsory arbitration would "broaden access for the American people to their justice system." *Id.* at 4. And Judge Broderick then concludes "we must face the fact that our federal system of justice has become inaccessible to many. We must adapt our federal judicial system to the ever-changing conditions of national life to ensure that every person, regardless of wealth, receives timely redress in our courts." *Id.* at 60. Unless Judges Parker, Bell, and Broderick want the Congress to expand federal court jurisdiction, their "access" point becomes a misuse of language. What their programs do, and are intended to do, is to burden and to restrict the traditional access of litigants *already in court* to their long-cherished day in court before a real judge or a real jury.



Under Article III of our Constitution, the judicial power of the United States is vested in the U.S. Supreme Court and the "inferior" federal courts established by acts of Congress.<sup>62</sup> There are strict limitations on the use of that judicial power by non-article III judges and other persons. The contempt power of Bankruptcy Judges is limited. Highly qualified U.S. Magistrate Judges cannot try even regular civil cases without the consent of the parties, and we go out of our way to make certain such consent is freely given. If Judge Parker's proposals were fully implemented, the federal judicial power in most civil cases would be delegated out, or sub-contracted, to non-judges and in some cases to non-lawyers.

The U.S. Congress has great control over the civil jurisdiction of federal district courts. If it chooses to do away with, or further limit, our broad diversity jurisdiction, it could. It could permit more federal rights to be asserted in state courts. It could establish additional specialized courts in social security and other areas. It could require more administrative remedies be exhausted before certain civil cases could be filed in federal court. But if the Congress chooses to permit certain civil cases to be filed in our federal courts, does it not thereby express its intent that they be handled and processed by juries and Article III judges in accordance with the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and established constitutional principles?

Herewith an aside to this discussion: many scholars and some judges favor doing away with, or severely curtailing, the diversity jurisdiction of our federal courts as a means of dealing with any overload problems. But most also realize that political realities make it unlikely that Congress will take such action. I suggest that they might want to consider installing Judge Parker's proposal in our federal district courts. Unless someone can prevail upon *state* governments to limit trials in their courts through the imposition of similar mandatory ADR tracks, then those having a choice of federal or state court will simply opt for, or choose to remain in, the state courts where they can still get their day in a real court without having to go through any of these diversions. Voila! A significant reduction in diversity cases! It really comes down to that "vision thing." Judge Parker and I have different — radically different — views of what our federal courts are, and should be, about.

## VII. JUDGE PARKER CALLS AND RAISES

If you agree that the present "experimental" mandatory court-annexed ADR programs unfairly trample upon the rights of "we, the people," consider Judge Parker's proposals. Judge Parker starts by observing that "current ADR programs and procedures are . . . inadequate."<sup>63</sup> But he does not take issue with the procedures used in those programs. Rather he complains that they are often imposed too late or "after the modern, undisciplined pre-

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62. U.S. CONST. art. III, § 1.

63. Parker, *supra* note 1, at 1910.

trial practices of lawyers have already run up a substantial bill and produced significant delay.”<sup>64</sup> His major complaint is that decisions rendered by these mandatory ADR programs are “accorded too little binding authority.”<sup>65</sup> So to him such programs are both too little and too late. He gives the example of the Pittsburgh, Pennsylvania arbitration program which provides “[i]nformal hearings, with relaxed rules of evidence” after which the arbitrators return a judgment.<sup>66</sup> Then he states, “[a]fter all this, if one of the litigants rejects the arbitrators’ decision, she may demand that the court schedule a full-blown traditional trial — *i.e.*, with no more justification than dissatisfaction with the results of the arbitrators’ particular decision.”<sup>67</sup> It is difficult to find a statement that more poignantly reveals the differences between Judge Parker’s views and mine. Since the parties have received the benefits of an informal hearing with relaxed rules of evidence, he in effect asks, what more could one possibly desire?!

Whereas Judge Broderick and Judge Peckham, in defending the legitimacy of their programs, rely most heavily on the “right” of a party dissatisfied with the results thereof to demand a real trial before a judge or a jury, Judge Parker sees that “right” as the major deficiency in those programs. He acknowledges that in those ADR programs there “exist cost-shifting disincentives” to the making of any demand for a trial *de novo*, but concludes that “such disincentives are generally too insignificant to truly discourage such demands.”<sup>68</sup> So Judge Parker sets out to correct that situation. He states this must be done if federal courts are fairly to be considered “comprehensive justice centers.”<sup>69</sup> Mercy, mercy!

Not only would Judge Parker make his mandatory “tracking” ADRs public and tax-supported;<sup>70</sup> not only would he require federal judges to play a “significantly” more active managerial role and “move our system closer to an inquisitorial system” of civil dispute resolution in which the real decisionmakers are neither juries nor judges;<sup>71</sup> but he would also mandate that the ADR decisions rendered in his “tracks” be given a “presumption of finality.”<sup>72</sup> And how, pray, may one overcome this presumption of finality? Judge Parker assures us that a party’s access to a “formalistic” trial will be “ensured when justified.”<sup>73</sup> After a decision is reached “through a non-traditional track,” the litigants would be given a “second procedural safeguard,” or “another meaningful opportunity to be heard about why they are *yet* entitled to a traditional trial.”<sup>74</sup> At this point the court is called upon to under-

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64. *Id.*

65. *Id.*

66. *Id.* (quoting JANE W. ADLER ET AL., *SIMPLE JUSTICE: HOW THE LITIGANTS FARE IN THE PITTSBURGH ARBITRATION PROGRAM* vii (Institute for Civil Justice 1983)).

67. *Id.*

68. Parker, *supra* note 1, at 1910.

69. *Id.* at 1911.

70. *Id.* at 1905.

71. *Id.* at 1912-13.

72. *Id.* at 1914.

73. Parker, *supra* note 1.

74. *Id.*

take "a cost/benefit-fairness analysis of whether the case warrants the *additional* litigant and court resources implicated by the post-decision, traditional litigation."<sup>75</sup> Judge Parker refers to this hearing as an "exemption procedure."<sup>76</sup> He even calls it a "safeguard" for cases "that might have been inappropriately tracked."<sup>77</sup> In deciding whether to grant the parties a trial, the court is called upon to consider "the factors analyzed at the tracking conference, including apparent resource disparity between litigants."<sup>78</sup> But, most importantly, the court is to "consider whether it is likely that a result substantially different from that reached through the non-traditional track will be reached by allowing the case to continue through the additional, traditional litigation track."<sup>79</sup> It is incumbent upon the litigant seeking to consume still more litigant and judicial resources to "overcome this presumption against such entitlement."<sup>80</sup> Furthermore, in sharp contrast to the defensive position taken by Judges Broderick and Peckham, Judge Parker frankly acknowledges that under his system "a network of incentives and disincentives should operate to discourage litigants from challenging the presumption."<sup>81</sup> Thus, post-decision challenges should be relatively few. At a later point he amplifies on this theme:

Relative cost and delay also work as *disincentives* for litigants to seek more process after the presumptively correct decision is rendered pursuant to a non-traditional track proceeding. It appears quite likely that most litigants who have been originally placed on a non-traditional track will not consider the additional process (benefit) of an traditional trial *worth* the additional transaction cost and delay inherent in such litigation. This seems especially true given that the litigant would have to overcome a presumption against entitlement to such a trial before she could start expending the additional time and money associated with the traditional trial itself.<sup>82</sup>

Judge Parker then states that in formulating his proposal he considered other more stringent disincentives but decided that, in the light of those already imposed, such additional disincentives would not be necessary.<sup>83</sup>

So while Judge Broderick's court designed its mandatory court-annexed arbitration program in a way that would make it economically unfeasible for a dissatisfied party to seek a trial *de novo*, Judge Parker has added to such disincentives a presumption of finality to make it quite certain that few would actually be able to successfully get the opportunity to have their case tried before a judge or a jury. At this point please turn to the Constitution and slowly read Article III, the Fifth Amendment, and the Seventh Amendment. Is the language becoming dimmer?

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75. *Id.*

76. *Id.*

77. *Id.* at 1915.

78. Parker, *supra* note 1.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1917.

83. Parker, *supra* note 1.

## VIII. JUDGE PARKER'S FEDERAL DISTRICT COURT

It is not clear to me how one can fully evaluate Judge Parker's multi-track proposal without having a detailed explanation of the precise procedures which would be required in each of his "tracks." It is almost as if he believes that a careful, precise explanation of his "tracks" is *non-essential* to a fair evaluation of his over-all proposal. However, I insist there is no way to fully evaluate his claim that his "tracks" will produce fair and reliable decisions without knowing how those tracks work. Still he does tell us just enough to give as a handle on his basic assumptions.

His "Litigation Track I" postulates a "non-judicial" decisionmaker.<sup>84</sup> We are told very frankly that "[t]he rules of evidence and the rules of civil procedure would not apply."<sup>85</sup> The parties and witnesses would just tell their stories. His "Litigation Track II," we are told, "most resembles what is known as court-annexed arbitration."<sup>86</sup> And we know that the arbitrator-decisionmakers would *not* be judges.<sup>87</sup> Since we have a wealth of information about such mandatory arbitration programs, we will be able to discuss the merits thereof. "Litigation Track III" would permit "the submissions of claims and defenses to a judge or jury" with the information being "presented in summary form."<sup>88</sup> If a jury is used, "this litigation track most resembles what is known as the summary jury trial (SJT) developed by Judge Thomas D. Lambros."<sup>89</sup> Since much is known about Summary Jury Trials we can also evaluate this track. Finally, "Litigation Track IV," his last, is described by Judge Parker thusly: "Herein lies the traditional jury trial conception of civil dispute resolution."<sup>90</sup> And, yes, we do understand our "traditional" litigation model which is the one still used by the overwhelming majority of our federal trial courts. Thanks be! However, we also note that if Judge Parker has his way, our traditional litigation model will also be "*reformed* pursuant to a significant, comprehensive Civil Justice Reform Act plan," the precise terms of which are not spelled out but which would at a minimum control the type and extent of discovery.<sup>91</sup> Now, armed with this description of Judge Parker's "Tracks" let us see if these mandatory ADRs are likely to produce fair and reliable decisions.

In my attacks upon mandatory court-annexed ADR programs, I have dealt mostly with the mandatory arbitration program which was first established in three courts on an experimental basis in 1978.<sup>92</sup> I focused on this because that program has been the centerpiece of the movement to install

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Parker, *supra* note 1, at 1916.

89. *Id.*

90. *Id.*

91. *Id.*

92. See Philip D. Frederick, *Federal Court-Annexed Arbitration*, 68 MICH. B.J. 523, 517 n.1 (1989). Connecticut dropped out early leaving only two "pilots" for the next 6 years. *Id.* Eight more courts were added in 1984-1985, bringing the total to ten. *Id.* at 512, 517 n.3 (listing districts in which court ordered arbitration was operating as of June, 1989).

other ADR programs in our courts and because much information is available about that program. And it appears to be the only ADR program that the Congress has addressed in a substantive manner.

Judge Peckham, in his attack upon the resolution opposing mandatory ADR's in our federal courts,<sup>93</sup> appears to take the back-up position that even if the criticisms expressed in the resolution were valid as to the court-annexed arbitration programs, those criticisms would not apply to other ADR programs. He states:

Although these criticisms are apparently aimed only at arbitration, the resolution's broad denunciation of all presumptively mandatory ADR programs includes within its sweep other varied ADR programs that bear little resemblance to arbitration and thus are not subject to the expressed criticisms. For example, in the Northern District of California's presumptively mandatory early neutral evaluation program, cases are not assigned based on the amount of controversy.

By encompassing *all* presumptively mandatory ADR programs, the resolution, perhaps unwittingly, criticizes and calls for an end to mandatory judicial settlement conferences, an ADR technique commonly used by trial judges and which has withstood judicial challenge. It also seeks to abolish other presumptively mandatory ADR programs such as mediation and early neutral evaluation. Such presumptively mandatory ADR procedures are not subject to the criticisms expressed in the resolution, but the resolution nonetheless seeks to abolish them with its broad brush. This unfounded and illogical reach of the resolution is in and of itself reason to reconsider it.<sup>94</sup>

It is necessary to put one matter to rest. One will note Judge Peckham's statement that the anti-court-annexed mandatory ADR resolution would call for an "end to mandatory judicial settlement conferences."<sup>95</sup> I assume this is intended as the Achilles' Heel argument. Judge Peckham believes, and he may be right, that most judges favor mandatory settlement conferences and, therefore, if I can be identified as opposing such conferences, my entire opposition to mandatory ADRs will be undercut at least among many of our fellow federal judges.

Well, I *am* opposed to mandatory settlement conferences. Indeed our "Biden Plan" for the federal district courts of Arkansas provides that judges "will not initiate or order a mandatory settlement conference with the Court."<sup>96</sup> I do not believe that the parties to civil lawsuits in our federal courts should be *ordered* to discuss settlement with a judge, a magistrate judge, or any other outsider.<sup>97</sup> But, my opposition to mandatory court-an-

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93. See *supra* part IV.

94. Memorandum, *supra* note 33, at 2-3 (footnote omitted). I sympathize with Judge Peckham. As a fair-minded judge he has difficulty using the unadorned term: "mandatory", so we always find the modifier "presumptively." His justification? The federal judges have the power to let you out of, or exempt you from, those ADR programs. Suffice to say it is the judge's call, not the parties!

95. *Id.* at 3.

96. U.S. Dist. Court for the E. Dist. of Ark., Civil Justice Expense and Delay Reduction Plan 3 (Dec. 30, 1991) (on file with SMU Law Review).

97. Professor Menkel-Meadow observes:

nexed ADRs goes well beyond my feelings about settlement conferences.

Those who support mandatory court-annexed ADRs seldom discuss in detail just exactly how those alternatives to a real trial work. Mostly they are content to describe them with language such as Judge Broderick's "Speedy Civil Trials"<sup>98</sup> and as procedures which produce "fair" and "reliable" decisions, see Judge Parker's assessment.<sup>99</sup> I am here to assert that none of these alternative procedures can properly be characterized as a "trial" and none can be counted on to produce "fair" and "reliable" decisions. Why? Because the essential truth revealing procedures and rules of evidence that we associate with real trials are not required. Unless the true facts in dispute are reliably established all else is meaningless. I made this point in an earlier article as follows:

With all due respect, it is not fair to describe ADR programs as only different in some negligible or unimportant degree from traditional trials in federal courts. They are clearly different in kind and in basic philosophy. In real trials, the objective is to arrive at the truth, vindicate rights, and to do justice. The evidence presented at a real trial is all-important. Any experienced trial judge will tell you that it is the proof and the evidence that determines the outcome of over 95 percent of the cases and not the eloquence or histrionic talents of the lawyers. And the procedures, rules, and the evidentiary safeguards incident to true trials ensure a high degree of reliability with respect to the results obtained. Not so with ADRs. They operate in a different atmosphere: where fault, guilt or innocence, right or wrong are not central to the process; where one-tenth of a loaf is better than none; where the debating skills of attorneys — and not their real truth-revealing, fact-establishing trial skills — are glorified; where the evidence is de-emphasized; where every claim is assumed to have some value; where true justice is considered too expensive or an unattainable abstraction.<sup>100</sup>

There is a school of thought, especially among some of the "economist" judges, that it is not important *how* civil cases are decided, only that they be

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Note here the persistence of the view that such mandatory settlement techniques do affect court caseloads, despite the empirical evidence to the contrary. The empirical evidence on the effectiveness of mandatory settlement conferences in reducing court dockets does not support a claim that settlement conferences should be used for efficiency purposes. As a judge and scholar, Judge Posner raises the efficiency issue by suggesting that if judges spend their time at mandatory settlement conferences, they may actually reduce court efficiency by being less available to try cases.

Menkel-Meadow, *supra* note 57, at 21 n.98 (citations omitted). The fairness and value of compelling parties and to attend settlement conferences has been questioned. As stated by Judge Posner, "[t]he broader concern . . . is that in their zeal to settle cases judges may ignore the value of other people's time. One reason people hire lawyers is to economize on their own investment of time in resolving disputes." *G. Heilman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 657 (7th Cir. 1988) (en banc) (Posner, J., dissenting). Judge Easterbrook also found the demonstration of the cost savings weak. *Id.* at 664 (Easterbrook, J., dissenting). My view is based on principle: Federal judges should not intrude into the settlement business unless invited by all parties.

98. Broderick, *supra* note 31, at 218.

99. Parker, *supra* note 1, at 1921.

100. G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE 34, 36 (1991).

decided. That view tears at the very fabric of our American democratic society. If the instruments of justice are not intended and designed to find the truth and bring about a just result, and are not so perceived, we are indeed in trouble. The economists must realize that there are certain values in our democratic society that must be accepted and may not be tampered with even in the name of efficiency.

I have demonstrated elsewhere the fundamental deficiencies of the court-annexed arbitration programs by quoting provisions of the local rules adopted by the Western District of Missouri,<sup>101</sup> and the district of New Jersey's Guidelines.<sup>102</sup> In 1992 the Federal Judicial Center published its "Manual For Litigation Management and Cost and Delay Reduction" which includes Rule 43 from the Western District of Oklahoma.<sup>103</sup> The Western District of Oklahoma, like the Eastern District of Pennsylvania,<sup>104</sup> uses the \$100,000 cut-off figure, above which cases are not forced into arbitration.<sup>105</sup> And, like others, it uses lawyers to act as its arbitrators.<sup>106</sup> Any attorney who has been admitted to practice five years or more, is admitted to practice in that district court, and who is determined by the Court "to be competent to perform the duties of an arbitrator" is eligible for selection.<sup>107</sup> The arbitrators are considered "independent contractors."<sup>108</sup> Those selected are not barred from practicing in that court,<sup>109</sup> and it is assumed that they would not be precluded from representing clients before other lawyer-arbitrators.<sup>110</sup> They are paid \$150 per day or part thereof for hearings in which they participate as an arbitrator or as a member of an arbitration panel.<sup>111</sup> They submit vouchers for payment by the Administrative Office of the United States Courts "for compensation and transportation expenses."<sup>112</sup> Rule 43(G)(5) provides:

5. Default of Party. Subject to the provisions of this Rule, the hearing shall proceed on the noticed date. Absence of a party shall not be

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101. *See id.* That court's rule states that "[t]he presentation of testimony shall be kept to a minimum. Each party's representation to the arbitrators should be primarily through the statements and arguments of counsel." W.D. Mo. R. 30 (H)(5). The Clerk of the Western District of Missouri advises that that court stopped assigning cases to their arbitration program in 1991 and the last arbitration was completed in March 1993. The court now has an early evaluation program.

102. *See, Eisele, supra* note 100, at 36. The Guideline states that "[i]n a general sense, the Court envisions this presentation process to be somewhat similar to a combination of opening and closing arguments augmented by live testimony where necessary to aid the arbitrator's fact-finding function." U.S. Dist. Court for the Dist. of N.J., Guidelines for Arbitration 5 (Dec. 19, 1991) (on file with SMU Law Review).

103. FEDERAL JUDICIAL CENTER, MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION 109 (1992).

104. E.D. Pa. R. 8(3)(A).

105. W.D. Okla. R. 43(B)(2)(a).

106. *Id.* 43(F).

107. *Id.*

108. *Id.* 43(F)(1)(a).

109. *Id.*

110. The potential for conflicts of interest and the ever-present appearance of such conflicts are manifest.

111. *Id.* 43(F)(2)(a).

112. *Id.*

grounds for a continuance but damages shall be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s). Failure to appear by a person required to be present or other failure to participate in good faith may constitute a default in accordance with Local Rule 17(E). In such instances, the hearing shall proceed and the arbitrator(s) shall enter an award. Upon a report of absence or other noncompliance with this Rule, or, on the motion of opposing counsel, appropriate action may be taken by the Court.<sup>113</sup>

Rule 43 (I) provides in part:

(I) *Attendance at and Conduct of Hearing.*

(1) In addition to lead counsel who will try the case for each party, a person with actual settlement authority must likewise be present for the hearing. This will be the parties if natural persons, or representatives of parties which are not natural persons, but may not be counsel (except in-house counsel) or a person who is not directly or actively associated with the party or parties. Other interested parties such as insurers or indemnifiers shall attend and are subject to the provisions of this Rule. Only the assigned Judge may excuse attendance by any attorney, party, or party's representative.

(2) Hearings are intended to last approximately two to two and one-half hours. Counsel for each party shall have up to one hour to communicate the highlights of his or her case. Plaintiff(s) will be permitted to reserve a limited time for rebuttal. In the case of multiple parties and multiple claims, adjustments are made at the discretion of the arbitrator.

(3) The hearing shall be conducted informally. All evidence shall be presented through counsel who may incorporate argument on such evidence in his or her presentation. The Federal Rules of Evidence shall be a guide, but shall not be binding. Counsel may present factual representations supportable by reference to discovery materials, including depositions, stipulations, signed statements of witnesses, or other documents or by a professional representation that counsel personally spoke with the witness and is repeating what the witness stated. Statements, reports, and depositions may be read from, but not at undue length. Physical evidence, including documents, may be exhibited during a presentation.<sup>114</sup>

The arbitrators have the power to make awards but are not required to issue an opinion explaining the award.<sup>115</sup> Rule 43 makes an effort to insulate the arbitration hearing from any subsequent trial de novo. It states that "[i]n the absence of agreement of the parties, and except as provided in this Rule, no transcript of the hearing shall be admissible in evidence at any subsequent de novo trial of the action."<sup>116</sup> The rule continues:

(2) *Limitation on Admission of Evidence.* At a trial de novo, the Court shall not admit any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter

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113. *Id.* 43(G)(5).

114. *Id.* 43(I).

115. *Id.* 43(O).

116. *Id.* 43(J).



concerning the conduct of the arbitration proceeding unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence, or the parties have otherwise stipulated.<sup>117</sup>

If a person still insists on a trial after the arbitrator's award, he must first deposit with the clerk an amount equal to the arbitrators' fees.<sup>118</sup> Rule 43 (P)(4) provides:

(4) *Return of Deposited Fees.* Upon application within fifteen days of the entry of a final judgment, the sum so deposited shall be returned to the party demanding the trial *de novo*, if

(a) the party demanding the trial *de novo* obtains a final judgment, exclusive of interest and costs, more favorable than the arbitration award, or

(b) the Court determines that the demand for trial *de novo* was made for good cause.

In the event that the moving party does not obtain a more favorable result and the sum so deposited is not returned to the moving party, such sum shall be paid to the Treasury of the United States.<sup>119</sup>

So we see that the arbitration hearing is conducted before non-judicial independent contractors, the right of cross-examination is gone, and the role of evidence becomes secondary. The whole objective is to drastically shorten the proceeding. Note that the guidelines from the Western District of Missouri candidly state:

An arbitration hearing is an opportunity to present informally the essence of a dispute. An arbitration hearing should not be conducted like a formal trial. Each party's presentation should not last more than 2 1/2 hours.

A party's presentation should be a combination of opening statement and closing argument supplemented by evidence. A party is not required to call any witnesses. However, a party may call witnesses, but the time allotted to that party should not be enlarged solely because witnesses were present.<sup>120</sup>

What lawyer would state that what happens at one of these court-annexed arbitration hearings is a trial?<sup>121</sup> As I have said before, any judge who re-

117. W.D. Okla. R. 43 (P)(2). One can reasonably question the efficacy and effectiveness of such language. I doubt that such a Chinese Wall can, or should, be erected. If a party makes a damaging admission at the arbitration hearing in an affidavit or otherwise would the local rule override the Federal Rules of Evidence or the due process rights of the litigant to submit that evidence to the trier of fact at the real, "de novo" trial? The reality is that these mandatory ADRs in effect compel the preliminary disclosure of information and trial tactics contrary to the discovery rules which, in turn, can compromise the effectiveness of any actual trial that may follow on. Furthermore, holding back, that is failing to fully participate in the ADR proceeding, may bring sanctions. Of course, if the effectiveness of the trial is prejudiced or compromised by the ADR proceeding that in itself may induce settlement — which is the principal objective of those requiring such diversions.

118. *Id.* 43(P)(3).

119. *Id.* 43(P)(4).

120. U.S. Dist. Court for the W. Dist. of Mo., Guidelines for Arbitration.

121. I am not alone in understanding the crucial differences between trials and arbitration. Note Justice Black's statement in *Republic Steel Corp. v. Maddox*:

For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial

quires a trial before him or her to be conducted in accordance with such rules would not only be summarily reversed on appeal, but would probably be considered as a proper candidate for impeachment.

Indeed, court-annexed arbitration is surely giving traditional arbitration a bad name. This is because the objectives of the two procedures are different. Traditional arbitration may go to some lengths to establish the true facts, but that would defeat the purpose of *court-annexed* arbitration. If court-annexed ADRs are not limited in time and procedure, they may last as long as trials. Therefore, if one's only justification for such diversions in the first place is the alleged reduction in costs and delays, we have a problem, don't we? The moral is that if ADRs are kept out of our courts and are voluntary, they have a much greater chance of being effective.

Coerced settlement is the primary objective of these compulsory court-annexed ADRs despite protests to the contrary. For instance, Judge Broderick states that the mandatory arbitration program in the Eastern District of Pennsylvania "was not designed primarily as a settlement program."<sup>122</sup> But he undercuts this contention when he explains his court's reason for adopting a maximum dollar cut-off figure.<sup>123</sup> Under all such mandatory programs, if the amount of money the plaintiff is legitimately seeking is more than the cut-off figure, then the case may *not* be ordered into the arbitration program. If, however, the figure is below the cut-off figure then the case is mandatorily forced into the program. How did the judges of the Eastern District of Pennsylvania arrive at the cut-off figure? Let me quote from Judge Broderick:

It was generally agreed that there should be some limitation on the amount in controversy. It was conceded that in cases where money damages only are being sought, the amount in controversy should be limited to an amount which might make it economically unfeasible for litigants to demand a trial *de novo*. The savings to the litigants, as well as to the courts is not realized whenever the amount in controversy encourages the losing party to demand a trial *de novo*. It was therefore determined to limit the amount in controversy to \$75,000 in order to avoid the possibility of making the arbitration program just one more layer of litigation.<sup>124</sup>

So where "big money" is sought, the parties are entitled to their traditional day in court unencumbered with this costly arbitration diversion. This is not so if the claim is relatively small. The court picked a figure which it felt would make it economically unfeasible for a party who was dissatisfied with

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proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.

379 U.S. 663, 664 (1965).

122. Broderick, *supra* note 31, at 218.

123. This cutoff figure was originally \$75,000, but was later raised to \$100,000. *Id.* at 220; see E.D.Pa. R. Civ. P. 8.3.A.

124. Broderick, *supra* note 31, at 220.

the arbitration award to then demand a trial de novo. The court has consciously constructed a tangible and effective disincentive aimed at the dissatisfied party. But it will more certainly discourage the poorer parties — those with limited resources.<sup>125</sup> By the time the arbitration award is entered, the parties will have already paid, or become liable for, the expense and legal fees incident to this ADR procedure. One who decides to ask for a trial de novo must then pay his or her lawyer again for preparing for and conducting the real trial. And if that party does not get a more favorable result at the trial than at the arbitration hearing, he or she will also be liable for the arbitrators fees for conducting an arbitration hearing that he did not want or ask for. In addition, if he holds back or skimps in order to save fees and expenses at the arbitration hearing, he or she may be exposed to additional sanctions on the ground that the party did not “participate in the arbitration process in a meaningful manner.”<sup>126</sup> Thus a real catch-22 situation occurs because the rule requires you to use what may very well be limited resources at the arbitration hearing, which, in turn, will discourage you from later demanding a trial de novo. This is sad, sad indeed.

I have discussed these mandatory court-annexed arbitration programs in such detail precisely because Judge Parker has *not* chosen to do so. These ADR programs are the heart of his track system. It is those programs that, in his reformation model, are going to provide whatever justice the parties to civil cases are likely to get in his federal court.<sup>127</sup> Can they be counted on to produce fair and reliable decisions?

Judge Parker’s “Litigation Track III permits the submission of claims and defenses to a judge or jury without the cost and delay associated with the traditional jury trial.”<sup>128</sup> He states that it resembles summary jury trials (SJT) as developed by Judge Tom Lambros of the Northern District of Ohio.<sup>129</sup> Under this procedure, each party may present the substance of its case before a six-person jury selected from the regular jury pool.<sup>130</sup> As described by Professor Leo Levin:

Each side is given one hour to summarize the evidence it would be prepared to present at trial. The judge then instructs the jurors on the law, and they retire to deliberate. While a consensus verdict is encouraged,

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125. Indeed, some critics have argued that ADR actually hurts those who are less powerful in our society — like women or racial and ethnic minorities — by leaving them unprotected by formal rules and procedures in situations where informality permits the expression of power and domination that is unmediated by legal restraints. In other criticisms, proceduralists have argued that various forms of ADR compromise our legal system by privatizing law making, shifting judicial roles, compromising important legal and political rights and principles, and failing to grant parties the benefits of hundreds of years of procedural protections afforded by our civil and criminal justice rules.

Menkel-Meadow, *supra* note 57, at 11 (citations omitted).

126. E.D. Pa. R. 8(5)(C).

127. Parker, *supra* note 1, at 1911.

128. *Id.* at 1916.

129. *Id.*

130. See Thomas D. Lambros & Thomas H. Skunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 47-48 (1980).

if the jurors fail to agree they may instead report their individual views. The verdict is not binding; its purpose is to provide a basis for settlement discussions.<sup>131</sup>

As of June 1992, twelve courts were using SJTs.<sup>132</sup>

Judge Parker, quoting Judge Jon Newman, expresses concern for the jurors — “the conscripted participants” — in our present system.<sup>133</sup> But summary jury trials use real, subpoenaed, jurors to participate, *not* in a real trial, but in an advisory role as part of a settlement effort for which neither the parties nor the prospective jurors *volunteered*.<sup>134</sup> And in many such programs, the jurors, who are there upon orders of the court, and who are away from their families and businesses, are not even informed that the “verdict” they are called upon to render will *not* be binding.<sup>135</sup> Talk about conscription!<sup>136</sup>

Court-annexed mandatory summary jury trials suffer from the same vices and inadequacies as court-annexed mandatory arbitration (as discussed in detail above) and then some. Judicial quality due process and the Rules of Evidence are not mandated; there is no, or limited, cross examination; the evidence is secondary; and as acknowledged by all, summary jury trials are not “trials,” but settlement devices.

Judge Feikens speaks my language when he says:

The Federal Judicial Center is sending judges and lawyers around the country to judicial conferences to preach the use of summary jury trials as an effective way of delivering justice in the quickest possible time at the lowest possible cost . . . .

The parties are required to submit to a procedure to which the rules of evidence and civil procedure do not apply. In the fifteen minute presentation the lawyers can say anything about their cases. Procedures designed to achieve a just result are ignored. No longer is the judicial process dealing with probabilities. There is no burden of proof. Relevancy is not a factor. Neither is credibility — the jury sees and hears no witnesses. How can the jury in this aborted procedure factor into the result the values of the community? It is the use of Russian roulette to achieve a disposition of a case.<sup>137</sup>

Although Judge Parker has not dwelt on the details of his four tracks, we can see that three of them are nothing more or less than the old mandatory ADRs with which we are all familiar. The only difference is he would impose them earlier and with even less discovery than similar ADRs presently enjoy, and he would remove the *right* of a *de novo* trial and provide in lieu

131. Levin & Golash, *supra* note 55, at 38.

132. *House Studies Alternate Dispute Resolution*, *supra* note 27, at 5.

133. Parker, *supra* note 1, at 1908 (quoting Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1644 (1985)).

134. Levin & Golash, *supra* note 54, at 38-39.

135. *Id.*

136. See *Hume v. M & C Management*, 129 F.R.D. 506, 510 (N.D. Ohio 1990) (holding that federal courts may not conscript citizens to serve as jurors in summary jury trials because it is not authorized by law).

137. The Honorable John Feikens, *The Civil Jury — An Endangered Species*, 20 U. MICH. J.L. REF. 789, 794 (1987).

thereof an opportunity to convince a very skeptical self-interested judge that there is a need to expend yet additional litigant and judicial resources on the case.<sup>138</sup>

Judge Parker argues that the *reviewability* of his ADR track decisions might be just enough due process to save them.

Whatever the court's adjudication at the post-decision, traditional trial entitlement hearing, the ruling and the reasons underlying it must be placed in the record. The court's adjudication in this respect should be reviewable according to the clearly erroneous standard. This same standard of review should apply to the final decision rendered through any non-traditional track.<sup>139</sup>

Ironically, one of the criticisms of the use of juries in civil cases is that their general verdicts do not report their factual findings, making appellate review problematical.<sup>140</sup> Nevertheless, the court's instructions as to the law, coupled with the jury's verdict, when reviewed in the light of a complete transcript and record of all of the testimony and evidence, will reveal the critical factual findings. Now compare the jury verdict with the decisions made in Judge Parker's first three tracks. Those decisions are in the form of a simple award or a denial thereof. We are not sure if there will be an electronic or stenographic record of the ADR proceeding. Even if there is, that record will not permit an honest application of the clearly erroneous doctrine because the decision cannot be checked against the real evidence.

Furthermore, what is to guide the appellate court's application of the abuse of discretion standard when reviewing the lower court's tract assignment and exemption decisions? Remember the original tracking decisions are to be based upon "apparent case complexity[,] . . . the need for information exchange (disclosure) and/or discovery, . . . the relative financial resources of the parties[,] . . . public policy externalities[,] and . . . whether the case involves novel questions of law or fact."<sup>141</sup> If a party demands an "exemption" hearing, "the court would conduct the hearing and listen to the arguments for and against the expenditure of additional litigant and court resources on the case."<sup>142</sup> For instance, Judge Parker, states, "Moreover, the court might find that the demanding party is attempting to 'bully' the other with her superior financial and legal resources" and therefore "had not demonstrated her entitlement to the traditional trial."<sup>143</sup>

I ask, how could that tracking decision be reviewed by an appellate court under either the clearly erroneous rule or the abuse of discretion doctrine? What kind of record would exist? We can see that one party is claiming that the other is simply bullying because of that party's superior financial and

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138. Parker, *supra* note 1, at 1914-15.

139. *Id.* at 1919.

140. See Kevin C. Kennedy, *We Need a Fresh Start: Repeal the Seventh Amendment*, 1991 DET. C. L. REV. 1289, 1291 (citing Edward Devitt, *Federal Civil Jury Trials Should Be Abolished*, 60 A.B.A. J. 570 (1974)).

141. Parker, *supra* note 1, at 1914.

142. *Id.* at 1919.

143. *Id.*

legal resources. Would the record reflect anything other than the argument? Would the parties have to develop the evidence on the disparity of financial and legal resources? What if the party with superior resources contended that the other party was asking for a trial in order to extort money from it? Would there be a full evidentiary hearing on that issue which could be reviewed?<sup>144</sup> In sum, reviewability in the context of Judge Parker's ADR tracks is meaningless. Since the underlying proceedings are fundamentally flawed, no review by an appellate court can save them.

Judge Parker tries to reassure our federal appellate judges that there should be few appeals under his system and that "the reformation model's procedural regime should not generate a new onslaught of appellate issues."<sup>145</sup> I disagree. The presently existing experimental mandatory court-annexed programs are already generating a plethora of conflicting appellate decisions.<sup>146</sup> Just imagine the issues his system would raise!

### IX. THE TRADITIONAL FEDERAL DISTRICT COURT

The number of federal district courts which have installed mandatory ADRs is still small. So, now, for the dual purposes of contrast and comparison let us examine how many "traditional" federal courts still operate in the United States in 1993. Most federal trial judges recognize that they should be devoting their time and efforts to the task of bringing the cases on their dockets to a condition of trial readiness as quickly as is reasonable and then to the task of promptly trying those cases that are not settled or disposed of upon motions to dismiss or for summary judgment. Most judges do not badger or cajole the parties or their attorneys into settlement, but most *do* encourage the parties to discuss settlement and try to remove impediments to settlement by, for example, the early resolution of questions of law.

The Eastern District of Arkansas, my district, does not initiate or order

144. I have asked what judges do if they do not try cases. If Judge Parker's reformation model is installed, the answer is clear. They will be busy, busy, busy with track assignment conferences, exemption conferences, and other satellite hearings. I suggest they could better spend their time by dealing with the "real thing" — bringing cases to trial readiness and then trying them. Remember, there will not be many to try (maybe 5%) because good attorneys and their clients are going to settle most of the cases that should be settled, *without* any coercion or involvement from the court.

145. Parker, *supra* note 1, at 1920.

146. Professor Menkel-Meadow observes:

Skillful lawyers are raising legitimate claims regarding the constitutionality of some of the aspects of ADR — such as infringements of the right to a jury trial, separation of powers, due process, and equal protection. Other claims which may not be as legitimate — such as refusing to participate in arbitration by claiming that it is coerced discovery — demonstrate that ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem-solving.

Menkel-Meadow, *supra* note 57, at 17. For some of the more interesting cases, see *Strandel v. Jackson*, 838 F.2d 884 (7th Cir. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (6-5 en banc); *Hume v. M & C Management*, 129 F.R.D. 506, 510 (N.D. Ohio 1990); *Cincinnati Gas & Elec. v. G.E. Co.*, 854 F.2d 900 (6th Cir. 1988), *cert. denied* 489 U.S. 1033 (1989).

settlement conferences. But my scheduling order provides, *inter alia*, that "[t]he Court will expect the attorneys to explore every possibility of settlement well in advance of the trial date and to notify the Court . . . promptly if cases are settled."<sup>147</sup> Furthermore, the Eastern District of Arkansas has just published a pamphlet entitled *Your Day In Court: The Federal Court Experience*, which each litigant and each attorney in every civil case *must* read.<sup>148</sup> That booklet encourages settlement and explains the many options available including the *voluntary* use of ADR programs:

If your case meets the jurisdictional requirements, states a legally valid claim, and has genuine issues of material fact, then you are constitutionally guaranteed the right to a civil trial, and you will not be forced to give up that right. However, it may be in your best interest to settle your lawsuit voluntarily, without going to trial. This might be cheaper and easier for everyone. Give close attention to your lawyer's recommendations in this matter. Ultimately, though, it is you who must decide whether or not to settle, and you need not apologize if you do insist on "your day in court." That is your right.

Your attorney and the opposing party's attorney may be able to work out terms for a settlement that are agreeable to both sides. This type of informal negotiated settlement is the most common and familiar way your suit can be resolved without trial. However, if it looks as though that route might be unsatisfactory, you can use a more formal Alternative Dispute Resolution (ADR) technique or program to help you settle. Some means of ADR settlement are binding — that is, they result in a decision both sides must accept. Some are non-binding — they result in findings more like advice, and either party may take it or leave it. All involve a neutral third party who evaluates the case and helps guide it to resolution. However, the different ADR methods vary in the amount of control that the neutral third party has. ADR techniques are variable and flexible, letting the parties and their attorneys design an effective, efficient, and private resolution of their dispute. But usually they are not cost-free. Indeed, some may be very expensive. Discuss these pros and cons with your attorney.

For more detail on ADR, please see the Additional Information section at the end of this booklet. Note that this court has consciously rejected *mandatory* ADR because it believes it is important to uphold your right to have your case tried to a jury or a judge. Nevertheless, ADR remains a voluntary option which, if chosen, might save time, money, and anxiety.<sup>149</sup>

The booklet also provides information concerning mediation, early neutral evaluation, summary jury trials, mini-trials, and arbitration in the "Additional Information" section of the pamphlet.<sup>150</sup>

Once a case is filed in the Eastern District of Arkansas it is no longer

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147. *Anton Farms v. Hoechst-Roussel Agri-Vet Co.*, No. 92-0451 (E.D. Ark. Sept. 17, 1992) (scheduling order).

148. U.S. DIST. COURT FOR THE E. AND W. DIST. OF ARK., *YOUR DAY IN COURT: THE FEDERAL COURT EXPERIENCE* (1992).

149. *Id.* at 15-16.

150. *Id.* at 25-26.

considered solely the property of the litigants. The court has an obligation to take control of each case early and to follow that case through to trial. Still, the most important, indispensable, element is setting the trial. The certainty of a real trial on a fixed date is the engine that makes the system work both well and efficiently.

Simply put, I believe I was appointed to serve as a *trial judge in a trial court*. I find great satisfaction in that role. I do not understand those trial judges who appear to believe that every trial represents a failure of the system. I believe and accept that some cases *should be tried*. Principle should be vindicated, truth ascertained and determined, rights established and declared, extortion resisted, and justice — pure justice — done, at least occasionally.

In taking on this fight, I believe I am speaking for the citizens and inhabitants of this land. I have reluctantly come to the conclusion that we law professionals — and particularly a few of us federal judges — have, albeit with the best of motives and intentions, done more to erode, than to protect, the rights of the people of this nation. And I suspect that, perhaps subconsciously, we have let our own self-interest in pressuring parties into settlements affect our judgment about the merits of these involuntary court-annexed ADR programs. I personally know and greatly admire many of my fellow judges who so ardently and sincerely support the opposite side of this debate. But the issues are too important to permit me to keep my peace. As I said in connection with the Sentencing Guidelines, it is unfortunate, but true, that we are more likely to lose the benefits of our constitutional form of government through the acts of our friends than from the acts of our enemies. This is because of the acts of well-intentioned, well-motivated people who, through their myopic support of some *lesser* goal, unwittingly undercut the larger, broader principles of our national life.

There is a place for alternate dispute resolution programs in our society, but they should not be mandatory and they should not be in, or annexed to, our federal district courts. They should truly be *alternatives* to, and not a part of, the litigation process. The ADR movement is apparently thriving and that is good. Voluntary out-of-court ADR programs are not only consistent with, but, indeed, complement, our existing due process, evidentiary-based federal trial system. We simply urge the ADR folks to do their thing on their own turf.

I have emphasized the vast difference in values and visions between the opponents and proponents of these mandatory court-annexed ADR programs reflecting our differing views concerning litigation and the proper role of our federal district courts. Justice Black, discussing a similar conflict in philosophy with his brother judges, stated:

There is also, apparently a vast difference between their philosophy and mine concerning litigation and the role of courts in our country. At least since Magna Carta people have desired to have a system of courts with set rules of procedure of their own and with certain institutional assurances of fair and unbiased resolution of controversies. It was in Magna Carta, the English Bill of Rights, and other such charters of



liberty, that there originally was expressed in the English-speaking world a deep desire of people to be able to settle differences according to standard, well-known procedures in courts presided over by independent judges with jurors taken from the public. Because of these deep-seated desires, the right to sue and be sued in courts according to the "law of the land," known later as "due process of law," became recognized. That right was written into the Bill of Rights of our Constitution and in the constitutions of the States.<sup>151</sup>

#### X. THE POPULARITY ARGUMENT: WE LOVE TO BE COERCED! REALLY?

In support of their "popularity rationale" for mandatory court-annexed ADRs, Judges Parker, Peckham and Schwarzer rely on Ms. Barbara Meierhoefer's work, *Court-Annexed Arbitration in Ten District Courts* published in 1990.<sup>152</sup> The principal data for her evaluation were the survey responses of some 3,501 lawyers, 723 parties, and 62 judges.<sup>153</sup> Her primary objective was to determine whether litigants viewed arbitration as a form of second class justice.<sup>154</sup> She acknowledged that much of her information was "attitudinal" because it was what respondents *believed* to have been accomplished.<sup>155</sup> Her study did not address how much time the programs saved litigants and the courts.<sup>156</sup> Indeed, cost and time savings were not reported by the majority of attorneys in cases where trial de novo was demanded.<sup>157</sup> Ms. Meierhoefer's case samples generally covered an eighteen month time frame within the 1985-1986 period.<sup>158</sup>

Ms. Meierhoefer reports that "the large majority of judges in the pilot courts support their own program," but they shared "no widely held view about what characteristics constitute a good program."<sup>159</sup> She also reports that the strength of the judges' positive attitudes varied significantly with the strength of their conviction that the program "reduces their caseload burden."<sup>160</sup> Thus, since ninety-seven percent of those sixty-two judges agreed that their burden was reduced by the program, they tended to think those programs were just wonderful.<sup>161</sup> How revealing!

Why would those judges *not* like their own programs? After all, they voted to install them in their courts, so they have a vested interest in them, which they emphatically make known to the attorneys who practice before them. That these judges do not agree on what constitutes a good program is also understandable because *their* primary interest is not in the merits of the

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151. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 669 (1964) (Black, J., dissenting).

152. MEIERHOEFER, *supra* note 29.

153. *Id.* at 2.

154. *Id.*

155. *Id.*

156. *Id.*

157. MEIERHOEFER, *supra* note 29, at 85.

158. *Id.* at 22.

159. *Id.* at 118.

160. *Id.*

161. *Id.*

programs, but in the *effect* of those programs in inducing settlements and clearing their civil dockets. The judges like them precisely *because they coerce settlements*. I would wager that very few, if any, of the judges polled had ever witnessed one of their own court-annexed arbitrations. So when the ADR advocates say the judges "like" those programs, remember that those same judges are mandatory ADR advocates themselves; that they have made a commitment to such programs and, therefore, have their reputations on the line; that they have a personal interest in pressuring settlements; and that they insist that the lawyers in their districts understand that the judges are strongly behind these programs and expect the bar to accept them and fall in line.

Which brings us to the lawyers. How many lawyers are willing to stand up to, and vocally oppose, the judges of their federal district courts? Some, but, alas, not many. Furthermore, what self-interests do these programs serve for lawyers? It is my belief that these mandatory ADR programs bring lawyers into these courts who would not otherwise feel competent to venture into such arenas. Experienced judges know that the challenge of trying real cases before judges and juries acts as a natural selection process. Those who find they can handle it, and are good at it, generally develop into able and effective trial lawyers. The others will drop out and pursue less stressful legal careers. Good trial lawyers are a breed apart. We federal judges know that a small percentage of those attorneys enrolled in our courts will be involved in a majority of the civil cases coming before us. I estimate that fewer than 250 lawyers will appear in 75% of the civil cases in my court. Most of the rest avoid real trial work.

But if these mandatory ADRs are served up as an alternative to real trials, lawyers with limited trial skills will start appearing more and more frequently because such programs are not very demanding and certainly do not require the marvelous truth-revealing talents of real trial lawyers. An attorney can process one of these ADRs with much less time and effort and can therefore handle a much greater volume of cases if real trials can be avoided.<sup>162</sup> Just let the arbitrators decide, recommend that your client accept their award, and move on to the next arbitration proceeding. The payoff is probably there, especially for the poor or mediocre trial lawyer. After all, one can, by using such procedures, turn over a much greater volume of cases with much less work per case.

Finally, we are told that the parties — the litigants — like these mandatory ADR programs.<sup>163</sup> Really? If so, why do they not voluntarily enter those programs? Note that Ms. Meierhoefer relied upon survey responses from 723 parties.<sup>164</sup> She was able to contact only 46% of her target sample and from this group got a 59% response rate.<sup>165</sup> The cases of 46%

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162. Sadly, I believe courts having these ADR programs will attract cases with little or no merit, that is, cases that would otherwise *not* be filed, on the theory that in the ADR process some value will be assigned to the case if for no other reason than to get rid of it.

163. MEIERHOEFER, *supra* note 29, at 63-65.

164. *Id.* at 2.

165. *Id.* at 55.

of her party respondents closed *before* the arbitration hearing.<sup>166</sup> *Only one third of her party respondents were individuals; the rest were corporations or those sued in their business or public capacities!*<sup>167</sup> About one third of the parties "had no personal participation in any event concerning the case on which they reported,"<sup>168</sup> while the number who reported involvement in court trials was only 3%.<sup>169</sup> Therefore, I question how much confidence can we place in Judge Parker's reliance upon this study, when he states:

As we have said, this track most resembles what is known now as court-annexed arbitration. It is likely that the litigants will be quite satisfied with the process they receive pursuant to this non-traditional litigation track. As the Federal Judicial Center reported to Congress (in fulfillment of the former's obligation to evaluate the performance of the mandatory, court-annexed, non-binding arbitration programs statutorily created by Congress in 1988): "Eighty percent of all parties in cases mandatorily referred to arbitration agreed that the procedures used to handle their cases were fair. . . ."<sup>170</sup>

Let us be fair. A party's reaction to, and perception of, these ADR programs will ordinarily be controlled by his or her attorney's opinions. After all, few parties have any independent basis in training or experience to judge these procedures or to compare them with real trials. If an attorney tells a client that ADR is just like a trial but quicker and less expensive, that client will probably accept that opinion if he or she has had no prior experience with real trials. If you do not know the difference between a diamond and a zircon, and someone who is supposed to know tells you they are the same, you will probably accept that opinion as true. The lay-client relies on the attorney's advice.

So when one seeks the opinions of parties, judges, and attorneys who use these mandatory court-annexed procedures, one must critically evaluate the answers received in the light of the knowledge and motivations of the respondents. Additionally, so much depends on what questions are asked and how they are framed. Although I am sure Ms. Meierhoefer attempted to be very careful and objective in conducting her study, I do not have that same confidence in the Federal Judicial Center.

Is it fair to impugn the objectivity of the Federal Judicial Center on this issue? Is it appropriate in assessing the value and persuasiveness of its publications to note the bias and pre-conceived positions of those who run that show, particularly if they profess to scientific objectivity? Surely judges and trial lawyers — at least those who can recall trying cases in court — will say, "of course."

Late last Fall, the Federal Judicial Center sent a "Planning For the Fu-

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166. *Id.*

167. *Id.* at 56.

168. *Id.* at 54.

169. *Id.* at 56.

170. Parker, *supra* note 1, at 1918 (quoting MEIERHOEFER, *supra* note 29, at 119-20).

ture" questionnaire to all United States District Judges.<sup>171</sup> The section on "Methods of Civil Dispute Resolution" asks the respondent to indicate on a range of one to five the extent of agreement or disagreement with seven different statements or propositions.<sup>172</sup> The terms "voluntary," "involuntary," "mandatory," or "at the request of or with the consent of the parties" are *nowhere to be found* in the questionnaire. Let me quote a few of the statements:

11.1 The role of the federal courts in civil cases should be to resolve disputes through traditional litigation only.

11.3 ADR procedures should be used by federal courts in civil cases because in some cases they produce fairer outcomes than traditional litigation.

11.4 ADR should be used by federal courts only to prevent lengthy delays in terminating cases.<sup>173</sup>

In the first statement, what is meant by "traditional litigation?" If litigation means "trials" then, of course, no one would support the idea that cases should only be resolved through trials when everyone knows that approximately ninety-five percent of all cases will be resolved without trials even in the absence of ADR programs. And we know that most federal courts encourage settlement and remove roadblocks to settlement by promptly ruling on pending motions and resolving questions of law. The second and third statements in the questionnaire speak of the use of ADRs without specifying whether the reference is to voluntary or involuntary ADRs. Thus, the key issue of *coerciveness* is avoided. Despite those problems, I fully expect the "returns" from the Center's questionnaire will soon be used to further fuel the push to establish mandatory ADRs in our United States District Courts.

I am aware of another way judges can increase the "popularity" of ADRs among lawyers and litigants. With a little indirection let me explain. The Rand Corporation study noted the "significant reduction" in the number of trials, proportioned to the number of cases filed, but reached no conclusions about the reason for the trend.<sup>174</sup> Judge Schwarzer opined that it might be because of the burgeoning criminal case load, saying "Civil cases may be getting squeezed out."<sup>175</sup> He went on to state that "[t]rials are very expensive and burdensome . . . . If the parties can find a way of disposing of their dispute without a trial, that's good. If the dispute cannot be disposed of after all reasonable efforts *and the parties cannot get to trial*, that's bad."<sup>176</sup> How revealing? It is true that each of us federal judges can drive litigants and their attorneys to seek some, almost any, alternative to the "traditional litigation track." We can do this by simply not doing our job properly — by letting our civil dockets collapse, by permitting unconscionable delays, or in

171. Federal Judicial Center, Planning for the Future, Questionnaire (Fall 1991) (available from Federal Judicial Center, Wash. D.C.).

172. *Id.*

173. *Id.*

174. Pollock & Felsenthal, *supra* note 20, at 3.

175. *Id.*

176. *Id.* (emphasis added).

sum, by not moving and trying cases in a prompt and orderly fashion so that the parties *can* get to trial within a reasonable time. I submit, however, that if we federal judges do our jobs, move and try our cases, and keep our civil dockets current, litigants and their attorneys will rarely, *voluntarily* seek any of those alternatives. Frankly, this is no time for modesty. People will choose the diamond over the zircon if they know the difference. When all is said and done, these mandatory ADR advocates have nothing to offer that can compare with the effectiveness of, or indeed the majesty of, a properly conducted trial before a real judge or a real jury in accordance with our traditional evidentiary and due process standards *if* the objective is to find and establish the true facts, — the *truth*; to properly apply the controlling law; to vindicate rights and principle; and to do justice.

Parties who choose to bring their cases to federal court have opted for a *judicial resolution* of their controversy. They could have chosen to utilize some voluntary ADR program. This may help explain why once in court, parties almost never voluntarily enter a court-annexed program. They filed their claim in court to get their day in court. That is what they want. And there is a further explanation that seems to elude ADR advocates. In many cases one side is in the right under the law and true facts, and the other is not. Where the facts are not clear, the law is not clear, or the equities are less one sided, cases are much more likely to settle, and usually do — without the aid of mandatory ADRs. Therefore, *forcing* cases into this coercive regime may jeopardize justice, sacrifice principle, and reward extorters. No, it is not enough that cases be resolved; they should be resolved justly. And the unencumbered right to a trial before a judge or a jury is the engine that makes our civil justice system work better to achieve this end than any other yet devised.

Here it is necessary to say something in support of that vanishing breed: the well-trained, ethical, experienced trial lawyer. The whole mandatory ADR phenomenon appears to be predicated upon the assumed incompetence or venality, or both, of our trial lawyers. This has not been my experience. Although I have come across incompetent and venal lawyers in my courtroom, they constitute a small minority. And I personally do not classify them as real trial lawyers. We should thank God for our honorable and effective trial lawyers, without whose talents the right to a real trial before a judge or a jury would be meaningless. But I fear that if these mandatory court-annexed ADR programs take hold, we will have little need for trial lawyers, or even just plain lawyers. The truth is that if this coercive, paternalistic assault is ultimately defeated, I suspect it will be because of a “few good lawyers” — the kind that played such an important role in the drafting of our Constitution.

## XI. DIFFERENT JUDGES: DIFFERENT PLEAS TO CONGRESS

Judge Parker sees the Civil Justice Reform Act of 1990 (the Biden bill) as just “a necessary first step in the right direction,” although “it does not go far enough to achieve true reform of our currently inadequate system of civil

dispute resolution."<sup>177</sup> He sees the need for "fundamental change."<sup>178</sup> He believes that the bar's "vested economic interest in the *status quo* . . . has effectively silenced the group that should have been the most vocal protector of the interest of litigants."<sup>179</sup> He compliments the Congress as being the leader in making our system "responsive to the needs of the people who use and support it: the taxpayers."<sup>180</sup> He lavishes praise on Senator Biden,<sup>181</sup> who:

with single-minded determination, secured passage of this controversial legislation. Senator Biden, adopting the attitude of Farragut at Mobile Bay, proceeded full speed ahead in spite of the concern of the judiciary that the bill potentially encroached upon traditional notions of separation of powers. The vision afforded by hindsight reveals the wisdom of Senator Biden's actions.<sup>182</sup>

Judge Parker wants civil dispute resolution to be even more "court-driven," than it is today.<sup>183</sup> While Judge Parker admires the Civil Justice Reform Act of 1990, he states, "it does not go far enough to achieve true reform."<sup>184</sup> He laments that cases filed subject to CJRA plans "are still bound by traditional case management techniques and the traditional trial model."<sup>185</sup> Then he states:

It is highly questionable that merely facilitating deliberate adjudication of civil cases on the merits in the traditional manner — even with monitoring, the limiting of discovery, and improved litigation management — will actually "*ensure* just, speedy, and inexpensive resolution of civil disputes," which is the aim of the Act. More is needed.<sup>186</sup>

What is this "more" that he seeks? In essence he wants the Congress to adopt his reformation model and impose it on all of the district courts of this nation: "We must break the economic stranglehold the traditional model has on civil litigation and provide an *array* of court-annexed methods to resolve civil disputes — an array of public, cost and time effective methods carrying at least a presumption of finality."<sup>187</sup> Judge Parker believes that the price our present system extracts from society "compels Congress to at least reform the civil litigation model."<sup>188</sup> So we see what Judge Parker

177. Parker, *supra* note 1, at 1931.

178. *Id.* at 1930.

179. *Id.*

180. *Id.*

181. I frankly acknowledge that I, along with most federal judges, opposed the mandatory micro-management provisions of the original version of the Biden Bill. Assuming Congress has such authority, it was still bad policy. But I also acknowledge that the revised act has caused some worthwhile studies of our district courts. I want Congress to realize that each case is different. Some require a great deal of hands-on management, others do not. Differential case management requires the exercise of judicial discretion. I ask Congress to trust the judges to handle each case according to its needs.

182. Parker, *supra* note 1, at 1930.

183. *Id.* at 1931.

184. *Id.*

185. *Id.*

186. *Id.* at 1931-32 (citation omitted).

187. *Id.* at 1932-33.

188. *Id.* at 1933.

wants of this Congress. What would *I* ask of Congress?

While I believe that much study and thought must be devoted to the future of our federal district courts, still there are certain actions that the Congress could take now to clear the air. It could declare that it is not going to sanction the annexation of compulsory ADR programs to our federal district courts where involuntary participation therein is made a condition precedent to a party's traditional right to a trial before a judge or a jury. It could reaffirm its intention to preserve for the inhabitants of this land a meaningful right to jury trials in civil cases as well as a meaningful right to a trial before a judge in civil cases where a jury is waived or not required. It could publicly recognize the importance of the many truth-enhancing rules and procedures that must be applied and followed in both preparing for and conducting trials in our federal courts. It could reaffirm its own faith in the concepts of due process, separation of powers, and equal protection inherent in our traditional trial system. Dramatically, it could let the sun set on this plethora of experimentation with mandatory court-annexed ADRs. Viewed solely by standards of efficiency and costs/benefits, they are not worth the candle. Viewed from the standpoint of fundamental rights, they are a disaster.

Recognize this: the rights of parties to civil cases in our federal district courts are not now the same for citizens in Northern California as they are for citizens in Eastern Arkansas. And recognize that these mandatory ADR programs are, in practice, gradually wiping out the right to a trial in civil cases. When federal district judges try fewer than ten civil cases per year, that is "tokenism."

## XII. DOES THE SEVENTH AMENDMENT PRESERVE THE RIGHT TO A JURY TRIAL IN CIVIL CASES?

Now let us narrow the focus to *jury* trials in civil cases. Some people do not like jury trials and have been up-front enough to call for the abolition of the Seventh Amendment.<sup>189</sup> I can deal with that debate straightforwardly. But I am troubled by those who would "finesse" the issue, putting roadblocks here and burdens there, while still insisting that they have not denied the right. Congress needs to decide whether, in our American democratic system, there is value to using juries in civil cases.

Judge Parker acknowledges that the system he suggests "arguably implicates the Seventh Amendment."<sup>190</sup> This is akin to acknowledging that the creation of a mandatory, albeit highly evolved, national religion would arguably implicate the First Amendment. The Seventh Amendment to the United States Constitution says:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United

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189. See Kennedy, *supra* note 140.

190. Parker, *supra* note 1, at 1921.

States, than according to the rules of the common law.<sup>191</sup>

Judge Parker notes that "there were various special, juryless, small claims tribunals in England and in the American Colonies, territories, and states before 1791."<sup>192</sup> Looking a bit more closely at the evolution of the jury trial in this country, we find that even before the enactment of the Bill of Rights, the authors of our Declaration of Independence specifically mentioned the loss "in many cases, of the benefits of trial by jury" under British rule as one of the "abuses and usurpations" which made independence necessary.<sup>193</sup> Alexander Hamilton "divided the citizens of his time between those who thought that jury trial was a 'valuable safeguard to liberty' and those who thought it was 'the very palladium of free government.'"<sup>194</sup> "The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, *to that of the judiciary.*"<sup>195</sup>

The importance of the jury as protection against the gradual corrosion or corruption, or both, of our democracy was underscored by Thomas Jefferson: "[Trial by jury is] the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."<sup>196</sup> In more modern times, the Supreme Court has noted that:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.<sup>197</sup>

The Court has also explained: "Maintenance of the jury *as a fact-finding body* is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care."<sup>198</sup>

Judge Parker argues that the Seventh Amendment allows for a "balancing" test of some sort, adjusting for "current demands placed upon vital societal interests."<sup>199</sup> In other words, efficiency concerns are seen as sufficient to eviscerate constitutional rights. The few examples that Parker cites fail to support this proposition. For example, Judge Parker cites *Beacon Theatres, Inc. v. Westover*<sup>200</sup> for the proposition that modern demands can

191. U.S. CONST. amend. VII.

192. Parker, *supra* note 1, at 1922.

193. THE DECLARATION OF INDEPENDENCE paras. 2, 20 (U.S. 1776).

194. *Galloway v. United States*, 319 U.S. 372, 397-98 (1943) (Black, J., concurring and dissenting).

195. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1978) (Rehnquist, J., dissenting) (emphasis added).

196. Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process — The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 16 n.6 (1990) (quoting 3 Writings of Thomas Jefferson 71 (Washington ed.)).

197. *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942).

198. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (emphasis added).

199. Parker, *supra* note 1, at 1921.

200. 359 U.S. 500 (1959).



be considered when determining the necessity for a jury trial.<sup>201</sup> In fact, *Beacon Theatres* explained that, because the right to a jury trial is so important, when a court has discretion as to whether a legal or equitable cause should be tried first, that discretion "must, wherever possible, be exercised to preserve jury trial."<sup>202</sup> If anything, *Beacon Theatres* sought to *expand* the availability of jury trials. Furthermore, Judge Parker cites a footnote in *Ross v. Bernhard*<sup>203</sup> for the proposition that courts are allowed to consider "the practical abilities and limitations of juries" as a relevant factor to the right to trial by jury.<sup>204</sup> Leaving aside the fact that this monumental "change" in the law was addressed in a footnote, and that courts are sharply divided on the application of this footnote,<sup>205</sup> the argument is simply that the complexity of certain cases renders an adequate remedy at law impossible and thus thrusts such cases into the equitable arena where there is no Constitutional right to a jury.

I submit that the Seventh Amendment allows for no such balancing test. The Supreme Court has flatly rejected "the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial."<sup>206</sup> The Court has also rejected the argument that delay can override the Seventh Amendment.<sup>207</sup> To allow the imposition of such a test "would effectively permit judicial repeal of the Seventh Amendment because nearly any change in the province of the jury, no matter how drastic the diminution of its functions, can always be denominated 'procedural reform.'"<sup>208</sup>

Judge Parker argues that his system consists of only procedural reforms.<sup>209</sup> He believes that his system falls within the conditions which "may be imposed upon the demand of such a [jury] trial, consistently with preserving the right to it."<sup>210</sup> He compares his program of ADR tracks, with their presumptions of finality, to the process of filing a lawsuit, requesting a jury trial, surviving qualified immunity, and surviving summary judgment.<sup>211</sup> The comparison between Parker's system and the voluntary acts of filing or requesting a jury trial as equivalent barriers or conditions for a trial needs

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201. Parker, *supra* note 1, at 1923.

202. *Beacon Theatres*, 359 U.S. at 510.

203. 396 U.S. 531, 538 n.10 (1970).

204. Parker, *supra* note 1, at 1923.

205. See *In re United States Fin. Sec. Litig.*, 609 F.2d 411 (9th Cir. 1979) (holding that there is no complexity exception to the Seventh Amendment right to a jury trial in civil cases), *cert. denied*, 446 U.S. 929 (1980); *In re Japanese Elec. Prod. Antitrust Litig.*, 478 F. Supp. 889, 935 (E.D. Pa. 1979) (noting that a jury "applying its collective wisdom, judgment and common sense to the facts of a case (in the light of the proper instructions on the law) is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case") *vacated*, 446 U.S. 929 (1980). But see *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (holding that the "sheer size of the litigation and the complexity of the relationships among the parties render it *as a whole* beyond the ability and competence of any jury to understand and decide with rationality").

206. *Pernell v. Southall Realty*, 416 U.S. 363, 384 (1974).

207. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 n.18 (1989).

208. *Parklane Hosiery Co. v. Shore*, 439 U.S. 332, 346 (1979) (Rehnquist, J., dissenting).

209. Parker, *supra* note 1, at 1920-21.

210. *Id.* at 1923 (citing *Capital Traction Co. v. Hof*, 174 U.S. 1, 23 (1899)).

211. *Id.* at 1924.

little response. Qualified immunity is a defense in certain cases and is almost always a question of law. If it can be established when viewing the facts in the light most favorable to the non-moving party, then no trial is needed. The factual disputes would not change the outcome of the case. Summary judgment is granted only when, the facts being viewed in the light most favorable to the non-moving party, there is no genuine issue of fact, and the moving party is entitled to prevail as a matter of law.<sup>212</sup> In other words, summary judgment is entered when there is nothing for the jury to do — there is simply no factual issue necessary to resolve.

Judge Parker also cites *Parklane Hosiery Co. v. Shore*,<sup>213</sup> for the proposition that procedural innovation can sometimes deny the Seventh Amendment right to a jury trial when such would have been available at common law.<sup>214</sup> Once again, in the case of collateral estoppel, asserted by whomever, *the issues of fact, by hypothesis, have already been decided* by a jury or a judge during a trial. The only question is: who shall be bound thereby? In every civil case referred for decision to one of Judge Parker's ADR tracks, there are, again by hypothesis, *unresolved* material factual issues.

Judge Parker contends that his system involves the same sort of decisions concerning the "appropriate amount of . . . judicial resources" warranted by a case that are typically made by a judge when deciding whether or not to certify a class or to issue a temporary restraining order (TRO).<sup>215</sup> He fails to note that neither of those issues implicates the Seventh Amendment. Certification of a class does not impede the individual litigant's right to a jury trial, and TROs are equitable, not legal, in nature, and thus do not require jury trials.

Judge Parker argues that the right of trial by jury is not infringed by his proposed system, but that the right "is *preserved* for and rationally, fairly distributed to those cases *entitled* to it."<sup>216</sup> The legitimacy of this argument is suspect, as one commentator has noted:

To date, the United States Supreme Court has artfully avoided any pronouncement of what substantive jury functions are 'preserved' by the right to trial by jury in suits at common law . . . In general terms, the Court has spoken grandly of the seventh amendment as a "fundamental guarantee of the rights and liberties of the people" of which "any seeming curtailment . . . should be scrutinized with the utmost care." However, the Court has yet to define in specific terms which substantive functions are so inherent to trial by jury, so elementary and necessary, that the seventh amendment preserves them from judicial or legislative encroachment.<sup>217</sup>

Therefore, one cannot predict with comfortable confidence what our

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212. See FED. R. CIV. P. 56(c).

213. 439 U.S. 322, 331-33 (1976) (holding that one may assert collateral estoppel to bind another to the results of some prior litigation, even though the one asserting it was not a party in that prior litigation).

214. Parker, *supra* note 1, at 1923-24.

215. *Id.* at 1924.

216. *Id.*

217. Paul B. Weiss, Comment, *Reforming Tort Reform: Is There Substance to the Seventh*

Supreme Court will decide when confronted with the Seventh Amendment issues raised by these mandatory court-annexed programs. But history, logic, and precedent give us reason to hope.

Our Constitution states that the right to jury trials in suits at common law shall be preserved.<sup>218</sup> That is clear enough for me. But even if the Constitution did not require jury trials in civil cases, good and wise policy would. What system could be more consonant with our American experience? When we exclude people from active participation in their justice system, that system will become elitist and increasingly remote from, and irrelevant to, the daily lives of the people.

I do not accept my adversaries' efficiency claims, but even if those claims could be established in dollar terms, that should not be a sufficient reason to deny civil litigants such a basic right. As Chief Justice Rehnquist noted:

The guarantees of the Seventh Amendment will prove burdensome in some instances; the civil jury surely was a burden to the English governors who, in its stead, substituted the vice-admiralty court. But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the Amendment.<sup>219</sup>

More pointedly, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."<sup>220</sup> Do members of Congress agree or disagree with De Tocqueville's observations:

To look upon the jury as a mere judicial institution, is to confine our attention to a very narrow view of it; for, however great its influence may be upon the decisions of the law-courts, that influence is very subordinate to the powerful effects which it produces on the destinies of the community at large. The jury is above all a political institution, and it must be regarded in this light in order to be duly appreciated. . . . The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the government. By obliging men to turn their attention to which are not exclusively their own, it rubs off that individual egotism which is the rust of society.

The jury contributes most powerfully to form the judgment, and to increase the natural intelligence of a people; and this is, in my opinion, its greatest advantage. It may be regarded as a gratuitous public school ever open, in which every juror learns to exercise his rights, enters into daily communication with the most learned . . . and becomes practically acquainted with the laws of his country, which are brought within the

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*Amendment?*, 38 CATH. U. L. REV. 737, 737 (1989) (footnotes omitted) (quoting Hodges v. Easton, 106 U.S. 408, 412 (1882); Dimick v. Schiedt, 293 U.S. 474, 486 (1935)).

218. U. S. CONST. amend. VII.

219. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 346 (1978) (Rehnquist, J., dissenting).

220. INS v. Chadha, 462 U.S. 919, 944 (1983).

reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties. I think that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.<sup>221</sup>

It is true the British have about done away with the jury trial in civil cases. Lord Donaldson of Lynton addressing a Conference on Litigation at the Great Hall at Lincoln's Inn observed:

You are apparently concerned at the enthusiasm of juries for awarding punitive damages and at the amount of those damages. In this country we have virtually abolished juries in civil cases with two exceptions. These are, first, malicious prosecution and false imprisonment and, second, defamation. The police are usually defendants in the former type of action and the Press in the latter. Curiously enough, there are few problems in actions against the police, the jury usually reaching a correct conclusion on liability and being reasonable in their awards of damages. It is quite otherwise in relation to the Press. Here juries take the defendants to the cleaners and do so under the guise of awarding compensatory and not punitive damages.

There is no doubt that the average citizen holds the Press in contempt. There is also little doubt that, despite all advice from the judges, they approach the matter from the point of view of what they think that the Press can afford. As various popular tabloids run competitions with enormous prizes designed to boost circulation, awards by juries bear some resemblance to intercontinental telephone numbers. Until recently the Court of Appeal could only order a retrial, which merely risked arriving at another perverse decision. Now the law has been changed to allow the Court of Appeal to substitute its own award. That there have been few appeals stems largely from the fact that plaintiffs settle for part of the sum awarded. However, I have little doubt that sooner or later defamation cases will join other civil claims in being tried by a judge alone or possibly by a judge sitting with two lay assessors.<sup>222</sup>

So marvelously British! And so revealing as to the chasm in legal thinking that still separates us from our British cousins. Although we have much in common, there are fundamental differences in our systems. Most British institutions are elitist rather than egalitarian, and the British do not have the benefit of a judiciary *independent* of the Legislative Branch of their government. Nor do they have anything equivalent to the Seventh Amendment to the Constitution. Frankly, in my opinion, our judicial system is far superior to theirs in its ability to fairly deal with a heterogeneous, complex, democratic society. And, it is my further opinion that *their* system will move toward ours — and not vice versa — as their society becomes less homogenous and the “outs” insist on getting into the club. The British and the Canadians are

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221. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 308-12 (Henry Reeve trans., 4th ed. 1845).

222. Theodore R. Tetzlaff, *Opening Statement: The English Rule from the English Perspective*, *LITIG.*, Summer 1992, at 1-2.

now trying to retrieve lost rights.<sup>223</sup>

The right to serve on juries is a precious one that we judges should encourage. By our jury plans we have been expanding the opportunity for more of our citizens to serve by decreasing the length, and thus the burden, of that service. The use of mandatory court-annexed ADRs on the other hand will inevitably reduce the opportunity for such service, thus making our judicial system increasingly remote from the people. What we need from our Representatives and Senators in the Congress is a ringing declaration that our traditional trial system is of great value and will be preserved and protected!

### XIII. TRIALS IN "TRADITIONAL" COURTS VS. TRIALS IN "ADR" COURTS

One of the more interesting statistical figures is the one that shows the number of trials per judgeship.<sup>224</sup> The figure stayed in the high forties during most of the 1970s, then fell to around forty until the mid 1980s. From 1985-1989 the average each year was thirty-five trials per judgeship; in 1990 it went to thirty-six; in 1991 and in 1992 the figure fell to thirty-one. In the Eastern District of Arkansas we averaged forty-three trials per judgeship in 1992, far below the average of the twenty year period between 1970 and 1990, when we tried more than sixty cases per year per judgeship.

By contrast, examine the figures for the districts most noted for their experimentation with court-annexed ADRs: the Northern District of California, the Western District of Michigan, the Northern District of Ohio and the Eastern District of Pennsylvania. Here are the figures for total trials per judgeship in 1992: the Eastern District of Pennsylvania, twenty-seven trials per judgeship; the Northern District of Ohio, fifteen; the Northern District of California, fourteen; and the Western District of Michigan, fifteen.<sup>225</sup> So three of the four districts had less than half the national average of thirty-one trials per judgeship. Since most of these districts are terminating their cases at around the national average, while trying less than half the national average, we can surmise that these coercive ADR programs are doing their job by forcing settlements, thus preventing trials. The message is: civil cases in our United States District Courts can be disposed of in the traditional manner or by mandatory ADRs. But the overall performance of the mandatory ADR districts is no better than that of districts which do not use such programs, and, by some measurements, not as good. The other, related, inference is that the judges in the traditionalist courts are spending their work-time quite differently from the judges utilizing mandatory ADRs.

Let us carry this inquiry farther: what proportion of the trials per judgeship are criminal and what proportion civil? At my request the Administrative Office of the United States Courts sent to me the figures for the total

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223. See Bert Raphael, *A Call for More Civil Jury Trials*, *ADVOCS. SOC'Y J.*, Aug. 1988, at 27.

224. For these statistics, see Administrative Office, *supra* note 10.

225. *Id.*

number of civil and criminal trials in each district in the United States.<sup>226</sup> In Eastern Arkansas, which has 5 judgeships, we had 163 civil trials and 60 criminal trials; Northern California, with 14 judgeships, had 133 civil and 108 criminal; Western Michigan, with 5 judgeships, had 33 civil and 44 criminal; Northern Ohio, with 12 judgeships, had 141 civil and 62 criminal; and Eastern Pennsylvania, with 23 judgeships, had 555 civil and 138 criminal.<sup>227</sup>

What was the total number of *civil* trials *per judgeship* in those districts? Eastern Arkansas 32.6; Northern California 9.5; Western Michigan 6.6; Northern Ohio 11.7; and Eastern Pennsylvania 24.1. These figures are calculated on the basis of judgeships, not judges, and they do not account for the number of civil cases that are tried by Magistrate-Judges with the consent of the parties. So to find out how many civil trials are completed per judge we would need to know how many Senior Judges the district has and what load share they carry. For instance, the Northern District of California has fourteen judgeships which are filled by "active" judges. It appears that several of these judgeships were unfilled in 1991-1992. In 1992 it had nine Senior Judges. If the senior judges averaged a workload of one-third of that for active judges this would mean Northern California had the equivalent of three additional active judges which would bring their total active workforce from fourteen (when all active positions are filled) to seventeen, and the number of civil trials to slightly less than eight per judge. Northern California has seven full-time Magistrate Judges who can try any civil case with the consent of the parties. If they tried four civil cases per year each that would reduce the civil cases to be tried by U.S. District Judges from 133 to 105 and the number of civil trials per district judge to just over six. There were 431 civil cases filed per judgeship, so, on this analysis, it would appear that the district judges are trying, jury and non-jury, less than 2% of their civil cases!<sup>228</sup>

So is it not fair to observe that these mandatory ADR districts are slowly but surely doing away with the *meaningful* right to a trial in civil cases? I have not yet been able to get the figures which would show how many of the civil trials were jury and how many non-jury. But even if they were all jury trials, one could also say that the Seventh Amendment, as a practical reality, is fading away in Northern California.

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226. *Id.*

227. *Id.*

228. *Id.* Another set of figures interests me. For Northern California the period from filing to disposition of civil cases is eight months, which, like Eastern Arkansas, is one month better than the national average. The period from issue to trial, however, is twenty-one months in Northern California, whereas the national average is fourteen months and for Eastern Arkansas eleven months. *Id.* Does that not suggest that those parties forced into Northern California's various ADR programs, who accept the ADR result, get in and out of the court about as fast as the national average, whereas those that insist on a trial "de novo" have a long, long wait?

#### XIV. WORKLOAD RELIEF: MORE JUDGES OR LESS JURISDICTION

The December-January 1993 issue of *Judicature* contains a debate which relates directly to the mandatory ADR issue. That debate is: Should the Congress meet the problem created by increased workloads by simply continuing the past practice of increasing the number of judgeships and supporting personnel; or should it establish a limit on the number of federal judgeships and deal with the workload problem through other means? Professor Victor Williams of the John Jay College of Criminal Justice takes the position that the increased work load should simply be handled by increasing the number of judges.<sup>229</sup>

Judge Jon O. Newman takes the contrary position.<sup>230</sup> He believes that a policy should be established limiting the number of federal judgeships to 1,000.<sup>231</sup> By way of explanation, he states:

Today, most observers regard the overall quality of the federal judiciary as higher than that of the average state judiciary. At a size of 3,000 to 4,000, its quality would be indistinguishable from the most pedestrian of state judiciaries.

. . . .  
 . . . A federal judiciary rising above 1,000 and heading for 3,000 judges will be of lesser quality and dominated by a burgeoning bureaucracy of law clerks, staff counsel, magistrate judges, and other ancillary personnel.

. . . .  
 In this decade, we will decide whether in the next century the federal judicial system will remain at a size that enables it to be true to the purpose, or become a vast faceless bureaucracy that will undermine the very need to have a federal judiciary. Few choices to be made in our lifetimes will have such effect on such a vital institution of our national life.<sup>232</sup>

Judge Parker appears to agree with Judge Newman when he states:

There might appear to be a ready solution to problems associated with modern litigation — one that does not require significant reformation measures. There is an obvious temptation to simply call for an increase in the number of judges and other court personnel in order to supply the rising demand for civil dispute resolution. Indeed, in an effort to cope with the ever-expanding universe of civil case filings, Congress has significantly expanded the number of federal district court and appellate judgeships. But the universe of judicial resources is incapable of the sort of practically infinite expansion needed to keep pace with unchecked, lawyer-driven, civil case demands. Moreover, expanding the federal judiciary beyond a certain point — which point appears to

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229. Victor Williams, *Solutions to Federal Judicial Gridlock*, 76 JUDICATURE 185 (1992-93).

230. Jon O. Newman, *1,000 Judges — The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187 (1992-93).

231. *Id.*

232. *Id.* at 188, 194.

be very near, if it has not already been reached — causes at least as many problems as it solves.<sup>233</sup>

Yes, the federal courts should be special; they should not be converted into “a faceless, bureaucracy.”

If Judge Parker gets his way, however, the “bureaucracy” argument and the “quality” argument will gain new significance. Why? Because then we will indeed have a federal judicial bureaucracy of immense size. His federal dispute resolution centers will employ or subcontract with thousands of additional personnel. For instance, the Eastern District of Pennsylvania has appointed 1,200 attorneys to act as arbitrators.<sup>234</sup> If every court had such a program one would expect over 30,000 lawyers to be involved nationally in that one mandatory ADR program. What about the mediators and the early neutral evaluators, etc., etc.? And, of course, when a court installs such a program someone must oversee it and handle the paper work. I am not aware of any careful study of the actual additional costs that result from the annexation of such programs to our district courts, but I suspect that they are not inconsequential. Additionally, there is no reason why a district court should limit itself to only one such ADR program. The Northern District of California has several, as do a few other districts. If Judge Parker’s proposal is accepted, the number of additional buildings and personnel required to staff the “array” of, or “battery” of, his new track programs boggle the mind! It is respectfully suggested that the Congress would want to make a careful study of the long range funding requirements before nationalizing the

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233. Parker, *supra* note 1, at 1926 (citation omitted). I am continuously amazed to see Judge Parker, throughout his article, cite authority which so aptly undermines his main thesis. For example, Judge Parker cites Mr. Theodore Tetzlaff’s statement of critical questions including the question: “[H]ow to preserve and improve the jury trial system so that it can continue to discharge its responsibilities under the Sixth and Seventh Amendments . . . .” *Id.* at 1906 (quoting Theodore R. Tetzlaff, *Opening Statement: Four Urgent Questions*, 18 LITIGATION 1, 2 (1991)). He also quotes the Administrative Office report of January 1991, which stated that “[u]nless actions are taken . . . [t]he circumstances will lead judges to have less of a sense of personal responsibility and accountability for the work they produce.” *Id.* at 1908 n.9 (alteration in original) (quoting William H. Rehnquist, *1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 2). Additionally, Judge Parker quotes Carolyn Dineen King, who said: “In my view, no judge would specifically condone a two track justice system. . . .” *Id.* (quoting Carolyn D. King, *A Matter of Conscience*, 28 HOUS. L. REV. 955, 963 (1991)). Then he quotes Senator Moynihan’s statement:

[O]urs is the only civilization in the world where there is something conspicuous and central to our urban arrangements called a courthouse. Think about it. When you wander across Europe looking at cathedrals, do you ever see a courthouse? No. . . .

It speaks well of us. It speaks to the world about how things can be different. It reminds us how very, very fragile any society is, and how strong the courts have to be to ensure its continued strength.

*Id.* at 1912 (quoting Sen. Daniel Patrick Moynihan, Speech at White Plains, New York (Dec. 4, 1992) (transcript available from SMU Law Review)). Finally, he quotes Professor Judith Resnik, who stated: “Proponents of management may be forgetting the quintessential judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review — characteristics that have long defined judging and distinguished it from other tasks.” *Id.* at 1919-20 (quoting Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 445 (1982)).

234. I believe these attorneys are classified as “independent contractors.”



dispute resolution system of this nation and before permitting federal district courts to devise and install as many different ADRs as they might want.

How about the "quality" argument? Judge Newman believes that federal district courts should be special places with judges of "uniformly high quality."<sup>235</sup> Judge Parker seems to agree, and I certainly agree. But if Judge Parker and the other mandatory court-annexed ADR advocates have their way, is it not fair to ask: Why do we need such quality? When judges do not judge, where is the need for judicial quality? Under Judge Parker's civil justice system the principal function of district judges would be to make "track" assignments and "exemption" decisions, conduct conferences, and manage a faceless bureaucracy. Who needs a judge, much less a judge of "high quality?"

For over 200 years our federal district courts have indeed been special places. I want them to retain that distinct status which is so essential to their effectiveness. I do not want that image blurred by the annexation of these alien ADR programs. As I have said before, I view the Article III federal district court as something very special — the place where real trials are conducted, the truth determined, rights vindicated, and justice obtained. Justice — not compromise, not efficiency, not cost effectiveness, but justice. There ought to be a place where justice, and justice alone, controls and defines the parameters of permissible procedures — where one is not forced to submit to something less than due process, even temporarily. I urge retention of a stand-alone Article III federal trial court where the people of this nation may truly have, and know they may have, their day in court unencumbered by costly non-judicial diversions to which they have not consented. I do not have an answer to the "numbers" question, but I do know what an Article III trial court should be.

## XV. CONCLUSION: WHO WILL BE THE JUDGE

My opponents who are giving up on our traditional civil trial system and who want to substitute one or more of these mandatory court-annexed programs for it, are all good, conscientious, intelligent, distinguished judges. They firmly believe that their proposals are in the best interest of our nation. But what can I say? When you are wrong, you are wrong! And, in my opinion, they are wrong on this issue. On the other hand, I am sure they view my effort as the last gasp of an old judge fighting the inevitability of change. Wrong!

I accept that change is not only inevitable; it is an imperative. I embrace it,<sup>236</sup> for I truly believe that every generation has the duty to turn over to the next a better America. The test, however, is not just a different America, but a better America, one that is always moving closer to, not away from, those

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235. Newman, *supra* note 229, at 194.

236. There are many ways in which our trial system can be improved. I am laboring in that field, and I invite my opponents in this debate to use their considerable talents to that same end.

great goals and values set forth in our Declaration of Independence and our Constitution.

In the end it really makes little difference what I think or what they think. The outcome will be determined by those law professionals and lay people, especially those Senators and Representatives in our Congress, who become interested in this issue, study it, make their own judgments, and then express them loud and clear. They will be the “judges” whose decisions really count.

