EASING GRIDLOCK IN THE UNITED STATES CONGRESS THROUGH MEDIATION:

LETTING OUR CITIES AND STATES TEACH US LESSONS ON GETTING ALONG
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I. **INTRODUCTION**

In recent years the United States Congress has become increasingly dysfunctional as partisanship is in a cyclical uptick and compromise has gone out of fashion.\(^1\) The outgoing 112\(^{th}\) Congress, in office during the 2012-2013 legislative year, was the least productive Congress in 65 years.\(^2\) Politicians are locked into policy positions due to pressure from increasingly partisan constituents, party leadership and campaign pledges.\(^3\) Congressional leaders have attempted to tunnel out of the gridlock, levying deadlines on themselves to either make grand bargains or suffer from self-imposed consequences—consequences like deliberately painful defaults designed not to be helpful to the electorate but to prick legislators into action.\(^4\) By fashioning makeshift solutions such as these, legislators become stuck in an endless loop of looming crisis after looming crisis, emerging from the latest storm wreckage only to confront even more rapidly advancing thunderclouds on the horizon.

What if, instead of communicating mostly through the media and warring factions of interest groups with bumper-sticker slogans, federal lawmakers gathered with a trained third-party neutral and discussed the benefits of a real policy solution to some of the nation’s most intractable issues? What if party leadership and relevant committees had a mediator to engage

\(^2\) See, e.g. GOVTRACK at http://www.govtrack.us/congress/bills/#statistics (last accessed April 13, 2013)
them in open, honest discussion about the substantive issues at hand without the distraction of cameras and angry constituents screaming for a hard line? Americans desperately need our Congress to function, and providing them with qualified third-party neutrals to serve as mediators might be a way to loosen the death grip of partisanship and inaction.

The presence of a third-party neutral could be particularly useful for lawmakers as a means of breaking the adversarial pattern they are locked into. Mediators are neutral third parties that specialize in helping parties better communicate and fostering a creative, solutions-generating environment in which parties are encouraged to discuss, negotiate and find common ground on policy issues. The mediator is not generally empowered to direct a resolution nor dictate the terms of the discussion, but instead works with the parties to craft creative solutions that align with their respective interests. Legislative mediators would be politically neutral, objective third parties who would meet with members of Congress and help them draft bipartisan bills, which the lawmakers would then present to the legislative body as a whole for a floor debate and ultimately, a vote. In this way the integrity of the democratic process is intact and the lawmakers have an available advocate for compromise and solutions-generating discussions.

The possible benefits of mediation as a tool to reduce Congressional infighting have become clearer as mediation gains in popularity in other contexts. Mediation creates a more collaborative and less adversarial environment, which may encourage lawmakers to

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compromise. Mediated solutions are generally more effective at achieving their goals than policies made in a winner-take-all context like the standard political process. They may also be cheaper in the long run as expensive litigation over the law is reduced or avoided entirely. The confidentiality of the mediation proceedings would also be a useful tool, as it is increasingly difficult for opposition leaders to engage in open, honest, civil communication in the fishbowl of Washington, where each interaction inevitably becomes public and “grandstanding” is common. Legislators that are stuck in endless cycles of stonewalling and posturing could use the mediation process to negotiate a way forward that minimizes future conflict and maximizes the benefit to all.

This paper proceeds as follows: Part II will examine the ways in which states and municipalities already use mediators to effectively resolve policy disputes between government actors. Part III will use these characteristics to draw a model for effective engagement at the national level by proposing a new Legislation and Policy department within the existing Federal

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8 For a concise summary of some of the benefits of mediation, see the University of Colorado’s Ombudsman site at http://ombuds.colorado.edu/about/questions-and-answers-about-mediation/


10 Jody Freeman & Laura I. Langbein, Regulatory Negotiation and the Legitimacy Benefit, 31 E.L.R. 10811 (2001)

Mediation and Conciliation Service. Part IV will discuss the various benefits and possible drawbacks for such a scenario and barriers or incentives to implementation.

II. THE MODEL: HOW CITIES AND STATES USE MEDIATORS AS TOOLS

Several governments at the local level have already seen the possible value of mediation as a tool to promote compromise and collaboration. In this section the paper will explore how mediation has been used in Illinois, Georgia and North Carolina to break gridlock and craft creative policy solutions that ultimately lead to better outcomes for constituents and the community at large.

A. Illinois General Assembly

In 2001, the Illinois General Assembly faced a common legislative problem: the clock was ticking, a deadline loomed, and unless legislators could compromise on a new bill, the old would expire without a successor—in this case, the Illinois telecommunications industry might have slipped outside the bounds of statutory regulation. The dramatic value of urgent, eleventh-hour deals in the political legislative process is apparent in television shows like The West Wing and House of Cards, but urgent drama is not a value in real-life legislating. So the Illinois General Assembly did something novel: it asked retired Illinois state judge Michael Getty to lead a multi-party mediation process designed to fashion a workable deal for all parties involved.

Judge Getty agreed, and brought together members of the General Assembly as well as a variety of telecommunications experts and industry representatives to create a preliminary draft

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13 Id.
of a solution. Because regulation of the telecommunications industry is such a contentious issue with significant amounts of money at stake, over 30 interested parties were invited to participate in the mediation. Using a mixture of joint sessions and private party caucusing, the parties were able to draft a compromise bill that the mediation participants later present to the full legislature for their consideration. It was ultimately voted into law with near-unanimous support.

B. Georgia LOST Mediations

In 2012, Georgia cities and counties faced what promised to be a contentious set of renegotiations of the distribution of the local option sales tax (LOST). Cities and counties share LOST revenues, and needed to agree on an equitable distribution of the funds. There were no set guidelines, and each city-county negotiation proceeded on a case-by-case basis in an effort to take the needs of individual localities into account and allow them to formulate their own plan. Parties were given 60 days to negotiate with each other, and if no agreement was reached they proceeded to enter a 60-day period of mandatory negotiation. If still no agreement surfaced, the dispute would be submitted to baseball arbitration.

University of Georgia professor Murray Weed participated in six of these negotiations, all of which ultimately ended successfully with joint city and county agreements on the tax

14 Id.
15 Id.
16 Id.
17 Id. The bill has one dissenting vote in the House and two in the Senate.
20 Id.
distribution. Professor Weed noted that the biggest hurdle in the negotiations was getting the parties to trust one other. Even more so than private parties, politicians are often suspicious of each other because of power struggles and personal or professional histories of public conflict, and they can be hampered by a deep sense that the other side does not share their underlying interests.

To overcome this obstacle, Professor Weed and other mediators used an evaluative mediation style as opposed to a more traditional facilitative style. In evaluative mediation, the mediator is more freely able to give advice and suggest equitable resolutions or new avenues of solutions to explore, in contrast to facilitative mediation in which the mediator does not give advice or make assessments. Professor Eric Green has noted that of all potential areas of conflict, the type that responds particularly well to evaluative mediation is sincere, good faith disagreement on a core issue. Since the disagreement over how to allocate LOST revenue, like most political conflicts, include deeply held beliefs and core notions of justice and equity, these mediations provided an excellent canvas for a successful evaluative mediation.

C. North Carolina Local School Budget Disputes

In 1997, North Carolina revised a statute that gave school boards the opportunity to mediate with county commissioners if they felt that the proposed school budget was

21 Telephone interview with Murray Weed, Local Government Program Manager, Carl Vinson Institute of Government at the University of Georgia (April 15, 2013).
22 Id.
23 Id.
24 Scott H. Hughes, Facilitative Mediation or Evaluative Mediation: May Your Choice Be A Wise One, 59 Ala. Law. 246 (1998)
25 Id.
26 Professor Eric Green, Boston University School of Law, Remarks at Harvard Law School (April 25, 2013).
inadequate. Since the statute has been in place, 30 mediations have taken place among North Carolina counties, 29 of them resulting in successful settlements. Several counties have used the mediation services more than once. Mediators are jointly selected by the county commissioners and the school boards, or they are appointed by the current senior Superior Court judge. The statute emphasizes the confidentiality of these private mediations.

In 2004, Iredell County initiated mediation when the county commissioners cut the expected school budget increase from 5 percent to 2 percent. The school board was furious, and tensions were exacerbated by “a series of miscommunications and politically charged exchanges.” The two boards met together for two days of intensive mediations, during which productive communication took place both within the mediation and informally during the breaks. Participants cited both as being crucial to the eventual resolution, which involved a new joint task force and procedures for better communication between the two boards.

One lesson to be learned from the Iredell County mediation is the value of the informal communication that occurs during breaks in the more formal mediation process. Various commentators have noted the decline of the bipartisan social life of Washington, D.C., lamenting

27 N.C.G.S 115C-431
29 Id.
30 Id.
31 N.C.G.S. 115C-431(4)
33 Id.
34 Id.
35 Id.
that social events are increasingly separated by party, and lawmakers from opposition parties rarely interact with each other outside the arena of the national media.\footnote{See, e.g. Congressman Patrick E. Murphy, *Bipartisanship a Must to Reach Grand Bargain*, SCRIPPS TREASURE COAST NEWSPAPERS (Feb. 12, 2013) http://patrickmurphy.house.gov/news/documentsingle.aspx?DocumentID=319624} A happy byproduct of mediation is that it provides a rare opportunity for lawmakers to interact and even socialize in a private setting, which can greatly increase understanding and empathy, ultimately creating a more collaborative and less adversarial approach to problem-solving.

III. **THE PROPOSAL: A FEDERAL LEGISLATIVE MEDIATION SERVICE**

By observing some successes of mediation at the state and municipal level, the concept of mediation at the national level emerges as a next logical step toward a better functioning legislative branch. One proposed model of Congressional mediation comes from L. Michael Hager, who advised in a 2010 *Washington Post* op-ed that the government establish a dedicated mediation agency at the federal legislative level similar in form to the nonpartisan Congressional Budget Office (CBO).\footnote{L. Michael Hager, *Congress Needs a Mediation Tool to Dissolve Gridlock*, THE WASHINGTON POST, June 18, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/06/17/AR2010061704566.html} However, the logistical and political hurdles of creating a new agency are enormous. Mediators could more easily fit within the purview of an existing agency where they would find an accessible infrastructure and established access to resources. A perfect home for legislative mediators may, in fact, already exist.

In 1947, Congress created the Federal Mediation and Conciliation Service (FMCS)\footnote{29 USC § 172} as an independent agency committed to “preventing or minimizing the impact of labor-management disputes on the free flow of commerce by providing mediation, conciliation and voluntary
arbitration.”\textsuperscript{39} Originally envisioned as a tool directed at labor and union disputes, FMCS was expanded in scope when the Negotiated Rulemaking Act of 1990\textsuperscript{40} authorized it to use its mediation services to encourage agencies to use negotiated rulemaking as a tool to improve informal rulemaking.\textsuperscript{41} Then-President Clinton was enthusiastic about the concept of FMCS-led agency rulemaking, urging agencies to use the new process in Executive Order 12866\textsuperscript{42} and issuing a Presidential Memoranda\textsuperscript{43} prodding agencies to consider mediation, indicating it is useful to “promote better communication, consensus building, and a less adversarial environment.”\textsuperscript{44}

Since then, negotiated rule making has been used by a variety of federal government agencies, including the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration, the Health Care Financing Administration, Indian Health Service, and the Office of the Inspector General.\textsuperscript{45} Mediators are brought in at an early stage, when the

\textsuperscript{40} The Negotiated Rulemaking Act was renewed in 1996 and incorporated into the Administrative Procedure Act at 5 U.S.C. §§ 561-570.
\textsuperscript{41} 5 U.S.C. §§ 561-570
\textsuperscript{44} Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative, 1 Pub. Papers 304 (1995).
The negotiated rulemaking process is highly beneficial and ultimately produces better outcomes for participators and the community at large.\textsuperscript{47} The EPA notes in its literature on the subject that “rules drafted by negotiation have been found to be more pragmatic and more easily implemented at an earlier date” and that “because the negotiating committee includes representatives of the major groups affected by or interested in the rule […] the tenor of public comment is more moderate.”\textsuperscript{48}

Thus, while we have mediation tools available to legislators at the municipal and state level, and mediators available to federal agencies, what is missing is a combination of the two: a group of professional mediators trained and available to meet with federal legislators—U.S. Congressional Representatives both in the House and Senate—who will facilitate a creative, collaborative environment in which lawmakers may craft policy proposals.

\textsuperscript{46} 5 U.S.C. §§ 561-570

\textsuperscript{47} See, e.g., Lubbers, Jeffrey S., \textit{Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking}, \textbf{SOUTH TEXAS LAW REVIEW}, Vol. 49, Issue 4, 987-1018 49 (concluding that on the whole critics view negotiated rulemaking positively despite “lively debate”); Daniel P. Selmi, \textit{The Promise and Limits of Negotiated Rulemaking}: 45 \textit{ENVTL. L.} 415, 469 (2005) (arguing that while negotiated rulemaking is neither a “panacea” nor a “cure for malaise” it can be “quite useful in some circumstances”); Philip J. Harter, \textit{Assessing the Assessors: The Actual Performance of Negotiated Rulemaking}, 9 \textit{N.Y.U. ENVTL. L.J.} 32 (2000) (arguing that negotiated rulemaking is “enormously successful in developing agreements in highly polarized situations); but see Cary Coglianese, \textit{Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter}, 9 \textit{N.Y.U. ENVTL. L.J.} 386 (2001) (arguing that empirical study does not support the finding that negotiated rulemaking leads to more efficient or cost-effective outcomes).

The next section of the paper will address the practical implications of how to create such an office and begin mediating. Using models put in place and lessons learned by local governments and federal agencies, the section will explore the possible risks and rewards of such a setup.

A. Agency Structure

The proposed federal legislative mediators should be located within a specific Legislation and Policy department within the already-existing Federal Mediation and Conciliation Service (FMCS). In this way, agency procedures, location and budget operate within established parameters. FMCS is already involved in policymaking procedures through federal agencies, and it would not be a stretch to extend services to legislators as well. In fact, the scope of FMCS’ work has been expanded 25 times since the agency was established in 1947, most recently in 2011 to require the Transportation Security Administration and unions subject to collective bargaining to attend “training in interest-based negotiations.” The FMCS has always been an agency with a flexible mission and would be highly adaptable to begin legislative mediations with the U.S. Congress.

B. Qualifications of Mediators

Current FMCS mediators go through an extensive application process and must have several years of “substantial, full-time” mediation experience as well as a thorough substantive knowledge of their practice area. Mediators in the proposed Legislation and Policy department


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would be subject to the same strict employment requirements. Moreover, because of the historic intersection of policy and partisanship, potential mediators would likely be required to have a politically neutral history; campaign donations or public statements made in favor of one party or another would necessarily disqualify them for employment by inspiring distrust or suspicions of bias. Their credentials and neutrality must be impeccable in order to gain the trust and respect of members of Congress.

C. Mediation Process

In legislative mediation, a group of Congressional representatives would work together with a qualified mediator to draft a bill acceptable to all. The goal would be to create consensus on a proposed draft bill that all parties are reasonably satisfied with and are willing to vote for. Then, the parties to the mediation would present the draft bill to the legislative body as a whole for floor debate and, finally, a vote. The mediator would serve to organize and facilitate this process.

As with most mediations conducted by FMCS, participation in the process would be voluntary. Legislators would send a mediation request directly to the Legislation and Policy department and a meeting would be scheduled. Common requesting parties would most likely include party leadership, caucus and committee leaders, or bill sponsors, although any legislator would be able to enlist the aid of a mediator. Their motivations for doing so would vary, but in general most legislators would likely use the process to facilitate a discussion about an issue important to them or their constituents that is complex or unwieldy and that may require intensive, focused problem-solving.

Procedurally, parts of the mediation would be similar to negotiated rulemaking techniques employed by federal agencies. As with the negotiated rulemaking process at the agency level, either party to the mediation would have the option of bringing in others, including
representatives of interest groups or other concerned populations. While mediators can privately caucus with parties at any time by asking the non-legislative parties to leave the room, the presence of selected interest groups or lobbyist might have the effect of making these actors more likely to feel a sense of ownership over the final policy proposal. They may, in turn, be less likely to revolt against it or encourage their followers to reject compromise solutions. Any extra-legislative actors would, of course, be subject to the same binding confidentiality requirements of the legislators themselves and would be invited only if the legislators wished them to be. They would have no vote over the ultimate draft bill and would be there solely if the legislators wished to consult with them or take advantage of their expertise.

Mediations would most likely be conducted consecutively over a period of days, and it is entirely possible that some mediations would be essentially ongoing discussions of the same issues that arise at a set time every year; for example, when a budget is due or when certain recurring, contentious types of legislation such as entitlement reform or education are being debated. However, there are advantages to having a more regular meeting cycle with a familiar cast of decision makers, as noted by authors John Stephens and Matthew Michel: “[r]egular meetings provide an ongoing exchange at times when tension is low and there is no immediate need to act. These meetings can create familiarity and raise the level of trust, which will be important for interactions during times of higher tensions and immediate decision making.”

An experienced governmental mediator in Georgia, Patrick Bell, has noted that one of the main challenges of intra-governmental mediation is that parties, unlike in private mediation where sides have identifiable goals, often come to the table with varying levels of agreement

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within their own side.\textsuperscript{53} In policy disputes in particular, five politicians from the same party may represent five very different ideas on the best way to achieve the common goal or, indeed, the common goal itself, and finding common ground within their ranks is just as crucial as forging agreement with the representatives of the other party.\textsuperscript{54}

To enhance the efficacy of mediation in this context, Bell recommends fairly extensive use of private caucusing.\textsuperscript{55} Caucusing becomes a vital tool, as a mediator will often conduct mediations within the mediation, separating the larger party into smaller interest groups and mediating within each group in turn. In this way, the group is better able to negotiate as a cohesive whole, and an agreement is more likely to be embraced by all members of the party.\textsuperscript{56}

D. Confidentiality

In a post-Freedom of Information Act America,\textsuperscript{57} confidentiality of government proceedings can be a contentious issue. Private citizens often demand, and are granted, open access to government records and meetings.\textsuperscript{58} Confidentiality is a crucial element of the mediation process, and without it the power of mediation would be diminish and politicians may be less likely to take the process seriously as a forum for open, honest consensus-building.

In 2012, when Georgia was revising the Open Meetings Act\textsuperscript{59} regarding government openness, lawmakers responded to input from mediators to carve out an exception to allow

\textsuperscript{53} Telephone interview with Patrick Bell, Mediator, Patrick Bell & Associates (April 8, 2013)
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} The “Freedom of Information Act,” also known colloquially as “FOIA,” was signed into law by President Lyndon B. Johnson in 1966 as 5 U.S.C. § 552
\textsuperscript{58} In 2012, 651, 254 record requests were received under the Act and 93.39% were fully or partially granted. FOIA.gov, http://www.foia.gov (accessed April 13, 2013).
\textsuperscript{59} O.C.G.A. § 50-14-3 (a)(5)
mediations involving governmental entities to be confidential.60

Gatherings involving an agency and one or more neutral third parties in mediation of a dispute between the agency and any other party […] the neutral party may caucus jointly or independently with the parties to the mediation to facilitate a resolution to the conflict, and any such caucus shall not be subject to the requirements of this chapter.61

Georgia’s confidentiality in mediation exception provides a model for the federal government by allowing freedom of information yet protecting certain spheres from the prying eyes of the public.

The confidential nature of mediation proceedings are already firmly in place under the APA, which dictates that both neutrals and parties in a dispute resolution proceeding “shall not voluntarily disclose or […] be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral.”62 While some exceptions apply and confidentiality is generally waivable, overall the confidentiality of the proceedings would have a firm basis in existing law. While leaks can never be fully prevented and no public democratic system may be (nor, arguably, should be) one hundred percent confidential, the environment is far more private than that to which most lawmakers are accustomed.

Confidentiality is likely the hook that has the potential to make legislative mediation appealing to lawmakers. Lawmakers are exceedingly busy people, constantly shuttling between home states and the capital, constituents and campaigns, party leaders and the opposition. Without confidentiality, a mediation to craft a bill proposal may seem like any other adversarial meeting. With confidentiality in place, however, the mediation creates a protected, leak-resistant

60 Telephone interview with Patrick Bell, Patrick Bell & Associates, April 7, 2013. Bell aided the effort.
61 O.C.G.A. § 50-14-3 (a)(5)
62 5 U.S.C. § 574(a)
environment that is practically nonexistent in today’s Washington. The freedom to operate within that insulated space would provide extra incentive for lawmakers to utilize the process.

IV. PARTICULAR BENEFITS AND CHALLENGES

As with any proposed change to the existing legislative framework, there are both risks and benefits to legislative mediation. This section will explore a few of those consequences and examine whether mediation can have a positive net effect on the legislative process despite any inherent drawbacks. This section will discuss such possible effects as the moderation of public discourse, the implications of political moderation as a result of procedural moderation, and the value of mediation as a way to better organize substantive discussion over particularly complex policy issues.

A. The Moderation of Public Discourse

The EPA noted in its negotiated rulemaking fact sheet that “because the negotiating committee includes representatives of the major groups affected by or interested in the rule, the number of public comments is reduced. The tenor of public comment is more moderate.” When mediation is used to craft a bill, whether by both major parties or by factions within the same party, the base of support is likely to be broader because involved parties have a sense of ownership over the bill, which they then spread to their political allies. The floor debates in both the House and Senate, while still no doubt containing robust opportunities for disagreement, may have a more moderated, policy-based tone if the bill they are disagreeing with has a base of support that includes members of their own party, committees or caucuses. Opportunities for mediation may increase the number of truly bipartisan compromise bills because lawmakers

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finally have a safe forum in which to fashion them, and a process designed to facilitate their creation.

**B. A Move Toward the Political Middle**

One possible criticism of legislative mediation is that a mediated policy proposal would inevitably move legislation toward the middle of the political spectrum, and some voters and legislators undeniably would prefer to pursue more ideologically pure policy objectives. Proponents of mediated settlements sometimes classify them as “win-win” situations in which each side has both gained and lost, resulting in a proposal that ultimately represents the interest of a broad swath of the public. However, others may characterize the agreements as “lose-lose” because both sides walk away from the table having made important concessions.

Mediation would likely be most useful when neither party clearly controls Congress. If a party has a supermajority of members—60 in the Senate or 290 in the House of Representatives—the party may not wish to use mediation services to craft a bill that will appeal widely to members of both parties because they do not need to; they can simply pass their preferred version of the bill, without making concessions, on a strict up-or-down vote. Those who have a simple majority, however, or those in the minority party, may be more likely to use mediation in order to gain enough votes from the opposing party to pass their legislation.

Because one of the central tenets of mediation is to explore underlying interests of both parties, there are possibilities for creative solutions that benefit both parties at the same time. In his book *Getting to Yes*, Robert Fisher gave a famous example of the value of unearthing underlying interests in problem solving with a story about two siblings fighting over an orange. Their mother takes the Solomonic approach and splits the orange in half to be shared equally.

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64 However, the unique use of the filibuster in the U.S. Senate requires that even the majority party draft a bill that has wide bipartisan appeal.
between her two children, which neither child is pleased about. But the readers quickly find out that one child actually only desired the juice of the orange, and the other only really wanted the peel to flavor a cake. The clear message is that if they had only communicated their underlying interests, they may have both walked away with the “functional equivalent of the whole orange.” Mediators are skilled professionals trained to get at the underlying interests of both parties, and in this way might encourage politicians to think in broader terms about what their desires and needs really are.

There is evidence to suggest that this element of mediation has already had useful effects when a public policy mediator facilitates discussions as part of a negotiated rulemaking at the federal agency level. One example took place when parties to a rulemaking clashed over whether barges should be required to tie down cranes on their decks. The Occupational, Safety & Health Reporter narrates the rest:

Some parties insisted cranes needed to be tied down for safety reasons, while others argued that on large ships such as aircraft carriers, cranes had to be mobile to perform necessary operations. After a series of questions posed by the mediator, it became clear that the goal shared by all was to prevent cranes from falling off any flotation device. The committee then developed a solution in which cranes on water vessels would be required to be either tied down, or fixed to rails with stops at each end, or corralled to prevent falling.

As the above example illustrates, legislative mediators would be uniquely positioned to use their professional skill set to help legislators understand the underlying interests at issue. Once these

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are clearer, lawmakers may have an easier time crafting practical policy solutions that serve the interests of all concerned parties.

Thus, while mediated policy solutions may represent a move toward the political middle, it will also help facilitate policies that will satisfy members of both parties simultaneously. Instead of representing a series of undesired compromises, the mediated bills would instead represent a collection of interests that may even be met simultaneously by the same policy after it is calibrated to their specific interests.

C. Better Organization for Complex Issues

Given that the impacts of national legislation are often spread out across vast expanses of time and space and impact multiple generations, the complexity of national policy issues are often enormous. In situations that are particularly unwieldy, Judge Getty’s model for effective legislative mediation in the Illinois General Assembly should serve as a model for the U.S. Congress and national representatives who find themselves gridlocked into fiercely opposing policy positions. For example, gun control has been a divisive wedge issue in the national debate lately, particularly in the aftermath of the Newtown school shootings in December 2012. Like the telecommunications issue in Illinois, both sides have powerful lobbies and hundred of millions of dollars to spend persuading legislators and the public to support their cause. Also like the Illinois issue, dozens of interested parties are involved, some of which have powerful ties to the legislators themselves.

Using the Illinois General Assembly’s 2001 mediation as a guide, Congress could bring in a qualified mediator to organize and mediate a closed-door discussion of the substantive underlying policy issues. In a “safe” environment, politicians would be more likely to moderate positions and compromise on nuanced ideas for change, or able to communicate underlying
interests so that the needs of all parties may not necessarily clash with the needs and desires of the other.

Like in the Illinois General Assembly telecommunications mediation of 2001, many complex policy issues facing federal legislators could be handled in a more collaborative way by the intervention of a trained mediator. The mediator would be better positioned to facilitate a large group and handle the complex logistics of assembling all interested parties and setting a time frame and agenda for the discussions.

Another way in which legislative mediation could help resolve particularly large or complex issues is the flexibility of the process, in which single noncontroversial issues could be agreed upon without being “held hostage” for later use as a bargaining chip to achieve concessions on a more controversial topic or another issue entirely. In this way, issues are isolated and taken outside the other “vast demands and shifting power balances” that dominate the legislative process. In this way, the mediation process is well served to bring particularly wide-ranging and complex issues to the negotiating table for targeted discussion and, hopefully, a consensus-generating policy solution.

V. CONCLUSION

The United States government is stalled, and has become locked into an unproductive cycle of stonewalling, pointed fingers, and hard-line stances. In this environment, professional mediators could provide a badly needed antidote to the gridlock and loosen the wheels of the American political process. Using our cities and states as a model for effective legislative

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68 Id.
mediation, the Federal Mediation and Conciliation Service should expand to create a new Legislation and Policy department of neutral, non-partisan professional mediators to facilitate the creation of collaborative policy solutions by the United States Congress.