

# A CALL FOR COMPROMISE: EXAMINING POLARIZATION AND THE POTENTIAL USE OF ADR SOLUTIONS IN CONGRESS POST-TRUMP ADMINISTRATION

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## I. INTRODUCTION

America serves as a mediator for global conflicts between other countries, but there is a disconnect between its role abroad and how it resolves conflicts within its own government. Considering high political polarization, political antipathy, and the need to “get things done” in a post-Trump America and a post-January-6th-Insurgency democracy, this article discusses the need for and potential benefits of using ADR in Congress.

Section II takes a more in-depth look at political polarization over history and the external and internal theories behind contemporary partisanship. It also touches upon the psychological consequences of political polarization, specifically hatred and intolerance, which toxifies Congress as a professional work environment and adulterates the legislative process itself. Section III provides a brief examination of negotiation and mediation, discusses the advantages and detriments of implementing ADR in Congress, and explores ADR’s potential to mitigate congressional polarization by reviewing how ADR has been implemented successfully in other government venues.

Section IV briefly explains Congress’ role in determining the funding for the U.S. government and increasing the debt ceiling before exploring two comparative case studies illustrating the breakdown of Congressional relationships and the extreme animosity spurring from increased political polarization. The first case study discusses the Congressional budget crisis in 1997 under President Clinton, and the second case study discusses the Congressional budget crisis in 2021 under President Biden—notably during which time the January 6th Insurgency was being investigated and some Congresspeople still falsely persisted that the 2020 election was “stolen” from former-President Trump—and Congress’ intense political antipathy and disfunction in finding a solution.

Section V discusses three possible ADR solutions to implement in Congress to increase legislative productivity and mitigate the effects of political polarization. It also notes the respective solutions’ advantages and detriments in being implemented. Lastly, Section VI ends this note with a brief conclusion.

## II. POLITICAL POLARIZATION

Political polarization is “the vast and growing gap between liberals and conservatives . . . [which is] a defining feature of American politics

today.”<sup>1</sup> Composed of “excessive partisanship and deep ideological division among political elites and officeholders,” political polarization inhibits the legislative process by halting productivity and diminishing the efficacy of democratic governance.<sup>2</sup> A distinctive rise in polarization occurred in the 1970s, and the gap between parties and their respective ideology has only increased in the years following.<sup>3</sup> It is no coincidence then that Congressional productivity has plummeted since 2020<sup>4</sup> or that 114th Congress (2016) was the most politically polarized Congress in over a hundred years.<sup>5</sup> The question therefore presents itself: In a post-Trump America—perceived to be even more politically divisive and fractured than ever before—will political parties continue to legislate in a proverbial never-ending game of tug-of-war, each trying to gain the upper hand through underhanded tactics or by changing the rules of the game?

The Founding Fathers did not intend for the institution of political parties—in fact, they warned about parties’ destructive natures.<sup>6</sup> Rather than relying on political parties, “the Framers intended for both majority and minority opinions to be safeguarded by our system of checks and balances.”<sup>7</sup> Nevertheless, political parties formed in the 1790s as “vehicles of promotion” to bridge the gap between elected officials and their constituents.<sup>8</sup> Some might argue forming political parties was beneficial for America, if not inevitable, in

<sup>1</sup> *Beyond Red vs. Blue: The Political Typology*, PEW RSCH. CTR. (June 26, 2014), <https://www.pewresearch.org/politics/2014/06/26/the-political-typology-beyond-red-vs-blue/> [<https://perma.cc/4Z69-AUHA>].

<sup>2</sup> Lindsey Phipps, *A Divided Nation: Political Polarization and Dispute Resolution*, 17 PEPP. DISP. RESOL. L.J. 111, 112–13 (2017) (citing Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization, in Negotiating Plea Agreements*, AM. POL. SCI. ASS’N 19, 19 (2016)).

<sup>3</sup> See Drew DeSilver, *The Polarized Congress of Today Has its Roots in the 1970s*, PEW RSCH. CTR. (Mar. 10, 2022), <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/> [<https://perma.cc/WX47-WVNN>].

<sup>4</sup> See Neal Rothschild, *Productivity in Congress Tanked in 2020*, AXIOS (Dec. 14, 2020), <https://www.axios.com/2020/12/14/congress-legislation-covid-19-2020> [<https://perma.cc/GBA5-A63F>].

<sup>5</sup> There is no data analysis for Congresses post-2016, so it is indeterminate whether Congress has continued to become more or less polarized. See Philip Bump, *Farewell to the Most Polarized Congress in More Than 100 Years!*, WASH. POST (Dec. 21, 2016, 11:08 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/21/farewell-to-the-most-polarized-congress-in-over-100-years/> [<https://perma.cc/4HT5-L8VQ>].

<sup>6</sup> See Todd Phillips, *Political Parties Were Never Meant to Be*, HUFFINGTON POST (Aug. 31, 2012, 1:32 PM), [http://www.huffingtonpost.com/todd-phillips/political-parties-were-ne\\_b\\_1846903.html](http://www.huffingtonpost.com/todd-phillips/political-parties-were-ne_b_1846903.html) [<https://perma.cc/J9LT-JTXN>].

<sup>7</sup> See Phipps, *supra* note 2, at 112.

<sup>8</sup> See Phillips, *supra* note 6.

the course of establishing strong democratic traditions. Yet, political parties as they exist today, extrapolated from their original mission of connecting officials and constituents, in an age of mass-communication and social echo-chambers, seem to do more harm than good. This section discusses the theories behind political polarization in Congress, both external and internal, before discussing the substantial negative impact of political polarization, not just on the legislative process, but on the zeitgeist of America as a whole, which further substantiates the need for ADR in Congress.

### A. *Theories of Polarization*

#### 1. *EXTERNAL*

External theories of political polarization “emphasize movement in the societal, economic, and electoral environments, and how they have altered incentives for political officials to cooperate or polarize.”<sup>9</sup> There are four main external theories that seek to explain political polarization: (1) polarized electorate theory, (2) “Clucking Theorem,” (3) “meddling media” theory, and (4) re-election theory.

The polarized electorate theory states that Congresspeople, as elected officials, are polarized because their constituents are.<sup>10</sup> This theory is as enticing, and evidentially shaky, as a “*deus ex machinas*.” Polarized electorate theory relies upon evidential support from two notions: (1) the notions of partisan sorting—the increasing support for political parties based on ideology—and (2) constituents’ increasingly polarized policy preferences.<sup>11</sup> Indeed, there is some evidence that American voters have become better sorted into the party system.<sup>12</sup> Previous studies have suggested that voters’ policy positions have remained just as ideologically moderate on key issues and policies as they always have been, while Congresspeople are increasingly more extreme in their policy positions.<sup>13</sup> Accordingly, the polarized electorate

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<sup>9</sup> *See id.*

<sup>10</sup> *See Barber & McCarty, supra note 2, at 23.*

<sup>11</sup> *See id.*

<sup>12</sup> *See generally* Morris P. Fiorina, *The Political Parties Have Sorted*, HOOVER INST. 1 (2016), [https://www.hoover.org/sites/default/files/research/docs/fiorina\\_3\\_finalfile.pdf](https://www.hoover.org/sites/default/files/research/docs/fiorina_3_finalfile.pdf) [<https://perma.cc/8JWY-XHL7>]. *See also*, Melissa De Witte, *Party Sorting to Blame for Political Stalemate, Says Stanford Political Scientist*, STANFORD NEWS (Oct. 26, 2020), <https://news.stanford.edu/2020/10/26/party-sorting-blame-political-stalemate/> [<https://perma.cc/WXF3-LSRG>].

<sup>13</sup> *See* Vicky Chuqiao Yang et al., *Why Are U.S. Parties So Polarized? A 'Satisficing' Dynamical Model*, 62 SOC'Y FOR INDUS. & APPLIED MATHEMATICS REV. 646, 647 (2020).

theory is often dismissed as having minimal credibility.<sup>14</sup> Yet, this dismissal is now called into question considering new evidence that American voters are, in fact, becoming more polarized in the policy positions.<sup>15</sup>

A 2010 study provides evidence that “a lower [economic] growth rate increases the support for extreme political platforms,” and “extreme platforms are unlikely to gain majorities in OECD countries, unless there is an extreme drop in the GDP per capita growth rate.”<sup>16</sup> America, an OECD (Organization for Economic Co-operation and Development) country member, had a declining GDP per capita growth rate in 2018 and 2019,<sup>17</sup> and a GDP per capita decrease in 2020.<sup>18</sup> Compared to past historical trends, the GDP per capita growth rate was much lower in the 2010s and 2020s compared to the 1970s—when polarization became the predominant characteristic of politics—which was a lower rate than the GDP per capital growth rate pre-1970s.<sup>19</sup> This theory is important considering a 2021 study that found the “US experienced the largest increase in polarization over [the past four decades]” compared to eleven other OECD countries.<sup>20</sup> Moreover, the increase in American polarization over the past four decades was found to be statistically significant.<sup>21</sup> This Note does not aim to argue a causal connection between the two studies, only to point out that the polarized electorate theory may have more credence than previously accounted for. If the American GDP per capita growth rate continues to decline, it is increasingly feasible that over the next

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<sup>14</sup> See, e.g., Phipps, *supra* note 2, at 116. (“[Polarized Electorate] theory lacks substantial evidence to support it . . .”).

<sup>15</sup> See Levi Boxell et al., *Cross-Country Trends in Affective Polarization*, NAT’L BUREAU OF ECON. RSCH. 1, 2 (2020), [https://www.nber.org/system/files/working\\_papers/w26669/w26669.pdf](https://www.nber.org/system/files/working_papers/w26669/w26669.pdf) [<https://perma.cc/ZF2G-ER6W>].

<sup>16</sup> Markus Brückner & Hans Peter Grüner, *Economic Growth and the Rise of Political Extremism: Theory and Evidence*, CEPR 1 (Mar. 17, 2010), <https://ssrn.com/abstract=1573427> [<https://perma.cc/A4H6-6CU2>].

<sup>17</sup> The GDP per capita growth from 2017 to 2018 increased at a rate of 4.87%, but the GDP per capita growth from 2018 to 2019 increased only at a rate of 3.66%, thus there was a lower economic growth rate, even if the economy was growing. See *U.S. GDP Per Capita 1960-2022*, MACROTRENDS, <https://www.macrotrends.net/countries/USA/united-states/gdp-per-capita> [<https://perma.cc/2MC5-T4H3>] (last visited Mar. 24, 2022).

<sup>18</sup> The actual GDP per capita amount in 2020 was \$63,531, which was a 2.44% decline from 2019, signaling a significant drop in the GDP per capita growth rate. *Id.*

<sup>19</sup> See *id.*; *U.S. GDP Growth Rate Over Time*, BUREAU ECON. ANALYSIS, [https://upload.wikimedia.org/wikipedia/commons/c/c8/U.S.\\_GDP\\_Growth\\_Rate\\_Over\\_Time.png](https://upload.wikimedia.org/wikipedia/commons/c/c8/U.S._GDP_Growth_Rate_Over_Time.png) [<https://perma.cc/C9LY-4ED9>] (last visited July 18, 2023).

<sup>20</sup> See Boxell et al., *supra* note 15.

<sup>21</sup> See *id.* at 10–11.

several decades, voters will become even more significantly polarized, giving increased weight to the polarized electorate theory.

Clucking Theorem describes the social costs of the “noise and mess” associated with “changes” (legal transitions), terming such noise and mess as “clucking.”<sup>22</sup> “‘Clucking’ consists of avoidable debates, controversies, disputes, litigation, filibusters, and other argumentative processes,” which are characteristic of political polarization in America.<sup>23</sup> In this way, “[c]lucking inflates the social costs of processes that shape changes [by] alter[ing] transitions, degrad[ing] the quality of reforms, imped[ing] certain changes, and facilitat[ing] undesirable transitions.”<sup>24</sup>

If the polarized electorate theory is akin to a “*deus ex machinas*,” then the Clucking Theorem is akin to the classic “chicken-or-the-egg” dilemma, because it is impossible to know which came first—clucking or polarization—only to know that both issues spur the increase of the other in a positive feedback loop. Significant social costs of clucking include, but are not limited to: “[W]aste related to unproductive debates and disputes, delayed changes, forgone transitions, compromised reforms, and willingness to tolerate socially undesirable norms.”<sup>25</sup> At best, such costs promote incivility between political actors in Congress, and, at worst, they promote political antipathy such that Congresspeople on both sides of the aisle consider one another a threat to the nation’s well-being and national security.<sup>26</sup> This has resulted “in a toxic work environment [for Congresspeople], wrought with bitter exchanges, [and] threats and fears about what the erosion of decorum in the chamber will mean for a body that has still not recovered [ten] months after the Capitol Hill riot.”<sup>27</sup> Hence, clucking further feeds into political polarization as parties demonize

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<sup>22</sup> See Barak Y. Orbach & Frances R. Sjoberg, *Article: Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1, 4 (2011).

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 5.

<sup>26</sup> See *id.* at 43–44.

<sup>27</sup> Lauren Fox, *'Toxic Is Spot-On': House Members Describe Roiling Animosity Among Lawmakers*, CNN: POL. (Nov. 24, 2021, 11:24 AM), <https://www.cnn.com/2021/11/23/politics/congress-anger-house-fights/index.html> [<https://perma.cc/7TRA-HLZS>].

and threaten each other<sup>28</sup> and blame one another for the “result[ing] [impositions of] lost time, lost participation, lost opportunity, increased administrative and recording costs, and degraded legal schemes.”<sup>29</sup>

What this paper terms the “meddling media” theory relies upon the supposition that partisan for-profit media outlets ideologically polarize themselves to better appeal to their own viewership.<sup>30</sup> Thus, with more partisan media outlets catering to politically minded people, the meddling media theory suggests the partisan media, at least in part, is to blame for increased American political polarization.<sup>31</sup>

News and social media are constant presences in American life. Despite the fact that most people have neither solidified nor staunch opinions,<sup>32</sup> humans in general seek to confirm their biases and counter ideas that oppose their biases.<sup>33</sup> Accordingly, politically minded Americans seek more partisan media to confirm their political biases.<sup>34</sup> This leads to increased competition amongst media outlets to be the most appealing (most profitable) by using agenda setting, priming, and framing techniques to either provide

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<sup>28</sup> See generally Rex Huppke, *Marjorie Taylor Greene and Others Throw 'Pedophile' Around with Ease. That Has to Stop*, USA TODAY (Apr. 6, 2022, 2:11 PM), <https://www.usatoday.com/story/opinion/2022/04/06/marjorie-taylor-greene-pedophile-fox-news-democrats-desantis-gay/9480331002/> [<https://perma.cc/SBS3-46WX>]; Donnie O’Sullivan, *Republican Congressman Posts Video Depicting Violence Against Ocasio-Cortez and Biden*, CNN: POL (Nov. 10, 2021, 10:50 AM), <https://www.cnn.com/2021/11/09/politics/gosar-anime-video-violence-ocasio-cortez-biden/index.html> [<https://perma.cc/98QC-888T>].

<sup>29</sup> Orbach & Sjoberg, *supra* note 22, at 6.

<sup>30</sup> See Matthew Levendusky, *Why Do Partisan Media Polarize Viewers?*, 57 AM. J. POL. SCI. 611, 611–13 (2013).

<sup>31</sup> See *id.* at 611–13.

<sup>32</sup> See generally Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCH. 808 (2003). See also Sean Freeder et al., *The Importance of Knowing 'What Goes with What': Reinterpreting the Evidence on Policy Attitude Stability*, 81 J. POL. 274 (2018); Matthew Yglesias, *Trump’s Reverse Midas Touch is Making Everything he Hates Popular*, VOX (Oct. 4, 2017, 9:00 AM), <https://www.vox.com/policy-and-politics/2017/10/4/16408968/trump-midas-touch> [<https://perma.cc/3ACQ-9G69>].

<sup>33</sup> To this end, it can be said that most people know what they stand against, but not what they stand for. See Milton Lodge & Charles S. Taber, *The Rationalizing Voter: Unconscious thought in Political Information Processing* PERSPS. ON POL. 1, 1–18, 32–42 (2007) [http://www.uky.edu/AS/Polisci/Peffley/pdf/Taber%26Lodge\\_The%20Rationalizing%20Voter.pdf](http://www.uky.edu/AS/Polisci/Peffley/pdf/Taber%26Lodge_The%20Rationalizing%20Voter.pdf) [<https://perma.cc/Y3W4-2PDG>].

<sup>34</sup> See C. Edwin Baker, *MEDIA, MARKETS, AND DEMOCRACY* 129–53 (2d ed., 2004).

commentary that consistently favors or criticizes one political ideology.<sup>35</sup> The result: echo-chambers that further polarize American constituents.<sup>36</sup>

## 2. INTERNAL

In contrast to external theories of political polarization, “internal [theories] highlight the formal and informal institutions of Congress and how they have transformed it in ways that increase polarization.”<sup>37</sup> There are two main internal theories of polarization that reveal the inherent problems within Congress: (1) “rule change” theory, and (2) chaos theory.

“Rule change” theory states that “polarization is due to changes in the rules and procedures of Congress.”<sup>38</sup> Past studies have looked at the rule changes (modification) of the amendment processes to encourage party line voting; however,

this argument [to explain polarization] is [considered] deficient for [three] reasons: (1) change does not affect the Senate; (2) it is unlikely that a single rule change can explain a gradual increase in polarization over the last four decades; and (3) [the changing of amendment processes] is not distinct from the procedures in state legislatures.<sup>39</sup>

In light of these deficits, however, I would like to tender the argument that rule change theory might still have some merit—not to explain four decades of polarization, but to explain recent spikes in polarization and the large potential for future increased polarization, making the use of ADR in Congress even more important. In doing so, I reference two rule changes.

The first “rule change” is very much *not* a rule change—the procedure for appointing Supreme Court Justices.<sup>40</sup> The “changing” of this rule for

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<sup>35</sup> See *id.* at 129; Jaibin Wu & Hanzhe Zhang, *Polarization, Antipathy, and Political Activism*, 60 ECON. INQUIRY 1, 11 (2021), <http://dx.doi.org/10.2139/ssrn.3666642> [<https://perma.cc/9ZBE-7A96>] (“[P]eople are increasingly more intolerant toward others holding more distanced views from them . . . which drives the center to shrink and the tails to grow.”).

<sup>36</sup> Levendusky, *supra* note 30, at 613.

<sup>37</sup> Phipps, *supra* note 2, at 116 (citing Barber & McCarty, *supra* note 2, at 23).

<sup>38</sup> Barber & McCarty, *supra* note 2, at 33.

<sup>39</sup> Phipps, *supra* note 2, at 119–20 (citing Barber & McCarty, *supra* note 2, at 33–34).

<sup>40</sup> There is no regularized system for Supreme Court appointments, so there cannot be a rule change here as there was no rule to change. See Frederick A. O. Schwarz, Jr., *Saving the Supreme Court*, BRENNAN CTR. FOR JUST. (Sept. 13, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/saving-supreme-court> [<https://perma.cc/Y4DE-VQV3>].

appointing new Justices—specifically, whether an outgoing President can still fill a vacant seat—was a contentious national issue in 2016 concerning Merrick Garland and again in 2020 concerning Amy Coney Barrett.<sup>41</sup> Contrary to the three previously mentioned deficits of rule change theory, changes to the Supreme Court nomination process affect the Senate because it is the Senate that confirms justices, and the process *is* distinct from the procedures in state legislatures. Again, while acknowledging that such a recent rule change cannot explain four decades of political polarization, it still accounts for contemporary increased hostility and party-line voting.

The second rule change to support the rule change theory is the November 2013 cloture rule change, which allows a minority of senators to end debate regarding most judicial and executive branch nominations, therein blocking the presidential nominations they find objectionable. Only Supreme Court nominations are excluded from the cloture rule.<sup>42</sup> Contrary to past rebuke, this rule change also affects the Senate. Specifically, “critics of the rule (as well as some supporters) have observed that the more relaxed cloture requirement will permit the appointment of more ideologically extreme nominees whenever the same party controls both the Presidency and the Senate.”<sup>43</sup>

Finally, the chaos theory here argues that increases in polarization are natural, mere consequences of government expansion in a modern society with different rules than those of years past. This theory is based on the mathematic chaos theory and shares similarities with the Second Law of Thermodynamics, which states, “as one moves forward in time, the net entropy (degree of disorder) of any isolated or closed system will always increase (or at least stay the same).”<sup>44</sup> Thus, while “[m]any blame the traditional media, the social media, the politicians, the party propaganda, or even foreign influences for the current situation in the U.S.,” chaos theory suggests that human nature and time suffice to drive us apart.<sup>45</sup>

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<sup>41</sup> Erick Trickey, *The History of ‘Stolen’ Supreme Court Seats*, SMITHSONIAN MAG. (Sept. 25, 2020), <https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/> [<https://perma.cc/73RM-QDET>].

<sup>42</sup> KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., *FEDERAL ADMINISTRATIVE LAW CASES & MATERIALS* 234 (3d ed. 2019).

<sup>43</sup> *Id.*

<sup>44</sup> *Entropy: The Hidden Force That Complicates Life*, FARNAM ST., [https://fs.blog/entropy/#\\_ftnref2](https://fs.blog/entropy/#_ftnref2) [<https://perma.cc/25Z3-KNFR>] (last visited Aug. 6, 2023) (citing *The Arrow of Time*, EXACTLY WHAT IS TIME? <https://www.exactlywhatistime.com/physics-of-time/the-arrow-of-time/> (last visited Aug. 6, 2023)).

<sup>45</sup> Wu & Zhang, *supra* note 35, at 17.

Whether Congress is truly an “isolated or closed system” remains a matter of interpretation. We may think of Congress as isolated because it is out of touch with the American public on a biographical level. Even though Congress is more diverse today than ever before,<sup>46</sup> its members are still disproportionately white, male, educated, rich, married, Christian, and over the age of fifty.<sup>47</sup> Additionally, Congress may be thought of as a “closed system” in so far as the majority of Americans do not feel heard by Congress,<sup>48</sup> nor does it appear that Congress concerns themselves with their constituents’ issue-specific preferences.<sup>49</sup>

Although Congress may be viewed as more open compared to years past—largely due to developments in technology that not only allow more information about Congressional action to be dispersed but also permit Congresspeople to travel back and forth from D.C. to their electorate<sup>50</sup>—this is not enough to conclude that Congress is open. Yes, information about Congress and its activities is more widely available now than it was before; yet, much of Congressional activity is still closed off from the public or secret,

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<sup>46</sup> Katharina Buchholz, *How Diverse is Congress?*, STATISTA (Jan. 7, 2021), <https://www.statista.com/chart/18905/us-congress-by-race-ethnicity/> [https://perma.cc/S3K4-L4RN].

<sup>47</sup> *Membership of the 117th Congress: A Profile*, CONG. RSCH. SERV. 6 (Dec. 14, 2022), <https://crsreports.congress.gov/product/pdf/R/R46705> [hereinafter *Membership of the 117th Congress*] [https://perma.cc/C9LU-TL5T]; Charlie Hunt, *Members of Congress May Not Look Like Their Constituents, But They Do Look Like Their Parties*, LEGBRANCH.ORG (Feb. 27, 2018), <https://www.legbranch.org/2018-2-27-members-of-congress-may-not-look-like-their-constituents-but-they-do-look-like-their-parties/> [https://perma.cc/RN9S-GJVH]. See generally Buchholz, *supra* note 46.

<sup>48</sup> Kathy Goldschmidt & Bradley Joseph Sinkaus, *The Future of Citizen Engagement: What Americans Want from Congress & How Members Can Build Trust*, CONG. MGMT. FOUND. 8 (2021), [https://www.congressfoundation.org/storage/documents/CMF\\_Pubs/cmf\\_citizenengagement\\_publicopiniontrust.pdf](https://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf_citizenengagement_publicopiniontrust.pdf) [https://perma.cc/9EXA-AEJY] (“[T]he majority felt their views were not considered by their Member of Congress. . . were not even communicated to their congressional representative, and . . . were not taken into account in the Member’s decision on what position to take.”).

<sup>49</sup> Philip D. Waggoner, *Do Constituents Influence The Work Of Legislators?*, LEGBRANCH.ORG (Apr. 3, 2018), <https://www.legbranch.org/2018-4-2-do-constituents-influence-the-work-of-legislators/> [https://perma.cc/GS2X-EK4N] (“These results suggest that legislators are mostly unconcerned with listening to the issue-specific preferences of their constituents.”). See also, generally Philip D. Waggoner, *Do Constituents Influence Issue-Specific Bill Sponsorship?*, 47 AM. POL. RSCH. 709, 733 (2019).

<sup>50</sup> Barber & McCarty, *supra* note 2, at 35.

especially productive legislating activity that results in compromise.<sup>51</sup> Furthermore, despite increased travel of Congresspeople to their constituencies, Congress can be viewed as a “closed system” as the tenure of its members allows for little “fresh blood” to participate. For example, “the average length of service for Representatives at the beginning of the 117th Congress was 8.9 years (4.5 House terms); for Senators, 11.0 years (1.8 Senate terms).”<sup>52</sup>

Assuming *arguendo* that both Congress and America<sup>53</sup> are isolated or closed systems, it therefore follows that the degree of disorder for both systems will always increase (or at least stay the same). As America has grown and evolved since its founding in 1776, the changing and breaking down of bipartisan norms has been a constant and natural companion, resulting in increased polarization. Thus, in essence, chaos theory argues that the extreme partisanship in Congress and society today is nothing more than a result of time and internal pressures forcing Congresspeople and citizens alike to evolve into polarized entities in a way that the Founding Fathers never anticipated.

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<sup>51</sup> Simon Bazelon & Matthew Yglesias, *The Rise and Importance of Secret Congress*, SLOW BORING (June 21, 2021), <https://www.slowboring.com/p/the-rise-and-importance-of-secret> [<https://perma.cc/6T5J-UR8C>] (“The core of the Secret Congress theory is that on highly salient issues . . . polarization is high and compromise is rare. . . . [P]rogress . . . if it happens, will tend to come from a handful of members on different sides of the aisle getting interested in the topic and working quietly with other members to make deals to make it happen.”).

<sup>52</sup> *Membership of the 117th Congress*, *supra* note 47. See also, Mildred Amer, *Members Who Have Served in the U.S. Congress 30 Years or More*, CONG. RSCH. SER. (Jan. 20, 2006), [https://web.archive.org/web/20090325003715/http://assets.opencrs.com/rpts/RL30370\\_20060120.pdf](https://web.archive.org/web/20090325003715/http://assets.opencrs.com/rpts/RL30370_20060120.pdf) [<https://perma.cc/AW78-FFPG>].

<sup>53</sup> With increased measures to limit immigration and a rise in popularity of both “America First” ethnocentric populism and isolationist policy preferences, this is certainly plausible. See generally *Number of Persons Obtaining Legal Permanent Resident Status in the U.S. from FY 1990 to FY 2021*, STATISTICA (June 2, 2023) <https://www.statista.com/statistics/199958/number-of-green-cards-in-the-united-states/> [<https://perma.cc/VLV2-J2W5>] (showing the marked decreases in immigration to America as a result of Trump Administration policies); Simon Jackman, *America’s Illiberal Turn*, *America in the World*, in STATE OF THE UNITED STATES: BIDEN’S AGENDA IN THE BALANCE 5–7, 21, 36 (Mar. 16, 2022) (showing that isolationist beliefs in the US have increased steadily from 28% of respondents in 2019 to 40% at the end of 2021. “Prior to 2016, the American National Election Studies never found more than 30 per cent of Americans to hold isolationist beliefs in a time series dating back to 1952, with levels of isolationism usually in the mid-20s.”).

### III. WHY ADR IN CONGRESS?

Before discussing the use of ADR in Congress, this section provides a brief background of ADR. Specifically, it examines two primary ADR tools,<sup>54</sup> how ADR has been implemented successfully in other government venues, and the extent of ADR's potential to mitigate congressional polarization. Although the use of a third primary ADR tool, arbitration, is productive and successful in other venues, since it is not well-suited for Congressional implementation, it will not be discussed in this Note.

#### A. *An Overview of ADR Tools*

##### 1. *NEGOTIATION*

Negotiation is the most flexible and informal of all the dispute resolution methods, and thus, is often overlooked for its obviousness.<sup>55</sup> In negotiation, there is no neutral third-party to assist parties in reaching an agreement. The involved parties themselves work together to reach an agreement, though they may choose to be represented by their attorneys.<sup>56</sup> Regardless of attorney involvement, however, discussions proceed without prejudice, such that, if the parties do not resolve their dispute through negotiation, their rights are not prejudiced and any offers made in contemplation of a settlement are not admissible in court as evidence either to prove or disprove the validity or amount of a disputed claim.<sup>57</sup>

Negotiation is favored for its flexibility and efficiency.<sup>58</sup> A successful negotiation may save on the costs and time associated with other, third party-

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<sup>54</sup> OTTO J. HETZEL & STEVEN GONZALES, *ALTERNATIVE DISPUTE RESOLUTION IN STATE AND LOCAL GOVERNMENTS* 15–16 (2015) (“Stephen Goldberg, Frank Sander, and Nancy Rogers described ADR is falling into three ‘primary processes’ of negotiation, mediation, and adjudication.”).

<sup>55</sup> PRACTICAL LAW LITIGATION, *ADR Mechanisms in the US: Overview*, THOMSON REUTERS PRAC. L., <https://westlaw.com> (last visited Feb. 22, 2022) (sign into a Westlaw account and search the title of this article in Practical law) [hereinafter *ADR Mechanisms*].

<sup>56</sup> *Id.*; PRACTICAL LAW DISPUTE RESOLUTION, *Overview and Comparison of ADR Processes*, THOMSON REUTERS PRAC. L., <https://westlaw.com> (last visited Feb. 22, 2022) (sign into a Westlaw account and search the title of this article in Practical law) [hereinafter *ADR Processes*]. See also, *Understanding the Pros and Cons of Alternative Dispute Resolution for Businesses*, FREIBERGER HABER LLP BLOG (Feb. 2, 2018), <https://fhnylaw.com/understanding-pros-cons-alternative-dispute-resolution-businesses/> [<https://perma.cc/UD2V-BCA2>] [hereinafter *Pros and Cons of ADR*].

<sup>57</sup> *ADR Processes*, *supra* note 56 (*i.e.*, Fed. R. Evid. 408).

<sup>58</sup> *ADR Processes*, *supra* note 56; *Pros and Cons of ADR*, *supra* note 56.

assisted, ADR methods and formal court hearings.<sup>59</sup> Negotiation is also favored as it is considered “risk free.” Parties can submit to and walk away from negotiating at any time, and, regardless of whether a resolution is reached, parties may choose to continue their working relationship.<sup>60</sup> Furthermore, negotiation is considered a more private method of dispute resolution, allowing for dispute resolution proceedings to remain confidential and party reputations to remain intact.<sup>61</sup>

Despite its many merits, negotiation is not always the best choice of ADR method. Akin to the saying, “*you can bring a horse to water, but you can’t make it drink*,” there is no guarantee parties will submit to negotiation or resolve contested issues.<sup>62</sup> There is also no guarantee of good faith dealings.<sup>63</sup> For this reason, negotiation can be abused as a stalling tactic to postpone further legal action.<sup>64</sup>

Even if both parties submit to negotiation discussions in good faith, there may still be complications. Because negotiations do not include the use of third-party neutrals, the risk persists that negotiation discussions become deadlocked or imbalanced due to the disparity in the respective power and influence of the involved parties.<sup>65</sup> Although attorney involvement may mitigate such imbalance issues, the lack of an involved third-party neutral also reduces the chances of an agreement in cases of a complex, multi-party dispute.<sup>66</sup>

## 2. MEDIATION

Mediation is similar to negotiation in that it is a flexible and creative method of dispute resolution wherein parties come together in private to resolve a dispute.<sup>67</sup> What differentiates mediation from negotiation is the

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<sup>59</sup> *ADR Mechanisms, supra note 53; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>60</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>61</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>62</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>63</sup> *ADR Mechanisms, supra note 55.*

<sup>64</sup> *Id.*

<sup>65</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>66</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>67</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

presence of a third-party neutral.<sup>68</sup> Said impartial neutral, known as a mediator, helps the parties try to reach a mutually acceptable resolution to their dispute.<sup>69</sup> Ultimately, however, it is the parties—not the mediator—who retain control of the decision on whether to settle and on the settlement terms.<sup>70</sup>

Although mediation is sometimes required by contract and is occasionally a mandatory pre-litigation step in some jurisdictions,<sup>71</sup> it is by and large a voluntary process.<sup>72</sup> It is typically used once a dispute becomes apparent, but it can also be used at the deal-making stage between parties to finalize the terms of a deal and overcome transactional obstacles.<sup>73</sup> Accordingly, similar to in negotiation, parties involved in mediation are free to walk away from discussions if they cannot reach an agreement.<sup>74</sup>

Mediation shares many advantages with negotiation, but its true advantage lies in its use of a mediator.<sup>75</sup> Involved parties may select their mediator to ensure not only the fairness of the mediation process but also that the mediator has substantial expertise or knowledge pertaining to the subject of the dispute.<sup>76</sup> Using an impartial mediator also allows for new perspectives and potential solutions to be shared and helps to prevent gridlock among involved parties.<sup>77</sup>

As with any ADR method, mediation is not without its flaws. Mediation is often a lengthy process, and though the costs of mediation are often significantly lower than the costs of litigation, mediation may be unnecessarily expensive when resolving lower-value disputes—especially as there is no guarantee of settlement being achieved during mediation.<sup>78</sup> The fact that the mediation process lacks the tools available in litigation, and even arbitration, to compel party production of evidence and documents to get to the “truth” of the dispute also weakens mediation as an ADR method.<sup>79</sup> Thus, mediation settlements “may be less likely in cases where a party believes that

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<sup>68</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>69</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56; Pros and Cons of ADR, supra note 56.*

<sup>70</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56.*

<sup>71</sup> *Pros and Cons of ADR, supra note 56.*

<sup>72</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56.*

<sup>73</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56.*

<sup>74</sup> *ADR Processes, supra note 56.*

<sup>75</sup> *Id.; Pros and Cons of ADR, supra note 56.*

<sup>76</sup> *ADR Processes, supra note 54; Pros and Cons of ADR, supra note 56.*

<sup>77</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56.*

<sup>78</sup> *ADR Mechanisms, supra note 55; ADR Processes, supra note 56.*

<sup>79</sup> *ADR Processes, supra note 56.*

there is an important point of principle at stake, or where they believe the other party is not acting in good faith.”<sup>80</sup>

### B. *ADR Use in Other Venues*

The use of ADR has enjoyed increasing success in the judicial and executive branches of government at the local, state, and federal levels;<sup>81</sup> however, the application and success of ADR in such settings is irrelevant to the potential success of implementing ADR in Congress given Congress’ unique legislative responsibilities. Thus, in order to better understand the contemporary success of implementing ADR on a federal level pertaining to legislative action, this Note looks to the implementation of ADR in federal agencies via the Federal Mediation and Conciliation Service (FMCS).

The federal mediation function was first used in 1918 when the Department of Labor created the U.S. Conciliation Service, and in 1947, Congress enacted the *Labor-Management Relations Act (Taft-Hartley Act)*, therein creating the Federal Mediation and Conciliation Service as an independent agency of the U.S. government.<sup>82</sup> The agency was originally meant to prevent or minimize the impact of labor-management disputes on the free flow of commerce by providing mediation, conciliation and voluntary arbitration.<sup>83</sup> Today, however, FMCS provides professional ADR services to a wide range of federal, state, and local government agencies to “resolve disputes, design conflict management systems, build capacity for constructive conflict management, and strengthen inter-agency and public-private cooperation.”<sup>84</sup>

Of particular relevance here, many agencies rely on regulatory negotiations (sometimes referred to as “reg negs”) rather than the traditional rulemaking process, in “an effort to establish more effective regulatory rules and to decrease potential litigation costs from unilateral rule

<sup>80</sup> *Id.*

<sup>81</sup> See generally HETZEL & GONZALES, *supra* note 54. See also, e.g., Nancy H. Rodgers, *When Conflicts Polarize Communities: Designing Localized Offices That Intervene Collaboratively*, 30 OHIO ST. J. ON DISP. RESOL. 173 (2016).

<sup>82</sup> *A Timeline of Events in Modern American Labor Relations*, FED. MEDIATION & CONCILIATION SERVICE, <https://www.fmcs.gov/aboutus/our-history/> [<https://perma.cc/UE6Y-96UN>] (last visited July 18, 2023).

<sup>83</sup> *Id.*

<sup>84</sup> *Alternative Dispute Resolution for Government*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/> [<https://perma.cc/5R2J-D7F8>] (last visited July 18, 2023); *FMCS Four-Year Strategic Plan 2018-2022*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/wp-content/uploads/2021/07/2018-FMCS-Strategic-Plan.pdf> [<https://perma.cc/5XT2-9X3N>] (last visited Mar. 24, 2022).

implementation.”<sup>85</sup> During regulatory negotiation, FMCS uses its ADR expertise to facilitate collaboration between regulators and those impacted by their regulations prior to the promulgation of a new rule, therein identifying and overcoming barriers that arise in the promulgation process.<sup>86</sup> A negotiated rulemaking should include “the various interests that will be significantly affected by the rules, including a representative of the agency itself, to negotiate a consensus—an actual agreement—on a proposed rule or policy.”<sup>87</sup>

FMCS successfully facilitated the first negotiated rulemaking for the Federal Aviation Administration in 1982 and has since facilitated negotiated rulemaking with numerous federal and state agencies, including but not limited to: the U.S. Departments of Housing and Urban Development, Transportation, Health and Human Services, Labor, Agriculture, and Education as well as the Centers for Medicare and Medicaid Services, the FAA, EPA, and OSHA.<sup>88</sup> These regulatory negotiation services have produced many successful results.<sup>89</sup> For example, FMCS “facilitated a negotiated rulemaking committee established by the Secretary of Health and Human Services to develop a consensus among interested parties for defining medically underserved areas around the nation.”<sup>90</sup>

### C. *ADR’s Potential to Combat Partisan Disputes in Congress*

The push to integrate ADR in Congress may be deemed “tricky” as (1) ADR has officially only ever been incorporated in agency rulemaking, never in Congressional legislating or in dispelling Congressional disputes; and (2) ADR is typically used to settle “vested disputes,” not “snap disputes.” That is not to say, however, that ADR bears no potential to be

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<sup>85</sup> *Regulatory Negotiations*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/services/alternative-dispute-resolution-for-government/regulatory-negotiations/> [<https://perma.cc/68HX-H36G>] (last visited July 18, 2023); *FMCS Four-Year Strategic Plan 2018-2022*, *supra* note 84.

<sup>86</sup> *Regulatory Negotiations*, *supra* note 85; *FMCS Four-Year Strategic Plan 2018-2022*, *supra* note 84.

<sup>87</sup> HETZEL & GONZALES, *supra* note 54, at 124.

<sup>88</sup> *Regulatory Negotiations*, *supra* note 85; *FMCS Four-Year Strategic Plan 2018-2022*, *supra* note 84.

<sup>89</sup> *Regulating by Consensus*, FED. MEDIATION & CONCILIATION SERV., [https://www.fmcs.gov/wp-content/uploads/2016/02/Negotiated\\_Rulemaking.pdf](https://www.fmcs.gov/wp-content/uploads/2016/02/Negotiated_Rulemaking.pdf) [<https://perma.cc/8XYD-CVNW>] (last visited Mar. 16, 2022). *See also Fast Facts About the Agency*, FED. MEDIATION & CONCILIATION SERV., <https://www.fmcs.gov/wp-content/uploads/2021/02/FMCS-Fast-Facts-FY2020-update-Feb-2021.pdf> [<https://perma.cc/K8JE-ADV3>] (last visited July 18, 2023).

<sup>90</sup> *Regulating by Consensus*, *supra* note 89.

implemented in Congress or that it cannot be used as a tool to combat partisan disputes.

The major forms of ADR (negotiation, mediation, and arbitration) typically conceive of disputes as vested, which are “more or less amenable to process, are ‘owned’ by the disputants, and are capable of being meaningfully addressed or even resolved.”<sup>91</sup> In contrast, “snap disputes” may be characterized as highly polarized public disagreements exacerbated by social media.<sup>92</sup> In this way, “snap” is not intended to characterize the disputes as quick and easy; rather, it is to characterize the disputes as a “snapshot” in time that confronts one’s consciousness in immediate and highly personal ways.<sup>93</sup> Snap disputes may manifest as actual confrontations in our personal lives, but unlike vested disputes, they are “foremost virtual experiences,” shaped by the surrounding world and “a disembodied cyberculture [of] sharing opinions and information by way of structured and unstructured networks.”<sup>94</sup>

With this in mind, any proposed ADR solution for Congress must be flexible and crafted specifically to address partisan snap disputes. Such a solution will bring Congress’ “dysfunctional patterns of interaction and judgment to the foreground” while addressing how Congresspeople characterize each other, how they experience differences and disagreements, whether they believe positive societal change is possible (and for whom), and what steps they can and are willing to take to move toward those positive changes.<sup>95</sup> Of course, creating and implementing such a solution is easier said than done.

There are four main obstacles to resolving snap disputes that may pose problems for successfully implementing ADR in Congress. First, from an interest-based negotiation perspective, “snap disputes lead to positional hard bargaining around values, typically exacerbated by the use of difficult tactics,

<sup>91</sup> Jennifer W. Reynolds, *Snap Disputes*, 25 HARV. NEGOT. L. REV. 37, 42 (“For the sake of categorizing these extremely varied disputes, we will call them vested disputes . . . because we carry them with us—they are ours.”).

<sup>92</sup> *Id.* at 46 (“Snap disputes are not . . . simply extreme vested disputes or intense political disagreements. . . . [S]nap disputing dynamics inform and overlap with political discourse and vested disputes in ways that promote fear and anger in both arenas. Social media, for all its many benefits, often amplifies polarization and negative emotions, especially fear—fear of speaking, fear of engaging, fear of being harmed, fear of losing, and fear of people who are different. These fears can distort and undermine otherwise normal political discourse, productive conflict, and effective dispute resolution.”).

<sup>93</sup> *Id.* at 45 (“Indeed, perhaps ‘snap’ could be an acronym (‘SNAP’) standing for ‘social networks amplifying polarization,’ which conveys how social media reflects, creates, and intensifies conflict within and between people.”).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 51.

such as name-calling or refusing to participate in conversation.”<sup>96</sup> Given how prominent gridlock has become and the twenty-one government shutdowns since 1976—three of which occurred under President Trump, including the longest shut down in history of thirty-four days—“refusing to participate in the conversation” poses a real threat to implementing ADR in Congress.<sup>97</sup>

Conducting a leverage analysis of snap disputes reveals a second obstacle—that is, that Congressional disputants “seek the ideological upper hand through a contest between normative positions that may, depending on the situation, devolve into one or both sides employing negative leverage (e.g., online harassment) to gain an advantage.”<sup>98</sup> A third obstacle to resolving snap disputes is that, from a narrative mediation perspective, snap disputes “expose the characterizations implicit in the disputants’ conflict stories (hero, villain, victim) along with the tendency for disputants to flatten out complexities and delegitimize the experience of those with whom they disagree.”<sup>99</sup>

Lastly, there is the fourth obstacle to account for—the very sustenance of polarization. Basic conflict theory teaches that people are more prone to the biases and cognitive shortcuts that can cause disputes to escalate when they feel threatened, such that snap disputes escalate so quickly because disputants feel personally threatened.<sup>100</sup> Basic conflict theory as applied to Congress means that, in the heat of conflict of confrontation, Congresspeople may fear being called out, fear missing the chance to call someone else out and therefore worsen the conflict by doubling down on positions, may rationalize the use of negative leverage, and may invest in hardliner narratives that oversimplify the conflict and make it difficult to listen, admit mistakes, or forgive.<sup>101</sup>

While not underestimating these obstacles to implementing ADR in Congress, this Note stresses the benefits of implementing ADR in Congress.

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<sup>96</sup> *Id.* at 48.

<sup>97</sup> See Tom Murse, *All 21 Government Shutdowns in U.S. History*, THOUGHTCO. (Jan. 29, 2020), <https://www.thoughtco.com/government-shutdown-history-3368274> [<https://perma.cc/J8MR-7PTM>]. See also Lee Drutman, *How Much Longer Can This Era Of Political Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021), <https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last/> [<https://perma.cc/K6UL-MENB>].

<sup>98</sup> Reynolds, *supra* note 91, at 48–49.

<sup>99</sup> *Id.* at 49. See *About Parties and Leadership*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/parties-leadership.htm> (last visited Mar. 14, 2022) [<https://perma.cc/5YLZ-5SGY>]; *The Legislative Process: Calendars and Scheduling (Video)*, CONGRESS.GOV, <https://www.congress.gov/legislative-process/calendars-and-scheduling> [<https://perma.cc/H8LZ-NRHK>] (last visited Mar. 14, 2022).

<sup>100</sup> Reynolds, *supra* note 91, at 48–49.

<sup>101</sup> *Id.* at 48–49, 63. That is not to say *all* perspectives must be listened to and *all* experiences honored.

## A CALL FOR COMPROMISE

Apart from enhanced public policy decisionmaking, as evidenced by the use of ADR by FMCS in regulatory negotiating, there are *at least seven* ways that utilizing ADR can help combat polarization and partisan disputes in Congress. First, ADR can mitigate the toxicity of Congress as a workplace by combating members' hostility towards one another and the use of such juvenile tactics as "name calling." Second, ADR can help promote *strategic* listening and strengthen the legitimacy of Congressional disputants' experiences, creating new channels of participation for Congresspeople (especially those from minority or diverse backgrounds) who might not otherwise have the opportunity to be heard or an incentive to participate in the legislative process.<sup>102</sup> Third, implementing ADR in Congress may be beneficial to evening out the legislative playing field among oppositional parties, therein combatting ideological extremism—especially given the innate nature of Congress, which affords power to long-standing members of either party and additionally gives leverage to the majority party to set legislative agendas, organize committees, and determine how action proceeds on the floor.<sup>103</sup> Fourth, a well-managed ADR system can serve as an early warning device or a "trip wire" to signal where conflict is brewing, particularly in congressional committees.<sup>104</sup> As a result, early intervention can occur and legislative and/or partisan problems can be addressed before a crisis escalates. Fifth, ADR can be incorporated to minimize "clucking" and other antagonistic behavior that serves to fortify the negative feedback loop of polarization. Additionally, implementing ADR in Congress can lead to budgetary savings by avoiding the monetary costs associated with "clucking,"<sup>105</sup> thus relieving financial pressure on Congress and freeing up funds for the pursuance of non-partisan and/or bi-partisan objectives, or, at the very least, Best Alternative to a Negotiated Agreement (BAFTA) objectives.<sup>106</sup> Sixth, ADR in Congress can lead to more

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<sup>102</sup> HETZEL & GONZALES, *supra* note 54, at 124 ("The quest to put together a committee to negotiate the rule or policy is in reality a quest to assemble a group of individuals representing those interests the policy will ultimately affect. To be sure, not every single narrow interest will be identified. The goal is to ensure that, together, the members will raise intubate the important facts and policies. It should be such that anyone who had an interest in the decision good point to someone on the committee, or several committee members, who represented that person's views.").

<sup>103</sup> *About Parties and Leadership*, *supra* note 99.

<sup>104</sup> HETZEL & GONZALES, *supra* note 54, at 83 ("Analysis of case data can reveal which departments, policies, or personnel produced the most conflict, just the same as incident reports in manufacturing show where problems exist.").

<sup>105</sup> *Id.* at 79–84.

<sup>106</sup> *Id.* at 156. With more funds available for use, more possibilities are possible. In this way, if one political party "gets a slice of the pie," there is still plenty of pie for the other party to eat.

communication across the aisle to share information about and brainstorm on new, creative solutions to timeless and contemporary problems.<sup>107</sup> Lastly, implementing ADR in Congress can help Congresspeople not feel so threatened by ideologies oppositional to their own. “Because of personal feelings and potential losses, that the other guy did negotiation may not interest some parties. They would rather rely on their political influence and ability to convince the decisionmakers and rely on an approach that would develop a facilitated or mediated solution.”<sup>108</sup> But stiff-arming legislation through Congress and relying on leverage—be it positive or negative—to gain traction against one’s political opponents creates more problems.<sup>109</sup> For that reason, ADR can benefit Congress by providing a structure wherein members can discuss their conflicting values<sup>110</sup> without harming their professional relationships.<sup>111</sup>

#### IV. A CASE STUDY IN COMPROMISE: COMPARING BUDGET CRISES

In light of the aforementioned potential benefits of implementing ADR into Congress, this section contains two comparative case studies to illustrate how ADR techniques—specifically, negotiations leading to legislative compromise—have been successfully implemented in Congress in the past. The first case study discusses the Congressional budget crisis in the late-1990s and the balancing of the budget in 1997 under President Clinton. The second case study discusses the Congressional budget crisis in 2021 under President Biden—during the midst of COVID-19 pandemic and post-January 6th insurgency—and Congress’ intense political antipathy and disfunction in finding a solution.

The juxtaposition of the 1997 and 2021 Congressional budget cases is important in so far as discrediting any nay-sayers who maintain implementing

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<sup>107</sup> *Id.* at 164.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 250 (“Value conflicts . . . occur because people have different lifestyles and read with different ideologies as well as different moral and ethical standards. . . . [T]o assume values can be changed during one or several negotiation sessions is unlikely. This limitation does not, however, prevent the parties from reaching a mutually agreeable resolution.”).

<sup>111</sup> *Id.* at 250–51 (“Relationship conflict stems from strong emotions, misperceptions or stereotypes, poor miscommunications, repetitive negative behavior. . . . Relationship conflicts can be addressed by creating a procedure that . . . limit[s] emotional outbursts and allow[s] for participants to voice their feelings without fear of reprisal or other form of retaliation. . . . Relationships can also be improved if the quality of the communications can be enhanced, . . . and if the negotiation process can encourage a positive problem-solving attitude among those in negotiation.”).

ADR in Congress is the naïve wish of a political idealist. Of course, there are many differences between the issues at heart in each case, but the principal behind the comparison persists: compromise is possible. “[M]ost Americans want their political leaders to compromise. A 56% majority prefers political leaders who ‘are willing to compromise,’ while 39% prefer leaders who ‘stick to their positions.’”<sup>112</sup> Of course, “the nation’s increasing ideological polarization makes political compromise more difficult, in part because those at opposite ends of the ideological spectrum see less benefit in meeting the other side halfway,”<sup>113</sup> but this does not mean that compromise is impossible, only that more effort and patience must be exerted to bridge the political divide.

### A. *Congressional Budget Crises Background*

In order to understand the core of the disputes and the high stakes involved in the following case studies, this subsection first provides a brief background on the role of Congress in passing the annual appropriations bill for funding the U.S. government and increasing the debt limit (“debt ceiling”). Of the two tasks, funding the U.S. government is the more frequent and relatively less calamitous hurdle for Congresspeople to tackle.<sup>114</sup> Each year, Congress must approve a federal appropriations bill to finance the government for the following 12 months. The federal government’s fiscal calendar starts on October 1 and ends on September 30, and if a new yearly budget is not passed by September 30 each year (before the new fiscal year begins on October 1), a government shutdown occurs.<sup>115</sup> During a federal government shut down, the government is required to “turn the lights off” and reduce agency activities and stop nonessential operations.<sup>116</sup> Partisan gridlock then enters the game when either party attempts to inject amendments or partisan

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<sup>112</sup> *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/6BE3-Y3EW>] (“And this preference has a decidedly ideological tilt: Consistent liberals overwhelmingly prefer leaders who compromise (by an 82% to 14% margin), while consistent conservatives voice a preference for leaders who stick to their positions, by a 63% to 32% margin.”).

<sup>113</sup> *Id.*

<sup>114</sup> See Thomas Franck, *Debt Ceiling vs Government Shutdown: How They’re Different and Why They Matter*, CNBC (Sept. 17, 2021), <https://www.cnbc.com/2021/09/17/debt-ceiling-vs-government-shutdown-2021-why-it-matters.html> [<https://perma.cc/PM6F-8W57>].

<sup>115</sup> *Id.*

<sup>116</sup> For example, “workers at the departments of Housing and Urban Development, Education, Interior, Labor and Commerce often have to send home the majority of their workers until Congress approves a new budget.” *Id.*

priorities into the required budgetary bill.<sup>117</sup> While Congresspeople grapple with the potential of such add-ons, in the case of a government shutdown, regular government employees and the American economy suffer the brunt of the poor-legislating consequences as collateral damage.<sup>118</sup> Considering the difficulties of passing federal appropriations bills and the consequences of government shutdowns, Congress will often use a continuing resolution (CR) to extend the budget deadline.<sup>119</sup> Continuing resolutions “keep the government, and the programs it administers, open and operating until lawmakers are able to enact full-year appropriations.”<sup>120</sup>

Compared to authoring a yearly budget, raising the debt ceiling is a near-crippling obstacle for Congress, which, if not overcome, results in a default. “The debt limit is a maximum cap on the total amount of money the federal government is authorized to borrow to fulfill its financial obligations. Because the United States runs budget deficits, it must borrow huge sums of money to pay its bills.”<sup>121</sup>

While the “raising the debt ceiling” debate often elicits calls by Congresspeople to cut back on government spending, lifting the debt limit does not authorize any new spending, rather, it simply allows the U.S. to finance existing obligations.<sup>122</sup> For many years, raising the debt ceiling was a routine Congressional practice; however, as polarization and political antipathy have increased, so too has brinkmanship over the debt ceiling.<sup>123</sup> Today, the debt ceiling is usually raised by Congress through a process known as budget reconciliation.<sup>124</sup> Budget reconciliation was first used in 1974 to expedite the passage of specific tax, spending, and debt-limiting legislation

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*; Ylan Mui, *The Government Shutdown Cost the Economy \$11 Billion, Including a Permanent \$3 Billion Loss, Congressional Budget Office Says*, CNBC (Jan. 18, 2019, 11:12 AM), <https://www.cnbc.com/2019/01/28/government-shutdown-cost-the-economy-11-billion-cbo.html> [<https://perma.cc/5S3E-VH4X>].

<sup>119</sup> *FAQ: What is a Continuing Resolution?*, CONCORD COAL., <https://www.concordcoalition.org/faq/#1619709037094-97fdf8c9-6b8b> [<https://perma.cc/7D9L-LURE>] (last visited Mar. 23, 2022).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (“Since 1960, Congress has acted more than 80 times – under both Republican and Democratic administrations – to permanently raise, temporarily extend, or revise the definition of the debt limit.”).

<sup>124</sup> *See generally*, Richard Kogan & David Reich, *Introduction to Budget “Reconciliation,”* CTR. BUDGET & POLICY PRIORITIES (May 6, 2022), <https://www.cbpp.org/research/federal-budget/introduction-to-budget-reconciliation> [<https://perma.cc/X7WK-56YF>].

and requires only fifty-one votes (or fifty-votes plus the vice president as the tiebreaker) to pass in the Senate.<sup>125</sup>

## B. *Case Studies*

### 1. *BUDGET CRISIS OF 1997*

In 1995, American partisans fought an “epic battle of the budget,” waging a political war that led to a government shutdown not once, but twice.<sup>126</sup> The following year, in November 1996, the American people voted to re-elect Democrat Bill Clinton as president and to keep Republicans as the majority party in Congress.<sup>127</sup> Despite such polarization, January 1997 represented a fresh start for elected leaders.<sup>128</sup>

Immediately after his 1996 re-election, President Clinton instructed his administration staff to prepare a balanced budget plan that could serve as a starting point for bipartisan compromise, touting Democratic priorities but also leaving room for the necessary compromises with the Republican Congress.<sup>129</sup> In an effort to see this plan to fruition, Erskine Bowles, the White House chief of staff, agreed that John Hilley, senior advisor to President Clinton, “should launch a secret foray into the Republican camp—not to weaken the opposition but to build a modicum of trust before the president presented his budget proposal to Congress.”<sup>130</sup>

The talks between Bowles and Hilley remained secret, not just from rank-and-file Republicans but also from many Democrats, both in Congress and in the White House.<sup>131</sup> Both Erskine and Hilley knew their outreach to the other side would never be successful if they announced their intentions to congressional Democrats or White House staff bent on partisan warfare.<sup>132</sup> Accordingly, there were only so-many “key players” that were involved in hammering out a bipartisan compromise for a balanced budget—besides President Clinton, Vice President Gore, and select advisory and administrative staff members, there were three members of the United States Treasury, four members of the Office of Management and Budget (OMB), two members of the Department of Health and Human Services, one member of the Department

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<sup>125</sup> *See id.*

<sup>126</sup> JOHN HILLEY, *THE CHALLENGE OF LEGISLATION: BIPARTISANSHIP IN A PARTISAN WORLD 1* (2008) (ebook).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1–2.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

of State, ten senators (five Republicans and five Democrats), and twenty-two House representatives (nine Republicans and thirteen Democrats) involved.<sup>133</sup>

The resulting bipartisan compromises—*The Balanced Budget Act of 1997* (PL 105-33) and *The Taxpayer Relief Act of 1997* (PL 105-34)—took a little under eight months to be created and finalized.<sup>134</sup> Said Acts not only “brought an end to a period of massive federal budget deficits,”<sup>135</sup> but also provided health insurance for five million children, allowed for \$35 billion in tax relief to help families pay for college and training, enacted a child tax credit, provided \$3 billion to move welfare recipients to private-sector jobs,<sup>136</sup> increased funding for environmental programs, strengthened incentives to move people from welfare to work, and provided new incentives for saving and investing.<sup>137</sup>

Upon further reflection, the bipartisan compromise resolving the 1997 budget crisis was made possible because the middle ground between the two political parties was large enough to allow leaders to balance the budget without exposure to severe political attack.<sup>138</sup> Furthermore, five additional factors were satisfied, making Congress ripe for compromise. First, “the American people were squarely behind the goal of a balanced budget.”<sup>139</sup> Second, each political party had already unsuccessfully attempted to reduce the national deficit while also trying to advance its political goals.<sup>140</sup> Third, the bipartisan compromise resolving the budget crisis was possible because, by 1997, the “deficit had become manageable.”<sup>141</sup> Fourth, the Congresspeople involved in negotiating the compromise were not reinventing the wheel—they fully understood the policies that were part of the bipartisan deficit reduction effort, as well as the political tolerances of each side and the expected effects

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<sup>133</sup> *Id.* at 251–55.

<sup>134</sup> *Id.* at 249–50.

<sup>135</sup> *Id.* at xi.

<sup>136</sup> Therein keeping President’s 1996 promise to provide \$12 billion to restore disability and health benefits for 350,000 legal immigrants. See William J. Clinton, *President’s Budget Message at the White House: A Principled Compromise*, CQ ALMANAC (June 29, 1997), <https://library.cqpress.com/cqalmanac/document.php?id=cqal97-0000181108> (on file with author).

<sup>137</sup> *Id.*; see HILLEY, *supra* note 126.

<sup>138</sup> HILLEY, *supra* note 126, at 228.

<sup>139</sup> *Id.* at 226.

<sup>140</sup> *Id.*

<sup>141</sup> Presidents Bush in 1990 and Clinton in 1993 bolstered the economy to replenish the Treasury with revenues such that “the budget could be balanced by curbing spending alone.” *Id.* at 228.

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of the policy changes that were on the table.<sup>142</sup> Lastly, the Congresspeople involved on both sides were “seasoned and responsible.”<sup>143</sup>

It is impossible to predict whether Congress will be “ripe” for compromise in the future with the above five factors coincidentally satisfied. Still, that does not mean compromise is impossible. Even if only two of the above five factors are satisfied,<sup>144</sup> implementing ADR in Congress may see to fruition the other three factors, which in turn may lead to more legislative compromise.

### 2. BUDGET CRISES OF 2021

In 2021, the U.S. budget deficit totaled \$2.77 trillion, the highest on record save for the all-time high of \$3.13 trillion reached in 2020,<sup>145</sup> and by Fall 2021, Congress faced two vital tasks: authorizing the federal budget for the 2022 fiscal year and raising the debt ceiling. Although on paper Democrats and Republicans were actually united in their desires to pass a continuing resolution to fund the government,<sup>146</sup> *how* the resolution would pass became the big question.

On the Republican side, virtually every Republican opposed the Democrats’ initial plan for the 2022 fiscal year budget.<sup>147</sup> Republicans, who voted for debt limit suspensions under President Trump, claimed that there was “no need for them to help because Democrats control all the levers of power in Washington” and were “preparing to push through trillions of dollars

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<sup>142</sup> “All those present knew that [abortion, labor issues, gay rights, and the like] were not even eligible for bipartisan consideration. . . . Many policies that were worthy on the merits were not part of the solution because the politics were too severe.” *Id.* at 227.

<sup>143</sup> “They understood the political and personal leanings of their colleagues and the policies they would and would not support. That knowledge and their leadership skills provided the foundation for an agreement

that could command the overwhelming support of their caucuses.” *Id.* at 227.

<sup>144</sup> *E.g.*, factor one of American support and factor three of the problem being manageable.

<sup>145</sup> HILLEY, *supra* note 126, at 228 (“Technically, the United States hit its debt limit at the end of July [2021], following a two-year extension that Congress agreed to in 2019.”); Alan Rappeport, *Explaining the U.S. Debt Limit and Why It Became a Bargaining Tool*, N.Y. TIMES (Sept. 27, 2021), <https://www.nytimes.com/2021/09/27/us/politics/us-debt-ceiling.html> [https://perma.cc/6NHD-TWFF].

<sup>146</sup> Associated Press, *US Budget Deficit Hits \$2.77 Trillion in 2021, 2nd Highest*, U.S. NEWS (Oct. 22, 2021, 3:41 PM), <https://www.usnews.com/news/business/articles/2021-10-22/us-budget-deficit-hits-277-trillion-in-2021-2nd-highest> [https://perma.cc/8YSF-9AG3].

<sup>147</sup> Franck, *supra* note 114.

in new spending on their own.”<sup>148</sup> Senate Minority Leader McConnell (R-Ky.) and Senate Republicans preferred Democrats link the necessary debt ceiling increase to their proposed \$3.5 trillion social policy bill, which was being drafted under reconciliation rules and could therefore pass with fifty-one Senate votes while avoiding the threat of a GOP filibuster.<sup>149</sup> This strategy would not only protect Senator McConnell’s caucus in the 2022 midterm elections, but also force Democrats into “toss-up races to defend themselves against accusations of wasteful spending.”<sup>150</sup>

On the Democratic side, party leaders were reluctant to use reconciliation to raise the debt ceiling independently because it would force them to “specify a dollar amount raised to the debt limit,”<sup>151</sup> which might be unfavorable to voters and cast the Democratic party in a negative light.<sup>152</sup>

Considering both Republicans’ and Democrats’ political strategies, “after weeks of public bickering and private negotiations with centrist holdouts,” they finally reached a compromise.<sup>153</sup> Senate leaders came to a “universal agreement” to pass the funding bill and compromise because they simply had to “get it done.”<sup>154</sup> In doing so, they rationalized members on both sides of the political aisle were “going to be disappointed in certain things” but that everyone would also “be glad about certain things,” too.<sup>155</sup>

The final bill, *Extending Government Funding and Delivering Emergency Assistance Act*, passed both chambers of Congress just in time, on September 30, 2021.<sup>156</sup> Although it was exceedingly difficult to pass, in part because the five factors for “ripe” Congressional compromise were not

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<sup>148</sup> Alan Rappeport, *supra* note 145.

<sup>149</sup> Franck, *supra* note 114.

<sup>150</sup> *Id.*

<sup>151</sup> Nathaniel Juhohn Lee, *With Congress in Gridlock, Here are the Alternative Solutions to the Debt Ceiling Crisis*, CNBC (Nov. 2, 2021, 10:32 AM), <https://www.cnbc.com/2021/11/02/with-congress-in-gridlock-here-are-the-alternative-solutions-to-the-debt-ceiling-crisis.html> [<https://perma.cc/GH27-98NG>].

<sup>152</sup> *Id.*; Rappeport, *supra* note 145.

<sup>153</sup> Emily Cochrane, *Democrats, Scaling Back Budget Bill, Press for Compromise by Week’s End*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/us/politics/democrats-budget-bill.html> [<https://perma.cc/4UTZ-RJJA>].

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* This bill allowed the continuation of running the federal government and was followed by similar extensions. President Biden signed the 2022 omnibus appropriations bill, the *Consolidated Appropriations Act*, on March 15, 2022. *Appropriations Watch: FY 2022, COMM. FOR RESPONSIBLE FED. BUDGET* (June 21, 2022), <https://www.crfb.org/blogs/appropriations-watch-fy-2022> [<https://perma.cc/KYF2-MWDR>].

<sup>156</sup> *Appropriations Watch: FY 2022, supra* note 155.

satisfied, Congresspeople managed to put aside their differences and do what needed to be done. In doing so, Congress once again proved that, when the call for compromise sounds, they can set aside polarization out of necessity in favor of pursuing productivity and future growth.

## V. PROPOSED SOLUTIONS

This Note proposes two methods to implement ADR in Congress in the hopes of mitigating congressional polarization.<sup>157</sup> First and foremost, this Note suggests mandatory ADR training for Congresspeople. It is “very important” for mediation participants to understand the mediation process.<sup>158</sup> How better to ensure that Congresspeople are informed of the mediation process than by requiring them to undergo training! Currently, there is not any requirement that Congresspeople do so, nor is there any guidance for effective communication or negotiation methods in the Congressional Handbook.<sup>159</sup>

Thus, in order to encourage flexibility and allow for polite discourse outside of the confines of partisanship and political antipathy, Congresspeople “need new skills for handling conflicts and [snap] disputes . . . that help them navigate the complexities of disagreements in the modern world.”<sup>160</sup> ADR training can teach Congresspeople these new skills and more, imparting the importance of listening, paraphrasing, asking questions, and acknowledging emotions, which many ADR instructors teach as part of negotiation, mediation, and other ADR courses.<sup>161</sup>

For example, “because listening is most difficult when people disagree,” during training, ADR “instructors often put students into ‘hot topic’ scenarios in which one student plays the Speaker and the other plays the Listener.”<sup>162</sup> “Speakers” then share their views with the “Listeners,” during

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<sup>157</sup> In Congress, there are more methods to implement ADR, which have already been pursued. See Tom Melling, *NOTES: Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677, 1692 (1994).

<sup>158</sup> HETZEL & GONZALES, *supra* note 54.

<sup>159</sup> *Members’ Congressional Handbook*, COMM. ON HOUSE ADMIN., <https://cha.house.gov/member-services/handbooks/members-congressional-handbook> [<https://perma.cc/5V8A-WZCZ>] (last visited Mar. 24, 2022). See also *Legislative Negotiation*, HARV. KENNEDY SCH., <https://ash.harvard.edu/legislative-negotiation> [<https://perma.cc/SX6K-ZYMT>] (last visited July 18, 2023).

<sup>160</sup> Reynolds, *supra* note 91, at 89.

<sup>161</sup> Reynolds, *supra* note 91, at 60. For a more in-depth list of ADR lessons Congressmembers might stand to learn from, John Hilley discusses ten thought-provoking skills necessary to compromise, which he garnered from his experience during the late-1990s budget crisis and balancing the federal budget in 1997. See HILLEY, *supra* note 126, at 230–34.

<sup>162</sup> Reynolds, *supra* note 91, at 60.

which time they are often encouraged to take hardline views that are the opposite of the Listeners' views.<sup>163</sup> With this in mind, "as the Speaker speaks, the Listener is expected to listen without baiting or arguing with the Speaker, clearing the mind of judgment and engaging in active listening skills like paraphrasing, asking questions, and acknowledging emotions."<sup>164</sup> Accordingly, students—and hopefully Congresspeople—can "learn how to disengage themselves from an adversarial default setting in difficult conversations and how to promote greater understanding and fruitful dialogue by listening effectively and carefully."<sup>165</sup>

Already there has been some initiative to provide ADR training to Congresspeople. For example, the Legislative Negotiation Project at the Harvard Kennedy School offers a "range of cases and simulations for teaching legislative negotiation tactics at the state and congressional level."<sup>166</sup> Additionally, "the Program on Legislative Negotiation (PLN) at American University is using materials developed by the Harvard Legislative Negotiation Project to provide training in the fundamentals of legislative negotiation to bi-partisan Congressional staff through the Library of Congress. The program has been so successful that there have been long waiting lists to attend [it]."<sup>167</sup> Lastly,

Stephen B. Goldberg, a distinguished negotiation theorist, writer, and trainer, has updated the classic text in the field, Goldberg, Sander, Rogers, and Cole, to include, for the first time in any law school negotiation/dispute resolution teaching book, materials and exercises on legislative negotiation. The book also examines causes and suggestions for remedying Congressional gridlock in negotiating legislative solutions to national problems.<sup>168</sup>

The second proposed method of implementing ADR in Congress is to rely on professional third-party neutrals to conduct formal negotiation,

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 61.

<sup>165</sup> *Id.*

<sup>166</sup> *Legislative Negotiation*, *supra* note 159.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

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facilitation, and mediation.<sup>169</sup> As it stands, “many dispute resolution practitioners have redoubled their efforts in creating interventions for dealing with political disputes and divisions in the community. These interventions are built on processes designed for managing large-scale public policy disputes” and “range from small, focused events to larger-scale, ongoing initiatives.”<sup>170</sup>

To be sure, this method of ADR implementation raises numerous questions. For example, “What are the moral obligations of ‘neutral third parties’ in [Congressional] disputes?”<sup>171</sup> Furthermore, how do professional third-party neutrals “remain trustworthy and ethical in environments that permit unethical, corrupt behavior?”<sup>172</sup> Are neutrals’ “sometimes-competing concerns of self-determination on the one hand and correcting power imbalances on the other, in non-mandatory non-binding processes able to be reconciled? Is there such a thing as self-interested empathy?”<sup>173</sup> Also, what of security concerns given the politically sensitive and often-times classified nature of Congressional disputes? Although third-party neutrals maintain confidentiality as part of their profession, the impracticality and risk of exposing non-government neutrals to national secrets is too great an obstacle to overcome. Coupled with the fact that “[t]raditional ADR-style interventions . . . often take a great deal of preparation and analysis, as in the case of trainings and facilitated conversations, and possibly may need ongoing maintenance and resources,” it is therefore suggested that a new government agency be created to implement ADR in Congress.<sup>174</sup> Similar to the Federal Mediation and Conciliation Service, this agency would allow for professional third-party neutrals with government clearance to facilitate, negotiate, and mediate congressional disputes in order to help mitigate the negative effects of extreme polarization and minimize name-calling, destructive legislative stalling, and other clucking. Furthermore, by utilizing a Congressional ADR service, the fourth and fifth factors for ripe Congressional compromise<sup>175</sup> may be satisfied. ADR neutrals have the knowledge and expertise not only to guide regulatory negotiations so that Congresspeople don’t try to reinvent the wheel,

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<sup>169</sup> This idea may already have some support among Congressmembers. *See generally, Negotiation Could Resolve Washington Gridlock, Says Senator*, ABA (May 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/may-2018/negotiation-could-resolve-washington-gridlock--says-senator/> [<https://perma.cc/72BG-NDGG>].

<sup>170</sup> Reynolds, *supra* note 91, at 56–57.

<sup>171</sup> *Id.* at 63.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 58.

<sup>175</sup> *See supra* Section IV.B.

but also to guide the focus of negotiations so that needless gridlock over issues too controversial to legislate does not interfere with pivotal productivity.

## VI. CONCLUSION

The “Call for Compromise” has sounded again. As America forges onward into a post-COVID-19 world, our Congresspeople must make a conscious effort to reject political antipathy and strive for bipartisan solutions to address the ongoing Russian-Ukrainian War, the aftermath of the January 6, 2021 Insurgency, future appropriations bills, and other unforeseen issues of great national importance.

Although political polarization is not without cause and has worsened in intensity since years past, it is not insurmountable. This Note has explored the root causes of political polarization, both nationally and in Congress, and advocated for implementing ADR in Congress, either by creating a new Congressional Mediation and Conciliation Service and/or through mandating ADR training for Congresspeople. If Congresspeople can communicate respectfully such that trust and respect can be rebuilt across the aisle; if they can commit to keeping a bipartisan tone and controlling the flow of legislative information to prevent polarized party efforts to subvert compromise; and if they can reach across the aisle to resolve an overarching goal, then a new era—one less defined by partisanship and polarization—may restore the faith of the American people in each other and in our government.