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# ARTICLES

## TOWARD A MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES

STEVEN A. GLAZER\*

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\* Steven A. Glazer is a federal administrative law judge (ALJ) with the Federal Energy Regulatory Commission and an Adjunct Professor at the University of Maryland School of Law. Judge Glazer also served as President of the Federal Administrative Law Judges Conference during 2008–2009. The views expressed in this Article are entirely his own and do not reflect the views of any agency, its chairman or other commissioners, or the U.S. government.

## INTRODUCTION

In October 2010, the Obama Administration surprised the Administrative Law Judges (ALJs) of the federal government with a proposal from the U.S. Office of Personnel Management (OPM) to eliminate the requirement that incumbent ALJs be licensed by their state bars to practice law.<sup>1</sup> The Notice of Public Rulemaking (NOPR) sought public comments through December 6, 2010,<sup>2</sup> and, as of this writing, a final decision from OPM is awaited. In making this proposal, the Obama Administration (through OPM) maintained the licensure requirement for applicants seeking to become ALJs, but reasoned with regard to incumbent ALJs that “the standards of ethical conduct that apply to ALJs as [f]ederal employees, and agencies’ existing authority to supervise ALJs and take actions against them in appropriate circumstances, are sufficient to ensure that ALJs are held to a high standard of conduct.”<sup>3</sup>

This announcement amounted to a sea change in the thinking of the White House and OPM about the management of Administrative Law Judge ethics. It not only reversed a longstanding position of the Bush 43 Administration on ALJ licensure requirements, but also reversed a similar policy line that appeared to be forming in the initial months of President Obama’s tenure and the appointment of his new OPM Director, John Berry. Many of my ALJ colleagues and I expected the new OPM Director to relax the restriction imposed on us in 2007 by President Bush to be “actively” licensed to practice law in our respective state bars, like attorneys, instead of being allowed to assume “judicial” or “retired” status as we had been able to do before.<sup>4</sup> The Bush rules required federal ALJs not only to adhere to the codes of ethics of our respective state bars that were imposed on attorneys actively engaged in the practice of law, but also required us to meet the Continuing Legal Education (CLE) requirements and higher dues of those organizations that active attorneys met, unlike state-court judges who are exempted from such requirements. None of us expected the Obama Administration to eliminate our duty to be members of state bars altogether.

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1. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998, 61,998 (Oct. 7, 2010) (to be codified at 5 C.F.R. pt. 930). By “state bars,” I mean not only the bars of the respective states but also the bars of “the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution” as OPM rules make clear. 5 C.F.R. § 930.204(b)(1) (2011).

2. 75 Fed. Reg. at 61,998.

3. *Id.*

4. Examining System and Programs for Specific Positions and Examinations (Miscellaneous), 72 Fed. Reg. 12,947, 12,948 (Mar. 20, 2007) (codified at 5 C.F.R. § 930.204(b)(1)).

For some of us in the administrative law judiciary, the new proposal comes as a welcome relief. The Bush rule imposed not only added educational and financial burdens on ALJs, but also placed OPM, state bar associations, and ALJs in an ethical quandary. State bars have ethical codes for their “active” attorneys, and some state bars have codes of conduct for their state judiciary. None of those codes, however, cover the work of federal ALJs. It was anomalous under the Bush rule to make the federal administrative law judiciary adhere to fifty-two different state codes of ethics for the same federal job in federal agencies when members of the federal Judicial Branch, who are themselves judicial members of their respective state bars, adhere to one U.S. Judicial Code. Eliminating the licensure requirement altogether ends the quandary.

Still, some in the federal administrative law judiciary are troubled by this development. They feel that the elimination of all need for ALJs to adhere to an ethical code is not advisable. For some ALJs at least, the ethical regulations generally governing federal employees do not suffice as governing precepts for their practice; they urge broader ethical standards for their ranks, more akin to those of the federal Judicial Branch. Still others caution that the new OPM proposal, born of the Obama Administration, may disappear with the advent of some future administration.

However the final rule now being considered by OPM turns out, there will be at least some movement in the future among the many different organizations of federal Administrative Law Judges<sup>5</sup> to pursue one or more of the following three options: either (i) to keep what was long the status quo before the Bush rule was implemented and what is now the case; that is, to have no applicable code of conduct at all; (ii) to advocate application to ALJs of the Code of Conduct for United States Judges (U.S. Judicial Code) that presently governs judges of the federal Judicial Branch (with the notable exception of the United States Supreme Court);<sup>6</sup> or (iii) to adopt a code of conduct exclusively for Administrative Law Judges.

This Article advocates the third course. There are many aspects of the

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5. At last count there were six: the National Association of Administrative Law Judges (NAALJ), the Forum of the United States Administrative Law Judges (FORUM), the National Conference of Administrative Law Judges of the American Bar Association’s Judicial Division (NCAIJ), the Federal Administrative Law Judges Conference (FALJC), the Association of Administrative Law Judges, and the American Judicature Society. See Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAT’L ASS’N ADMIN. L. JUDGES 321, 322 (2002).

6. CODE OF CONDUCT FOR U.S. JUDGES (Judicial Conference of the U.S. 2011); see also Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 957 n.54 (2011).

role of the federal administrative law judiciary that militate in favor of adopting a modernized ALJ code of conduct rather than merely adopting someone else's code. Indeed, ALJs have already tried to do so with no success so far. That first attempt, *The Model Code of Judicial Conduct for Federal Administrative Law Judges* (ALJ Model Code),<sup>7</sup> was written in 1989 by the Judicial Administration Division of the National Conference of Administrative Law Judges of the American Bar Association. It was patterned after the then-current version of the Model Code of Judicial Conduct (ABA Model Judicial Code) that was adopted by the ABA's House of Delegates in 1972 to replace the then-half-century old Canons of Judicial Ethics. The ABA Model Judicial Code was revised by the ABA three times, in 1990, 2004, and 2007, but the ALJ Model Code did not follow suit.<sup>8</sup>

The U.S. Judicial Code was adopted by the Judicial Conference of the United States in 1973 and was revised in 1987, 1992, 1996, 1999, 2000, and 2009.<sup>9</sup> Patterned along the lines of the ABA Model Judicial Code, the U.S. Judicial Code applies to federal circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges and magistrate judges, certain federal special masters and commissioners, and judges of the Tax Court, the Court of Appeals for Veterans' Claims, and the Court of Appeals for the Armed Forces.<sup>10</sup> It does not apply to federal ALJs.

The ALJ Model Code remains merely a recommendation for ALJs to follow and has remained unrevised since its formulation in 1989. It has not incorporated any of the changes that the U.S. Judicial Code or the ABA Model Judicial Code has adopted since then. The federal ALJ community has not taken part in any of the changes that have been made to the ABA Model Judicial Code or the U.S. Judicial Code.

Developments affecting the federal administrative law judiciary in recent years warrant a review and revamping of the ALJ Model Code as a way to address the potentially uncomfortable void that ALJs are left with if they have no code to live by. This Article examines several aspects of the ALJ Model Code as currently drafted (that is, the 1989 version) and compares it to the U.S. Judicial Code and ABA Model Judicial Code. It also recommends changes to the ALJ Model Code that would align it more

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7. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES (1989).

8. In the 2007 revision, the American Bar Association (ABA) explicitly included Administrative Law Judges within the meaning of "judge" in the ABA Model Judicial Code. See Diana Gillis, *Closing an Administrative Loophole: Ethics for the Administrative Judiciary*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 149, 160 (2011).

9. CODE OF CONDUCT FOR U.S. JUDGES intro. note, at 1 (Judicial Conference of the U.S. 2011).

10. *Id.* at 2.

closely with modern federal ALJ practice to make it more worthy of being adopted as the binding code of ethics for federal Administrative Law Judges.

#### I. THE ROLE AND ETHICS OF FEDERAL ADMINISTRATIVE LAW JUDGES

The administrative law judiciary of the federal government consists of a corps of adjudicators who are chosen through a competitive recruitment process to render impartial and independent decisions in administrative agency cases. As of December 2009, this corps consisted of 1,584 ALJs who are posted at the local offices of more than thirty federal agencies throughout the country.<sup>11</sup> Eighty-four percent of ALJs are posted at the Social Security Administration (SSA), deciding appeals of initial denials of claims for Social Security disability benefits.<sup>12</sup> The remainder render initial decisions in a wide variety of agency matters, including various labor-related matters at the U.S. Department of Labor, utility rate, licensing, and complaint cases at the Federal Energy Regulatory Commission, unfair labor practice cases at the National Labor Relations Board (NLRB), shipping pilot licensing cases at Coast Guard, intellectual property cases at the International Trade Commission, and farm price-support cases at the Department of Agriculture, to name just a few.<sup>13</sup>

Administrative Law Judges perform their duties pursuant to the Administrative Procedure Act (APA), enacted by Congress in 1946 to create an independent and impartial cadre of case adjudicators within federal agencies.<sup>14</sup> ALJs are authorized by the APA to preside at the taking of evidence in hearings and render “recommended” and “initial” decisions in agency cases.<sup>15</sup> In so doing, ALJs are empowered to administer oaths and affirmations, issue subpoenas, rule on offers of proof and receive relevant evidence, regulate the course of the hearing, and take other judicial actions.<sup>16</sup> They are directed by the APA to perform their functions “in an impartial manner.”<sup>17</sup> They are further instructed by the statute not to engage in *ex parte* contacts on facts at issue in cases, nor to “be responsible to or subject to the supervision or direction of an employee or agent

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11. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3180–81, 3213–14 (2010) (Breyer, J., dissenting) (“My research reflects that the Federal Government relies on 1,584 ALJs to adjudicate administrative matters in over 25 agencies.”).

12. *See id.* at 3213–14.

13. *Id.*

14. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

15. 5 U.S.C. §§ 554(d), 556(b)(3) (2006).

16. *Id.* § 556(c)(1)–(9).

17. *Id.* § 556(b)(3).

engaged in the performance of investigative or prosecuting functions for an agency.”<sup>18</sup> These provisions of the APA have long been held to afford Administrative Law Judges a unique degree of independence and freedom to be impartial in creating case records that form the basis of their initial agency decisions. These initial decisions are ultimately subject to review by the agency officials, who shoulder the burdens of political pressure.<sup>19</sup>

By virtue of their quasi-judicial role, federal ALJs have been held to be responsible in disciplinary proceedings before the Merit Systems Protection Board (MSPB) for judicial behavior not in accordance with the ABA Model Judicial Code.<sup>20</sup> The application of the ABA Model Judicial Code to ALJs, however, was not by their consent; rather, the MSPB imposed it upon them involuntarily, through gradual application in the Board’s ALJ disciplinary cases. This case-by-case application by MSPB of a code of ethics designed by and for other judges, whose appointment process and duties differ significantly from the process and duties of ALJs, led to a movement among ALJs to respond with an ethical code of their own that led in 1989 to the drafting of the ALJ Model Code.

Despite the ABA Model Judicial Code’s separate origin, it was the natural inclination of the ALJ committee members who drafted the ALJ Model Code in 1989 to use that Code as a prototype for their own work. However, there has long been a debate as to whether federal Administrative Law Judges are so much like federal Article III judges that the same canons of ethics should be applied to both judiciaries.

The fact that ALJs, unlike Article III judges, are charged with furtherance of agency policy and must remain oriented to agency policy and narrower agency jurisdiction in adjudicating administrative cases has been identified as an important distinction between the two.<sup>21</sup> The fact that in most judicial administrative proceedings the agency head or the commission for which the ALJ works, not the ALJ, is the “ultimate

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18. *Id.* § 554(d)(1)–(2).

19. *See, e.g.*, *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 758 (2002) (noting that ALJs are shielded from political influence under the Administrative Procedure Act (APA) such that “the role of the ALJ . . . is similar to that of an Article III judge”) (citations omitted); *Butz v. Economou*, 438 U.S. 478, 513 (1978) (“[T]he process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.”).

20. *See* *Office of Hearings & Appeals, SSA v. Whittlesey*, No. CB7521930005T1, slip op. at 16, 59 M.S.P.R. 684, 696 (M.S.P.B. Dec. 7, 1993) (“[T]he ABA Code is an appropriate guide for evaluating the conduct of administrative law judges.”); *Chocallo*, 2 M.S.P.B. 20, 63 (1980).

21. John L. Gedid, *ALJ Ethics: Conundrums, Dilemmas, and Paradoxes*, 11 WIDENER J. PUB. L. 33, 49 (2002).

factfinder” for the agency also differentiates ALJs from their Article III counterparts.<sup>22</sup> These distinctions have prompted several state courts to decide that the canons of ethics that are applied to their judicial branches do not have to be applied to their state ALJs.<sup>23</sup>

The federal OPM was preoccupied for many years with the ethical underpinnings of the ALJ position. For years, federal ALJ candidates were required to be members of a state bar, but incumbent ALJs were not. As a result, many federal ALJs withdrew or became “inactive” members of their state bars. In states where they could do so, they became “judicial” members of their state bars, usually without the privilege of being able to practice law in the state while they were so qualified.

In 2007, the OPM of the Bush Administration proposed “clarifications” to its regulations governing the bar membership qualifications for Administrative Law Judges.<sup>24</sup> Among OPM’s proposals was one requiring incumbent ALJs to be “active” members of their state bars, usually meaning to have the same membership status as practicing attorneys in their state, not just the nonpracticing “judicial” or “inactive” status usually reserved for state and federal judges.<sup>25</sup> The ALJs, OPM pointed out in making this proposal, “must be held to a high standard of conduct so that the integrity and independence of the administrative judiciary is preserved.”<sup>26</sup> “The purpose of a professional license,” OPM went on, “is to ensure that administrative law judges, like attorneys, remain subject to a code of professional responsibility.”<sup>27</sup>

OPM pointed to its work in professionally developing the requirements for ALJ applicants and noted that its requirement for active bar membership was “based on the results of three job analyses of the administrative law judge occupation conducted by OPM’s Personnel Research Psychologists in 1990, 1999, and 2002.”<sup>28</sup> “The results of these studies show that Integrity/Honesty is fundamental for performing the duties of an administrative law judge,” OPM concluded.<sup>29</sup> Hence, OPM determined that it would “adhere to its long-standing position that an administrative law judge applicant must demonstrate he or she is an active member or has judicial status that authorizes the practice of law and

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22. *See id.* at 53 n. 91 (listing cases that similarly support this proposition).

23. *Id.* at 53.

24. Examining System and Programs for Specific Positions and Examinations (Miscellaneous), 72 Fed. Reg. 12,947, 12,947 (Mar. 20, 2007).

25. *Id.* at 12,948–49, 12,955 (codified at 5 C.F.R. § 930.204(b)(1) (2011)).

26. *Id.* at 12,948.

27. *Id.*

28. *Id.*

29. *Id.*

requires adherence to his or her State's or jurisdiction's ethical requirements."<sup>30</sup>

Notwithstanding the stated purposes for this rule change, which was implemented immediately and without a preceding notice-and-comment period, OPM may have had other underlying purposes for it. OPM might have viewed the rule change as a way to encourage incumbent ALJs to retire, clearing the field for newly minted judges on the ALJ Register. Whatever its purpose, the rule change was challenged in court by the Association of Administrative Law Judges, the union of federal ALJs in the SSA. As part of a litigation compromise, OPM agreed in 2008 to suspend the requirement as to incumbent ALJs "until further notice."<sup>31</sup> OPM took note of "the burdens imposed by the active licensure requirement" on incumbent ALJs, recognizing in particular "the potential differences between the ethical requirements that pertain to an advocate and those requirements that pertain to someone asked to adjudicate cases impartially, and the variations in what States require as to lawyers serving as ALJs."<sup>32</sup>

After the suspension, OPM continued to cogitate on this matter. In mid-2010, the Obama Administration OPM floated, without official publication, a modification of the 2007 rule which would require a federal ALJ to maintain a license or status requiring "adherence to an ethical code" but would defer to the rules of the applicable licensing entity as to the type of license or status appropriate for a sitting federal administrative law judge. This proposal met with mixed opinions from the ALJ community. Had it been adopted, it would have created a dilemma for federal ALJs and state bar associations.

Noticing, perhaps, the petard upon which it had hoisted itself, OPM reversed course and on October 7, 2010, published a notice of proposed rulemaking (NPRM) and request for comments in the *Federal Register*, seeking to eliminate the licensure requirement for incumbent federal ALJs altogether.<sup>33</sup> In so doing, OPM recognized that "the standards of ethical conduct that apply to ALJs as Federal employees, and agencies' existing authority to supervise ALJs and take actions against them in appropriate circumstances, are sufficient to ensure that ALJs are held to a high standard

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30. *Id.*

31. 5 C.F.R. § 930.204(b)(2) (2011); *see also* Programs for Specific Positions and Examinations (Miscellaneous), 73 Fed. Reg. 41,235 (July 18, 2008) (furnishing notice of the Office of Personnel Management's (OPM's) intent to amend section (b)(2)).

32. Programs for Specific Positions and Examinations (Miscellaneous), 73 Fed. Reg. at 41,235.

33. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998 (Oct. 7, 2010).

of conduct.”<sup>34</sup> Active bar membership would continue to be required for ALJs at the time of their application and appointment but not thereafter.

As of this writing, comments on the NPRM have not yet been considered by OPM, and the rule has not yet been finalized. However, some in the ALJ community are troubled and believe that the elimination of all need to adhere to an ethical code is not advisable. For some ALJs at least, the ethical regulations generally governing federal employees do not suffice as governing precepts for their practice; they urge broader ethical standards for their ranks, more akin to those of Article III judges. Still others caution that the new OPM proposal of the Obama Administration may disappear with the advent of some future administration, prompting OPM to revisit the matter yet again.

Should this urge for ethics in the federal ALJ community (or potential threat from above) persist, Administrative Law Judges may opt to press for one of three options: either (i) to keep what has long been the status quo; that is, to have no applicable code of conduct at all; (ii) to advocate adoption of the U.S. Judicial Code; or (iii) to update and adopt the ALJ Model Code. While it is a swifter course either to keep things as they are or even to opt into the existing U.S. Judicial Code, there are many aspects of the role of the federal administrative law judiciary which militate in favor of adopting a modernized ALJ Model Code instead.

## II. THE CHANGING LANDSCAPE OF THE FEDERAL ADMINISTRATIVE LAW JUDICIARY

Political perceptions about federal administrative due process are always in flux, particularly when assessing the amount of “process” that is “due” in any individual case before an agency. The ALJ function is itself the product of a hard-fought compromise between New Deal-era “institutionalists” seeing a need for government employees who would adhere strictly to their agencies’ policies and implement them in every case, versus conservative “judicialists” who sought to constrain New Deal agencies like the NLRB and the Securities and Exchange Commission (SEC) within strict due process requirements that would prevent the sudden imposition of new policies with retroactive application.<sup>35</sup>

In the 1970s and 1980s, a full hearing governed by the APA and conducted on the record by an Administrative Law Judge was regarded as a right to which all were entitled, regardless of the size and nature of the dispute. During the 1970s, for instance, the passage of Supplemental Security Income (SSI) legislation for disabled Americans prompted a

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34. *Id.* at 61,998.

35. Gedid, *supra* note 21, at 44–45.

controversy between the SSA, which administered SSI, and the Civil Service Commission (predecessor of the modern Office of Personnel Management), which maintained the Register of candidates qualified to become ALJs, as to whether the APA applied to SSI claim cases just as it did to traditional Social Security and Medicare cases. SSA pushed for full APA coverage for all claims, whereas the Commission considered the APA not to cover SSI claims.<sup>36</sup>

Congress put this controversy to rest by passing the Social Security Act Amendments of 1977,<sup>37</sup> requiring ALJs to adjudicate both types of cases on an equal footing under the APA.<sup>38</sup> The then-Chief Counsel of the House Ways and Means Committee exemplified the tenor of those times when he wrote to the head of hearings and appeals for Social Security urging the Department of Health, Education, and Welfare (within which SSA was then housed) “to accord a lowly private citizen—a welfare recipient—the same rights as the Government accords a powerful corporation in contested matters: namely, the right to appear before an Administrative Law Judge under the full rights and protection of the Administrative Procedure Act.”<sup>39</sup>

The view of that era—favoring the greatest degree of due process for even the smallest case—changed markedly with the advent of more conservative presidential administrations in the 1980s and 1990s. It was noted as early as 1979 by then-University of Chicago Professor of Law Antonin Scalia that administrative law was developing “a constant and accelerating flight away from individualized, adjudicatory proceedings to generalized disposition through rulemaking.”<sup>40</sup> Scalia further observed at the time that “the governmental and societal importance of adjudication has dramatically decreased.”<sup>41</sup>

By 1981, a philosophy of “small government” came on the scene. Newly sworn President Ronald Reagan intoned at his first inauguration that “government is not the solution to our problem; government is the problem.”<sup>42</sup> Public opinion turned away from the notion that the solution to all problems was more government control. Favorable public ratings for

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36. See Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment In Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 213–14 (2002) (detailing the history of the debate regarding the APA’s application to Supplemental Security Income).

37. Pub. L. No. 95-216, § 371, 91 Stat. 1509, 1559 (1977) (codified at 42 U.S.C. § 1383 note (2006)).

38. See Wolfe, *supra* note 36, at 216–20.

39. STAFF OF H. COMM. ON WAYS & MEANS, 93D CONG., REP. ON THE DISABILITY INSURANCE PROGRAM 63 (1974).

40. Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57, 72 (1979) (quotation marks omitted).

41. *Id.*

42. Ronald Reagan, President, Inaugural Address, PUB. PAPERS 1 (Jan. 20, 1981).

most federal agencies and departments waned in the late 1990s, according to a 2010 study by The Pew Research Center.<sup>43</sup> Most notably, the study found that public confidence in the performance of the SSA, where the vast majority of ALJs work, had declined markedly.<sup>44</sup>

Today, the rise of the “Tea Party” movement, which decries solving every problem with “more government—top-down dictates from bureaucrats presumed to know better what you need,”<sup>45</sup> evidences continued evolution of the public perception of federal power and capability. Winds of change have blown considerably off course the viewpoint that an elite corps of highly paid adjudicators is the most capable of deciding all agency cases, from whether to pay the smallest Social Security claim to whether to approve the largest electric utility rate increase. This sentiment was expressed publicly by Representative (now House Speaker) John Boehner, Republican of Ohio, prior to the 2010 congressional elections; he asserted that “taxpayers are subsidizing the fattened salaries and pensions of federal bureaucrats who are out there right now making it harder to create private sector jobs.”<sup>46</sup> Since those elections, distrust of civil servants has been translated into action by President Obama and Congress in freezing federal employee pay and threatening to cut pay and benefits.

This trend in political thinking translates into a particular bias against formal adjudication of agency cases. Witness the supporting views of Justice Scalia, who noted that the process of confirming Supreme Court Justices was tending toward a “European system” of selecting professional judges composed largely of a bench of “ultimate bureaucrats.”<sup>47</sup> With such thinking in vogue, the federal administrative law judiciary, coming principally from the ranks of federal government attorneys, often find themselves in the critics’ crosshairs.

The very direct role that SSA has in the personal lives of so many individuals seeking disability compensation from that agency has placed its

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43. See PEW RESEARCH CENTER, *THE PEOPLE AND THEIR GOVERNMENT: DISTRUST, DISCONTENT, ANGER AND PARTISAN RANCOR* 55–58 (2010), <http://people-press.org/reports/pdf/606.pdf> (detailing that favorable opinions have declined significantly for seven of the thirteen federal agencies that were included in the survey).

44. See *id.* at 58 (noting that only 36% of responders voted for excellent/good performance).

45. Dick Army & Matt Kibbe, *A Tea Party Manifesto*, WALL ST. J., Aug. 17, 2010, at A19.

46. John Boehner, House Minority Leader, Remarks on Jobs and the Economy before the City Club of Cleveland, Ohio (Aug. 24, 2010), available at <http://boehner.house.gov/News/DocumentSingle.aspx?DocumentID=203967>.

47. Jeff Jeffrey, *Scalia Is Pleased That Kagan Isn't a Judge*, NAT'L L.J. (May 26, 2010) (online at LexisNexis).

Administrative Law Judges at the center of this debate. SSA processed 2.6 million disability claims in 2008.<sup>48</sup> As of that year, SSA's backlog of disability claims pending before its ALJs stood at 300,000 out of a total of 760,000 pending cases.<sup>49</sup> In 2008, the average processing time for a disability case before an SSA ALJ stood at 510 days.<sup>50</sup> Although this backlog was considered to be an improvement over past years,<sup>51</sup> the onset of the recession in 2008–2009 has been a setback for the agency. Applications for SSI benefits soared by 21% to 2.8 million from 2008 to 2009 as the economy declined.<sup>52</sup>

State agencies initially consider Social Security disability claims in a process that usually lasts over 100 days, but fewer than 40% of applications are approved at that stage.<sup>53</sup> Of those who are rejected, two-thirds of them do not bother to appeal to SSA.<sup>54</sup> Those who do, however, go before federal ALJs, who reverse a large majority of the rejections and award the claims.<sup>55</sup> Applicants making their way through this appeals system frequently use legal counsel, and the success rate for people represented by counsel before ALJs is much higher than it is for people who are unrepresented.<sup>56</sup>

ALJ productivity at this level of review is a sore spot in relations between an embattled SSA management feeling congressional pressure about the backlog and its overworked corps of ALJs.<sup>57</sup> The push for productivity pits the need for speedy adjudication against the equal need for careful deliberation. This tension imposes immense pressure on ALJs, who are driven by SSA management to roll cases out quickly (which usually

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48. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-398, SOCIAL SECURITY DISABILITY: ADDITIONAL PERFORMANCE MEASURES AND BETTER COST ESTIMATES COULD HELP IMPROVE SSA'S EFFORTS TO ELIMINATE ITS HEARINGS BACKLOG 8 (2009).

49. *Id.* at 13.

50. *Id.* at 10.

51. *See id.* at 11 (noting that despite increases in total hearings-level claims pending, SSA data indicates that the backlog for fiscal year 2006 through 2008 has decreased).

52. Michael A. Fletcher, *Jobless Are Straining Social Security's Disability Benefits Program*, WASH. POST (Sept. 14, 2010, 3:24 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/13/AR2010091306493.html>.

53. *Id.*

54. *See id.*

55. *Id.*

56. *Id.*

57. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING AND PERFORMANCE MANAGEMENT 18 (2010); *see also* Abrams, No. CB-7521-08-0001-T-1 (MSPB, Mar. 29, 2010) (nonprecedential decision) (recommending an ALJ's termination for failing to follow instructions to improve productivity).

translates into grants of claims) yet are haunted at the same time by the prospect that half of all applications for disability benefits could be unjustified.<sup>58</sup>

Congress, despite passage of the APA half a century ago, persists in straying from the APA's objective of a unified, independent, and impartial administrative law judiciary. Indeed, at this point, ALJs are actually a minority among the many types of federal agency adjudicators that Congress has created to decide cases in its many programs. There are approximately 3,000 other types of federal adjudicators:<sup>59</sup> "immigration judges" at the Department of Justice; "hearing officers" at the Department of Agriculture's National Appeals Division; "administrative judges" on the various agency Boards of Contract Appeals, the Merit Systems Protection Board, and the Equal Employment Opportunity Commission; "administrative patent judges" and "administrative trademark judges" at the Patent and Trademark Office; "hearing officers" at the Department of Defense; "law judges" at the Board of Veterans Appeals of the Department of Veterans Affairs; and full- and part-time "administrative judges" at the Atomic and Safety Licensing Board of the Nuclear Regulatory Commission. Although these other types of adjudicators are often accorded a certain measure of independence within their agencies, it is not guaranteed by statute as it is with Administrative Law Judges under the APA.

On top of this constant political controversy, the way that the ALJ job is done is also changing. Many ALJs wear robes like other federal and state judges and hold hearings on the record between adversaries represented by counsel. But whereas ALJs once took live transcribed testimony in court and published initial decisions in legal reports, many ALJs today hold hearings by telephone and teleconference as well as in person. Many initial decisions are available to the public only on the Internet, if at all.

At the Office of Medicare Hearings and Appeals of the U.S. Department of Health and Human Services and at hearing centers of the SSA, ALJ hearings are recorded electronically and paperlessly rather than transcribed. Witnesses are heard by telephone and teleconference. At the

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58. See Michael D. Chafetz, *Malingering on the Social Security Disability Consultative Exam: Predictors and Base Rates*, 22 CLINICAL NEUROPSYCHOLOGIST 529, 530 (2008) (citing a study that showed a 50% or higher rate of test failure on state Psychological Consultative Exams that test whether applicants are disabled); see also Nathan Koppel, *The Judge Who Rarely Rules "No,"* WALL ST. J. (May 19, 2011, 1:42 PM), <http://blogs.wsj.com/law/2011/05/19/the-judge-who-rarely-rules-no/> (noting that ALJ David Daugherty has awarded benefits in all but four of his last 2,000 cases).

59. John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 349-52 (1992).

Federal Energy Regulatory Commission, pleadings and exhibits are filed with agencies electronically over the Internet or on CD rather than by means of paper originals and copies delivered in person or by mail to a docket office. Initial decisions are still written as before, but they are written on computers and filed electronically. Most lawyers rely on Internet services to research those decisions rather than perusing published loose-leaf reports.

Even the very act of adjudication itself is changing. With the advent of alternative dispute resolution (ADR) in federal agencies during the 1990s, administrative cases that once required formal hearings are now handled through settlement proceedings that may be facilitated by an ALJ or a nonjudicial arbitrator or mediator. Formal fact-finding is substituted with the arm-twisting and give-and-take of settlement conferences, settlement offers, and contested or uncontested settlement agreements. No precedential decisions are made. Settlement proceedings conducted by ALJs or other neutrals are now a necessary predicate to initiating most formal administrative proceedings before the Federal Energy Regulatory Commission.<sup>60</sup>

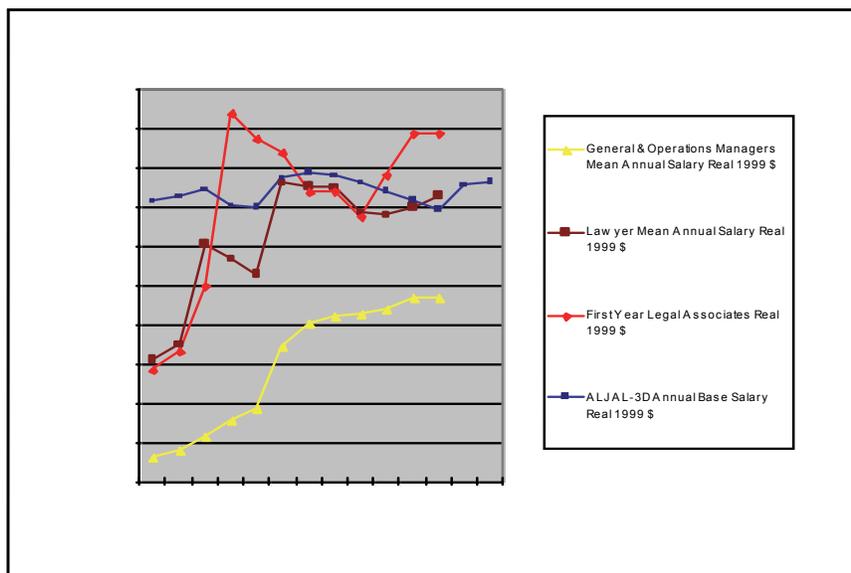
The framers of the APA in the 1940s believed that the adjudicators, who were then known as “hearing examiners” or “hearing commissioners” and eventually came to be known as Administrative Law Judges, should be well-paid to attract the best talent.<sup>61</sup> That too has changed significantly since 1989, and over time has lost ground to other congressional fiscal priorities. In the 1990s and 2000s, federal ALJ pay in constant dollars did not keep up with compensation in related professions. In constant (1999) dollars, the nationwide base pay of middle-level ALJs compared with the nationwide average pay of lawyers, managers, and first-year law firm associates in firms of 251 or more lawyers took the following tracks over the period 1997–2010<sup>62</sup>:

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60. See 18 C.F.R. §§ 385.603–604 (2011).

61. DEPT. OF JUSTICE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 6 (1941) (“[T]he bill proposes to improve the process of formal adjudication by bringing about a more uniformly high quality of hearing officers. This is to be achieved by creating ‘hearing commissioners’ with tenure, substantial salaries, full power to control and conduct hearings, and power to issue decisions of a considerable degree of finality.”).

62. This chart was created by referring to Bureau of Labor Statistics figures for the years 1997–2009. See *Occupational Employment Statistics*, U.S. BUREAU OF LABOR STATISTICS, [http://www.bls.gov/oes/oes\\_dl.htm](http://www.bls.gov/oes/oes_dl.htm) (last updated April 25, 2012); Nat’l Ass’n for Law Placement, *How Much Do Law Firms Pay New Associates? A 14-Year Retrospective as Reported by Firms*, NALP BULLETIN, (Sept. 2009), available at <http://www.nalp.org/2009septnewassocsalaries>. Figures for federal employee pay are available from the Office of Personnel Management and published in the *Federal Register*. All figures are adjusted



As the chart shows, ALJ base pay in constant-dollar terms remained flat through these years, whereas the average real pay of lawyers and business managers rose significantly. The pay premium of middle-level ALJs over lawyers and non-lawyer managers narrowed in real-dollar terms. Even more tellingly, the real pay of entry-level associates at large law firms across the United States rose spectacularly in the late 1990s, fell in the early 2000s, and then rose strongly again after 2006, from a position considerably below the pay of middle-level ALJs to one well above it. This anomaly persists despite the fact that entry-level lawyers at law firms as a rule are at least a decade away in their careers from having the experience necessary to qualify as neophyte ALJs.

As unemployment worsened after 2008, the level of federal pay actually started to look good to outsiders and was raised by some conservative politicians as a rallying cry for cutting government “waste.” House Speaker (then Congressman) John Boehner claimed during the 2010 election season that “Federal employees now make on average *more than double* what private sector workers take in.”<sup>63</sup> While the notion is often lost on such critics that the depressed level of private pay and benefits during the Great Recession of 2008 and thereafter is not something to aspire to, the advent of bad economic times has justified the arguments of those who fight to cut government pay, even if good times return. As a result, President Obama and Congress have frozen the pay of federal ALJs for 2011 and 2012 along

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according to the Consumer Price Index (CPI-U).

63. Boehner, *supra* note 46.

with all other federal employees, and as of this writing, are widely expected to extend the freeze into 2013. Unlike other federal employees, however, ALJs have no opportunity to earn bonuses, and the upper limit of their pay scale is capped at \$165,300 per year.

Although there are certainly other professions whose relative pay understates the importance of their jobs in public life (public school teachers come to mind), the message that society has sent to those entering the work world by flattening real wages for such jobs and reducing their levels in relation to comparable jobs is clear—these jobs are not valued as highly as investment bankers, Wall Street lawyers, doctors, movie stars, and corporate CEOs. The administrative law judiciary, like their Article III judicial peers, have petitioned Congress frequently to address this imbalance. Whether Congress listens or not (and it has been a while since it had last seen fit to do so), the long-run trend is that the ranks of ALJs will be filled less by highly qualified candidates and more by less qualified ones.

### III. TOWARD A MODERNIZED ALJ MODEL CODE

There is a longstanding view among the administrative law judiciary that a code of judicial conduct must be applied to them. Doing so countervails the antagonistic public perception, arising from negative attitudes toward government in general, that agency adjudication is often biased or that adjudicators often do not take their role seriously enough. While it would be easy to just let things slide as they are now, with no applicable code of conduct in place, it is probably shortsighted to do so as the public continues to sour on the efficacy and efficiency of their government. It would also be shortsighted for Administrative Law Judges merely to adopt the U.S. Judicial Code wholesale, because it is designed for adjudicators who fill a different role in our system and in our society.

The better option, given the course of change in the modern work of ALJs and the trend in public perceptions of government work, would be to update the 1989 ALJ Model Code to fit a more production-oriented, high-tech, less-formal model of administrative adjudication, and to seek its adoption by all relevant federal agencies. Public expectations of judicial conduct in general have changed. The work of Administrative Law Judges sets them apart from their judicial peers in fulfilling those expectations, and their ethical code should be tailored accordingly.

If the ALJ Model Code as it is currently worded (that is, in its 1989 form) or the current U.S. Judicial Code were applied to all federal ALJs now, both would impose burdens that may be appropriate for Article III judges but have no real place in an ALJ role. There are provisions of the ALJ Model Code and the U.S. Judicial Code that, because of their origin in the

ABA Model Judicial Code, (i) do not really pertain to ALJs; (ii) create conflicts with other laws that do pertain to ALJs; (iii) impose restraints on ALJs' lives that are more fitting for jurists who appear in the public spotlight more often than ALJs do; or (iv) ignore the modern reality of ALJ work. Avoiding the appearance of impropriety is important, as the U.S. Judicial Code requires of Article III judges.<sup>64</sup> Yet a code of ethics that restrains the life of a federal ALJ outside of the job, or that hamstrings how an ALJ interacts with the community or earns a living outside of judicial duties, is unnecessary for what is essentially a far less public role than that of a presidentially appointed, Senate-confirmed federal district court judge or federal court of appeals judge. Therefore, instead of having ALJs simply adopt the U.S. Judicial Code wholesale, the wiser course would be for the ALJ Model Code to be modernized and adapted into a format that is more realistic and reasonable for Administrative Law Judges to live by.

#### A. *Unnecessary Canons*

Among the canons of the 1989 ALJ Model Code that could be eliminated in whole or in part are those that are unnecessary in view of federal statutes and regulations that already cover ALJs in their capacity as federal employees. These canons, in light of OPM's recent proposal to eliminate licensure requirements due, in large part, to the fact that "the standards of ethical conduct that apply to ALJs as Federal employees . . . are sufficient to ensure that ALJs are held to a high standard of conduct,"<sup>65</sup> should be readily recognized by the administrative law judiciary as unnecessary for the conduct of their jobs. These include Canons 2(B),<sup>66</sup> 5(C),<sup>67</sup> and 7(A),<sup>68</sup> which impose rules that are already covered by existing

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64. CODE OF CONDUCT FOR U.S. JUDGES Canon 2, at 3 (Judicial Conference of the United States 2011).

65. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998, 61,998 (Oct. 7, 2010).

66. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2(B), at 6 (1989) ("An administrative law judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the office to advance the private interests of others, nor convey or permit others to convey the impression that they are in a special position of influence. A judge should not testify voluntarily as a character witness.").

67. *Id.* Canon 5(C)(1), at 17–18 ("An administrative law judge should refrain from financial and business dealings that tend to reflect adversely on impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the agency in which the judge serves.").

68. *Id.* Canon 7(A)(1)–(3), at 23.

(1) An administrative law judge should not solicit funds for or pay an assessment to a

federal statutes and regulations. ALJs, by virtue of their federal employment, are subject to 5 C.F.R. Part 2635, the “Standards of Ethical Conduct for Employees of the Executive Branch,” and its underlying statutes. These provisions apply to independent agencies as well as to the Executive Branch departments.<sup>69</sup>

These laws make the foregoing Canons superfluous. If imposed on ALJs as a matter of law, the present ALJ Model Code could create conflicts with these existing laws, triggering unintended consequences.

One actual example calls into question Canon 2(B)’s provision in the Code of Judicial Conduct that “A judge should not . . . convey or permit others to convey the impression that they are in a special position to influence the judge.”<sup>70</sup> In *Chisolm v. Transouth Financial Corp.*,<sup>71</sup> the U.S. District Court for the Eastern District of Virginia, Norfolk Division, applied this Canon to prohibit itself from allowing a retired U.S. district court judge from appearing before it as counsel for a defendant, even though he had nothing to do with the case while he was a sitting judge.<sup>72</sup> Although the retired jurist was not barred as a then-practicing attorney from acting as counsel by his state bar rules of conduct, the court took it upon itself to

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political organization or candidate.

(2) An administrative law judge should resign from office when the judge becomes a candidate either in a party primary or in a general election except that the judge may continue to hold office, while being a candidate for election to or serving as a delegate in a state constitutional convention, if otherwise permitted by law to do so.

(3) An administrative law judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

69. 5 U.S.C. § 105 (2006). Among these provisions are: 5 C.F.R. § 2635.702 (2011) (“An employee shall not use his public office for his own private gain . . . or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity . . . .”); *id.* § 2635.502 (“Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household . . . and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter . . . .”); *id.* § 2635.402 (“An employee is prohibited . . . from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him . . . has a financial interest . . . .”); 5 U.S.C. § 7323 (“[A]n employee may not . . . use his official authority or influence for the purpose of interfering with or affecting the result of an election; . . . knowingly solicit, accept, or receive a political contribution from any person . . . [or] run for the nomination or as a candidate for election to a partisan political office . . . .”).

70. CODE OF CONDUCT FOR U.S. JUDGES Canon 2(B), at 3 (Judicial Conference of the United States 2011).

71. No. 2:93cv632, 2000 U.S. Dist. LEXIS 8483 (E.D. Va. May 12, 2000).

72. *Id.* at \*12.

disqualify him as a matter of *its own* ethics. Citing a 1998 Opinion of the Committee on Codes of Conduct, the district court noted that, “In such cases . . . the judge sitting in the case has an affirmative obligation . . . to take appropriate steps to disqualify the former judge as counsel.”<sup>73</sup> The court permitted his firm, however, to continue representing the defendant.<sup>74</sup>

Typically, under federal employee ethics rules, a presiding ALJ facing such a scenario might consider recusing himself or herself from hearing a case, particularly where there is a “covered relationship” between the ALJ and the counsel representing one party, if “the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.”<sup>75</sup> “Covered relationships” do not typically include an ALJ’s former judicial colleagues at the agency or at previous agencies, except where the sitting ALJ was once an employee or subordinate of the former ALJ now acting as a party’s counsel.<sup>76</sup> The presiding ALJ could seek a waiver of the regulation from his or her agency to hear the case.<sup>77</sup> By contrast, Canon 2(B) as applied in *Chisolm* could turn this well-settled regulatory structure on its head if applied to ALJs by pitting the ALJ’s sense of ethical duty under the Code of Judicial Conduct against his or her agency’s prerogative to waive such concerns when others take priority, such as constraints in reassigning the matter to other ALJs or when adjustments may be made that would reduce or eliminate the likelihood that a reasonable person would question the presiding ALJ’s impartiality.<sup>78</sup>

The provision in Canon 2(B) that an ALJ “should not testify voluntarily as a character witness” is the same as Canon 2(B) in the U.S. Judicial Code.<sup>79</sup> It is meant to guard against injecting the prestige of judicial office into a proceeding in which the judge testifies. It does not shield a judge from testifying as a character witness in response to an official summons.<sup>80</sup>

Here, too, the applicability of this rule as an ethical concern for ALJs is debatable. It would make more sense as a rule of evidence than a rule of ethics, and has, in fact, been applied in conjunction with them. One

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73. *Id.* at \*13 (citing COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 70: DISQUALIFICATION WHEN FORMER JUDGE APPEARS AS COUNSEL (1998)). This opinion was substantially revised in June 2009.

74. *Id.* at \*18–\*20.

75. 5 C.F.R. § 2635.502(a) (2011).

76. *Id.* § 2635.502(b)(1)(iv).

77. *Id.* § 2635.502(d).

78. *Id.* § 2635.502(d)(1)–(6).

79. Compare CODE OF CONDUCT FOR U.S. JUDGES Canon 2(B), at 3 (Judicial Conference of the United States 2011), with MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2(B), at 6 (1989).

80. CODE OF CONDUCT FOR U.S. JUDGES Canon 2(B) cmt., at 4.

federal district court cited the ABA Model Code version of Canon 2(B) to disallow a bankruptcy judge from offering supportive testimony for a defendant in a later case brought by the trustee of the bankruptcy estate.<sup>81</sup> The court found, *inter alia*, that such testimony would be needlessly cumulative and unduly prejudicial to the plaintiff “because the testimony of Judge Phillips will clearly put his prior judicial position and the power and authority he had as a judicial officer in support of Vaughn.”<sup>82</sup> Also, in addition to finding that the testimony would violate the Canon of judicial ethics, the district court ruled that it would violate Federal Rules of Evidence 402, 403, and 605 because it was irrelevant, because “its probative value is substantially outweighed by the danger of undue prejudice,” and because the evidentiary rule against a judge testifying at the trial over which he presides “should apply to the presiding judge of the underlying trial where facts, rulings and performance of the attorneys are the key issues in this pending case.”<sup>83</sup>

Certainly, the testimony of an ALJ who heard an underlying case should not be permitted in a related case as a matter of evidentiary rule. However, Canon 2(B) sweeps more broadly than that; it disallows an ALJ’s voluntary character testimony in *any* case, whether the ALJ is related to the case or not. Moreover, the rule may be defeated simply by the issuance of a summons, which is always a wise precaution for a litigator to take with most witnesses. Character testimony is most often submitted for the purpose of establishing or impeaching a party’s reputation for truthfulness in the community.<sup>84</sup> Hence, the testimony of an ALJ, whose job requires credibility determinations as a matter of routine, would naturally be entitled to a high degree of credence by a judge or a jury, but would still be subject to establishing a foundation for the ALJ’s knowledge of the individual and that individual’s reputation for truthfulness.<sup>85</sup> If such testimony must be treated as prejudicial *per se*, then, it should be dealt with as a prophylactic rule of evidence, not as a matter of ethics that is left up to the conscience of the individual ALJ.

In another case, a federal court of appeals heard the appeal of an income tax evasion proceeding in which a state court judge was upbraided by the presiding federal district court judge before he was called to testify under

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81. *Chiasson v. Vaughn*, No. 08-121-FJP-SCR, 2009 U.S. Dist. LEXIS 3300, at \*4–\*5 (M.D. La. Jan. 7, 2009).

82. *Id.* at \*3.

83. *Id.* at \*3–\*4.

84. *See, e.g.*, Edward J. Imwinkelried, EVIDENTIARY FOUNDATIONS 115–16, 140–41 (3d ed. 1995).

85. *Cf. id.*

subpoena as a character witness for the defendant physician.<sup>86</sup> The federal trial judge considered the state court judge's testimony to be a violation of the Code of Judicial Conduct even though it was under subpoena. The presiding judge left the decision whether to testify up to the state judge and the latter promptly chose not to. The defendant thereupon appealed on the ground that he was deprived by the trial court from offering valuable character testimony. The Fifth Circuit sustained the district court, however, stating:

As a practical matter, Judge Armitage's testimony as a character witness would have had to have been "voluntary," subpoena or no subpoena. [Defendant] Callahan could issue a summons which would command the witness' appearance, but he could not by dint of the subpoena force the witness to speak well of him. The decision on whether to commend a defendant's character will always be "voluntary" in that sense. Obviously, Callahan would not have subpoenaed Judge Armitage unless he expected the Judge's cooperation. Nothing the trial judge said barred Judge Armitage from reaching his own decision on whether he wished to lend the prestige of his office to Callahan's defense. *Although we do not approve of the trial court's actions in scrutinizing the Judge's decision*, the fact that the decision was finally left solely to the witness prevented the mistake from rising to the level of reversible error.<sup>87</sup>

Even though Judge Armitage's testimony under subpoena would have passed the ethical test, in the view of the Fifth Circuit, the Canon became the vehicle by which to squelch the testimony. The testifying judge chose to avoid the witness stand, notwithstanding the subpoena, and the appellate court upheld the lower court's treatment of him. Dealing with this problem under the Rules of Evidence would have been less messy.

In sum, a bad rule makes bad law. As a canon of ethics, the rule against judges testifying as character witnesses does little if anything to prevent wrongful behavior on a judge's part, since the judge can still be called upon to testify under subpoena. More appropriate would be to turn it into a rule of evidence that bars an ALJ's testimony in instances where it bears on the truthfulness of a party or witness. As the district court noted in *Chiasson v. Vaughn*,<sup>88</sup> there are other generally applicable rules of evidence that can be applied readily to bar such judicial testimony; the Canons of Judicial

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86. *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979), *cert. denied*, 444 U.S. 826 (1979).

87. *Id.* at 1088 (emphasis added).

88. No. 08-121-FJP-SCR, 2009 U.S. Dist. LEXIS 3300, at \*3-\*4 (M.D. La. Jan. 7, 2009).

Conduct are not needed either to trump those rules or to amplify them. It follows *a fortiori* that it need not be applied to ALJs.

### B. *Inapplicable Canons*

There are some canons in the ALJ Model Code that should be removed because they impose legal impediments that are not applicable to ALJs. Among these is Canon 3(C),<sup>89</sup> which treats disqualification for reasons including a judge's financial interest.

Canon 3(C), according to the ALJ Model Code, "is derived, without substantial modification, from 28 U.S.C. 455, as amended in 1974."<sup>90</sup> That statute was itself amended by Congress in 1978 and 1988 without a comparable amendment to the ALJ Model Code. In the 1978 amendment, Bankruptcy Court Trustees were removed from the provisions of 28 U.S.C.

89. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C), at 11–13 (1989). The Canon reads in part:

- (1) An administrative law judge should disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances when
  - (a) the judge has a personal bias or prejudice concerning the proceeding;
  - (b) in private practice the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
  - (c) the judge has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
  - (d) the judge knows that he or she, individually or as a fiduciary, or his or her spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
  - (e) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
    - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
    - (ii) is acting as a lawyer in the proceeding;
    - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
    - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.
- (2) A judge should inform himself or herself about the judge's personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the judge's household.

90. *Id.* Canon 3(C) cmt., at 13.

455.<sup>91</sup> In the 1988 amendment, a subsection was added to the statute allowing judges to avoid disqualification by divesting the interest that provides the grounds for disqualification.<sup>92</sup>

The provision applicable to all federal employees that is comparable to the financial interest portion of Canon 3(C) is 5 C.F.R. § 2635.402.<sup>93</sup> That regulation, derived from a criminal statute,<sup>94</sup> prohibits a federal employee “from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.”<sup>95</sup> The general provision also has a section that allows the employee to cure the conflict by divestiture of the financial interest.<sup>96</sup>

Canon 3(C) does something that the general rule of 5 C.F.R. § 2635.402 and its underlying statute, 18 U.S.C. 208(a), do not do: It specifically defines the term “financial interest.”<sup>97</sup> It is defined as “a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant” in a party in a case, but does not include certain specific types of relationships, such as passive ownership in an investment fund.<sup>98</sup> The “however small” criterion is significantly different from the general employee provision because it bars a judge from obtaining the waiver from the disqualification rule that is available to all other federal employees if, in the written opinion of the designated agency ethics officer, “the employee’s financial interest in the particular matter or matters is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee.”<sup>99</sup> This criterion also differs from the general *de minimis* exemption available to federal employees for matters involving specific parties in which the employee’s disqualifying financial interest (or that of his or her spouse or minor children) consists of

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91. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 214, 92 Stat. 2549, 2661 (amending subsections (a) and (e) of § 455 of title 28 of the United States Code).

92. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1007, 102 Stat. 4642, 4667 (1988) (adding subsection (f) to § 455 of title 28 of the United States Code).

93. See generally 5 C.F.R. § 2635.402 (2011).

94. 18 U.S.C. § 208(a) (2006).

95. 5 C.F.R. § 2635.402(a) (2011); see also *id.* § 2635.402(b)(2) (listing the employee’s spouse, minor child, general partner, organization in which the employee serves as officer, director, trustee, general partner or employee, or a prospective employer as persons who are disqualified because of an imputed financial interest).

96. *Id.* § 2635.402(e).

97. See MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C)(3)(c), at 13 (1989).

98. *Id.* Canon 3(C)(3)(c)(i)–(iv), at 13.

99. 5 C.F.R. § 2635.402(d)(2)(ii).

publicly traded securities issued by one or more entities affected by the matter, or long-term federal government or municipal securities, and the aggregate market value of the holdings of the employee (including spouse and minor children) in the securities of all entities does not exceed \$15,000.<sup>100</sup>

Hence, the ALJ Model Code has the potential to exclude an ALJ from hearing a case because of a *de minimis* stock ownership in a party in the case, even though any other federal employee making similar decisions about that party on behalf of the agency could obtain an exemption from the rule or would be exempt by regulation. One could be of two minds on this scenario. On the one hand, the rule tends to enhance the reality and public perception of ALJ impartiality and independence by applying a “zero tolerance” rule for financial interest. On the other hand, the rule is not updated to permit divestiture of the interest as a solution, and can hamstring an agency when using its scarce corps of ALJs to the fullest extent. In this regard, the rule does not specify that parties themselves, including the private parties, can waive the rule.

Another aspect of Canon 3(C) that differs substantially from the federal rule on conflict of interest is that it speaks of *long past* interests as well as *present* interests of the judge and his or her relatives and colleagues, whereas the general federal rule speaks only of *immediate past* or present interests of an employee’s relatives and colleagues. Canon 3(C) requires judicial recusal in instances where “in private practice the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.”<sup>101</sup>

The analogous provision applicable to all federal employees is 5 C.F.R. § 2635.502.<sup>102</sup> It states that an employee should not participate in a matter in which the employee “knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.”<sup>103</sup> A “covered relationship” includes “[a]ny person for whom the employee has, *within the last year*, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee.”<sup>104</sup>

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100. *Id.* § 2640.202(a).

101. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 3(C)(1)(b), at 11 (1989).

102. *See generally* 5 C.F.R. § 2635.502.

103. *Id.* § 2635.502(a).

104. *Id.* § 2635.502(b)(1)(iv) (emphasis added).

Hence, an ALJ who worked in a law firm ten years ago would be barred under Canon 3(C) from hearing a case that he or a partner in his firm worked on back then, whereas under the general federal rule he would not. Moreover, an ALJ following this part of Canon 3(C) would not be able to avail himself of the waiver provisions of 5 C.F.R. § 2635.502(d), which would allow the designated agency ethics official to “authorize the employee to participate in the matter based on a determination, made in light of all relevant circumstances, that the interest of the Government in the employee’s participation outweighs the concern that a reasonable person may question the integrity of the agency’s programs and operations.”<sup>105</sup> Again, this aspect of Canon 3(C) may be viewed by some as enhancing ALJ independence and impartiality, and may be viewed by others as an unnecessary constraint on agency efficiency.

### C. *Overly Intrusive Canons*

There are items in the Model Code that should be removed or refashioned because they intrude too much into the personal liberty and privacy of ALJs. These include the Commentary to Canon 2,<sup>106</sup> which concerns membership in exclusionary organizations; Canon 4,<sup>107</sup> which discusses participation in “quasi-judicial” organizations; Canon 5,<sup>108</sup>

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105. *Id.* § 2635.502(d).

106. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2 cmt., at 7 (1989) (“It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”).

107. *Id.* Canon 4, at 14–15. The Canon reads:

An administrative law judge, subject to the proper performance of judicial duties, may engage in the following quasi-judicial activities, if in doing so doubt is not cast on the capacity to decide impartially any issue that may come before the judge:

- A. Speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.
- B. May appear at a public hearing before an executive or legislative body or official and may otherwise consult with an executive or legislative body or official, unless otherwise prohibited by law.
- C. May serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

108. *Id.* Canon 5, at 16–17. The Canon reads:

- A. Avocational Activities. An administrative law judge may write, lecture, teach, and speak on non-legal subjects, and engage in the art, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity

treating extra-judicial civic and avocational activities; and Canon 6,<sup>109</sup> involving remuneration for these activities.

### 1. *Exclusionary Organizations*

The commentary to Canon 2 regarding membership in organizations that “invidiously discriminate” was not raised to the level of a “canon” by the authors of the 1984 ABA Report that recommended its inclusion in the ABA Model Judicial Code.<sup>110</sup> Following suit, the authors of the ALJ Model Code kept it as commentary as well. In the 1990 revision of the ABA Model Judicial Code, however, the commentary was elevated to canon

of the office or interfere with the performance of judicial duties.

B. **CIVIC AND CHARITABLE ACTIVITIES.** An administrative law judge may participate in civic and charitable activities that do not reflect adversely upon impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee, non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

- (1) An administrative law judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.
- (2) An administrative law judge should not use or permit the use of the prestige of the judge’s office for the purpose of soliciting funds for any educational, religious, charitable, fraternal, or civic organization, but the judge may be listed as an officer, director, or trustee of such an organization. The judge should not be a speaker or the guest of honor at an organization’s fund raising events, but may attend such events.
- (3) An administrative law judge should not give investment advice to such an organization, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

109. *Id.* Canon 6, at 22. The Canon reads:

An administrative law judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in the judge’s judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

- A. **Compensation.** Compensation should not exceed a reasonable amount nor should it exceed what a person who is not an administrative law judge would receive for the same activity.
- B. **Expense Reimbursement.** Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the administrative law judge and, where appropriate to the occasion, by the judge’s spouse. Any payment in excess of such an amount is compensation.

110. *See* Lynne Reaves, *Judges and Bias: Club Resolution Watered Down*, A.B.A.J., Oct. 1984, at 34, 34 (noting that the wording “leaves the door open” for membership in some private organizations, and cites a Jewish community center or a Polish American Society as examples).

level as Canon 2(C) and expanded to include organizations that discriminated on the basis of gender, ethnicity, or sexual orientation. The ALJ Model Code did not follow suit. This Canon is now Rule 3.6 of Canon 3 of the current ABA Model Judicial Code and Canon 2(C) of the U.S. Judicial Code.<sup>111</sup>

Code commentary on this rule has expanded over the years. The ALJ Model Code repeats the commentary of the original 1984 amendment to the ABA Model Judicial Code by stating that membership in such organizations “may give rise to perceptions by minorities, women, and others, that the judge’s impartiality is impaired.”<sup>112</sup> Deciding whether an organization engages in invidious discrimination, however, is deemed by the ALJ Model Code commentary to be “a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization’s current membership rolls but rather depends on the history of the organization’s selection of members and other relevant factors.”<sup>113</sup> As with the original ABA Model Judicial Code, the ALJ Model Code leaves it to the conscience of each judge to decide whether the organization in question practices invidious discrimination.

In the 1990 revisions to the ABA Model Judicial Code, the “other relevant factors” commentary was expanded to include “whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.”<sup>114</sup> In this revision, the choice of whether to quit the organization or not was no longer left to the conscience of individual judges; instead, the Code was revised to state that “When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge *must* resign immediately from the organization.”<sup>115</sup> One exception was allowed: “A judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.”<sup>116</sup>

Originally, ethical considerations about judicial membership in organizations stemmed from the concern that a judge’s membership might be seen as “personal, direct advocacy to the public of the policy positions

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111. See CODE OF CONDUCT FOR U.S. JUDGES Canon 2(C), at 3 (Judicial Conference of the United States 2011); ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (2010).

112. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 2 cmt., at 7 (1989).

113. *Id.*

114. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 2 (2010).

115. *Id.* cmt. 3 (emphasis added).

116. *Id.* cmt. 4.

advanced by the organization” that “might reasonably be seen as impairing the judge’s capacity to decide impartially any issue that may come before the judge.”<sup>117</sup> This was considered especially true of organizations that litigated before the judge.<sup>118</sup> By contrast, the principal concern during the 1990 ABA Model Judicial Code revision and thereafter fixed on gender discrimination. Complaints from political factions about memberships of nominees to the U.S. Supreme Court in a variety of organizations were the impetus behind these changes. In 1987, Justice Anthony Kennedy was criticized during his nomination for his membership in a San Francisco club that excluded women. He subsequently resigned from the club, prompting in large part the 1990 Code reforms.<sup>119</sup>

Accusations of membership in gender-discriminatory clubs did not remain an exclusive indictment of male nominees. In 2009, Justice Sonya Sotomayor resigned from an elite all-women’s club during her nomination fight after Republicans questioned her participation in it, although she did not believe the club to practice “invidious discrimination.”<sup>120</sup> Other female Supreme Court Justices have also had to defend their membership in single-gender clubs, both during their nomination proceedings and at other times.<sup>121</sup>

The inherent ambiguity of this standard and its entanglement with politics raise legitimate questions about whether it is necessary or expedient to apply to ALJs, who for the most part practice outside of the political sphere and the public eye. Certainly the provision of the 1990 revisions that a judge must resign from an organization when he or she “learns” that it is discriminatory is open to question, because it seems from the experience of Supreme Court nominees that the “learning” element turns more on whether someone powerful in politics or the media has called the judicial nominee’s membership into question than whether the judicial nominee has determined, personally and independently after analyzing

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117. COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 82: JOINING ORGANIZATIONS (1998). This opinion was substantially revised in June 2009 and no longer contains such language.

118. COMM. ON CODES OF CONDUCT, JUDICIAL CONFERENCE OF THE U.S., ADVISORY OP. NO. 40: SERVICE ON GOVERNING BOARD OF NONPROFIT ORGANIZATION THAT TENDS TO BECOME INVOLVED IN COURT PROCEEDINGS (1998). This opinion was substantially revised in June 2009.

119. Paul Marcotte, *Judicial Code Re-Examined*, A.B.A. J., Apr. 1, 1988, at 152.

120. Mark Sherman, *Sotomayor Quits Belizean Grove*, HUFFINGTON POST (June 19, 2009, 10:40 PM), [http://www.huffingtonpost.com/2009/06/19/sotomayor-quits-belizean-n\\_218307.html](http://www.huffingtonpost.com/2009/06/19/sotomayor-quits-belizean-n_218307.html).

121. *Id.* (noting that former Supreme Court Justice Sandra Day O’Connor and current Supreme Court Justice Ruth Bader Ginsburg have, at different times, been involved in all-women groups).

objective facts, that quitting the organization is warranted.

In some respects, this rule suggests a *lack* of independence and impartiality on a judge's part because it makes a judge more susceptible to political pressures than perhaps ought to be. In that regard, there is a particular danger in imposing the stringent rule of the 2007 ABA Model Judicial Code on ALJs because of their positions within agencies of the Executive Branch rather than the independent Judicial Branch. Such agencies are themselves very sensitive to politics because their executives are politically appointed and their budgets are approved by Congress. It is not inconceivable that an ALJ's membership in an organization that is considered by a faction of the party in power to be invidiously discriminatory could be called into question by agency managers to temper the ALJ's independence and impartiality, or to serve as a "litmus test" of the ALJ's political bona fides.

The commingling of religion and politics in public life, notwithstanding our constitutional prohibition against government entanglement with religion, raises an additional concern about this provision as it applies to ALJs. Almost every religion in America takes a political stand of some kind. A judge's membership in an organized religion alone may be enough to raise questions about his or her social or political views, regardless of how the judge decides cases. The fact that the 2007 revisions to the ABA Model Judicial Code state in commentary that "A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule" is helpful, but, in view of the context in which it appears in the rule, not much comfort.<sup>122</sup>

Taken as a whole, the entwining of this rule with politics and the media suggests that it is better applied solely to judicial positions that require election or Senate confirmation rather than to Administrative Law Judges, who come from broader walks of life and lead less publicity-conscious lives and careers. Thus, the rule as it was promulgated in the 1989 ALJ Model Code, wherein the decision to quit organizations suspected of invidious discrimination is left to the conscience of each individual judge rather than to ethical fiat, is best left as it is.

## 2. *Legal and Civic Organizations*

Canon 4 of the ALJ Model Code governs an ALJ's participation outside of his or her job in so-called "quasi-judicial activities," the Code's term for endeavors having to do with "the law, the legal system, and the

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122. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 4 (2010).

administration of justice.”<sup>123</sup> This covers a wide range of organizations, such as the various state bar associations, the American Bar Association and its committees, The Federalist Society, the American Association for Justice (formerly the Association of Trial Lawyers of America), the American Inns of Court, the Federal Administrative Law Judges Conference, the Forum of the United States Administrative Law Judges, the Association of Administrative Law Judges, and the like.

Under Canon 4 of the ALJ Model Code, ALJs are free to engage in the activities of these organizations by speaking, writing, lecturing, and teaching, as well as serving as members, officers, and directors, so long as “doubt is not cast on the capacity to decide impartially any issue that may come before the judge.”<sup>124</sup> ALJs are also permitted to assist such organizations by raising funds and participating in their management and investment. They may also make recommendations to public and private fund-granting agencies on projects that such organizations sponsor.

Canon 5 of the ALJ Model Code concerns outside activities that are “non-legal” in nature, such as “the arts, sports, and other social and recreational activities.”<sup>125</sup> Canon 5 requires an ALJ’s participation in these pursuits, such as educational, religious, charitable, fraternal, or civic organizations, to be more limited in nature. The organization cannot be one that is “conducted for the economic or political advantage of its members.”<sup>126</sup> The ALJ may serve as an officer, director, trustee, or non-legal advisor of such an organization, but not if it “will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves.”<sup>127</sup> The ALJ may not solicit funds for such an organization, nor give it investment advice, but may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions, and may be listed as an officer, director, or trustee of the organization.<sup>128</sup> The ALJ may not be a speaker or guest of honor at the organization’s fund-raising events, but may attend such events.

In the changes to the ABA Model Judicial Code that were made after the ALJ Model Code was adopted in 1989, Canons 4 and 5 were reorganized into what is now Canon 3 of the ABA Model Judicial Code. Now, organizations having to do with “the law, the legal system, or the

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123. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 4, at 14 (1989).

124. *Id.*

125. *Id.* Canon 5(A), at 16.

126. *Id.* Canon 5(B), at 16.

127. *Id.* Canon 5(B)(1), at 16.

128. *Id.* Canon 5(B)(2), (3), at 17.

administration of justice” as well as organizations constituting “educational, religious, charitable, fraternal, or civic organizations not conducted for profit” are treated under a single Rule—3.7.<sup>129</sup> A judge subject to the ABA Model Judicial Code may now fundraise for both types of organizations,<sup>130</sup> manage their investments,<sup>131</sup> solicit contributions for them from other judges that he or she does not supervise,<sup>132</sup> and serve as an officer, director, trustee, or non-legal advisor of such organizations.<sup>133</sup> Also, the judge may now appear or speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with, an event of both such organizations; “but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.”<sup>134</sup> Furthermore, a judge may solicit memberships and grants only for the law-related organizations.<sup>135</sup>

The U.S. Judicial Code maintains the separation of provisions for “law-related activities” on the one hand and “civic and charitable activities” on the other.<sup>136</sup> Its restrictions are the same as those of the updated ABA Model Judicial Code except in one significant respect: while a judge may assist a “law-related organization” in the management and investment of its funds,<sup>137</sup> the judge may not do so for a “civic and charitable organization.”<sup>138</sup>

Although the updated ABA Model Judicial Code and the U.S. Judicial Code have liberalized the freedom of judges to participate in non-legal, apolitical, and non-profit charitable and civic organizations, they still lay out a rather confusing roadmap for what can and cannot be done. Certainly the older, unrevised ALJ Model Code is even more crabbed, particularly regarding such matters as soliciting contributions, appearing as a guest of honor at a fund-raising dinner, or being a board member.

It is extremely difficult, if not impossible, to think of any charitable organization that would hold a dinner that would *not* be for the purpose of fund-raising. The ALJ Model Code precludes ALJs from being honored at

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129. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.7(A)(1) (2010).

130. *Id.* R. 3.7(A)(1)–(2).

131. *Id.* R. 3.7(A)(1).

132. *Id.* R. 3.7(A)(2).

133. *Id.* R. 3.7(A)(6).

134. *Id.* R. 3.7(A)(4).

135. *Id.* R. 3.7(A)(3), (5).

136. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)–(B), at 11–12 (Judicial Conference of the United States 2011).

137. *Id.* Canon 4(A)(3), at 12.

138. *Id.* Canon 4(B)(2), at 12.

any such event even though other judges are not. Nor is it possible to think of any nonprofit board of directors meeting that would not discuss or vote on the organization's investments; under the ALJ Model Code, an ALJ-director would be forced to refrain from discussion and voting on such issues even though the ABA Model Judicial Code would not present such a restraint. It is certainly not the case these days that educational, religious, charitable, fraternal, and civic organizations refrain from engaging in lobbying activities at the local, state, or federal level in furtherance of the "political advantage" of their members; under the ALJ Model Code, ALJs would be precluded from participating in any organization that engages in such activities.

Federal law is very specific regarding the extent of political activity in which an ALJ may be engaged. Under the Hatch Act,<sup>139</sup> a federal ALJ may not knowingly solicit, accept, or receive a political contribution from any person;<sup>140</sup> be a candidate for nomination or election to a partisan political office;<sup>141</sup> or engage in partisan political management or partisan political campaigns.<sup>142</sup> In practice, the Hatch Act forbids an ALJ from, among other things, campaigning for or against a candidate in partisan elections, making campaign speeches, collecting contributions or selling tickets to political fund-raising functions, distributing partisan campaign material, organizing or managing political rallies or meetings, holding office in political clubs or parties, hosting or inviting anyone to a political fundraiser, or accepting or receiving donations for a political party, candidate, or group.<sup>143</sup>

While the Hatch Act walls off ALJs from engaging in politics, there is no basis to preclude ALJs from engaging in the activities of apolitical groups that have nothing to do with the judge's adjudicatory function for a federal agency. A particularly overbroad aspect of Canon 5 of the ALJ Model Code is that it limits an ALJ's ability to participate in non-legal, nonprofit organizational activities in fields that do not fall within the subject matter of the ALJ's agency. This may make sense for Article III judges whose caseload can come from almost any walk of life, but it makes no sense for ALJs who decide cases in only one particular statutory field. Why, for instance, should it be a breach of a Code of Conduct for an ALJ at the Federal Energy Regulatory Commission, who hears nothing but electric

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139. 5 U.S.C. § 7323 (2006).

140. *Id.* § 7323(a)(2).

141. *Id.* § 7323(a)(3).

142. *Id.* § 7323(b)(2)(A).

143. *Further Restricted Employees—Political Restrictions and Prohibited Activities*, U.S. OFFICE OF SPECIAL COUNSEL, <http://www.osc.gov/haFederalFurtherRestrictionandActivities.htm> (last updated Apr. 23, 2012).

transmission and gas or oil pipeline rate cases, to be able to participate as a full voting member of the board of directors of the National Alliance on Mental Illness (NAMI), a nonprofit organization that engages in public education and lobbying for mental health, to appear as a speaker or guest of honor at its fund-raising dinners, and to assist in soliciting contributions from the general public? Certainly NAMI is not an entity that “will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings before any agency in which the judge serves,”<sup>144</sup> nor would the ALJ’s service in NAMI “detract from the dignity of the office or interfere with the performance of judicial duties.”<sup>145</sup>

It is well-recognized by the ALJ Model Code, as it is in the ABA Model Judicial Code, that “[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the society in which he or she lives.”<sup>146</sup> In that spirit, the ALJ Model Code should recognize that ALJs are a diverse group of individuals who have much to offer the community as a whole, and they should be able to do so to the fullest extent not in conflict with the particular issues that come before them in their own administrative agency cases.

### 3. *Compensation from Legal and Civic Organizations*

Canon 6 governs any compensation that an Administrative Law Judge may receive from working for legal and non-legal civic organizations of the type covered by Canons 4 and 5. The ALJ Model Code admonishes that such compensation “should not exceed a reasonable amount” nor be more than what a non-ALJ would receive for the same activity.<sup>147</sup> It also requires that expense reimbursements “should be limited to the actual cost of travel, food and lodging reasonably incurred” by the ALJ “and, where appropriate to the occasion, by the judge’s spouse.”<sup>148</sup> Additionally, the Code directs

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144. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 5(B)(1), at 16 (1989).

145. *Id.* Canon 5(A), at 16.

146. *Id.* Canon 5(A) cmt., at 16; *see also* CODE OF CONDUCT FOR U.S. JUDGES Canon 4 cmt., at 15 (Judicial Conference of the United States 2011) (stating the same proposition almost identically); ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.1 cmt. 2 (2010) (“Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.”).

147. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 6(A), at 22 (1989).

148. *Id.* Canon 6(B), at 22.

that “[a]ny payment in excess of such an amount is compensation.”<sup>149</sup>

This provision is the same as Canon 4(H) of the U.S. Judicial Code.<sup>150</sup> In the ABA Model Judicial Code, it was transformed in 2007 into Rules 3.12, 3.14, and 3.15 of Canon 3. Rule 3.12 is the general language of previous codes that such compensation may be accepted by the judge “unless such acceptance would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”<sup>151</sup> Rule 3.14 goes into more depth than before about what types of expenses are acceptable, adding to the original wording “other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items.”<sup>152</sup> Spousal expenses are also expanded to include the expenses of a judge’s “domestic partner[] or guest.”<sup>153</sup>

The ABA Model Judicial Code has long had extensive reporting requirements for judicial compensation and expense reimbursements when received from legal and non-legal civic organizations.<sup>154</sup> These reporting requirements have been excluded from the ALJ Model Code because ALJs must comply with the Ethics in Government Act provisions concerning the filing of public financial reports.<sup>155</sup>

In view of the lack of an exclusively judicial financial reporting requirement, and in light of the extensive rules and reporting requirements applicable to ALJs together with all senior federal employees, there is no reason why Canon 6 needs to be in the ALJ Model Code at all. Certainly it is outdated, as the reference in the ABA Model Judicial Code to the expenses of a judge’s domestic partner or guest as well as a spouse suggests. Certainly it is financially imprecise, since it refers to all expense reimbursements over “actual cost[s] . . . reasonably incurred” as “compensation” and does not account for actual expenses over “travel, food and lodging” that are now recognized by the ABA Model Judicial Code as reimbursable expenses and certainly should not be deemed as pure “compensation” to the receiving ALJ. Perhaps most arbitrary and capricious about the rule is its requirement that such compensation and

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149. *Id.*

150. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(H), at 14 (2011).

151. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.12 (2010).

152. *Id.* R. 3.14(A).

153. *Id.* R. 3.14(B).

154. *See, e.g.*, CODE OF CONDUCT FOR U.S. JUDGES Canon 4(H)(3), at 14 (Judicial Conference of the United States 2011) (noting that a judge should make required financial disclosures, including disclosure of gifts and other things of value); ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.15 (2010) (stating that reporting requirements should include compensation for extrajudicial activities, gifts, and reimbursement of expenses).

155. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 6 cmt., at 23 (1989).

expenses must be reasonable when there is no definition of what “reasonable” is.

#### *D. Canons Contrary to Modern Practice*

There are items in the ALJ Model Code that should be removed as contrary to modern practice. These include Canon 3’s limitation on cameras in the courtroom<sup>156</sup> and Canon 5’s treatment of arbitration,<sup>157</sup> the practice of law,<sup>158</sup> and extrajudicial appointments.<sup>159</sup>

##### *1. Cameras in the Courtroom*

Concerning the prohibition on cameras in the courtroom in Canon 3(A)(7), the Medicare Office of Hearings and Appeals and the SSA now hold hearings by teleconference. Telecommunications have become an increasingly-used technology in administrative proceedings. Witnesses and counsel are now not only beamed into hearings, but hearings are also beamed out to audiences worldwide. The days of intrusive journalistic practices, when flashbulb-popping cameras would disrupt crowded court proceedings, are long gone. There should be no ethical presumption as to whether cameras should be allowed in a particular proceeding or not; it should be strictly a matter for the ALJ to decide on advice of counsel for the individual parties in the case.

##### *2. Alternative Dispute Resolution*

Canon 5(E) of the ALJ Model Code was promulgated prior to the passage of the Alternative Dispute Resolution Act (ADRA) in 1990.<sup>160</sup>

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156. *Id.* Canon 3(A)(7), at 10 (“A judge should prohibit broadcasting, televising, recording or photographing in hearing rooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by an appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of proceedings in hearing rooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.”).

157. *Id.* Canon 5(E), at 21 (“An administrative law judge should not act as an arbitrator or mediator.”).

158. *Id.* Canon 5(F), at 21 (“An administrative law judge should not practice law.”).

159. *Id.* Canon 5(G), at 21 (“An administrative law judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters which may come before the judge.”).

160. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C. § 571-84 (2006)).

That Act states that “administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.”<sup>161</sup> The Act further states that “alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious,” and that “such alternative means can lead to more creative, efficient, and sensible outcomes” in federal administrative proceedings.<sup>162</sup> Accordingly, the Act requires federal agencies to “adopt a policy that addresses the use of alternative means of dispute resolution and case management.”<sup>163</sup>

Consistent with the passage of ADRA, the ABA updated its Model Judicial Code to provide that a judge could not act as an arbitrator or a mediator “unless expressly authorized by law.”<sup>164</sup> The U.S. Judicial Code does the same.<sup>165</sup> As for ALJs, at least one agency, the Federal Energy Regulatory Commission, has initiated alternative dispute resolution procedures pursuant to ADRA in which ALJs participate as settlement judges.<sup>166</sup> When FERC initiates administrative proceedings, it usually first authorizes the use of settlement procedures before initiating a formal hearing before an ALJ.<sup>167</sup> The ALJs acting as settlement judges attempt to arrive at a settlement agreement among the parties in lieu of formal litigation, either in whole or in part as to some issues. The program has been highly successful and has resulted in a large number of settlements, even in complex, multiparty cases.

The passage of ADRA and its impact on federal agency practice renders Canon 5(E) obsolete as it is currently written. Administrative Law Judges are particularly well-suited to act as arbitrators and mediators in government cases as well as in a variety of non-governmental settings, especially in areas that do not fall within the jurisdiction of their own agencies. For example, nothing should prevent a FERC ALJ from acting as an arbitrator in a patent dispute or an NLRB ALJ from acting as a mediator in a non-labor construction contract dispute. The expertise of Administrative Law Judges in resolving disputes does not have to be limited to the sphere of their own agencies.

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161. 5 U.S.C. § 571 (congressional findings).

162. *Id.*

163. *Id.* § 571 note (promotion of alternative means of dispute resolution).

164. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.9 (2010).

165. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(4), at 12 (Judicial Conference of the United States 2011).

166. 18 C.F.R. §§ 385.603–.605 (2011).

167. *Id.* § 385.603(c)–(d).

### 3. *Practice of Law*

Canon 5(F) of the Model ALJ Code forbids an ALJ from practicing law. The ABA Model Judicial Code has been revised in this respect to provide that a judge “may act *pro se* and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, but is prohibited from serving as the family member’s lawyer in any forum.”<sup>168</sup> The U.S. Judicial Code provides the same.<sup>169</sup>

As there is no official code of ethics that applies to federal ALJs at present, and in the wake of OPM’s 2010 NPRM to drop licensure requirements for incumbent ALJs,<sup>170</sup> ALJs are free to practice law outside of their government jobs so long as they comply with the ethical requirements that apply to all federal employees.<sup>171</sup> Those rules mandate that such outside employment must not conflict with the employee’s official duties, meaning that it must not be “prohibited by statute or by an agency supplemental regulation” and that it must not “require the employee’s disqualification from matters so central or critical to the performance of his official duties that the employee’s ability to perform the duties of his position would be materially impaired.”<sup>172</sup> Also, the employee must seek the permission of the agency he or she works for in order to engage in such outside work, if required by that agency’s own regulations.<sup>173</sup> But with those caveats, ALJs may represent others, appear in courts as counsel and *pro se*, represent family members, and conduct legal business outside of government, so long as their bar licenses permit them to do so.

Given this flexibility, federal Administrative Law Judges should give serious consideration to whether it really makes sense to impose what is essentially the trade restraint of Canon 5(F) of the ALJ Model Code upon themselves. The Canon is already outdated in view of the ABA Model Judicial Code and the U.S. Judicial Code, which permit judges to engage in family practice and act *pro se* at the very least. By eliminating the licensure requirement entirely for incumbents, OPM is at least suggesting that it would not be averse to allowing ALJs to “moonlight” as outside attorneys.

More pointedly, ALJs, like federal employees in general, have good cause to feel resentful toward the current crop of politicians and pundits

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168. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.10 (2010).

169. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(A)(5), at 12 (Judicial Conference of the United States 2011).

170. Programs for Specific Positions and Examinations (Miscellaneous), 75 Fed. Reg. 61,998 (Oct. 7, 2010) (to be codified at 5 C.F.R. pt. 930).

171. 5 C.F.R. §§ 2635.802–.803 (2011).

172. *Id.* § 2635.802(a)–(b).

173. *Id.* § 2635.803.

who bash the well-deserved, and by no means excessive, pay and benefits of federal ALJs for their own political advantage. If those influential personages are so aghast at the fact that ALJs make their living off of public funds,<sup>174</sup> then they should have no problem at all if ALJs offer their skills elsewhere for private remuneration. With a two-year (and potentially, a three-year) pay freeze now in place and talk of furloughs and cuts so in vogue in the halls of Congress, allowing an ALJ to hold down a part-time job as an attorney in a field outside of his or her agency's jurisdiction would at least allow the ALJ to make up the difference that pay cuts and years of flat pay impose. Moreover, if the pay freeze becomes permanent in the future and locks ALJs into a fixed salary that cannot be augmented by step increases or bonuses,<sup>175</sup> outside employment will be the only means available to an ALJ for keeping up with the cost of living.

Moonlighting is not an alien concept in government service. Legislators in many states (e.g., Alaska, California, Louisiana, New York, Washington, and others) are permitted to engage in law practice outside of their representative duties, notwithstanding the appearance of power and influence that their political roles accord them. In recent years, the New York City Bar became concerned about potential conflicts of interest between state and client presented by the over 17% of their state legislators who are also attorneys.<sup>176</sup> The Bar seeks reforms in the financial disclosure law for legislators, requiring attorney-legislators to disclose sources and amounts of outside income, including the identity of paying clients, a description of the services rendered, and the types of fee arrangements entered into.<sup>177</sup>

Federal ALJs are required to file annual public financial disclosures on

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174. Such talk brings to mind the well-known scene in the movie *Casablanca* when Claude Rains, playing Captain Reynaud, whistles Rick Blaine's Café Americain to a halt, pronouncing that he is "shocked, shocked" to find that there is gambling going on in the establishment; whereupon the croupier hands the Captain his winnings on the former's way out the door, to the latter's polite thanks. *CASABLANCA* (Warner Bros. Pictures 1942).

175. The pay freeze implemented for calendar year 2011 does not affect step increases or bonuses. However, ALJs are barred by statute from receiving bonuses and their step increases are capped by the Executive Level III salary level, which is itself frozen. Hence, unlike other federal employees whose frozen pay can be mitigated by step increases and bonuses, the frozen pay of ALJs cannot be.

176. N.Y.C. BAR, REPORT ON LEGISLATION BY THE COMMITTEE ON STATE AFFAIRS, THE COMMITTEE ON GOVERNMENT ETHICS AND THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY: REFORMING NEW YORK STATE'S FINANCIAL DISCLOSURE REQUIREMENTS FOR ATTORNEY-LEGISLATORS 2 (2010), <http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf>.

177. *Id.* at 4.

the Office of Government Ethics' Form SF 278,<sup>178</sup> which requires disclosure of the identity of outside organizations worked for, their type, the position being held, and income over \$5,000 per year earned from the firm and from any one named client.<sup>179</sup> The designated ethics officials of each agency are tasked with reviewing these forms and using the information they contain to enforce the ethics laws. If a federal ALJ is engaged in an outside law practice, it would have to be publicly disclosed on the form, and most of the details sought by the New York City Bar for state attorney-legislators are already required.<sup>180</sup>

#### 4. *Extrajudicial Appointments*

Finally, Canon 5(G) of the ALJ Model Code prohibits an ALJ's membership on governmental panels "concerned with issues of fact or policy on matters which may come before the judge."<sup>181</sup> The ALJ Model Code recognizes in its commentary that "[v]aluable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments."<sup>182</sup> However, the ALJ Model Code warns, "The appropriateness of conferring these assignments on judges must be assessed . . . in light of the demands on judicial manpower created by today's crowded dockets and the need to protect judges from involvement in extra-judicial matters that may prove to be controversial."<sup>183</sup>

Rule 3.4 of the ABA Model Judicial Code now says, "A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice."<sup>184</sup> The U.S. Judicial Code goes even further, stating in Canon 4(F) that:

A judge may accept appointment to a governmental committee, commission, or other position only if it is one that concerns the law, the legal system, or the administration of justice, or if appointment of a judge is required by federal statute. A judge should not, in any

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178. See 5 C.F.R. §§ 2634.201–202 (mandating filing and listing parties that must file disclosure forms, which explicitly includes ALJs).

179. U.S. OFFICE OF GOV'T ETHICS, OGE FORM 278 11 (2011), [http://oge.gov/Forms-Library/OGE-Form-278-Automated-\(PDF\)/](http://oge.gov/Forms-Library/OGE-Form-278-Automated-(PDF)/).

180. See generally *id.*

181. MODEL CODE OF JUDICIAL CONDUCT FOR FED. ADMIN. LAW JUDGES Canon 5(G), at 21 (1989).

182. *Id.* Canon 5(G) cmt., at 21.

183. *Id.* at 21–22.

184. ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.4 (2010).

event, accept such an appointment if the judge's governmental duties would tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary.<sup>185</sup>

Clearly, the ABA and the federal judiciary have recognized that judges play valuable and vital roles as advisors on government panels concerned with "the law, the legal system, or the administration of justice." Federal ALJs, no doubt, would do so as well. It is commonplace among other federal employees who are asked by their agencies or other branches of the federal government to sit on special boards and committees to help decide policy questions. They do so willingly even though they, like ALJs, have crowded dockets.

It makes little sense to prohibit ALJs from serving extrajudicially on government advisory panels just because they are busy people. Chief ALJs already sit on the management committees of many federal agencies by virtue of their supervisory positions. So long as individual cases that are pending before the ALJ are not affected by such participation, the advice and counsel of ALJs on governmental panels and boards, particularly those that concern "the law, the legal system, or the administration of justice," should be welcomed and encouraged.

One wrinkle that arises in this change is in the arena of remuneration for extra work. Often, federal employees who volunteer for agency-sponsored policy committees and panels can look forward to bonuses and awards for such work. ALJs, unlike other federal employees, are forbidden from receiving bonuses or awards of any kind outside of their fixed salaries.<sup>186</sup> In light of this prohibition, the ALJ Model Code's rule against extrajudicial appointments appropriately protects those who do not wish to be pressured into performing extra work for no pay, but at the same time it unfairly shackles ALJs who genuinely *want* to volunteer for such work, even at no extra pay.

It would be more appropriate for the government to give consideration to the notion that Administrative Law Judges who perform such work should be able to receive special remuneration for working on extrajudicial government boards and committees as an exception to the overall prohibition on ALJ bonuses and awards. To avoid the appearance that doing so would turn into a disguised form of award for "performance," which is anathema to the independence and impartiality of the federal administrative law judiciary, such additional remuneration could perhaps be fixed by law at a standard rate.

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185. CODE OF CONDUCT FOR U.S. JUDGES Canon 4(F), at 14 (Judicial Conference of the U.S. 2011).

186. 5 C.F.R. § 930.206(b) (2011).

## CONCLUSION

The purpose of this Article was to recommend changes to the ALJ Model Code that would align it more closely with modern federal ALJ practice and make it worthy of being adopted as the binding code of ethics for federal ALJs in the modern age. It is not the purpose of this Article to recommend the actual adoption of any code of ethics, because in the author's view ALJs have performed their duties just fine without having any of the current model and adopted codes applied to them directly. However, the gradual adherence of other federal judicial appointees to codes of ethics (with the notable exception of the U.S. Supreme Court), and the stance of the Merit Systems Protection Board that ALJs should adhere to *some* code of ethics, makes the coming of the day ever nearer that a federal ALJ Code of Ethics will be adopted or imposed. In view of the coming of that day, federal Administrative Law Judges should get ready by studying the subject now and bringing the models they have in line with what they really do.

# CIVIL JUSTICE REFORM IN SOCIAL SECURITY ADJUDICATIONS

JEFFREY S. WOLFE\*

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## INTRODUCTION

Across a constitutional divide, Congress and the federal courts share a mutual obligation to ensure that our judicial system offers all Americans justice in civil and criminal matters within a reasonable time and at reasonable expense. Neither branch alone can accomplish this important goal. The federal judiciary cannot adequately solve systemic problems affecting congestion, delay, and costs in the courts without appropriate legislative reform instituted by Congress. Congress, for its part, cannot legislate efficiency in the federal court system without granting federal judges the autonomy, resources, and direction to employ their unique expertise in devising effective procedural reforms.<sup>1</sup>

—Joseph Biden

Such were then-Senator Joseph Biden's words describing the need to empower federal judges in 1994 after the passage of the Civil Justice Reform Act of 1990 (CJRA).<sup>2</sup>

The CJRA became the cornerstone of federal judicial reform, designed to combat growing costs and delay in the federal courts—circumstances that held potential for increasingly reduced access to the courts by the American public.<sup>3</sup> These words and the actions they describe are equally true today when considering the Social Security Administration's (SSA's) system of administrative appeals, described as the largest administrative adjudicatory system on the planet.<sup>4</sup>

Some 700,000 administrative appeals are now pending before SSA in a system designed to handle only 400,000. This “backlog” of some 300,000 appeals is not a single-year phenomenon, but has been growing for decades. The salient truths emerging from this backlog are not interesting

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1. Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1285 (1994).

2. 28 U.S.C. §§ 471–482 (2006).

3. See, e.g., Carl Tobias, *Extending the Civil Justice Reform Act of 1990*, 64 U. CIN. L. REV. 105 (1995). The author notes:

The Act commanded that by December 31, 1995 the Judicial Conference submit a report on the pilot program, including an analysis of how much the principles and guidelines decreased expense and delay, to the Judiciary Committees of the Senate and of the House of Representatives. The legislation required that the Conference consider these results in light of the effect on cost and delay . . . .

*Id.* at 107 (footnote omitted).

4. See *Information About Social Security's Hearings and Appeals Process*, SOC. SEC. ONLINE, <http://www.ssa.gov/appeals> (last modified Jan. 20, 2012) (“The Social Security Administration's (SSA) administrative appeals operation, under the Office of Disability Adjudication and Review (ODAR) is one of the largest administrative judicial systems in the world. SSA issues more than half a million hearing and appeal dispositions each year. Administrative law judges (ALJ) conduct hearings and issue decisions.”).

tidbits for statisticians but stories of human suffering as American citizens wait—in some cases, for more than two years—for their “day in court” after being denied disability benefits.

The hard truth behind this story is that it could have been avoided. In a report released in December 2007, the Government Accountability Office (GAO) stated:

[M]anagement weaknesses as evidenced by a number of initiatives that were not successfully implemented have limited SSA’s ability to remedy the backlog. Several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the “Hearings Process Improvement” initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it.<sup>5</sup>

Most recently, the agency has sought and attained appointment of an increased number of administrative law judges (ALJs)—judges appointed under the aegis of the Administrative Procedure Act (APA)<sup>6</sup>—to hear and decide cases in an increased number of hearing offices around the country. As SSA Commissioner Michael J. Astrue has commented, “increasing the number of administrative law judges has resulted in a plateau in the rise of pending cases.”<sup>7</sup> While laudable, the issue framed by the backlog centers not simply on the number of judges but on the way in which they work—especially within the bureaucratic milieu of an executive branch agency such as SSA.

The world’s largest administrative judicial system houses some 1,300 federal administrative law judges within the Office of Disability Adjudication and Review (ODAR). These judges are not, however, “independent” as are members of the federal judiciary. Instead, embedded within an executive branch agency, the federal administrative judiciary

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5. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS 3–4 (2007) [hereinafter GAO-08-40, BETTER PLANNING], <http://www.gao.gov/new.items/d0840.pdf>.

6. See 5 U.S.C. § 3105 (2006), which provides:

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

7. News Release, Soc. Sec. Admin., Social Security Hearings Backlog Falls to Lowest Level Since 2005 (Mar. 2, 2010), <http://www.ssa.gov/pressoffice/pr/hearings-backlog-0310-pr-alt.pdf>.

within ODAR is described as “quasi-independent,” functioning this way as a result of the APA, which provides for independent decisionmaking and quasi-independence in tenure and service.

Given the foregoing, the premise underlying this Article and each of its several sections is straightforward: the task of judging embraces discrete skills that cannot be fully maximized absent a jurisprudential environment in which such skills may be fully exercised. Members of the administrative judiciary, appointed under the APA, exercise a judicial function tempered not by original jurisdiction under the law as in the courts, but, as with all executive branch agencies, by congressional delegation of legislative power and derivative regulation implemented by the agency. It is within this cultural milieu that the issue of effective adjudicatory functioning arises; and it is here that many argue the adjudicatory process has faltered. It is here where it must be rejuvenated.

Part I of this Article explores the actions of the agency over time, both as related directly to the role of the administrative law judge in the case management process and to the agency’s management of the backlog crisis generally, examining the cultural environment of bureaucratic management that has, despite the passage of decades, failed to remedy a persistent animus between the agency and its cadre of administrative law judges to the public detriment. Part II next examines the core attributes of the managerial judge and contrasts this in Part III with the agency’s handling of the backlog of disability appeals specifically. Part IV examines the alternative of an independent corps of administrative law judges as a viable means to implement needed case management oversight and Part V summarizes the issues. Appendix I highlights selected GAO reports focused on the agency’s handling of the backlog; Appendix II lists pertinent GAO reports selected over a twenty-year period from 1989 to 2009.

## I. THE CHALLENGE: THE BACKLOG, THE JUDGES, AND THE AGENCY

### A. *The Backlog of Pending Social Security Appeals*

As of this writing, some 700,000 appeals<sup>8</sup> are pending before ODAR—

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8. See *Eliminating the Social Security Disability Backlog: Joint Hearing Before the Subcomm. on Soc. Sec. and Subcomm. on Income Sec. & Family Support of the H. Comm. on Ways & Means*, 111th Cong. 134 (2009) (statement of Hon. Ronald G. Bernoski, President, Association of Administrative Law Judges), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr50764/pdf/CHRG-111hhr50764.pdf> (“Towering over SSA is a backlog of over 765,000 cases claiming disability benefits under Title II and Title XVI of the Social Security Act.”).

most being appeals of the agency's denial of disability claims.<sup>9</sup> This represents almost twice the number of appeals that the agency acknowledges its hearings and appeals system is designed to handle in a timely and effective manner.<sup>10</sup> The resultant delay in hearing and decisionmaking has given rise to numerous reports of human suffering and tragically poignant stories of desperation as Americans seeking much-needed benefits are told to wait.<sup>11</sup> Whether the framers of the Social Security Act envisioned the future scope and breadth of that which they originally conceived cannot truly be known. Today, SSA oversees the world's largest system of administrative adjudication with some 1,300 administrative law judges sited in 169 hearing offices throughout the United States.<sup>12</sup> At issue are appeals from determinations by the agency under Title II and Title XVI of the Social Security Act,<sup>13</sup> primarily related to determinations of entitlement to disability benefits.

The original intent of the framers of the Social Security Act in their description of administrative decisionmaking—including adjudication—is made clear in a 1940 statement by the Social Security Board in which the Board described the anticipated decisionmaking model under the new

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9. See *infra* note 23 (discussing the administrative hearings and appeals process, in which the Social Security Act provides for a tiered decisionmaking/adjudicative process in disability appeals).

10. SSA defines a backlog as a set of cases pending beyond an optimal projected number at the end of a given fiscal year. The Government Accountability Office (GAO) describes SSA's definition of a backlogged case as follows:

SSA measures its claims processing performance at each level of the process in terms of the number of claims pending each year and the time it takes to issue a decision. Since 1999, the agency has used a relative measure to determine the backlog by considering how many cases should optimally be pending at year-end. This relative measure is referred to as "target pending" and is set for each level of the disability process with the exception of the reconsideration level. SSA's target pending is 400,000 for claims at the initial stage and 300,000 and 40,000 for the hearings and Appeals Council stages, respectively. The number of pending claims at year-end that exceed these numbers represents the backlog.

GAO-08-40, BETTER PLANNING, *supra* note 5, at 10.

11. See, e.g., *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 2009: Hearings Before the Subcomm. on the Dep'ts of Labor, Health & Human Servs., Educ. & Related Agencies of the H. Comm. on Appropriations*, 110th Cong. 695, 764–66 (2008), available at [http://www.c-c-d.org/task\\_forces/social\\_sec/CCD-House-Approps-testimony2-28-08.pdf](http://www.c-c-d.org/task_forces/social_sec/CCD-House-Approps-testimony2-28-08.pdf) (Marty Ford, Co-Chair, Social Security Task Force Consortium for Citizens with Disabilities, testifying on reducing the backlog at SSA and on SSA's FY 2009 budget overview).

12. See *Hearings and Appeals, Hearing Office Locator*, SOC. SEC. ONLINE, [http://www.ssa.gov/appeals/ho\\_locator.html](http://www.ssa.gov/appeals/ho_locator.html) (last visited May 14, 2012).

13. See 42 U.S.C. § 901 (2006) (establishing the current independent executive branch agency we know as the Social Security Administration).

Social Security Act “in terms of ‘simplicity and informality’ as well as ‘accuracy and fairness.’”<sup>14</sup> In the words of Paul Verkuil, “The decision model proposed by the Social Security Board was designed to make an enormously complex program work at low cost and with substantial public satisfaction.”<sup>15</sup> The goal identified is transparency in decisionmaking with sustained public approval in meeting the need for clear and timely administrative responses. Unfortunately, the lofty goals of the 1940s—to meet the needs of a nation poised on the brink of a new age—now lie buried, overwhelmed by numbers once not thought possible.

An overview of the decisionmaking and appeals process through which an individual must progress is initially important to understand the context of the Social Security hearings and appeals process. Under the Social Security Act, agency decisions with which a person disagrees proceed through a multistep decision and appeals process. The Act establishes an individual right to a hearing in the event of disagreement with an agency decision.<sup>16</sup> Four internal levels comprise the hearings and appeals process. A person aggrieved by an “initial determination” of the agency may seek “reconsideration.”<sup>17</sup> If after reconsideration a grievance yet remains, the individual may file a request for hearing before a federal administrative law judge.<sup>18</sup> The first two steps in this process are generally paper determinations with no personal inquiry or appearance by the claimant. When a request for hearing is made, the individual claimant is given the opportunity to appear before an administrative law judge, who, appointed under the APA,<sup>19</sup> serves as an independent decisionmaker charged with making “findings of fact, and decisions as to the rights of any individual applying for a payment” under the Act.<sup>20</sup> Upon conducting a hearing, the administrative law judge, acting under a delegation of authority from the Commissioner, “shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner’s findings of fact and such decision.”<sup>21</sup>

If the claimant disagrees with the decision of the administrative law judge he or she may file a “request for review” before the Appeals Council—once again, a paper review of the administrative law judge’s

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14. Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258, 270–71 (1978).

15. *Id.*

16. 42 U.S.C. § 405(b).

17. *Id.* § 405(b)(3)(A).

18. *Id.* § 405(g).

19. 5 U.S.C. § 3105 (2006).

20. 42 U.S.C. § 405(b)(1).

21. *Id.*

hearing and findings.<sup>22</sup> Upon review, the Appeals Council may affirm, modify, or reverse the decision of the administrative law judge.<sup>23</sup> By statute, the aggrieved claimant who still disagrees with the decision of the agency may then seek judicial review.<sup>24</sup>

At stake now is a crisis of pending appeals before administrative law judges—a backlog that has grown despite the agency’s long-standing knowledge of the problem.<sup>25</sup> Repeated unsuccessful attempts by the agency to resolve this crisis have not stilled the cries of the waiting nor salved the pain of those who suffer.<sup>26</sup> The hope of a helping hand has been lost in a system overburdened with bureaucratic initiative, underscored by a growing disenfranchisement of its judges. What was once intended to meet the needs of those who can no longer compete in the workplace has itself become a burden.

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22. See 20 C.F.R. § 404.968 (2011).

23. See Alan G. Skutt, Annotation, *Provision of 42 USCS § 405(g) Making Secretary of Health and Human Services’ Findings of Fact Conclusive If Supported By Substantial Evidence as Applying to Administrative Law Judge or Social Security Appeals Council*, 90 A.L.R. FED. 280, 287, § 2(a) (1988) (“[A]n individual seeking benefits from the Social Security Administration will, in the first instance, receive an initial determination by the agency either granting or denying benefits. If the individual is dissatisfied with the initial determination, he or she may request a reconsideration. The next step in the administrative appeal process is for the individual to file a request for a hearing before an administrative law judge (ALJ). Once the ALJ has rendered a decision, the Social Security Appeals Council may review the decision either on a motion of the individual, or on the motion of the Council itself pursuant to 20 CFR § 404.969.” (footnote omitted)).

24. 42 U.S.C. § 405(g).

25. See GAO-08-40, BETTER PLANNING, *supra* note 5.

Over the last decade, SSA experienced a substantial increase in its backlog of disability claims, with a particularly severe accumulation of claims at the hearing level. From fiscal years 1997 through 2006, the total number of backlogged claims—numbers exceeding the level that should optimally be pending or in the pipeline at year-end—doubled. . . . In fiscal year 2006, 30 percent of claims processed at the hearings stage alone, took 600 days or more.

*Id.* at 3.

26. See, for example, the GAO commentary, which in a summary statement effectively describes SSA’s repeated unsuccessful attempts to resolve the backlog:

Finally, management weaknesses as evidenced by a number of initiatives that were not successfully implemented have limited SSA’s ability to remedy the backlog. Several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the “Hearings Process Improvement” initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it.

*Id.* at 3–4.

### B. *The Judges*

Federal administrative law judges have been described as akin to federal district judges in the Judicial Branch.<sup>27</sup> Administrative law judges serving in the Executive Branch derive their authority both from the APA and, by operation of such statute, derivatively from the agency head.<sup>28</sup> As such they serve as neutral decisionmakers, charged with ensuring that appeals from agency action be handled in a fair, impartial, and timely manner. This has been described as the power to hear and decide. Significant debate, however, exists over the jurisprudential reach of an administrative law judge's mandate to hear and decide within ODAR.<sup>29</sup>

At the outset, when considering this question in light of the overall role of judges within SSA, there is little question but that the agency's cadre of administrative law judges plays a vital role in resolving administrative appeals pending before the agency.

In no small measure, however, can the agency's inability to avoid the current crisis—though it has been growing now for many years—be said to be a direct result of the agency's, and derivatively, Congress's, unwillingness to empower its cadre of administrative law judges as was done in the federal courts when the Judicial Branch faced a similar crisis of rising costs and delay.

Unlike the reformation of the federal courts in the 1990s with the enactment of the CJRA,<sup>30</sup> proposals for reform within ODAR, including calls for a Social Security Court similar to that of the Court of Appeals for Veterans Claims, have been rejected. Also rejected was legislation designed to remove administrative law judges from the agencies in which they now function, establishing a separate adjudicative agency; arguably, some say, a necessary step to enable administrative law judges to return to the task of judging unhindered by unnecessary agency intervention and political

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27. See *infra* note 52.

28. 5 U.S.C. § 556 (2006) provides in part:

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this

title.

29. See, e.g., Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 TULSA L.J. 203, 212 (1996).

30. 28 U.S.C. §§ 471–482 (2006). As the U.S. Senate explained, the purpose of the Civil Justice Reform Act was “to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in our Nation’s Federal courts.” S. REP. NO. 101-416, at 1 (1990).

agendas.<sup>31</sup> These issues are especially visible within SSA, which utilizes a

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31. See, e.g., John Holmes, *In Praise of the ALJ System*, ADMIN. & REG. L. NEWS, Summer 1996, at 3, 17. Holmes writes:

A “Corps Bill” to house all ALJs under one roof has again been proposed in Congress but not acted on during the last session. Proponents allege that such a corps would assure independence from agency pressure, provide more efficient handling of caseloads since ALJs could be assigned on a gradual basis to those areas where more work has been generated, and would provide savings and efficiency through elimination of duplication of material and personnel. Opponents contend there would be a loss of expertise, alleged savings would be ephemeral, and that the proposed bill would shift political pressure to Congress. Some feel Social Security interests would eventually dominate such a “corps.”

....

A well trained, experienced cadre of ALJs exists which is well recognized and respected by practitioners for its judicial integrity, independence, and competence. Not all decisions rendered by federal agencies need be subject to ALJ jurisdiction. Indeed, most decisions do not require hearing. Others are amenable to non-judicial determination such as mediation or other alternative dispute resolution. However, when substantive rights of private parties are affected adversely by agency actions and/or controversy arises between private parties because of agency actions, a competent form of independent, impartial, final decisionmaking is required. In my opinion, Congress should mandate and agencies should use more, rather than less, ALJs. The best manner of obtaining a settlement of a dispute is where all parties are aware that they will obtain a fair, impartial hearing and a relatively prompt, analyzed decision on the merits.

I also note earlier referenced attempts at passage of a so-called administrative law judge Corps Bill, as set forth in the 1983 Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary. *Administrative Law Judge Corps Act: Hearing Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 98th Cong. (1983). The purpose of that hearing was styled, “A Bill to Establish a Specialized Corps of Judges Necessary for Certain Federal Proceedings Required to be Conducted, and For Other Purposes.” *Id.* In a statement before the Subcommittee, Professor Abraham Dash of the University of Maryland School of Law, in endorsing the bill, stated in part:

I am very much for this bill, but I come here with some bewilderment. Bewilderment that the Federal Government in 1983 is still discussing this issue. I know that the files of the committee must have the past record of this issue, but I would like to remind you of that history. Back in 1936, more than 20 years before the APA became law, we had the Norris and the Logan bill, which talked of an administrative court by consolidating our present article I courts with the hearing examiners. This concept failed. Then you have the second Hoover commission of 1955, which recommended a centralized administrative hearing system. I might note that the present bill, under consideration has some of the same principles in it as the Logan bill and Hoover commission report.

The Hoover commission, as I said, in 1955 recommended much the same thing. The Ash Council, in 1971, after another thorough study, talked in terms of an administrative court of appeals, and addressed this issue.

In 1974, the Civil Service Commission report, I think it was known as the LaMacchia Committee, came out for a uniform corps of administrative law judges, after extensive study.

greater number of administrative law judges than all other federal agencies combined.<sup>32</sup> Despite calls for judicial empowerment, administrative law judges within the agency have found their jurisprudential reach going in the other direction.

Instead of empowering judges, the agency has gradually narrowed the judges' case management window, with the latest such action being implementation of regulations potentially curtailing the judge's ability to set the time and place of the hearing. While not applicable to all judges in all circumstances, the regulation focuses on judges who are not functioning as it is perceived they should.<sup>33</sup> This action is unfortunately consistent with a long-standing animus between the agency and its cadre of judges, extending back to the late 1970s when, in 1977, the Association of Administrative Law Judges filed an action before the United States District Court for the Western District of Missouri in response to agency-imposed quotas.<sup>34</sup> While that action was settled with the promise of no future quotas, it did not prevent the agency from pursuing four separate actions against administrative law judges for low productivity in the 1980s.<sup>35</sup>

Suffice it to say, the agency and its judges must find common professional ground. Failure to do so has led to an ineffective long-term resolution of case management issues, which in turn has led to the current backlog. The critical inquiry when examining the history of today's pending administrative caseload is why the agency has not followed the

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In 1977, the Bork Committee of the Department of Justice came out for the same thing. In other words, I think the record is so replete with these recommendations after extensive studies, that it's amazing we haven't done anything about it at this time.

*Id.* at 98; see also Rhonda McMillion, *Autonomy for ALJs: Bills Would Create Independent Corps of Administrative Law Judges*, A.B.A.J., Aug. 1992, at 103 ("The problems that have beset the system, causing judges to sue their employing agencies, and employing agencies to pressure and threaten judges, are not caused by any one agency; they are the result of the conflict caused by housing judges in the very agency whose decisions they review" (quoting Judge Charles Bono, then-President of the Association of Administrative Law Judges).

32. See Schwartz, *supra* note 29, at 213 (showing a table of the distribution of administrative law judges across all federal agencies).

33. See 20 C.F.R. § 404.936(a) (2011), (providing that the agency, as opposed to the administrative law judge, "may" establish the time and place of the hearing: "We may set the time and place for any hearing. We may change the time and place, if it is necessary.").

34. Settlement Agreement, *Bono v. Soc. Sec. Admin.*, Civ. No. 77-0819-CV-W-4 (W.D. Mo. 1979), reprinted in *Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. of the S. Comm. on Governmental Affairs*, 98th Cong. 448 (1983). The Settlement Agreement signed by the parties provides, in part: "[The Office of Hearings and Appeals] will not issue directives or memoranda setting any specific number of dispositions by ALJs as quotas or goals." *Id.*

35. For a discussion of the action undertaken under the Bellmon Amendment, see *infra* note 46.

example of the federal courts in the face of a growing backlog. Why has the agency not empowered its judges? A longitudinal view of the issues surrounding pending appeals before the earlier Bureau of Hearings and Appeals (BHA), the former Office of Hearings and Appeals (OHA), and now ODAR, leads an observer to conclude that the agency response to a growing caseload has been to pursue bureaucratic solutions and establish top-down control mechanisms with hoped-for control of both outcomes and activity.

The result of such actions—whether intended or not—has been a narrowing of judges’ responsibility for case management. For example, as of this writing, despite years of a growing backlog and an increasing number of lawyers and nonlawyers representing claimants in such appeals, no overarching formal rules of procedure govern hearings before Social Security administrative law judges despite calls from the administrative judiciary to implement such rules.<sup>36</sup> Instead, the agency has, over the span of several decades, invoked all manner of administrative “initiatives,” “process improvements,” and disability “re-engineering” efforts, few of which have involved the administrative judiciary, and few of which, as discussed herein, have actually accomplished the intended results.<sup>37</sup> Despite these efforts, the disability appeals backlog has grown to the point that many now suffer as a result of significant delay and unavailability of timely access to de novo appeal procedures before an administrative law judge following an administrative denial.<sup>38</sup> What was intended to be a transparent appeals process with attendant widespread public satisfaction has instead become an opaque, little-understood adjudicatory mechanism whose outworkings have been characterized by at least one national disability law firm as antagonistic and intimidating.<sup>39</sup>

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36. This is not to say that there are no regulations that govern such hearings. To the contrary, a regulatory structure exists, but effectively fails to accomplish long-identified gaps, such as closing the evidentiary record following close of the hearing. *See, e.g.*, Administrative Law Judge Hearing Procedures—General, 20 C.F.R. § 404.944 (2011).

37. *See* GAO-08-40, BETTER PLANNING, *supra* note 5, at 3–4.

38. A bevy of news reports abound. *See, e.g.*, *Disability Claims Spike, Mire Backlogged System*, CBS NEWS (May 18, 2010), <http://www.cbsnews.com/stories/2010/05/11/national/main6471596.shtml>.

39. The Binder & Binder *Newsletter* recites, “WE’LL DEAL WITH THE GOVERNMENT, YOU HAVE ENOUGH TO WORRY ABOUT.” *Binder & Binder Monthly Newsletter*, BINDER & BINDER, <http://newsletter.binderandbinder.com/> (last visited May 14, 2012). The *Binder & Binder Commercial Break* further states, “Reminding you that we are, ‘America’s Most Successful Social Security Disability Advocates’ gives you a little sometimes necessary encouragement when you see our commercials. . . . For the same reason, you like being reminded that we, ‘don’t let anybody intimidate you.’” Dick Summer, *Commercial Break*, BINDER & BINDER, <http://005623d.netsolhost.com/prints/>

The single most significant signpost pointing toward this growing opacity in the disability appeals process—with a resultant inability to resolve the backlog—is the long history of conflict between the agency and its administrative law judges. This broken relationship has even drawn the notice of and comment from the blue-ribbon, presidentially-appointed Social Security Advisory Board. As recently as 2006, the Board urged both the agency and its judges to, in effect, bury the hatchet.<sup>40</sup> That a presidential blue-ribbon advisory panel felt compelled to make such a comment is telling. Such notice is not, however, a new phenomenon.

In 1978, the Social Security Administration departed from the plan laid down by its former Director of the Bureau of Hearings and Appeals, H. Dale Cook, who was appointed to the federal bench in 1974. In 1975, Robert Trachtenberg assumed office and plotted a new course. During Director Cook's tenure, the agency expressed strong arguments in favor of APA applicability before the Civil Service Commission, specifically advancing the need for administrative law judges. Under Director Trachtenberg, however, new initiatives were put into place, which drove the agency into a twenty-five-year period of tension with its judges. Even the staff of the House Ways and Means Committee commented on the long history of conflict between administrative law judges and SSA management in the years since Director Trachtenberg's tenure:

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binder-and-binder-commercial-break.pdf (last visited May 14, 2012).

40. A 2006 report of the Social Security Advisory Board calls for reconciliation between the agency and its administrative law judges:

In our 2001 report on the disability process, we noted a need to change SSA's relationship with its ALJs from one of confrontation to cooperation. There is still a need to improve that relationship. There is a residue of mistrust that goes back at least as far as the late 1970s, when pressures to reduce the number of allowances and increase the number of decisions led to a situation that was described as "an agency at war with itself." Since then, many ALJs have resented what they saw as the agency's failure to consult them about changes that have been made. Lack of consultation on the Hearing Process Improvement initiative implemented in 2000 was a major factor lending support to the formation of the ALJ union. We believe that the SSA-ALJ relationship has improved more recently but still needs attention.

The agency has much to gain from the advice and input of the dedicated professionals in the ALJ corps, at the national, regional, and hearing office levels. The ALJ corps, in turn, needs to acknowledge the agency's legitimate desire to ensure that hearing decisions are made promptly and consistently. There is an understandable and probably inevitable tension between the public's interest in decisional independence and the public's interest in consistency and efficiency, but we believe these interests can be reconciled. We urge SSA and its ALJs to work together to develop reasonable procedures to reconcile them.

SOC. SEC. ADVISORY BD., IMPROVING THE SOCIAL SECURITY ADMINISTRATION'S HEARING PROCESS 15 (2006) (footnote omitted), <http://ssab.gov/documents/HearingProcess.pdf>.

[T]he staff is concerned by the apparent state of BHA administration at the present time. Lawsuits have been filed by BHA employees concerning administration and a multitude of administrative charges have been instituted by both sides. *It is an agency at war with itself. The management and rather substantial numbers of staff are devoting a great deal of their time attacking each other. This time could be better spent serving social security claimants.*<sup>41</sup>

The source of this ongoing animus arguably lies in a fundamental difference in worldview. In effect, Director Trachtenberg changed the agency's culture by adopting a bureaucratic worldview and subsuming the judicial perspective. The result has been both dramatic and, over time, detrimental to the agency's mission as first conceived.<sup>42</sup> In considering the effect of this fundamental change, one must necessarily consider the function of those whom we call "bureaucrats." Bureaucrats attempt to manage and control performance and outcomes to achieve politically designated goals. This concept is inherently anathema to the American ideal of a "fair" hearing that affords an individual fundamental due process rights before an independent decisionmaker who is to render an impartial decision and who is not bound by a predetermined political agenda in which value is placed on consistency and predictability.<sup>43</sup>

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41. Jeffrey Scott Wolfe, *Are You Willing To Make The Commitment In Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 237–38 n.268 (2002) (alteration in original) (quoting STAFF OF SUBCOMM. ON SOC. SEC. OF THE H. COMM. ON WAYS & MEANS, 96TH CONG., SOCIAL SECURITY ADMINISTRATIVE LAW JUDGES: SURVEY AND ISSUE PAPER 3 (Comm. Print 1979)).

42. See *supra* note 26 and accompanying text.

43. See, e.g., Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians? Part I: A Single Policy Task*, 97 AM. ECON. REV. 169 (2007). Alesina and Tabellini note:

A recent principal-agent literature addresses related issues in career-concerns models. Mathias Dewatripont, Ian Jewitt, and Jean Tirole [ ] discuss the foundations of this approach and apply it to study the behavior of government agencies. They focus on some issues related to ours, namely the nature and "fuzziness" of the agencies' mission, but they do not contrast bureaucratic and political accountability. Eric Maskin and Tirole [ ] investigate the attribution of responsibilities between accountable and nonaccountable agents. The latter have intrinsic motivations, while the former seek to please their principals because of implicit rewards (career concerns). In our set up, instead, we neglect the role of intrinsic motivations. Both bureaucrats and politicians need to be kept accountable with implicit incentives, but the implicit incentive schemes can be of two kinds: those that define a politician (striving for reelection), and those that define a bureaucrat (career concerns). Christian Schultz [ ] contrasts direct democracy, representative democracy, and bureaucratic delegation. *Like Maskin and Tirole . . . he views bureaucrats as unaccountable and focuses on the trade-off between ideological polarization and accountability: bureaucrats are less polarized than partisan politicians, but are more inflexible since they are unaccountable and cannot be removed after shocks to the voters' policy preferences.*

*Id.* at 170 (emphasis added).

Bureaucrats are less flexible in their actions with a correspondingly reduced ability to adapt to a changing environment with creativity and innovation.<sup>44</sup> They are perceived as the mirror image of the American ideal of a fair-minded judge who acts not on a political agenda but who seeks the “right” result regardless of political cost. No citation of authority is needed to state that Americans seek a fair shot at overturning a prior unfavorable result. Fair play and due process are fundamental ideals of American culture. Americans are desirous of a fair opportunity to convince a neutral decisionmaker of the efficacy of their cause. In such a setting there is no external control or management over the outcome—only the doing of that which Americans cherish—the furthering of the ideals of justice and fair play.<sup>45</sup> The growing tide of such appeals has strained a bureaucratically managed judicial system, a fact evident from the existence of the backlog itself. That the agency has attempted to bureaucratically manage a judicial system while withholding necessary tools from its judges, with singularly poor results, is evident from its actions dating back to the 1980s. In a strange scenario played out in reverse, the agency brought a challenge to its judges’ decisionmaking when it implemented the so-called Bellmon review.<sup>46</sup> Judges whose “favorable” decision rate, that is, whose

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44. *Id.*

45. Nowhere is this more significant than in Social Security appeals proceedings. Unlike regulatory agencies, individual decisions by administrative law judges in Social Security cases do not determine agency policy. See Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965 (1991), in which the author notes the inherent difference between regulatory agencies which establish essential agency policy through individual precedential adjudications and mass-justice benefits agencies, such as SSA, where individual adjudications are not policymaking or precedential.

For agencies with extremely large caseloads, typically no individual disposition decisions are salient in themselves. Important issues of policy are resolved in generic rulemaking proceedings which produce standards governing behavior or the disposition of future cases. This type of caseload, accordingly, tends to be centered on the resolution of factual disputes rather than policy issues. For this type of caseload, adjudication of cases by a separate or quasi-separate administrative organ is the best response. Indeed, in the case of large-scale benefit or other programs, the volume of adjudication may be so large as to render ineffective attempts to control policy through the administrative appellate review process.

*Id.* at 998–99.

In the mass-justice agency, rulemaking is the primary policymaking vehicle. Unfortunately, SSA’s reluctance to implement comprehensive Rules of Procedure place it in a role more akin to that of a regulatory agency, reserving the right of agency review of individual decisions as if same were precedential; which, of course, they are not, given the sheer number of cases decided.

46. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HRD-89-48BR, RESULTS OF REQUIRED REVIEWS OF ADMINISTRATIVE LAW JUDGE DECISIONS (1989) [hereinafter

reversal of underlying administrative denials reached 70%, were targeted for disciplinary action, including “re-education” by the agency. In a series of legal actions challenging the agency’s actions, individual administrative law judges argued the agency action violated the APA. The U.S. Court of Appeals for the Second Circuit, in *Nash v. Bowen*,<sup>47</sup> described the agency action toward its administrative law judges as nothing short of coercion:

The point is that the “Bellmon Review Program” is for all intents and purposes the same as the “Quality Assurance System” considered herein, i.e., the targeting and pressuring of ALJs with high allowance of benefit rates (a/k/a “reversal” rates) to fall into line or be subjected to disciplinary action.

....

The Secretary’s “reversal” rate policy embodied in the “Quality Assurance System,” however, is cause for concern. To coerce ALJs into lowering reversal rates—that is, into deciding more cases against claimants—would, if shown, constitute in the district court’s words “a clear infringement of decisional independence.”<sup>48</sup>

Rather than focus upon the issues that have traditionally concerned judicial case management—rising costs and increasing delays—the agency, in implementing the Bellmon review, seemed animated by the political question of whether too many were being granted benefits. The “bureaucratic” concern thus evidenced was improperly placed on the outcome of the case by questioning the substantive performance of the judges rather than modifying the underlying criteria for award of Social Security benefits, with little attendant concern for the growing backlog. This example portrays the agency’s misplaced emphasis, especially in a system where individual adjudicative decisions do not affect overall Social

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GAO/HRD-89-48BR, REQUIRED REVIEWS]. The Report notes:

Social Security disability claimants whose initial benefit applications are denied may appeal through several layers of administrative and judicial processes. However, the appeal process is very time-consuming. For some claimants, even favorable decisions by administrative law judges (ALJs) are delayed because they are chosen at random for further review by the Social Security Administration’s (SSA’s) Appeals Council. In many cases the delay is only a month or so, but some cases are delayed several months while subsequent appeals are considered.

This random review process is carried out under the Bellmon Amendment (96-265, sec. 304(g)) passed in 1980. Early reviews under the amendment were directed at ALJs who issued favorable decisions in 70 percent or more of their cases and were so controversial they led to a lawsuit by the Association of ALJs. The controversy and lawsuit resulted in restrictions on the use of Bellmon review data that limited the program’s value for quality assurance purposes.

*Id.* at 1.

47. 869 F.2d 675 (2d Cir. 1989).

48. *Id.* at 679, 681.

Security policy. It is a revealing window into the agency's cultural environment.

To set due process as an overarching goal requires a cogent, well-defined infrastructure, free of political interference. It becomes an even more complex undertaking if burdened by politically driven outcomes. As a matter of practical jurisprudence, due process in American juridical systems occurs within a human system whose defining characteristics embody concepts of justice and fair play tempered by compassion. Considering both the black letter of the law and the otherwise real context of disparate human life, the American ideal of justice necessarily asks, *What is the right thing to do?* This is a decision often sheltered in gradations of gray. This is especially so in the fact-intensive undertaking made by federal administrative law judges in Social Security disability appeals. These essential American ideals run contrary to the demand for control, political consistency, and predictability inherent in modern notions of a politically-activated bureaucracy. Here lies the impetus, if not the roadblock, to change in Social Security's disability appeals system. What is required is a fundamental cultural change within the agency's worldview, ending the "Trachtenberg Era," whose legacy dates to 1975, and beginning anew an era in which politically independent judges, and not agency managers, administer a judicial system.

### C. *The Agency*

Viewed from a wider perspective, the agency's apparent historical animus toward its administrative law judges and the corresponding resistance by judges to the demanded predictability of bureaucratic and politically motivated outcomes appears to rest squarely on inherent tensions that arise in the placement of a judicial system within an executive branch bureaucracy. These tensions are exacerbated by the agency's seeming confusion of roles—treating what are fact-intensive hearings as if such hearings were policymaking—when, as a matter of Executive Branch functioning, such hearings cannot by definition play such a role. The sheer number of such hearings belies such a result.<sup>49</sup>

In advocating such a view, one necessarily embraces the attendant corollary: the goals, worldview, and functioning of bureaucracies fundamentally differ from those of judicial systems. And while one might argue the system of adjudication mandated by the APA<sup>50</sup> necessarily places administrative law judges inside the bounds of executive branch agencies,

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49. See 5 U.S.C. § 3105 (2006).

50. 5 U.S.C. §§ 554, 556 (2006).

the sheer size of the modern adjudicatory system of disability appeals exceeds that envisioned in 1946 when the APA was passed—most certainly by several orders of magnitude.<sup>51</sup> The growth of this system of administrative adjudication—populated not primarily by “managers” but by legally trained professionals serving in a role likened to that of the federal judiciary<sup>52</sup>—has fundamentally changed the system as originally envisioned. Despite this evolutionary change, Social Security “managers” continue to circumscribe the role of the administrative judiciary, seeking greater control over its members as the spiraling backlog continues.<sup>53</sup>

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51. For example, in *Richardson v. Perales*, the Supreme Court first noted that “over 20,000 disability claim hearings [are held] annually.” 402 U.S. 389, 406 (1971). To the Court, this was a “structure of great and growing complexity”: “Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.” *Id.* at 410. Today, more than thirty times as many appeals are pending. One cannot but wonder whether the Court would, today, declare that the disability appeals system is “working well” as it did in 1971.

52. *See Butz v. Economou*, 438 U.S. 478, 513 (1978) (noting that an administrative law judge performs a “functionally comparable” role to a judge and that “the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.”). A number of lower court decisions have echoed the *Butz* ruling, reaffirming the Court’s declaration that “the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.” *Id.* at 514.

53. The situation brings to mind the counter-intuitive lessons in learning to fly, and more particularly, learning to escape a spin. In the words of an Army pilot:

One of the maneuvers that I was taught was how to put the plane into a spin and bring it back to level flight. It was fairly easy to start the spin, we just slowed the plane down and pulled the nose up so that it was not hardly flying and it would begin the spin.

Now came the hard part, getting it back to straight and level flight. This plane was pointed almost straight down at the ground and spinning. The natural inclination was to take the stick and, if the spin was to the right, pull the plane back to the left. But, if we did this, it would begin spinning to the left and in a tighter spin.

The way to get this plane out of the spin and back flying the way it was supposed to fly was to take your feet off of the pedals and let go of the stick. If you did this, it would just fly its self right out of the spin and back to normal flight. If you would fight with the plane, it would continue to spin until it crashed into the ground.

Learning to do that was one of the hardest things that I had to learn in all of flight school. Learning to let go and let it happen.

*See Stay In the Now, I've Got You*, HAPPYNESS IS A CHOICE.COM, <http://happynessisachoice.com/articles/acceptance/stay>. The lesson illustrates human nature generally, and describes agency behavior as regards the administrative judiciary, specifically. A natural, virtually instinctive response when faced with crisis is to seize control and attempt to *do* something. It is counter-intuitive to let go. Rather than let go and thereby avoid a crash, agency managers have grasped an even tighter hold, effectively

Administrative law judges, foreclosed from many of the procedural tools they deem necessary to accomplish the task before them, seek to improve their professional functioning as judges. The result? A clash of worldviews, resulting in ongoing calls from the Social Security Advisory Board, the American Bar Association, and the Association of Administrative Law Judges to resolve these differences. Setting aside the arguments on each side, it is at bottom an animus ill-suited to the task of public service so significantly involving the welfare of the American people.

At this juncture in American history, the situation is straightforward, if not difficult to embrace. The Nation's disability appeals system has grown beyond its founding roots. The evolution of the system of disability benefits began with a fundamental shift in national perspective in 1935 with the passage of the Social Security Act.<sup>54</sup> In the midst of the Great Depression, Americans in a competitive, capitalist society gained an assurance that their contributions as American workers would not go unrewarded, such that a small benefit was made available upon retirement, which today has become a mainstay of millions of Americans in their elder years. In the 1950s, Americans recognized that this same benefit should be extended to those not yet of retirement age but who, because of disabling physical or mental conditions, could no longer compete in order to meet minimum daily needs for sustenance and shelter. This benefit, too, has gained a significant place in American society.<sup>55</sup>

While retirement benefits are generally a function of numerical analysis (quarters paid, amounts earned, etc.), the question of entitlement to disability benefits is far more subjective—embracing legal, vocational, and medical issues—and is often open to varying interpretation. By operation of law, the subjective nature of these determinations warrants an opportunity to be heard—to present evidence and testimony in aid of the claim.

As discussed herein, arguably, the ability of the agency to meet the demands of this due process requirement has been outstripped by the need for greater and greater numbers of such hearings, resulting in a hearings backlog of such duration and extent that it is now a “crisis.”<sup>56</sup> As a result, it

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ignoring the solution of letting go (and unleashing the talents of its administrative law judge corps).

54. For an historical overview of the Social Security Act and history leading to that point in time, see *Historical Background and Development of Social Security*, SOC. SEC. ONLINE. (Dec. 6, 2011), <http://www.ssa.gov/history/briefhistory3.html> (last modified Dec. 6, 2011).

55. See *A History of the Social Security Disability Programs*, SOC. SEC. ONLINE. (1986), <http://www.ssa.gov/history/1986dibhistory.html> (last visited May 14, 2012).

56. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, SOCIAL SECURITY DISABILITY: DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY

is important to recognize the systemic inadequacy of the bureaucratic worldview: the demand by the agency upon its judges for resolution of dramatically increased numbers of pending disability appeals has not resulted in a wider empowerment of administrative law judges by the agency but has instead seen the agency invoke repeated nonjudicial attempts to remedy the situation while simultaneously narrowing the role of the administrative law judge. This is no more plainly illustrated than by the recent change in regulation potentially limiting the ability of the administrative law judge to set his or her own docket.<sup>57</sup>

## II. JUDGING AND THE EFFECTIVE DISPOSITION OF CASES: THE MANAGERIAL JUDGE, THE CJRA, AND THE FRCP

Judging and effective disposition of cases are invariably functions of caseload management—a task historically associated with the professional functioning of judges. In this, the lessons from the federal courthouses are instructive in the current Social Security backlog crisis.

In the late 1970s and '80s, increasing caseloads and resulting delays in the United States courts brought this reality into focus: to be effective, a judge was no longer simply required to hear the evidence in an individual case, ensure justice was done, and make a decision when the parties indicated the case was ripe for decision. Leaving the pace of the litigation to the parties often resulted in unwelcome delay as one party sought—for both tactical and strategic reasons—to slow the litigation process to the detriment of his opponent. This resulted in a growing perception that the judicial system was unresponsive to societal needs. Calls were made for change from within the system. The role of the effective judicial officer was seen as changing to fulfill the equitable maxim, “Justice delayed is justice denied.”<sup>58</sup> Doing so meant learning to engage in proactive pretrial case management in an effort to bring pending cases to a more swift resolution. Then-Chief Judge Robert Peckham, of the U.S. District Court for the Northern District of California, makes the point plainly:

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CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION (2002) [hereinafter GAO-02-322, DISAPPOINTING RESULTS]. The GAO stated, in part:

This [Hearing Process Improvement] initiative was implemented nationwide in 2000.

The initiative has not improved the timeliness of decisions on appeals; rather, it has slowed processing in hearings offices from 318 days to 336 days. As a result, the backlog of cases waiting to be processed has increased substantially and is rapidly approaching crisis levels.

*Id.* at 3.

57. Compare 20 C.F.R. § 404.936 (2010), with 20 C.F.R. § 404.936 (2011).

58. THE YALE BOOK OF QUOTATIONS 312 (Fred R. Shapiro ed., 2006) (quoting William E. Gladstone, British Prime Minister (1868–1894)).

Traditionally, judges have been depicted solely as dispensers of justice, weighing opposing evidence and legal arguments on their finely-calibrated scales to mete out rewards and punishments. Until quite recently the trial judge played virtually no role in a case until counsel for at least one side certified that it was ready for trial. But today's massive volume of litigation and the skyrocketing costs of attorney's fees and other litigation expenses have, by necessity, cast the trial judge in a new role, that of pretrial manager.<sup>59</sup>

The judge as pretrial manager views his or her role in the light of increasing caseloads with attendant increases in the cost of access to courts and resultant delay once there. This worldview is both specific to the needs of individual cases as well as societal recognition that delays in individual cases result in system-wide general delay. As one writer observes:

Advocates of managerial judging point to several indications that action is needed. They cite the growing caseload of the federal judiciary. They express concern with the changing nature of civil litigation: new causes of action have expanded the judicial role and challenged the limits of judges to reform institutions and to remedy social ills. More recently, the rising cost of civil litigation has come to the fore as a major justification for managerial judging.

For now, it is not important to debate whether any of the purported justifications for managerial judging are valid. What is more important is to recognize that the advocates of managerial judging are making a fundamental critique of the existing procedural regime. The present structure of civil procedure, they say, necessarily fails to achieve its self-proclaimed goal of "the just, speedy, and inexpensive determination" of controversies if left to its own devices.<sup>60</sup>

Faced with institutional erosion in the form of increasing costs and delays, the courts recognized a critical need to broaden the judicial role to encompass the entire life cycle of a case, from the moment of its filing to its eventual disposition.<sup>61</sup> No longer was the judge to be a passive participant awaiting word from the lawyers that the case was now ready for trial. This

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59. Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 770 (1981).

60. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309-10 (1986) (footnotes omitted).

61. See Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 90 (1993) ("Congress passed the Civil Justice Reform Act during 1990 because of mounting concern over abuse in civil litigation, particularly in the discovery process; the growing costs of resolving civil lawsuits; and decreasing federal court access in those cases. For a decade and a half, many federal judges, led by Chief Justice Warren Burger, had contended that the federal judiciary was experiencing a litigation explosion and increasing discovery and litigation abuse." (footnote omitted)).

was evident in the passage of the CJRA.

The CJRA was enacted “to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy and inexpensive resolution of civil disputes in our Nation’s federal courts,”<sup>62</sup> in recognition of a growing concern by federal judges that “a litigation explosion was taking place in the federal courts, resulting in increased discovery and litigation abuse.”<sup>63</sup>

The legislative history indicates that the central purpose of the Civil Justice Reform Act is to accomplish the often stated but frequently unachieved goal of Rule 1 of the Federal Rules of Civil Procedure: to ensure the “just, speedy, and inexpensive determination” of civil disputes in federal courts. The legislative history notes that “[h]igh costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled. By improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers.”<sup>64</sup>

Integral to the implementation of the CJRA are core concepts of managerial judging such that district judges working with required CJRA Advisory Committees within each of the ninety-four federal districts were to devise individual cost and delay reduction plans, to be implemented within the district through “adoption of the specific methods of litigation management and cost and delay reduction.”<sup>65</sup> These concepts of judicial management included:

- “early and ongoing judicial management of cases”
- “management of the discovery process”
- “authorizing judges to explore settlement in complex cases and requiring parties to have attorneys with settlement authority present at conferences”
- “‘systematic [and] differential treatment of civil cases that tailors the level of individualized and case specific management’ to factors including ‘case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation

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62. S. REP. NO. 101-416, at 1 (1990).

63. Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521, 1524 (1993).

64. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 390 (1992) (alteration in original) (footnote omitted) (quoting S. REP. NO. 101-416, at 1 (1990)).

65. Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 843–45 (1994).

and disposition of the case.”<sup>66</sup>

Review of the original report<sup>67</sup> giving rise to the CJRA captures the essence of the revolution in judicial activism that the Act sought to encourage: CJRA plans “should also recognize that there has not been adequate utilization of available and existing tools to respond to this substantially changed civil litigation system, to control cost and delays.”<sup>68</sup> The legislation thus sought to:

- (1) Build reform from the bottom up;
- (2) Promulgate a national, statutory policy in support of judicial case management;
- (3) Impose greater controls on the discovery process;
- (4) Establish differentiated case management systems;
- (5) Improve motions practice and reduce undue delays associated with decisions on motions; and
- (6) Expand and enhance the use of alternative dispute resolution.<sup>69</sup>

In so acting, Congress sought to encourage proactive judicial involvement in all federal civil actions, adopting a national public policy calling for creative judicial management of civil litigation at an early stage in the proceedings to curb cost and delay. Congress demanded that federal judges abandon a passive stance and no longer leave to counsel the decision to signal when a case is ready for trial. Instead, early hands-on judicial case management was to extend to the case from the moment of its filing, involving the assigned judge at the beginning of the litigation to ensure effective, efficient, and timely case management, and ultimately a less costly disposition without undue delay.

For the agency the question of effective judicial involvement by federal administrative law judges in case management is a question of an expanded judicial role. The nature of the backlog crisis is described by the same problems federal courts confronted and whose resolution was and remains a logical response. Professor Judith Resnik frames the issue in her 1982 seminal article, *Managerial Judges*. Quoting both the *Commentary of the Mishnah* and the Preface to the *Manual for Complex Litigation*, Professor Resnik offers pithy guidance to the problem of case management, evincing a philosophical notion of the proper judicial role:

Should you be called upon to function as a judge, do not be like the legal

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66. Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1456–60 (1994) (footnote omitted) (quoting 28 U.S.C. § 473(a)(1) (2006)).

67. See BROOKINGS INST. TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989); see also Robel, *supra* note 66, at 1450.

68. See Robel, *supra* note 66, at 1460.

69. Mullenix, *supra* note 64, at 391 (quoting S. REP. NO. 101-416, at 15 (1990)).

advisors who offer to place their juridical knowledge at the service of the litigating parties. . . . [Y]ou must remain silent and abstain from interference in the arguments . . . . Do not by even so much as a gesture seek to influence either prosecution or defense.

And:

There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management.<sup>70</sup>

The traditional judicial role stands out against the emergent judicial role of judge-as-pretrial-case-manager. Professor Resnik observes that the modern judicial role encompasses a view of judicial activity as extending from the filing of the case to its ultimate disposition.<sup>71</sup> She describes this then-new role as “shepherding the case to completion.”<sup>72</sup> *Shepherding* contemplates greater familiarity with the case at a much earlier time in the life of the litigation. In this, she asserts judicial management is the new form of “judicial activism” but warns that such “judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their decisions.”<sup>73</sup> She nevertheless acknowledges that the world of judging has, indeed, changed:

Today the unhyphenated “pretrial” is a stage unto itself, no longer a prelude to trial but rather assumed to be the way to end a case without trial. Today’s rule brims with details about what judges are supposed to do, including establishing “early and continuing control,” organizing discovery, “facilitating the settlement of the case,” and referring parties in appropriate instances to “special procedures” (such as arbitration or mediation) “to assist in resolving the dispute.” In the contemporary rule, we find the managerial judge, the settlement judge, the dealmaking judge, [and] the judge promoting alternative dispute resolution.<sup>74</sup>

*The Federal Rules of Civil Procedure* as amended undeniably reflect this proactive approach beginning with Rule 1, which establishes a lens through which the balance of the Rules—and correspondingly, the actions thereunder—are to be viewed: “[The Rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>75</sup> Rule 16, as Professor Resnik notes, provides for detailed management of every civil action, requiring, in part:

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70. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982) (alterations in original).

71. *Id.* at 378.

72. *Id.*

73. *Id.* at 380.

74. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000) (emphasis omitted) (footnote omitted).

75. FED. R. CIV. P. 1.

In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation, and;
- (5) facilitating settlement.<sup>76</sup>

Rule 16 further requires entry of a scheduling order “as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.”<sup>77</sup> Entry of a scheduling order is thus mandatory. A pretrial conference may then address a variety of matters, including “special procedures for managing potentially difficult or protracted actions” and “facilitating in other ways the just, speedy, and inexpensive disposition of the action.”<sup>78</sup> In the words of one writer,

Rule 16 is explicitly intended to encourage the active judicial management of the case development process and of trial in most civil actions. Rule 16 calls on judges to fix deadlines for completing the major pretrial tasks and encourages judges to actively participate in designing case-specific plans for positioning litigation as efficiently as possible for disposition by settlement, motion, or trial. Rule 16 authorizes and regulates use of a wide range of case management tools and powers—principally through pretrial conferences. It also authorizes a wide range of sanctions for violations of pretrial orders.<sup>79</sup>

The managerial judge in the federal court is thus equipped with the tools to engage in proactive case management from the outset of litigation, able to reach into his or her quiver and bring forth a variety of arrows in an attempt to resolve the case before trial; or if not, to resolve the case in a timely manner in the courtroom. Effective judging is seen to embrace effective—that is, timely—and just case disposition. Among the options available are various pretrial settlement mechanisms including ENEs (early neutral evaluations), mini-trials, summary jury trials, and settlement conferences. This is further encouraged by the Alternative Dispute

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76. FED. R. CIV. P. 16.

77. FED. R. CIV. P. 16(b)(2).

78. FED. R. CIV. P. 16(c)(2), (2)(L), (2)(P).

79. 3 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* 16-1 (3d ed. 2011); see also Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence With Civil-Law Judging*, 36 SW. U. L. REV. 191, 196 (2007).

Resolution Act of 1998,<sup>80</sup> which provides that every U.S. District Court “shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.”<sup>81</sup>

A principal player behind the codification of judicial management as reflected in the CJRA was then-United States Senator Joseph Biden, who as Chair of the Senate Judiciary Committee commissioned the Brookings Institution in conjunction with the Foundation for Change to form a “task force to ‘develop a set of recommendations to alleviate the problems of excessive cost and delay.’”<sup>82</sup> The findings of the task force became the basis for the CJRA.<sup>83</sup>

In 1994, then-Senator Biden wrote in the *Stanford Law Review*:

For many years, the federal courts were the preferred forum for many litigants, but recently public confidence in the federal courts’ ability to provide the “just, inexpensive, and speedy determination of every action” has begun to erode. . . . *Court congestion has become pronounced, particularly for civil cases, as crowded dockets and inefficient procedures combine to make litigation expensive and delays lengthy.* As a result, economic concerns rather than the merits of a case too often govern the decision to file a civil suit. In a society where access to justice is implicit in our Bill of Rights, *the closing of the courthouse doors to ordinary citizens threatens not only the judicial system’s operation, but also the integrity of the democratic system.*<sup>84</sup>

Then-Senator Biden thus viewed as critical the need for active and expanded judicial management of civil cases as a means to reverse a growing delay of such magnitude as to effectively close the courthouse doors to the majority of the American people—a virtual collapse of the system of justice if unchecked. The CJRA was necessary to “restore public confidence.”<sup>85</sup> Of particular note was the perceived need for congressional action. As with the current crisis confronting SSA, Senator Biden wrote of the federal court system:

These consensus-building efforts would have been futile without the legislature’s involvement. Prior to the CJRA’s enactment, the federal

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80. 28 U.S.C. § 651 (2006).

81. *Id.* § 651(b). Rule 23 also authorizes extensive judicial management procedures in class actions by conferring broad authority to make appropriate orders to determine the course of the proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument, in addition to conferring authority to make appropriate orders to deal with similar procedural matters. Rowe, *supra* note 79, at 196–97.

82. Johnston, *supra* note 65, at 837 (quoting BROOKINGS INST. TASK FORCE ON CIVIL JUSTICE REFORM, *supra* note 67, at vii).

83. *Id.*

84. Biden, *supra* note 1, at 1285–86 (emphases added) (footnotes omitted).

85. *Id.* at 1286.

judiciary's recent history was replete with proposals to reform the civil justice system from groups such as the American Bar Association, the Association of Trial Lawyers of America, and the American Law Institute. *Yet despite the warning bells and the calls for change from both inside and outside the judiciary, the rule changes recommended to Congress by the Judicial Conference remained largely ineffectual.*<sup>86</sup>

The lessons from the federal courthouse apply equally to the backlog crisis now facing the agency and ultimately, the American people. Those who assess the proactive role of the modern federal judge agree, "If judges did not intervene in the morass that is modern litigation, this would clog dockets, increase litigation costs, and free litigants to use litigation's expense and delay to gain unfair tactical advantages over their adversaries."<sup>87</sup> Why is it different for the backlog now facing the agency?

In Judge Peckham's words:

Pretrial management of cases has become a necessary device for dealing with our judicial system's bursting calendars. It has proven to be an advantage to litigants and not merely a necessary evil. The scheduling function served by the early status conference has proven to be a particularly effective device for increasing the productivity of courts and minimizing the cost of litigation. Moreover, in the pursuit of efficiency we have discovered a way to improve our trials by making them better organized and, I believe, more comprehensible to the lay juror. . . . Pretrial properly focuses the action on the search for truth rather than on gamesmanship.<sup>88</sup>

The solution adopted by the courts to growing delay and increasing costs (with a resultant lack of public access to and confidence in the federal courts) was to *expand* the active role of the judge in case management, beginning at the initial filing of the case through to completion. These measures allow the judge to bring his or her full decisionmaking power to bear in the whole of the case—from its inception to completion—enabling greater flexibility and creativity in handling and disposing of cases throughout the litigation. Case resolution is no longer limited simply to disposition by trial, or by prolonged traditional methods employed by counsel, who by definition could not effectively resolve delay caused by a recalcitrant opponent absent court intervention.<sup>89</sup>

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86. *Id.* at 1291 (emphasis added) (footnote omitted) (noting that the American Bar Association, Association of Trial Lawyers of America, and the American Law Institute all had proposals to reform the civil justice system).

87. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 42 (2003).

88. Peckham, *supra* note 59, at 804–05.

89. Delay for the sake of delay often benefits the defendant in an adversarial proceeding, for delay maintains the status quo *ante*, enables the passage of time, the fading of memory, and the disappearance of evidence and witnesses. *See, e.g.,* Engalla v. Permanente

These same solutions can and should be applied to the backlog crisis now threatening public confidence in and access to the Nation's system of disability claims and appeals. Effective judging requires effective case management. Administrative law judges, before whom hundreds of thousands of Americans appear each year, should be enabled to apply the full measure of their ability to decide through the life of the case—from the time a request for hearing is filed to entry of a final decision. Effective case management tools should be formulated and rules enacted, enabling members of the administrative judiciary within the agency to take an expanded and proactive role in the life of all cases that they will ultimately decide. The question is, why not empower administrative law judges with effective case management tools from the outset of a case?

### III. ADJUDICATORY INERTIA WITHIN THE AGENCY

To answer the question requires the asking of yet another question. Why has the case management role of the administrative judiciary within the agency narrowed rather than grown in response to a growing backlog? What has prevented the agency from expanding the role of judges in addressing pending hearings? The answers to these questions require an understanding of the adjudicatory inertia that pervades the agency's approach to problem solving.<sup>90</sup>

The crisis now facing the agency finds its genesis in a long history of attempts to redress a growing caseload through management-driven initiatives and process improvements, which did not result in any effective solution to the problem but did serve to further isolate the agency's cadre of administrative law judges from the problem-solving roundtable. The collective results of these various management-driven solutions have served to cement the agency into a pattern of adjudication little changed since the 1970s.

The true measure of the extent of this adjudicatory stasis is seen in the agency's multiple remedial attempts, resulting not in a reduction of the growing backlog but in an escalation of the problem to crisis proportions. Review of these various process improvements and initiatives shows that all are bureaucratic add-ons—programs largely outside the adjudicatory framework, described in their best light as parallel attempts to address the pending caseload with little or no judicial involvement in either their inception or implementation.

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Med. Grp., Inc., 938 P.2d 903, 918 (Cal. 1997).

90. When examining these issues it is also necessary to examine pertinent GAO findings verbatim, and so excerpts from such reports are reproduced here in order to better understand and communicate the context of the findings.

Succinctly stated, the agency has not sought to change an adjudicatory model that has subsisted in its present form for more than fifty years. Given the failure of management-driven solutions, the present backlog augurs for just such a change. When first devised, the hearings process was conceived as nonadversarial, adopting an inquisitorial jurisprudence akin to that found in judicial systems in continental Europe. Professor Robert M. Viles undertook a comprehensive study of the Social Security disability system in 1968.<sup>91</sup> He describes the hearing procedure in the words of one hearing examiner:

In 99% of the cases, people come in without any representation. It is my job to represent those people when they come in. It seems strange, but we use the terminology that we ‘wear three hats.’ We put on the first hat, and we represent the claimant, we present all the testimony on his behalf, and drag it out of him by questioning. We then represent the government, the Social Security Administration, and search the law—that’s the second hat. We search our minds, and we search whatever other records are available, we search the evidence, and we present the best case that the government has. Then we turn around and put on the third hat, and we decide which evidence is most favorable, and in whose behalf.<sup>92</sup>

This model remains today despite the fact that the number of pending appeals has grown nationally from 20,000 in 1971<sup>93</sup> to over 700,000 today, and the percentage of persons represented by counsel has grown to almost 80%.<sup>94</sup> Hearing examiners are now administrative law judges, but as recently as 2000, the U.S. Supreme Court recognized the inquisitorial nature of the administrative hearing undertaken by Social Security

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91. Robert M. Viles, *The Social Security Administration Versus the Lawyers . . . And Poor People Too* (pts. 1 & 2), 39 *Miss. L.J.* 371 (1968), 40 *Miss. L.J.* 24 (1968).

92. 40 *Miss. L.J.* at 40–41 (quoting *Rausch v. Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967)).

93. See, e.g., *Richardson v. Perales*, 402 U.S. 389, 406 (1971) (“With over 20,000 disability claim hearings annually, the cost of providing live medical testimony at those hearings, where need has not been demonstrated by a request for a subpoena, over and above the cost of the examinations requested by hearing examiners, would be a substantial drain on the trust fund and on the energy of physicians already in short supply.”).

94. A September 2007 report by SSA’s Office of Inspector General (OIG) shows that in fiscal year 2006, 439,000 of the 559,000 claims heard by administrative law judges were represented by attorney and nonattorney representatives, representing claimants in almost 80% of all claims appealed. Examined another way, the OIG notes, “[i]n FY 2006, approximately 26,000 attorneys and 5,000 non-attorneys represented claimants before ODAR.” OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., A-12-07-17057, CLAIMANT REPRESENTATIVES BARRED FROM PRACTICING BEFORE THE SOCIAL SECURITY ADMINISTRATION 1 (2007), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf>.

administrative law judges.<sup>95</sup>

The push by administrative law judges for expanded case management authority has sparked a debate over the question of judicial independence under the APA.<sup>96</sup> The agency's view is straightforward. An administrative law judge's role is strictly limited to "decisional-independence," restricting the judge to conducting the hearing and thereby largely reserving to the agency prehearing case management. Under this view, the agency reserves to itself the right to frame a judge's functioning within the larger structure of the agency: "[I]n spite of the ALJ's complete independence of decision, he/she is a part of and is under the administrative direction and control of his employing agency."<sup>97</sup>

In a January 31, 1997, memorandum on SSA hearings titled *Legal Foundations of the Duty of Impartiality in the Hearing Process and its Applicability to Administrative Law Judges*, then-General Counsel Arthur Fried wrote:

SSA's and the claimant's ability to benefit from the highest quality and most efficient service of the ALJ corps is undermined by the differing and often contradictory understanding in various parts of the Agency of . . . "decisional independence." This confusion exists about both the meaning of "decisional independence," and the extent to which such independence limits the otherwise appropriate authority of the Agency to manage the performance of the ALJ corps.<sup>98</sup>

General Counsel Fried thus framed it this way:

[T]o what extent may SSA manage the performance of the ALJ corps? Inherent in the concept of "management" is "control." During the 1980s, SSA "attempted to exercise control" over ALJs in three respects: (1) it demanded greater ALJ productivity, (2) it demanded greater consistency in ALJ decision making, and (3) it altered the "proportion of cases in which they granted or denied benefits."<sup>99</sup>

The agency focus on control over administrative law judges stands in stark contrast to the CJRA and the efforts of the federal courts to endow

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95. *Sims v. Apfel*, 530 U.S. 103, 110–11 (2000) (explaining that SSA's adjudication system has replaced the normal adversary procedure with an investigatory model resulting in inquisitorial proceedings).

96. *See* 5 U.S.C. §§ 556–557 (2006); *see also supra* Part I.A (discussing the agency intervention and political agenda as hindering the administrative law judges from executing their duty).

97. *See Wolfe, supra* note 41, at 225 (alteration in original) (quoting Memorandum from the Division of Policy and Procedure to the Director, BHA (Dec. 12, 1977) (on file with Author)).

98. *Id.* at 205–06 (quoting Memorandum from the Division of Policy and Procedure to the Director, BHA (Dec. 12, 1977) (on file with Author)).

99. *Id.* at 206 (quoting Richard J. Pierce, *Political Control Versus Impermissible Bias In Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 483 (1990)).

judges with broader case and pretrial management authority. Dean and Professor of Law Victor Rosenblum described the January 1997 memorandum as “[a] prototype of myopic perception” of administrative law judges and their duties and further explains that his purpose in writing is “to examine the dysfunctionality of the General Counsel’s narrow conception of impartiality in his memorandum.”<sup>100</sup>

The issue of judicial independence and a correspondingly expanded case management role for judges has not been limited to SSA. Similar issues have plagued administrative adjudications within the Department of Agriculture.

It is common knowledge that an absolute necessary element for the existence of an impartial adjudicator is judicial independence. However, it is of great concern to all of us who believe in the idea of impartiality and fairness that this necessary element of judicial independence is under such intense attack. The attacks emanating from those within the leadership roles of the administrative bureaucracies include the agencies’ leaders and the government attorneys (Offices of the General Counsel) in the U.S. Department of Agriculture (USDA) and [SSA].<sup>101</sup>

This restrictive view of the role of administrative law judges within the agency is evident in its earlier actions. While Congress and the federal courts were struggling to combat increasing delay and rising costs in a perceived effort to keep the courthouse doors open in 1989, the agency was withdrawing resources from its administrative law judges. In a 1989 Report to the Subcommittee on Social Security of the House Ways and Means Committee, the GAO noted various actions to restrain administrative law judges, including the withdrawal of individual staff and administrative support, placing staff persons in a shared pool, and, to make matters worse, no longer serving under the direction of individual judges:

OHA began “pooling” resources within some hearing offices as a demonstration project in the late 1970s, and expanded it to additional hearing offices in the early 1980s. Under pooling, ALJs do not have direct control over their support staff. Some or all support staff previously assigned to individual ALJs are now placed in a common staff pool. OHA began pooling staff to improve efficiency and balance staff workload.

GAO asked ALJs for their views on the pooling of decision writers and staff attorneys in their offices. About two-thirds of the ALJs who responded said such a reconfiguration had a negative effect on hearing office

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100. Victor G. Rosenblum, *Toward Heightening Impartiality in Social Security Agency Proceedings Involving Administrative Law Judges*, 18 J. NAT’L ASS’N ADMIN. L. JUDGES 58, 58 (1998).

101. Wendell Fennell & Fred Young, *Judicial Independence Under Siege*, 17 J. NAT’L ASS’N ADMIN. L. JUDGES 211, 211 (1997) (emphasis omitted).

operations.<sup>102</sup>

While the GAO study documented a perceived loss of resources within the administrative law judge community, “many of the managers GAO spoke with said that staff pooling provided more flexibility in using staff and allowed a more balanced workload for all staff.”<sup>103</sup> The question becomes whether the net effect of this and similar actions effectively places the proverbial cart before the horse. In a 2006 Social Security Advisory Board report, staffing issues similar to those raised in 1989 were again questioned:

In discussing these figures on ALJ decisions, we do not mean to imply that only ALJs have an impact on the number of decisions. ALJs are only a part, albeit a very important part, of the hearing process. They are dependent on others to prepare cases for hearing and to write decisions after the hearings. They need staff in those positions in sufficient quantity and quality.

In fact, many ALJs and management officials have told us that their most urgent need is support staff rather than additional ALJs. We have heard that the type of support staff needed varies from office to office. In some offices there is a shortage of case technicians to prepare cases for hearing. In others, a lack of decision writers creates a bottleneck. In 2005, the median office had between 4 and 4.5 staff members (decision writers, case technicians, and other support staff, excluding those designated as management). This is fewer than the peak in 2001 of 5.4 staff members per judge. Our analysis of the data from 2002 through 2005 shows that, as staff-to-judge ratios increase, dispositions per judge also tend to increase and average processing time tends to decline.<sup>104</sup>

The GAO study recounts a long history of tension between the agency and its judges, highlighting the continuing debate over the manner of judicial functioning:

Conflicts between OHA management and ALJs have existed for at least a decade. Some issues that divided management and ALJs in the late 1970s and early 1980s are still argued today. For example, in June 1977, five ALJs filed a lawsuit alleging that SSA’s use of numerical production goals and related matters violated the APA and the Fifth Amendment to the Constitution. This case was settled in June 1979, in what is commonly referred to as the “Bono agreement,” in which SSA and the five ALJs agreed to certain policy and practice changes.

In the early 1980s, another disagreement arose over criteria OHA

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102. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO HRD-90-15, MANY ADMINISTRATIVE LAW JUDGES OPPOSE PRODUCTIVITY MEASURES 4 (1989) [hereinafter GAO HRD-90-15, PRODUCTIVITY MEASURES].

103. *Id.*

104. SOC. SEC. ADVISORY BD., *supra* note 40, at 14.

management used in selecting ALJ decisions for review. Commonly known as Bellmon reviews, OHA management selected cases for review based on a judge's high allowance rates. ALJs disagreed with the selection process, claiming interference with their decisional independence. In 1983, the Association of Administrative Law Judges, which represents about 50 percent of SSA's ALJs, filed suit seeking an injunction against targeted Bellmon reviews. On June 21, 1984, before the court ruled on the suit, OHA rescinded the policy of targeting for review ALJs who had high allowance rates.<sup>105</sup>

Herein, perhaps, lies the genesis of much of the current debate between the agency and the administrative judiciary. Judges have, in recent times, reversed agency administrative decisions at a greater rate than they have affirmed such determinations. In significant part, this is because a claimant's condition worsens over time. Other factors include the fact that claimants are now overwhelmingly represented at a hearing; such proceedings usually embrace the first face-to-face encounter between the claimant and a decisionmaker, all previous decisions having been a paper or "file review."

Decisions by administrative law judges, then, invoke the human factor—largely unaccounted for by the agency in earlier administrative denials. In effect, the judge is reversing the earlier agency determination, resulting in a statistically greater frequency of "paying cases" than at lower administrative levels. Judicial decisions thus cost the agency, whose budget must then account for the greater number of pay cases than originally contemplated. As the GAO noted in 2002 in assessing "five initiatives to improve SSA's disability claims process":

[A]ccording to SSA, more denied claimants would appeal to ALJs under the Prototype [hearing process] than under the traditional process. More appeals would result in additional claimants waiting significantly longer for final agency decisions on their claims, and would increase workload pressures on SSA hearings offices, which are already experiencing considerable case backlogs. It would also result in higher administrative costs under the Prototype than under the traditional process. More appeals would also result in more awards from ALJs and overall and higher benefit costs under the Prototype than under the traditional process.<sup>106</sup>

High reversal rates by judges of agency disability determinations have led the agency to conclude that there is (or must be) a correspondingly high error rate among such decisions, in turn leading the agency to exert greater control over the claims process. Evidently, the agency assumes its

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105. GAO HRD-90-15, PRODUCTIVITY MEASURES, *supra* note 102, at 12 (footnotes omitted).

106. *See, e.g.*, GAO-02-322, DISAPPOINTING RESULTS, *supra* note 56, at 3.

administrative determinations are more likely to be correct than the judicial decisions of its judges. These issues came to the fore, as noted earlier,<sup>107</sup> with the initiation of the so-called Bellmon review (named after legislation sponsored by then-U.S. Senator Henry Bellmon of Oklahoma)—a program that contemplated heightened review of administrative law judge-issued “favorable” decisions.<sup>108</sup> A 1989 GAO report summarizes the intensified scrutiny of such decisions:

Based partly on the results of a 1981 study of 3,600 ALJ decisions, which concluded among other things that there was a higher probability of error in favorable decisions of those ALJs with high overall allowance rates, SSA decided to implement the amendment by directing its Bellmon reviews at those ALJs with allowance rates of 70 percent or higher. Entire hearing offices were targeted if their collective allowance rate was 74 percent or higher. Targeted ALJs were required to forward all favorable decisions (allowances) to the Appeals Council for review before their effectuation or finalization. . . . ALJs whose decisions were often objected to were to be given counseling, retraining, and eventually subjected to “disciplinary or remedial” measures. By 1983, OHA was using the own-motion rates (analyst referrals to the Appeals Council) to decide which ALJs would be targeted for review.<sup>109</sup>

In effect, the agency determined to “discipline” or remediate (in some cases, “retrain”) judges.<sup>110</sup> This resulted in federal litigation in 1983, which revealed, among other things, that the “Associate Commissioner for Hearings and Appeals had a performance goal in his Senior Executive Service contract to reduce ALJ allowance rates.”<sup>111</sup>

Critically, the court found:

With reason, plaintiff and its members viewed defendants’ combined actions as a message to ALJs to tip the balance against claimants in close cases to avoid reversal or remand by the Appeals Council, which would increase their own motion rate, which would result in being placed on Bellmon Review, with the added potential for peer counseling and [Merit Systems Protection Board] proceedings.<sup>112</sup>

The clear agency perception was that the collective error in decisionmaking was by judges and not the underlying policies or initiatives of its administrators. In effect, the agency ascribed error to judicial

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107. See *supra* note 46 and accompanying text.

108. See GAO/HRD-89-48BR, REQUIRED REVIEWS, *supra* note 46, at 1.

109. *Id.* at 8.

110. See *Ass’n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1137–38 (D.D.C. 1984).

111. GAO/HRD-89-48BR, REQUIRED REVIEWS, *supra* note 46, at 8.

112. Heckler, 594 F. Supp. at 1139.

decisionmaking, looking to its own analysts as a baseline against which administrative law judge decisionmaking was measured. Thus, agency initiatives since that time specifically address the question of “inconsistencies” between the underlying administrative decisionmakers and the judges<sup>113</sup> and have sought to rectify the issue through more benign methods, including “process unification.” As pointed out in a 2004 GAO study, however, the assessment of inconsistency is itself subject to question:

SSA’s assessments have not provided a clear understanding of the extent and causes of possible inconsistencies in decisions between adjudication levels. The two measures SSA uses to monitor inconsistency of decisions have weaknesses, such as not accounting for the many factors that can affect decision outcomes, and therefore do not provide a true picture of the changes in consistency. Furthermore, SSA has not sufficiently assessed the causes of possible inconsistency. For example, SSA conducted an analysis in 1994 that identified potential areas of inconsistency, but it did not employ more sophisticated techniques—such as multivariate analyses, followed by in-depth case studies—that would allow the agency to identify and address the key areas and leading causes of possible inconsistency. SSA has yet to repeat or expand upon this 10-year-old study.<sup>114</sup>

More than any other indicator, this illustrates the inapposite worldviews represented by the nonjudicial and judicial actors in the system. Even the Social Security Advisory Board (SSAB), a bipartisan Presidential advisory panel,<sup>115</sup> has seen a need to call for a restoration of the relationship between the agency and its administrative law judges, pointing to a “residue of mistrust that goes back at least as far as the late 1970s, when pressures to reduce the number of allowances and increase the number of decisions led to a situation that was described as ‘an agency at war with itself.’”<sup>116</sup> The 2006 SSAB Report urges the agency and its judges to work with one

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113. See GOV’T ACCOUNTABILITY OFFICE, GAO/T-HEHS-95-233, SOCIAL SECURITY DISABILITY: MANAGEMENT ACTION AND PROGRAM REDESIGN NEEDED TO ADDRESS LONG-STANDING PROBLEMS I (1995) (statement of Jane L. Ross, Director, Income Security Issues, Health, Education, and Human Services Division: “In summary, our work shows that SSA has serious problems managing the disability programs on several separate but related fronts. First, the lengthy and complicated decision-making process results in untimely decisions, especially for those who appeal, and shows troubling signs of inconsistency, which compromise the integrity of the process.”).

114. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-656, MORE EFFORT NEEDED TO ASSESS CONSISTENCY OF DISABILITY DECISIONS, at Highlights (2004).

115. See *About the Board—Authorizing Statute*, SOC. SEC. ADVISORY BD., <http://www.ssab.gov/AbouttheBoard/AuthorizingStatute.aspx> (last visited May 14, 2012) (discussing the creation of the a seven-member bipartisan Social Security Advisory Board along with the establishment of SSA as an independent agency).

116. SOC. SEC. ADVISORY BD., *supra* note 40, at 15.

another, recognizing the inherent and long-standing differing views of each.

The agency's operational milieu, as evidenced by repeated agency action which excludes the administrative judiciary from policymaking, ignores the inherent expertise and experience the judges bring to the unique field of judicial case management.<sup>117</sup> This is most clearly seen in the recent February 8, 2008, Office of Inspector General Audit Report (2008 Report) titled *Administrative Law Judges' Caseload Performance*.<sup>118</sup> Instead of focusing on creative potential within the existing regulatory scheme by which administrative law judges may assume an expanded judicial role, bringing to bear their talents, training, and experience in a wider case management role, the 2008 Report, like the 1997 Office of General Counsel (OGC) Memorandum, ignores the call of the SSAB for reconciliation and seeks to reinforce the idea that judges may be held accountable for even greater productivity standards.

The 2008 Report, like its 1997 OGC counterpart, appears to challenge the scope of judicial independence arguing that its protections be subordinated to the demands of production. "Federal legislation," it states, "does not prevent SSA from establishing a performance accountability process wherein ALJs are held to reasonable production goals, as long as the goals do not infringe on ALJs' qualified decisional independence."<sup>119</sup> In making this assertion, the 2008 Report cites, among other authorities, *Nash*

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117. One noted commentator writes:

The term "federal administrative judiciary" is not frequently used, but it highlights the relationship between the administrative decision system and the federal judiciary. Administrative deciders are significant participants in our constitutional scheme. . . .

Administrative Law Judges as a group are among the most diversely talented, well-trained, and deeply entrenched adjudicators in our system, even when they are compared with the federal district and state judiciary. There are almost 1,200 ALJs who are assigned to 30 federal agencies. This is approximately equivalent to the number of judges on the federal trial bench. . . .

. . . .  
. . . A survey concludes . . . in education, training and experience, they seem no less qualified than bankruptcy judges and magistrates, if not members of the federal bench. . . . They enjoy a more secure tenure and compensation than do bankruptcy judges or magistrates because they do not serve terms. Rather, they effectively receive life tenure subject to removal for good cause. . . . These protections provide ALJs with a certain degree of judicial independence.

Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343-45 (1992).

118. See OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-07-07-17072, ADMINISTRATIVE LAW JUDGES' CASELOAD PERFORMANCE 3-4 (2008) [hereinafter OIG REPORT], <http://www.ssa.gov/oig/ADOBEPDF/A-07-07-17072.pdf>.

119. *Id.* at 4.

*v. Bowen*.<sup>120</sup> The *Nash* court explained:

The setting of reasonable production goals, as opposed to fixed quotas, is not in itself a violation of the APA. The district court explicitly found that the numbers at issue constituted reasonable goals as opposed to unreasonable quotas. Judge Elfvin explained that

[a] minimum number of dispositions an ALJ must decide in a given period, provided this number is reasonable and not “etched in stone”, is not a prescription of how, or how quickly, an ALJ should decide a particular case. It does not dictate the content of the decision.<sup>121</sup>

The 2008 Report calls for “performance accountability procedures” to be established, examining through the course of the Report various “what if” scenarios (projecting the resulting backlog reduction if individual judges decided 400, 450, 500, or 550 cases per year).<sup>122</sup> The 2008 Report concludes that backlog reduction can be achieved by simply imposing a goal and demanding (under penalty of accountability procedures) that judges meet the goal, with no other changes to case management procedures or processes through which expanded and creative judicial management methods can be brought to bear during the life of the case. In this, it evokes the earlier Bellmon review and ignores the Bono Settlement Agreement of 1979.<sup>123</sup> The 2008 Report typifies the agency’s cultural stance, looking at judges not as a valued repository of expertise but as extensions of bureaucratic will—demanding they do more, but confining such further activity to a narrow band of crystallized action and banning heightened case management authority.

The 2008 Report contemplates continuing a jurisprudence founded on the same model as has stood for multiple decades. It fails to embrace the SSAB call for collaboration generally and makes no proposals to encourage a collaborative effort to resolve caseload management and the backlog specifically. Instead, it mirrors that which has been. The agency—regardless of the efficacy of its underlying position with respect to goals and productivity—continues a seeming adversarial stance with its judges, isolating the judges in an ever-narrowing and circumscribed decisionmaking window, effectively the reciprocal course taken by Congress and the federal courts.<sup>124</sup>

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120. 869 F.2d 675 (2d Cir. 1989).

121. *Id.* at 680–81 (alteration in original).

122. OIG REPORT, *supra* note 118, at 6.

123. *See Bono, supra* note 34.

124. *See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1038 (Fredrick C. Mish et al. eds., 11th ed. 2008) (providing the definition of *reciprocal* and, through inference, explaining that in nautical terms a reciprocal course is 180 degrees in the other (opposite) direction).

## IV. CIVIL JUSTICE REFORM IN A NEW VENUE?

One alternative previously unaddressed in this Article is whether there should even be a push for an expanded case management role for administrative law judges within SSA. Some argue that the ideal solution is a change of venue—the creation of an independent corps of administrative law judges which would, by definition not be subject to the bureaucratic stricture of any given agency, but which would nevertheless have responsibility for independent adjudication of all administrative appeals currently heard by administrative law judges across executive branch agencies.

This view finds support in an unexpected manner. While many have debated the continuing role of the federal administrative judiciary within the Executive Branch, arguments that urge a separation of administrative law judges from their respective agencies, and that have at their core supposed threats to the integrity of the administrative decisionmaking process, have not won the day. Over time, the issues have come to center not so much on the question of integrity of the decisionmaking process but on effective functioning. A brief overview of the various arguments highlights this distinction.

A 1985 article in the *ABA Journal* titled *Breaking Away: Administrative Law Judges Seek Freer Status* recounts the introduction of legislation some twenty-five years ago whose purpose was “to consolidate federal administrative law judges into an independent corps.”<sup>125</sup> The arguments then centered on the appearance of bias as well as undue influence: “Advocates of the corps concept say it would eliminate an appearance of bias that exists because judges work for agencies whose cases they hear . . . .”<sup>126</sup>

One writer points out that it is the need “to protect the integrity, independence and impartiality of administrative law judges”<sup>127</sup> that fuels the call for reform in federal administrative adjudication. The Honorable Charles N. Bono, then an administrative law judge at SSA who chaired the ABA National Conference of Administrative Law Judges in 1992, explained that “[t]he tension between an agency’s administrators and its ALJs is magnified by the fact that the employing agency has an agenda that may conflict with the judges’ responsibility to provide parties with due process.”<sup>128</sup> Judge Bono further clarified his point in testimony in an April 29, 1992 hearing of the House Judiciary Subcommittee on Administrative

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125. Faye A. Silas, *Breaking Away: Administrative Law Judges Seek Freer Status*, A.B.A. J., July 1985, at 18.

126. *Id.*

127. McMillion, *supra* note 31, at 103.

128. *Id.*

Law and Governmental Relations: “ALJs have been subjected to monthly performance targets set by agencies; rankings, ratings and evaluations of individual performances; and threats of removal, reprimand or deprivation of staff and equipment if targets are not met.”<sup>129</sup>

Those opposed to this view argue that this is a nonissue, as evidence of bias has not been raised.<sup>130</sup> Note, however, the plaintiff’s argument in *Richardson v. Perales* in 1971, raising essentially this very argument:

Finally, the claimant complains of the system of processing disability claims. He suggests, and is joined in this by the briefs of *amici*, that the Administrative Procedure Act, rather than the Social Security Act, governs the processing of claims and specifically provides for cross-examination. The claimant goes on to assert that in any event the hearing procedure is invalid on due process grounds. He says that the hearing examiner has the responsibility for gathering the evidence and “to make the Government’s case as strong as possible”; that naturally he leans toward a decision in favor of the evidence he has gathered; that justice must satisfy the appearance of justice; and that an “independent hearing examiner such as in the” Longshoremen’s and Harbor Workers’ Compensation Act should be provided.<sup>131</sup>

—an argument the Supreme Court then rejected:

Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts.<sup>132</sup>

The Author questioned, in an earlier writing, “Would the court today hold that delays in decisionmaking of between one and two years violate fundamental due process, if not the public policy underlying these benefits? Would it look to the ‘governmental structure of great and growing complexity’ of 2010 and still declare that it is ‘working well?’”<sup>133</sup>

In a more temperate assessment, the difference between a judge sitting in a court of law and an administrative law judge in the Executive Branch is described as not so much a difference in functioning, as both must strive for impartiality, but as a question of constitutional structure:

The instinctive defensive reaction to a claim that the administrative

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129. *Id.*

130. *Id.*

131. *Richardson v. Perales*, 402 U.S. 389, 408–09 (1971) (citations omitted).

132. *Id.* at 410.

133. Jeffrey S. Wolfe, *The Times They Are a Changin’: A New Jurisprudence for Social Security*, 29 J. NAT’L ASSN. OF ADMIN. L. JUDICIARY 515, 543–44 (2009) (footnotes omitted) (quoting *Richardson*, 402 U.S. at 410).

adjudicator is controlled by the agency she serves may be to raise the vigorous assertion that due process requires the ALJ be independent of the agency she serves. The distinctions between judges of the judicial branch and those of the executive branch are such, however, as to call into question such a conclusion. At the outset, it is important to note the distinctions that courts have already made that set apart the executive judiciary from the judicial branch adjudicators: that “[a]dministrative decisionmakers do not bear all the badges of independence that characterize an Article III judge, but they are held to the same standard of impartial decisionmaking.” Though it may be appealing for ALJs to believe they must operate independent of their agency, constitutional jurisprudence does not support a claim that due process mandates such independence. Rather, if we conclude that as ALJs we must “avoid, and should be shielded as much as possible from, any influences that might in any way compromise such independence, neutrality, and impartiality,” as Judge Young has recommended, we must find bases for this mandate other than those found in the Due Process Clause of the Constitution.<sup>134</sup>

Judge McNeil aptly points out “that by the 1930s the administrative court was entrenched and expanding, sharing much of the same apparent authority as that possessed by article III courts, without the constitutional protection of life tenure and undiminished salary.”<sup>135</sup> Administrative decisionmaking was ratified by the Supreme Court in *Crowell v. Benson*:

[The case] assumed that public rights disputes may not require a judicial decision at either the original or appellate levels. Even in private rights cases, *Crowell* held, an administrative tribunal may make findings of fact and render an initial decision of legal and constitutional questions, as long as there is an adequate review available in a constitutional court.<sup>136</sup>

Critically, however, Judge McNeil notes that the inherent relationship between the administrative law judge and the agency within which he or she sits is a creature of the APA.

The ALJ serves an executive function not shared by the article III judge: her authority is no greater than that of the agency she serves, and as an adjudicator she is charged with an affirmative ethical obligation to perform judicial or quasi-judicial tasks in the context of the executive agency’s mandate, not independent of that agency, for she has no authority

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134. Christopher B. McNeil, *Similarities and Differences Between Judges in the Judicial Branch and the Executive Branch: The Further Evolution of Executive Adjudications Under the Administrative Central Panel*, 18 J. NAT’L ASS’N OF ADMIN. L. JUDGES 1, 6–7 (1998) (alteration in original) (footnotes omitted).

135. *Id.* at 14.

136. *Id.* (footnotes omitted) (emphases omitted) (citing *Crowell v. Benson*, 285 U.S. 22, 51–65 (1932)).

independent of that agency.<sup>137</sup>

Against this backdrop, the question arises whether it is now time for SSA's administrative law judges to migrate to a separate adjudicative agency, or even to an Article I court similar to that of the U.S. Court of Appeals for Veterans Claims.

In examining the question, the issue is not whether there is a need for such action based on arguments of threats to the integrity of administrative law judge decisionmaking, agency influence, or the appearance of bias, but rather whether the agency, as a politically animated entity tasked with responsibility for such decisionmaking, has effectively forfeited its responsibility by virtue of continued ineffective action in dealing with the problem. More to the point, has the agency, by virtue of its continued animus in its relationship with its administrative law judges, made a migration of this corps of administrative decisionmakers a virtual necessity such that to do anything less would result in the continuity of the pending backlog?

The answer to these questions lies in both a historical as well as functional view of the agency and its conduct. Repeated actions since the mid-1970s have signaled agency intention to more closely manage administrative decisionmaking. As such, the issues are not new. In a 1991 article in the *Notre Dame Law Review*, Professor Daniel Gifford writes:

The focus of these debates has been the relationship between the Department's Social Security Administration and the administrative law judges, and, in particular, the extent to which the Secretary of Health and Human Services may legitimately attempt to influence the ways in which the administrative law judges work.

The SSA has justified its management initiatives as designed to improve the quality and efficiency of the social security program. They are designed, it is said, to foster efficient disposition of caseloads, to reduce inconsistency in results, and to hold back the dramatic increases in cost which have afflicted the program in recent years. Many administrative law judges, however, have viewed these supervisory initiatives from the Secretary as intrusions upon their independence which they have challenged in the courts. Disability claimants have also been quick to assert that these management efforts have interfered with their right to an impartial decision.<sup>138</sup>

A crucial failing, in Professor Gifford's view, has been the failure by the

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137. *Id.* at 35; see also James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192 (2006) (drawing the distinction between *independence* and *impartiality*, and noting that the administrative judges are no less judges, but are not independent as are judges in the Judicial Branch and are nevertheless required to be impartial in presiding over hearings).

138. Gifford, *supra* note 45, at 1010.

agency to promulgate precise procedural rules and thereby attain greater consistency in adjudicative decisionmaking:

But the SSA has been unable or unwilling to formulate other policies with sufficient clarity and comprehensiveness to reduce the disparity among the way ALJs decide cases. In the absence of precise and binding rules, the SSA has resorted to quality control programs and other management techniques. This novel approach to mass adjudication has forced a new and more precise examination of the extent to which management techniques can properly be classified as part of the policy control which belongs to the agency.<sup>139</sup>

This inaction has continued to the present. No comprehensive formal rules of procedure for disability hearings exist, and indeed, repeated calls by administrative law judges to enact rules that would at least close the record after a hearing have fallen on deaf ears. Even today, post-hearing, a claimant can discover new evidence and submit it as part of an appeal with the administrative law judge never having seen the documents. As Professor Gifford points out, “It is difficult for the SSA to complain of inconsistent decisionmaking by administrative law judges and yet fail to promulgate corrective rules. If ALJ decisions are heavily inconsistent, then large numbers of them are apparently wrong.”<sup>140</sup> Arguably, then, if large numbers are wrong, why has the agency been reluctant to implement rules of procedure designed to streamline and facilitate the decisional process, effectively akin to those adopted by the Judicial Branch when it faced a similar impending crisis of cost and delay? Professor Gifford further observes:

[I]f the SSA can conclude that administrative law judges inconsistently decide similar cases, the SSA may be able to reduce the issues to written form and provide for the resolution of those issues by rule. In short, the very ability of the SSA to identify inconsistencies in ALJ decisionmaking suggests that those inconsistencies could be reduced through increased rulemaking.<sup>141</sup>

In the years since Professor Gifford’s writings, the agency has continued to employ “quality control programs and other management techniques.”<sup>142</sup> It has done so despite repeated audits by the GAO demonstrating that SSA’s “techniques” have not worked, and continues in this path to the present time. In Professor Gifford’s words, “This novel approach to mass adjudication has forced a new and more precise examination of the extent to which management techniques can properly

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139. *Id.* at 1011.

140. *Id.* at 1016–17.

141. *Id.* at 1017.

142. *Id.* at 1011.

be classified as part of the policy control which belongs to the agency.”<sup>143</sup>

In 2003 the Honorable Robin Arzt, serving as an administrative law judge with the SSA, in a comprehensive analytical writing, proposed what is virtually a blueprint for a new, separate adjudicatory agency to hear and decide Social Security disability appeals. She terms this agency the “United States Office of Hearings and Appeals (USOHA).”<sup>144</sup> She proposed an adjudicatory agency having

exclusive jurisdiction to make the final administrative decisions of Social Security Act Titles II, XVI and XVIII benefits claims. The USOHA would have permissive jurisdiction over other classes of cases, so it may hear and decide other classes of cases such as those that the SSA ALJs have heard in the past. The final administrative adjudication authority of SSA and [the Department of Health and Human Services (DHHS)] would be abolished, including the SSA Appeals Council and DHHS Medicare Appeals Council.<sup>145</sup>

Judge Arzt also proposed:

An individual ALJ’s decision would be appealed to appellate panel staffed by ALJs, which would consist of three ALJs who would review the cases locally. The ALJ appellate panels would be akin to the United States Bankruptcy Court appellate panels. . . .

The final decisions of the USOHA would be appealable only to the federal courts, with the District Courts as the first step in the judicial review.<sup>146</sup>

Notably, Judge Arzt proposes agency independence through appointment of a “Chief Administrative Law Judge . . . by the President from the ranks of the ALJs.”<sup>147</sup> A critical hallmark of such an independent adjudicatory agency is the ability of such a body to do what the agency has not to this point been able to accomplish: “The USOHA would set its own rules of practice and procedure and the ALJs would administer the agency.”<sup>148</sup> She argues the need for such an independent agency as predicated on a recognized need for effective adjudicatory functioning free from political or policy concerns—issues that now plague the agency:

There is an inherent, and often real, conflict between (1) the need for independent and impartial appellate administrative decisionmakers and

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143. *Id.*

144. Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make the Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT’L ASS’N ADMIN. L. JUDGES 267, 269 (2003) (internal quotations marks omitted).

145. *Id.* at 274.

146. *Id.* at 274–75.

147. *Id.* at 275.

148. *Id.*

decisions, and (2) Executive Branch agency policymakers' desire to control the decisionmakers and the outcome of their decisions to conform to policy and political concerns. This conflict results in agency policymakers' intrusions into the administrative adjudication function.

Many of the same rationales that justify Congress' creation of specialized independent Article I courts to perform the initial judicial review of final administrative decisions by Executive Branch agencies also support the separation of the appellate administrative adjudication function from Executive Branch agencies. This is done to promote decisional independence from the agencies' policymaking/rulemaking, prosecutorial/enforcement and investigatory functions.<sup>149</sup>

Judge Arzt cites to other, similar legislation by Congress, including the establishment of the U.S. Tax Court, the Court of Appeals for Veterans Claims, as well as congressional action to create the Board of Tax Appeals "to provide an independent tribunal to hear taxpayers' appeals from tax deficiency notices before payment of the tax after a Congressionally created board studied the IRS appellate review practices." That board concluded:

[I]t would never be possible to give to the taxpayer the fair and independent review to which he is of right entitled as long as the appellate tribunal is directly under, and its recommendations subject to the approval of, the officer whose duty it is to administer the law and collect the tax. As long as the appellate tribunal is part and parcel of the collecting machinery it can hardly maintain the attitude essential to a judicial tribunal.<sup>150</sup>

A similar rationale, she argues, applies here. Furthermore, in a mass-justice system such as the Social Security disability appeals system, which literally decides hundreds of thousands of cases annually, the policymaking function often times served by administrative law judges through adjudicatory decisionmaking is absent. Such absence effectively moots the need for continued agency oversight of the adjudicatory function, since no policymaking function is thereby served.

[W]hen an agency no longer formulates policy through its adjudication function but does so only through rulemaking, which is the case for SSA and [DHHS Centers for Medicare and Medicaid Services], supervision of the appellate administrative adjudicators and review of their decisions by policymaking political appointees has no reason to continue. At that point, there is no reason to keep the adjudicatory function within the agency.<sup>151</sup>

Others agree, noting that "[i]n the benefit agencies, the efficient disposition of a large volume of benefit claims demands the use of relatively

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149. *Id.* at 279.

150. *Id.* at 279–80 (alteration in original) (quoting H.R. REP. NO. 68-103, at 4 (1923)).

151. *Id.* at 280–81.

precise standards, whose applications do not raise significant policy issues.”<sup>152</sup> Mass-justice systems such as SSA do not formulate policy through adjudicatory decisionmaking, rendering even more significant the agency’s failure to implement comprehensive rules of hearing procedure:

In a mass-justice agency, adjudication is unsuited for use as a vehicle for announcing or formulating policy. The cases come too fast and in too great a volume for decisionmakers to look to other cases as guides; sorting out, distinguishing or following large volumes of cases whose holdings are necessarily circumscribed by their unique factual configurations is impractical. Thus, in a mass-justice agency, the agency head does not rely on adjudication to control policy and, accordingly, does not sit as a final adjudicator. Moreover, the removal of the agency head from control of adjudication is fully consistent with the agency head’s policy responsibility because no individual case is programmatically salient. The agency head is not concerned with the disposition of any one case, but with the policies applied to large classes of cases.<sup>153</sup>

The question is not an issue of judicial independence, for the administrative law judge is indeed a creature of the APA, which in turn defines the administrative law judge function as a derivative one.<sup>154</sup> Rather, the question for the agency and for Congress is an issue of effective functioning—of carrying the congressional mandate embodied within the Social Security Act forward in a meaningfully timely manner. Judge Arzt critically notes that the proposed USOHA should properly be a part of the agency, but with direct lines of authority equivalent to the Commissioner with a presidentially appointed chief administrative law judge endowed with the ability to formulate rules of procedure necessary for effective adjudication.<sup>155</sup> The functional purpose of such an adjudicative agency is to free the administrative judiciary within the agency from the miasma of policies, programs, and initiatives that, having been repeatedly tried, have not succeeded in addressing a decades-long mounting backlog.

Administrative law judges, tasked with the need to hear and decide can effectively construct and administer a system of hearings and appeals consistent with their professional worldview, experience, training, and expertise. The ability to accomplish what, to date, the agency has failed to do—establish rules of procedure—would significantly enhance proactive case management by administrative law judges who, like their Article III brethren, could become involved in a case from the outset of the appeal, furthering a far more timely resolution than currently exists. Many case

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152. Gifford, *supra* note 45, at 997.

153. *Id.* (footnotes omitted).

154. *See generally* Moliterno, *supra* note 137, at 1191.

155. Arzt, *supra* note 144, at 274.

management techniques can be employed to enhance the decisionmaking process, even in the hybrid jurisprudence now framed as nonadversarial by existing agency regulation.<sup>156</sup> Meaningful judicial case management requires no less.

#### V. FROM HERE, WHERE?

The wheel has effectively turned full circle. In 1989 the problem, as defined by SSA and recounted by the GAO, was a question of consistency between the judges and the agency. The so-called Bellmon review catapulted the agency and its administrative law judges into federal court with allegations by the agency of erroneous decisions on the part of the judges and claims by administrative law judges of infringement of judicial independence—accompanied by an allegation that a Senior Executive Service bonus provision was tied to a reduction in administrative law judge “reversals.”<sup>157</sup>

In 2012, the question asked by the agency is now not so concerned with consistency as it is with numbers. How many decisions can an administrative law judge decide? The 2008 Report references Commissioner Astrue’s statement that judges have now been asked to decide between 500 and 700 cases annually.<sup>158</sup> This is an increase in expectations that many judges have attempted to meet with varying degrees of success depending on staffing, scheduling, and accounting for the individual differences in complexity each case brings. Judges have further noted that a statistically significant number of cases have little to do with disability *per se*, being instead issues of overpayment, appeals on nonmedical entitlement issues (such as income and resources), and issues relating to retirement.

While it would be a welcome end to say that a solution was reached and the agency and administrative law judges are working together in much the same fashion as did the courts with members of the bar and Congress in implementing the CJRA, such has not been and is not now the case. Instead, the manner in which the administrative law judge functions has remained almost unchanged, apart from the request for and production of increasing numbers of dispositions. No broad-sweeping procedural changes have been implemented that would allow a judge to become involved in a case upon the filing of a Request for Hearing; nor, in fact, have any rules of

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156. 20 C.F.R. § 404.900(b) (2011).

157. See GAO/HRD-89-48BR, REQUIRED REVIEWS, *supra* note 46.

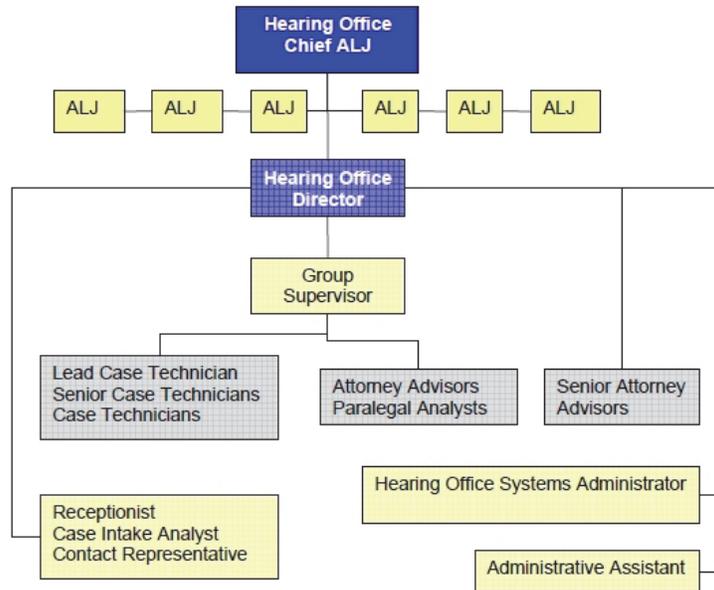
158. See OIG REPORT, *supra* note 118, at 6 n.29 (“SSA has asserted that ALJs should be able to process 500 to 700 cases annually,” according to Michael J. Astrue, Commissioner of Social Security).

procedure actually been enacted.

Remarkably, with the difficulties illustrated by the Bellmon review and the long-standing debate over the meaning and scope of decisional independence, the administrative law judge remains at the center of the solution to the backlog crisis, though little has been done to enhance the judicial role or function in the hearings process. The current configuration is, functionally, a counter-evolutionary or retrograde step back from 1989, reflecting the removal of individual judicial staffing. The current hearing office configuration also reflects changes following the Hearing Process Improvement initiative, with a further refinement of pooled staffing into administrative groups headed by a group supervisor, potentially further distancing the judge from support staff. As the Figure below clearly shows, the administrative law judge has no direct supervision over support staff.

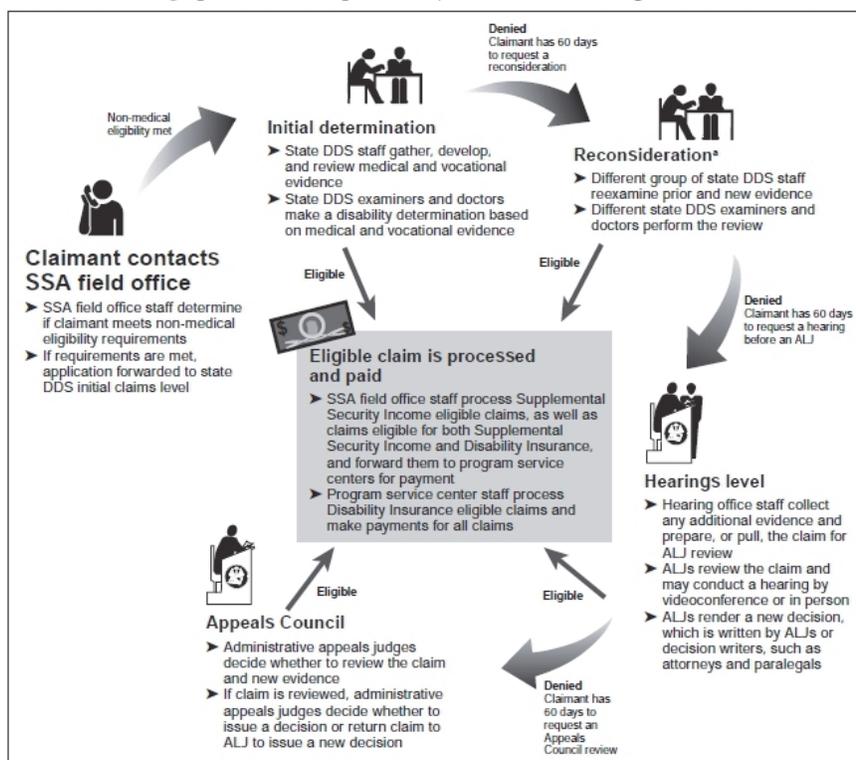
**Figure 1**<sup>159</sup> depicts the current hearing office configuration:

### Hearing Office Organization Chart



159. *See id.* at Appendix C.

The hearings process is depicted by the GAO at **Figure 2:**<sup>160</sup>



Sources: GAO analysis of SSA data; images, Art Explosion.

The “hearings level” description in Figure 2 describes only three administrative law judge activities:

- Administrative law judge prehearing review;
- Administrative law judge conduct of a hearing; and
- Administrative law judge issuance of a decision (which may or may not be written by the issuing judge).

No in-depth study has been conducted to mirror that called for by the CJRA, examining the hearings process and the procedures by which the administrative law judge functions. No study has examined the potential role of the administrative law judge in nonadversarial versus adversarial jurisprudence; nor has any comparative study been undertaken to determine if additional benefit can be derived from assigning a case to a judge from the time it is filed—that is, from the time a request for hearing

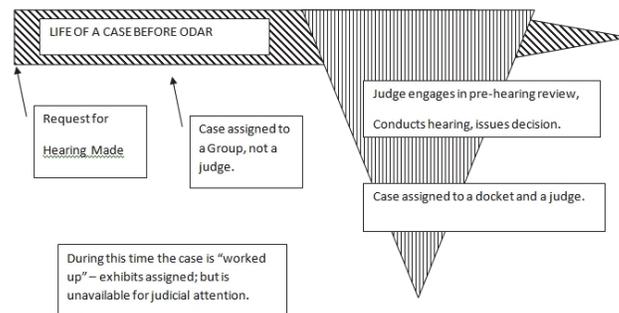
160. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1053, ADDITIONAL PERFORMANCE MEASURES AND BETTER COST ESTIMATES COULD HELP IMPROVE SSA'S EFFORTS TO ELIMINATE ITS HEARINGS BACKLOG 6 (2009).

before an administrative law judge is made.

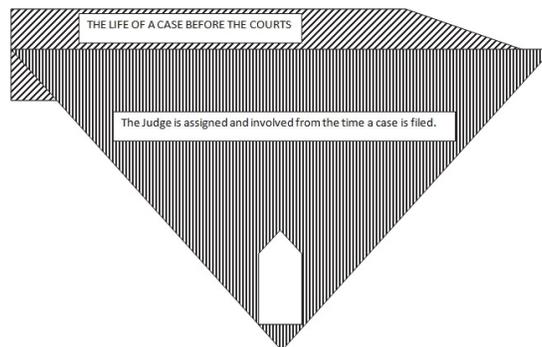
The evident assumption in the ensuing silence is that the administrative law judge is only to hear and decide the case when it is before him or her for decision. Thus, the only contemplated judicial activity prior to a hearing is to read (review) the case file once it is assigned for hearing. Once a case is assigned to a judge, he or she may also indicate whether prehearing case development is necessary, either in the form of obtaining records or scheduling consultative examinations, or may, after a hearing, order such examinations.

These activities occur within the narrow time frame, comparatively speaking, that by definition comes at the relative end of the life of the case once it is pending at ODAR. Figure 3 diagrammatically depicts the life of a case and the narrow role of the administrative law judge (the superimposed triangle) in that life.

**Figure 3:**



The inverted cone in Figure 3 illustrates the narrow scope of judicial involvement at the end of the life of the case before ODAR—and stands in contrast to a depiction of judicial involvement in a case before the federal courts, as shown in **Figure 4:**



Failing to provide innovation and creativity in the conduct of the hearings process, when coupled with a reluctance to address even basic questions, such as closing the record to the post-hearing receipt of evidence, much less formulation of a comprehensive set of rules of procedure,<sup>161</sup> reduces the mandate of greater productivity to a simple command to “pedal faster.”

The agency’s administrative judiciary is keenly aware of the backlog and of the human price paid for delay, and has endeavored to redress the situation with increasing case dispositions working within the existing infrastructure. This is far from ideal. Instead, there is, and has been, a continuing need for comprehensive reform of the scope and breadth as was undertaken by Congress with the passage of the CJRA. The agency has been aware of and has been attempting to redress the backlog crisis since the late 1980s. It has not succeeded. Despite the expenditure of millions of dollars, no actions have been taken to empower the federal administrative judiciary to parallel the revolution in judicial management in the federal courts. However, it stands undisputed that the agency’s administrative adjudicatory system is the largest of its kind in the world.

Standing as a gleaming example of a successful attack on the burden of cost and delay is the success of the CJRA. It has been an effective mechanism for reduction of cost and delay in the federal courts. Despite this, no hue and cry has been raised for SSA to implement the same unique innovation undertaken to avert spiraling cost and delay facing the federal courts in 1989. The growing delay and costs in the federal courts were of such magnitude as to cause then-Senator Biden to call for congressional action in the passage of the CJRA as necessary to “grant federal courts the requisite autonomy, resources, and direction to bring about systemic reform and to solve the mounting crisis of litigation costs and delays.”<sup>162</sup>

More than business as usual is required to save the Nation’s system of

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161. Some arguments have been made by representatives or claimants’ organizations that to “close the record” or develop enforceable rules of procedure would somehow harm claimants. In truth, are they not harmed to a greater extent having to wait? Given that more than 80% of all claimants are now represented by counsel who are by definition equipped to deal with the requirements of such rules, little actual harm can be foreseen. Instead, the absence of rules of procedure signal a lack of accountability for representatives and leave open a hearings process which can only benefit from innovative and creative procedural rules designed to accomplish here what the Civil Justice Reform Act and its progeny have done for the federal courts. Is it possible to decide a case without a full hearing? The answer is yes. Should we discuss whether a non-adversarial jurisprudence continues as the best course in light of overwhelming representation in today’s system? The answer is yes. Should comprehensive rules of procedure be established to ensure a case is ready for hearing if a hearing is required? The answer, again, is yes.

162. Biden, *supra* note 1, at 1286.

disability appeals. The inertia of past practices and documented animus must be overcome and creative measures employed in the framing of a renewed decisionmaking paradigm. Both the agency and its cadre of administrative law judges must embrace the call of the Social Security Advisory Board to change SSA's relationship with its administrative law judges from "one of confrontation to cooperation."<sup>163</sup> In the highest ideals of public service, to serve the American people, it is time to empower the federal administrative judiciary—talented, capable, highly motivated men and women, dedicated to public service—and allow them the same opportunity to employ equal, if not greater, measures of creativity and judicial innovation witnessed during the past twenty years in the federal courts.

All this will not be finished in the first hundred days. Nor will it be finished in the first thousand days, nor in the life of this administration, nor even perhaps in our lifetime on this planet. But let us begin.

—John Fitzgerald Kennedy, 35th President (1961–1963).<sup>164</sup>

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163. SOC. SEC. ADVISORY BD., CHARTING THE FUTURE OF SOCIAL SECURITY'S DISABILITY PROGRAMS: THE NEED FOR FUNDAMENTAL CHANGE 19 (2001).

164. Inaugural Address, 1 PUB. PAPERS 1, 2 (Jan. 20, 1961).

APPENDIX I: THROUGH THE EYES OF THE GAO  
– SUMMARY OF KEY GAO REPORTS

Collected key GAO reports addressing the backlog of disability appeals cases reflect a growing caseload punctuated with repeated attempts by the agency to “plug the gap,” with little success.

**GAO Report 02-322**

A 2002 report characterizes the agency’s actions as “disappointing,” examining four agency efforts that the GAO found had only limited or no success:

SSA has implemented four of the five disability claims process initiatives either nationwide or within selected geographic locations. As summarized below, the improvements realized through their implementation have, in general, been disappointing.

- The Disability Claim Manager Initiative. This initiative was completed in June 2001. Results of the pilot test, which was done at 36 locations in 15 states beginning in November 1999, were mixed; claims were processed faster and customer and employee satisfaction improved, but administrative costs were substantially higher. An SSA evaluation of the test concluded that the overall results were not compelling enough to warrant additional testing or implementation of the Disability Claim Manager at this time.
- The Prototype. This initiative was implemented in 10 states in October 1999 and continues to operate only in these states. Preliminary results indicate that the Prototype is moving in the direction of meeting its objective of ensuring that legitimate claims are awarded as early in the process as possible. Compared with their non-Prototype counterparts, the DDSs [disability determination services] operating under the Prototype are awarding a higher percentage of claims at the initial decision level, while the overall accuracy of their decisions is comparable with the accuracy of decisions made under the traditional process. In addition, when DDSs operating under the Prototype deny claims, appeals reach a hearing office about 70 days faster than under the traditional process because the Prototype eliminates the reconsideration step in the appeals process. However, according to SSA, more denied claimants would appeal to administrative law judges under the Prototype than under the traditional process. More appeals would result in additional claimants waiting significantly longer for final agency decisions on their claims, and would increase workload pressures on SSA hearings offices, which are already experiencing considerable case backlogs. It would also result in higher administrative costs under the Prototype than under the traditional process. More appeals would also result in more awards from administrative law judges and overall and higher benefit costs under the Prototype than under the traditional process. Because of this, SSA acknowledged in December 2001 that it would not extend the

Prototype to additional states in its current form. During the next several months, SSA plans to reexamine the Prototype to determine what revisions are necessary to decrease overall processing time and to reduce its impact on costs before proceeding further.

- The Hearings Process Improvement Initiative. This initiative was implemented nationwide in 2000. The initiative has not improved the timeliness of decisions on appeals; rather, it has slowed processing in hearings offices from 318 days to 336 days. As a result, the backlog of cases waiting to be processed has increased substantially and is rapidly approaching crisis levels. The initiative has suffered from problems associated with implementing large-scale changes too quickly without resolving known problems. SSA is currently studying the situation in hearing offices to determine what changes are needed.
- The Appeals Council Process Improvement Initiative. This initiative was implemented in fiscal year 2000 and has resulted in some improvements. While it fell short of achieving its goals, the time required to process a case in the Appeals Council has been reduced by 11 days to 447 days and the backlog of cases pending review has been reduced from 144,500 (fiscal year 1999) to 95,400 (fiscal year 2001). Larger improvements in processing times were limited by, among other things, automation problems and policy changes.
- The Quality Assurance Initiative. SSA's original (1994) plan to redesign the disability claims process called for SSA to undertake a parallel effort to revamp its existing quality assurance system. However, because of considerable disagreement among internal and external stakeholders on how to accomplish this difficult objective, progress has been limited to a contractor's assessment of SSA's existing quality assurance practices. In March 2001, the contractor recommended that SSA adopt a broader vision of quality management, which would entail a significant overhaul of SSA's existing system. SSA established a work group to respond to the contractor report, but no specific proposals have yet been submitted to the Commissioner for approval.<sup>165</sup>

### **GAO Report 08-40**

In a December 2007 report, the GAO even assesses the agency with responsibility for making the situation worse:

While backlogs in processing disability claims have plagued SSA for many years, several factors have contributed to their increase in the last decade including substantial growth in initial applications, staff losses, and management weaknesses. . . . Finally, management weaknesses as evidenced by a number of initiatives that were not successfully implemented have

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165. GAO-02-322, DISAPPOINTING RESULTS, *supra* note 56, at 3–4.

limited SSA's ability to remedy the backlog. Several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem. For example, the "Hearings Process Improvement" initiative implemented in fiscal year 2000 significantly increased the days it took to adjudicate a hearings claim and exacerbated the backlog after the agency had substantially reduced it.<sup>166</sup>

The backlog has been present and growing for more than a quarter century. Even the court in *Nash v. Bowen* couched its comments in light of the backlog, commenting: "Moreover, in view of the significant backlog of cases, it was not unreasonable to expect administrative law judges to perform at minimally acceptable levels of efficiency. Simple fairness to claimants awaiting benefits required no less."<sup>167</sup>

### **GAO-02-552-T**

Though the hearings backlog is longstanding, the manner in which judges conduct hearings has not changed. A 2004 GAO report echoes both the issues of increased cost and undue delay that were the subject of the CJRA, but to date have not been successfully addressed by the agency:

SSA has experienced difficulty managing its complex disability determination process, and consequently faces problems in ensuring the timeliness, accuracy, and consistency of its disability decisions. Although SSA has made some gains in the short term in improving the timeliness of its decisions, the Commissioner has noted that it still has "a long way to go." Over the past 5 years, SSA has slightly reduced the average time it takes to obtain a decision on an initial claim from 105 days in fiscal year 1999 to 97 days in fiscal year 2003, and significantly reduced the average time it takes the Appeals Council to consider an appeal of a hearing decision from 458 to 294 days over the same period. However, the average time it takes to receive a decision at the hearings level has increased by almost a month over the same period, from 316 days to 344 days. According to SSA's strategic plan, these delays place a significant burden on applicants and their families and an enormous drain on agency resources.

Lengthy processing times have contributed to a large number of pending claims at both the initial and hearings levels. While the number of initial disability claims pending has risen more than 25 percent over the last 5 years, from about 458,000 in fiscal year 1999 to about 582,000 in fiscal year 2003, the number of pending hearings has increased almost 90 percent over the same time period, from about 312,000 to over 591,000. Some cases that are in the queue for a decision have been pending for a long time. For example,

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166. GAO-08-40, BETTER PLANNING, *supra* note 5, at 3-4.

167. 869 F.2d 675, 681 (1989).

of the 499,000 cases pending in June 2002 at the hearings level, about 346,000 (69 percent) were over 120 days old, 167,000 (33 percent) were over 270 days old, and 88,500 (18 percent) were over 365 days old.<sup>168</sup>

### **GAO Report GAO/T-HEHS-97-118**

A 1997 report summarizes the many earlier reports in a characteristically similar straightforward manner: “Despite SSA attempts to reduce the backlog through its [Short Term Disability Project Plan (STDP)] initiatives, the agency did not reach its goal of reducing this backlog to 375,000 by December 1996.”<sup>169</sup>

In short, a long series of GAO reports and findings, when considered together with the various statements of agency officials, paints a frighteningly simple picture of repeated complex initiatives (e.g., STDP—short term disability project), process improvements (e.g., HPI—hearing process improvement), and a string of alternative decisionmakers (the adjudication officer, the senior attorney, the federal reviewing official, and similar denominations of nonjudicial personnel)—all to little or no avail, despite the expenditure of tens of millions of dollars. And, while hindsight is twenty-twenty, the public, the agency, and members of Congress stand not now looking back over twenty-five years for the first time, but having done so with the eyes of many who have looked and seen similar views over many years. The gaze of members of Congress, high ranking officials, and the tenure of multiple Commissioners have seen the problems, heard the testimony, and witnessed the result.

Still, the backlog persists.

#### APPENDIX II: 20 YEARS OF SELECTED GAO FINDINGS ON THE SOCIAL SECURITY ADMINISTRATION BACKLOG (1989–2009)

### **1989**

#### ***The Bellmon Review—GAO Letter to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means, Regarding Suggestions on Ways to Make the Social Security Appeals Process Less Burdensome***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-HRD-89-

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168. U.S. GOV'T ACCOUNTING OFFICE, GAO-02-552T, SOCIAL SECURITY DISABILITY: COMMISSIONER PROPOSES STRATEGY TO IMPROVE THE CLAIMS PROCESS, BUT FACES IMPLEMENTATION CHALLENGES 3–4 (2004).

169. U.S. GOV'T ACCOUNTING OFFICE, GAO/T-HEHS-97-118, SOCIAL SECURITY DISABILITY: SSA ACTIONS TO REDUCE BACKLOGS AND ACHIEVE MORE CONSISTENT DECISIONS DESERVE HIGH PRIORITY 3 (1997).

48BR, RESULTS OF REQUIRED REVIEWS OF ADMINISTRATIVE LAW JUDGE DECISIONS (1989), <http://archive.gao.gov/d25t7/139091.pdf>.

This article assesses the merits of the Bellmon Review. It finds that while the reviews appear to be cost effective, they also delay the payment of benefits and, overall, do not appear to have much value.

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-HRD-90-15, MANY ADMINISTRATIVE LAW JUDGES OPPOSE PRODUCTIVITY INITIATIVES (1989), <http://www.gao.gov/assets/150/148485.pdf>.

In a report that attempted to determine what caused the recent conflicts between OHA management and administrative law judges, GAO found that such conflicts centered around management's attempts to increase administrative law judges' production levels. The study further found that the reduction in the number of administrative law judges was warranted for a four-year period because of a sharp drop-off in the number of appeals. However, OHA should have rehired more ALJs when the number of appeals climbed back to its previous high levels.

## 1995

***GAO Testimony of Jane L. Ross, Director, Income Security Issues, Health, Education, and Human Services Division, Before the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-HEHS-95-233, SOCIAL SECURITY DISABILITY: MANAGEMENT ACTION AND PROGRAM REDESIGN NEEDED TO ADDRESS LONG-STANDING PROBLEMS (1995), <http://www.gao.gov/assets/110/106213.pdf>.

In this testimony, Jane Ross addressed three areas of concern about SSA management: (1) "improving the timeliness and consistency of disability decisions"; (2) "helping more people reduce their dependence on cash benefits"; and (3) "ensuring that benefits are going only to those least able to work."

## 1996

***GAO Report to the Ranking Minority Member, Committee on Ways and Means, House of Representatives***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-96-87, BACKLOG REDUCTION EFFORTS UNDERWAY: SIGNIFICANT CHALLENGES REMAIN (1996), <http://www.gao.gov/archive/>

1996/he96087.pdf.

The report assesses the growing difficulty SSA faces with respect to the growing backlog of cases awaiting a hearing decision. The report finds that the backlog results from “(1) multiple levels of claims development and decision-making, (2) fragmented program accountability, (3) decisional disparities between DDS and OHA adjudicators, and (4) SSA’s failure to define and communicate its management authority over the ALJs.”

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS 96-170, SSA DISABILITY REDESIGN: MORE TESTING NEEDED TO ASSESS FEASIBILITY OF NEW CLAIM MANAGER POSITION (1996), <http://www.gao.gov/archive/1996/he96170.pdf>.

The report evaluates the concerns that come along with the creation of a new position, the disability claim manager. The report finds that SSA would benefit by increasing efficiency, better addressing claimant needs, and reducing processing time. However, the report concedes that no test conducted to assess the feasibility of the new position can be truly accurate at this time.

***Testimony Before the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/T-HEHS-96-211, SSA DISABILITY REENGINEERING: PROJECT MAGNITUDE AND COMPLEXITY IMPEDE IMPLEMENTATION (1996), <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-T-HEHS-96-211/pdf/GAOREPORTS-T-HEHS-96-211.pdf>.

The report provides information on SSA’s proposal to redesign its disability claims process. Specifically, it assesses SSA’s vision and progress for the redesign, the issues related to the scope and complexity of the redesign, and SSA’s efforts to maintain stakeholder support. The report finds that while the redesign can reduce costs, save time, and improve the quality of service, the scope of the redesign’s initiatives may jeopardize the likelihood of accomplishing the goals of the redesign.

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-20, SSA DISABILITY REDESIGN, FOCUS NEEDED ON INITIATIVES MOST CRUCIAL TO REDUCING COSTS AND TIME (1996), <http://www.gao.gov/archive/1997/he97020.pdf>.

This report studies the impact of reengineering, which is a process used by various organizations “as a means to identify and quickly put in place dramatic improvements.”

### 1997

#### ***Testimony Before the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-HEHS-97-118, SOCIAL SECURITY DISABILITY: SSA ACTIONS TO REDUCE BACKLOGS AND ACHIEVE MORE CONSISTENT DECISIONS DESERVING HIGH PRIORITY (1997), <http://www.gao.gov/archive/1997/he97118t.pdf>.

Jane L. Ross, the Director of Income Security Issues at the Health, Education, and Human Services Division, testifies on the actions SSA undertook as they relate to SSA's management of its Disability Insurance and Supplemental Security Income programs. Ross testifies that the actions resulted in the development of plans that generally improved the management of its programs.

### 1999

#### ***Testimony Before the Subcommittee on Human Resources and the Subcommittee on Social Security, Committee on Ways and Means, House of Representatives***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OCG-99-20, MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS: SOCIAL SECURITY ADMINISTRATION (1999).

This report discusses the corrective actions SSA has undertaken to address major performance and management challenges, which have hampered the effectiveness of SSA. While SSA has recently developed goals for improving its management, this report emphasizes that the “agency must take actions to address the root causes of its management and performance weaknesses and ensure sustained management oversight and attention.”

#### ***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-99-25, SSA DISABILITY REDESIGN: ACTIONS NEEDED TO ENHANCE FUTURE PROGRESS (1999), <http://www.gao.gov/archive/1999/he99025.pdf>.

The report assesses SSA's efforts to redesign the disability claims process and identify actions that SSA can take to better ensure future progress. The report finds that while SSA has made progress overall, it has yet to

meet most of its milestones for testing and implementing its initiatives.

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-99-50R, SOCIAL SECURITY: REVIEW OF DISABILITY REPRESENTATIVES (1999), <http://archive.gao.gov/paprpdf2/161794.pdf>.

This report assesses “(1) the extent to which disability representatives contribute to decisional delays, (2) other potential reasons for decisional delays, and (3) additional options available to SSA to ensure that disability decisions are reached in a more timely manner.”

## 2001

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-261, MAJOR MANAGEMENT PROBLEMS AND PROGRAM RISKS: SOCIAL SECURITY ADMINISTRATION (2001), <http://www.gao.gov/pas/2001/d01261.pdf>.

“This report addresses the major performance and accountability challenges facing” SSA. This analysis hopes to help the administration carry out its responsibility in a more efficient manner by suggesting that it use its research and policy development components to assist policymakers in addressing crucial policy issues.

## 2002

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, SOCIAL SECURITY DISABILITY: DISAPPOINTING RESULTS FROM SSA'S EFFORT TO IMPROVE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION (2002), <http://www.gao.gov/new.items/d02322.pdf>.

This report discusses five disability claims process initiatives, four of which have been implemented by SSA, and the disappointing improvements they have achieved.

## 2003

***GAO Report to the Chairman of the Social Security Subcommittee, Committee on Ways and Means, House of Representatives***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-117, MAJOR

MANAGEMENT CHALLENGES AND PROGRAM RISKS: SOCIAL SECURITY ADMINISTRATION (2003), <http://www.gao.gov/cgi-bin/getrpt?GAO-03-117>.

In its analysis, the GAO recommends that modernizing the federal disability programs should be added to the 2003 high-risk list. The analysis implores that SSA continue “to strengthen the integrity of the SSI program[,] . . . [i]mprove SSA’s programs that provide support for individuals with disabilities[,] . . . [b]etter position SSA for future service delivery challenges[, and] . . . [s]trengthen controls to protect the personal information SSA develops and maintains.”

## 2004

***GAO Testimony Before the Subcommittee on the Oversight of Government Management, the Federal Workforce and the District of Columbia, Committee on Governmental Affairs, U.S. Senate***

Citation: U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-552-T, SOCIAL SECURITY DISABILITY: COMMISSIONER PROPOSES STRATEGY TO IMPROVE THE CLAIMS PROCESS, BUT FACES IMPLEMENTATION CHALLENGES (2004), <http://www.gao.gov/assets/120/110762.pdf>.

This report finds that SSA is at a “crossroads” in its efforts to improve its disability claims process and attempts to provide guidance on how SSA can effectively move forward. In particular, the report critically assesses the viability of the Commissioner’s strategy to overcome the agency’s challenges.

***GAO Report to the Chairman of the Social Security Subcommittee of the House Committee on Ways and Means***

Citation: U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-656, SOCIAL SECURITY ADMINISTRATION: MORE EFFORT NEEDED TO ASSESS CONSISTENCY OF DISABILITY DECISIONS (2004), <http://www.gao.gov/new.items/d04656.pdf>.

The report addresses a problem that has plagued SSA: inconsistency in its decisionmaking. The report examines “(1) the status of SSA’s process unification initiative, (2) SSA’s assessments of possible inconsistencies in decisions between adjudication levels, and (3) whether SSA’s new proposal incorporates changes to improve consistency in decisions between adjudication levels.

## 2006

***GAO Testimony Before the Subcommittee on Social Security,***

***Committee on Ways and Means, House of Representatives***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-779-T, SOCIAL SECURITY ADMINISTRATION: AGENCY IS POSITIONING ITSELF TO IMPLEMENT ITS NEW DISABILITY DETERMINATION PROCESS BUT KEY FACETS ARE STILL IN DEVELOPMENT (2006), <http://www.gao.gov/assets/120/114067.pdf>.

The SSA has designed and implemented a new disability determination process that essentially eliminates the Appeals Council. While there are concerns associated with this new initiative, the report notes that SSA has made substantial preparation for the successful implementation of its initiatives. The report takes into account the various comments in reaching its assessment.

**2007*****GAO Report to Congressional Requesters***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-40, SOCIAL SECURITY DISABILITY: BETTER PLANNING, MANAGEMENT, AND EVALUATION COULD HELP ADDRESS BACKLOGS (2007), <http://www.gao.gov/new.items/d0840.pdf>.

The report makes recommendations to the SSA Commissioner to improve the execution of its initiatives. The report identifies trends in Supplemental Security Income disability claims from 1997 to 2006. To identify the trends, the report reviews prior GAO reports, position papers, testimonies from national advocacy groups, agency documents, and interviews of SSA officials.

**2008*****GAO Report to Congressional Requesters***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-1053, SOCIAL SECURITY DISABILITY: MANAGEMENT CONTROLS NEEDED TO STRENGTHEN DEMONSTRATION PROJECTS (2008), <http://www.gao.gov/new.items/d081053.pdf>.

This report recommends that "SSA establish written policies and procedures for managing and operating its projects consistent with standard research practices and internal control standards in the federal government."

**2009*****GAO Report to Congressional Committees***

Citation: U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-398, SOCIAL

SECURITY DISABILITY: ADDITIONAL PERFORMANCE MEASURES AND BETTER COST ESTIMATES COULD HELP IMPROVE SSA'S EFFORTS TO ELIMINATE ITS HEARINGS BACKLOG (2009).

In 2007, SSA implemented “a plan for eliminating the hearing backlog.” In this report, “GAO (1) examined the Plan’s potential to eliminate the hearings-level backlog, (2) determined the extent to which the plan included components of sound planning, and (3) identified potential unintended effects of the Plan on hearings-level operations and other aspects of the disability process.”

# COMMENTS

## MINE SAFETY: PENALTY STRUCTURE AND ENFORCEMENT MECHANISMS OF THE MINE ACT IN THE WAKE OF THE UPPER BIG BRANCH EXPLOSION

CYNTHIA WILDFIRE\*

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## INTRODUCTION

On April 5, 2010, an explosion at the Upper Big Branch Coal Mine in West Virginia killed twenty-nine miners.<sup>1</sup> In 2011, thirty-seven miners were killed on the job.<sup>2</sup> An additional fifteen hundred current and former coal miners die each year of black lung.<sup>3</sup> Strict adherence to the safety measures mandated by the Mine Act<sup>4</sup> would have prevented all or nearly all of these deaths.<sup>5</sup> The Mine Act, as implemented by the Mine Safety and Health Administration (MSHA),<sup>6</sup> is tailored to address common and foreseeable dangers in mines. The Act's effectiveness is blunted, however,

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1. See Ken Ward Jr. & Andrew Clevenger, *Last Four Upper Big Branch Miners Found Dead: Death Toll Rises to 29; Worst U.S. Mine Disaster in 40 Years*, CHARLESTON GAZETTE, Apr. 9, 2010, <http://www.wvgazette.com/News/201004090857> (reporting four days after the disaster that rescue workers were able to return to the mine and determine there were no survivors).

2. See *2011 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/STATS/DAILY/D2011BAR.PDF> (last updated Dec. 31, 2011).

3. *Black Lung*, UNITED MINE WORKERS OF AM., <http://www.umwa.org/?q=content/black-lung> (last visited May 8, 2012). Black Lung and other related diseases are all preventable occupational diseases caused "by prolonged breathing of coal mine dust." *Id.*

4. See Mine Improvement and New Emergency Response Act of 2006 (MINER Act), Pub. L. No. 109-236, 120 Stat. 493 (codified in scattered sections of 29 U.S.C. and 30 U.S.C.); Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended in 30 U.S.C. §§ 801-965 (2006)). The Federal Mine Safety and Health Act of 1977 and the MINER Act of 2006, which amended the prior legislation, are collectively referred to as the "Mine Act." See News Release, Office of Pub. Affairs, U.S. Dep't of Labor, Mining Deaths Rise in 2010: MSHA Chief Pledges Continued Enforcement, Outreach on Behalf of Nation's Miners 2 (Jan. 13, 2011), <http://www.msha.gov/media/PRESS/2011/NR110113a.pdf> (quoting Joseph Main, Assistant Secretary of Labor for the Mine Safety and Health Administration (MSHA), describing the enforcement power of the agency as stemming from the Mine Act).

5. See News Release, *supra* note 4, at 1 (quoting Joseph Main, Assistant Secretary of Labor for MSHA, as stating, "Mining deaths are preventable").

6. The Mine Safety and Health Administration was created within the Department of Labor in 29 U.S.C. § 557a (2006). For an organizational chart of MSHA, see *MSHA Program Areas*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/programs/programs.htm> (last visited May 8, 2012).

because many mine operators, who are ultimately responsible for ensuring a safe workplace,<sup>7</sup> choose to accept citations and penalties rather than follow MSHA's safety directives.<sup>8</sup> This means that the causes of the explosion at Upper Big Branch, as well as the causes of most other mining fatalities, are already illegal. Obviously then, enforcement and compliance are appropriate points for consideration and review, but they depend in large part on cooperation from the judges who review MSHA's actions.<sup>9</sup> To affect improvement, enhanced enforcement mechanisms and higher penalties need to be accompanied by changes at the Federal Mine Safety and Health Review Commission (FMSHRC or Commission). Policy changes at MSHA to strengthen enforcement or increase the consequences of noncompliance will have little effect if FMSHRC reverses orders or reduces penalties to previous lower levels when companies contest the actions.

After a series of mine accidents in 2006, Congress passed the MINER Act,<sup>10</sup> which amended the 1977 Mine Act. Among other things, the amendments increased penalties and created a category of "flagrant" violations, which can have penalties of up to \$220,000 each.<sup>11</sup> The impact of those amendments is not yet clear; the first flagrant violation case to be

7. See 30 U.S.C. § 801(e) (2006) ("[T]he operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines . . .").

8. See News Release, Office of Pub. Affairs, U.S. Dep't of Labor, MSHA Announces Results of November Impact Inspections (Dec. 21, 2010), <http://www.msha.gov/media/PRESS/2010/NR101221.pdf> (quoting Assistant Secretary Joseph Main's statement that impact inspections "reduce the number of mines that consider egregious violation records a cost of doing business"); see also *Blankenship's First Comments on Tragedy*, METRONews, Apr. 6, 2010, <http://www.wvmetronews.com/index.cfm?func=displayfullstory&storyid=36365> (quoting the CEO of Massey Coal after the Upper Big Branch mine disaster saying, "Violations are unfortunately a normal part of the mining process"). Performance Coal, a subsidiary of Massey Coal, was the operator of the Upper Big Branch Mine.

9. Cf. 30 U.S.C. § 823(a)-(d) (establishing the Federal Mine Safety and Health Review Commission (FMSHRC or Commission) and describing its structure and procedures for review of Mine Act cases).

10. Pub. L. No. 109-236, 120 Stat. 493 (codified in scattered sections of 29 U.S.C. and 30 U.S.C.); see also Joseph Main, *MINER Act: 5 Years Later*, (WORK IN PROGRESS): THE OFFICIAL BLOG OF THE U.S. DEP'T OF LABOR (June 15, 2011), <http://social.dol.gov/blog/miner-act-5-years-later/> ("The Mine Improvement and Emergency Response (MINER) Act of 2006 was drafted in response to the tragedies at the Sago, Aracoma, and Darby mines.").

11. See 30 C.F.R. § 100.5(e) (2010) (defining flagrant violations as those involving "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury").

litigated on its merits is currently on appeal.<sup>12</sup> It is possible that without further regulatory changes holdings favorable to MSHA in this and other cases would alter the risk analysis for mine operators, at least for the most egregious violations.

Mine safety regulations have formed and developed in response to well-publicized mine disasters in an attempt to correct the weaknesses and flaws in the law revealed by the disasters.<sup>13</sup> Congress has not thus far passed legislation responding to the Upper Big Branch disaster,<sup>14</sup> which lost a strong advocate after the death of long-time West Virginia Senator Robert C. Byrd.<sup>15</sup> MSHA released its official report on the disaster on December 6, 2011, but the report has not prompted a renewed effort to make legislative changes.<sup>16</sup> Even if Congress does not act, MSHA has already adjusted its enforcement methods and can continue rulemaking within the parameters of the current statute to respond to the dangers revealed by the disaster.<sup>17</sup> While mine safety has improved immensely since the formation

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12. See *Stillhouse Mining, LLC*, 33 FMSHRC 778, 797 (2011) (“[W]hether an alleged violation is ‘flagrant’ under section 110 of the Mine Act presents a case of first impression for this Administrative Law Judge and the Commission.”); see also *Cases Currently on Review Before the Commission*, FED. MINE SAFETY & HEALTH REV. COMM’N, <http://www.fmsirc.gov/MonthlyCaseReport.pdf> (last visited May 8, 2012) (listing *Stillhouse* as one of the cases on review as of April 12, 2012).

13. See Alison D. Morantz, *Mining Mining Data: Bringing Empirical Analysis to Bear on the Regulation of Safety and Health in U.S. Mining*, 111 W. VA. L. REV. 45, 46–47 (2008) (detailing mine regulation that began after the Monongah disaster killed hundreds of miners in 1907 and continuing through the 2006 MINER Act, enacted after twelve miners died in an explosion at the Sago Mine).

14. See Sam Hananel, *House Rejects Mine Safety Bill Prompted by West Virginia Disaster*, HUFFINGTON POST (Dec. 8, 2010, 4:54 PM), [http://www.huffingtonpost.com/2010/12/08/house-rejects-mine-safety\\_n\\_794122.html](http://www.huffingtonpost.com/2010/12/08/house-rejects-mine-safety_n_794122.html) (explaining that the legislation would have made it easier for regulators to shut down problem mines prior to an accident, such as the explosion at Upper Big Branch).

15. See Ken Ward Jr., *Sen. Robert C. Byrd on the Massey Mine Disaster: “I Am Sick, I Am Saddened and I Am Angry,” Coal Tattoo*, CHARLESTON GAZETTE (Apr. 9, 2010, 10:35 AM), <http://blogs.wvgazette.com/coalattoo/2010/04/09/sen-robert-c-byrd-on-the-massey-mine-disaster-i-am-sick-i-am-saddened-and-i-am-angry/> (providing a statement from Sen. Byrd calling for action, including “a reexamination of the health and safety laws that have been put into place and what more may need to be done to avoid future loss of life”). Senator Byrd passed away not long after the Upper Big Branch explosion.

16. See *Upper Big Branch Mine-South*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/PerformanceCoal/PerformanceCoal.asp> (last visited May 8, 2012) (providing links to the *Fatal Accident Investigation Report* and other materials relating to the disaster).

17. See *Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 18–21 (2011) (statement of Joseph Main, Assistant Secretary of Labor for MSHA) (explaining MSHA’s actions in response to Upper Big Branch, including impact

of MSHA,<sup>18</sup> disasters like Upper Big Branch, continued deaths from smaller accidents, and long-term health problems<sup>19</sup> demonstrate the need for further safety improvement.

Because existing regulations address most risks present in mines, including the causes of the Upper Big Branch disaster, any new regulations or legislation should focus on widespread noncompliance. The Commission has acted as a barrier to stronger enforcement measures in the past, and this Comment will address its role in considering potential methods of increasing compliance. Part I will provide an explanation of mine-specific terminology, common violations, and the structure of MSHA and FMSHRC. Part II will discuss the fines currently applied to violations and the accompanying appeals process that often reduces penalties, arguing that fines need to be higher to incentivize compliance. Part III will discuss other enforcement measures that could increase compliance, with a focus on inspectors' authority to shut down production in some situations. Finally, Part IV will outline potential solutions. Each Part will discuss the relationship between MSHA and the Commission, the extent to which the Commission's administrative law judges (ALJs) interfere with enforcement measures, and the potential changes that could overcome the limitations imposed by the Commission.

## I. BACKGROUND, TERMINOLOGY, AND ADMINISTRATIVE STRUCTURE

### A. *Background on Mining Terminology and Common Violations*

Because the subject matter of this Comment involves technical terminology and legal standards specific to the Mine Act, an overview of the significance of a few frequent violations may be helpful. The Upper Big Branch Mine and the conditions investigators found after the accident will

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inspections at high-risk mines and rulemaking on pattern of violations injunctions, coal dust, and examinations).

18. See Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 99–100 (2011) (demonstrating a drop in fatalities after the passage of comprehensive mine safety legislation).

19. Autopsies of the Upper Big Branch victims revealed cause for concern about increases in black lung, including in younger miners and those with fewer years on the job. See J. DAVITT MCATEER ET AL., GOVERNOR'S INDEP. INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES 32 (2011), available at <http://www.nttc.edu/programs&projects/minesafety/disasterinvestigations/upperbigbranch/UpperBigBranchReport.pdf> (reporting that seventeen of the twenty-four autopsies with sufficient lung tissue revealed coal workers' pneumoconiosis (CWP), and five of those with CWP had less than ten years of mining experience).

be used as an example throughout. The violations that contributed to the disaster are not unusual in other mines,<sup>20</sup> though most do not reach a similar extent of noncompliance.

Upper Big Branch used longwall mining, a highly productive method of underground coal mining used primarily in Appalachia.<sup>21</sup> Longwall mining uses a shearer machine to extract a full seam of coal, with the shearer bits removing the coal and then dropping it onto a conveyor belt in a relatively automated process.<sup>22</sup> The roof above the coal seam is then allowed to collapse, forming a caved-out and inaccessible area called the “gob.”<sup>23</sup> Machinery for longwall mining is very expensive, but fewer workers are needed and the coal can be extracted more efficiently.<sup>24</sup> This type of mining tends to produce large quantities of dust, and ventilation is often a challenge.<sup>25</sup>

The long-established room-and-pillar method of underground coal mining remains the most common method used today.<sup>26</sup> Room-and-pillar mining removes the coal from “rooms,” leaving behind pillars of coal to support the roof that many companies later extract during retreat mining, allowing the roof to collapse behind miners.<sup>27</sup> Conventional room-and-pillar mining involves the labor-intensive process of undercutting the coal, drilling holes in it, blasting it loose with explosives, and then loading it.<sup>28</sup> Continuous room-and-pillar mining uses a machine to remove the coal and load it in one step, though both types require frequent stops for roof

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20. In 2010, the most frequently cited standards for underground coal mines were: (1) accumulations of combustible materials; (2) ventilation plan violations; (3) electrical equipment violations; (4) failure to protect from falls of roof, face, and ribs; and (5) roof control plan violations. See *Most Frequently Cited Standards for 2010: Underground—Coal*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/stats/top20viols/top20home.asp> (select “2010” under “What Year?,” “Underground” under “Select a Mine Type,” and “Coal” under “Select an Industry Group,” and then select “Get Top Twenty”) (last visited May 8, 2012) (compiling data for citations given at various types of mines). Others in the top twenty include machinery and equipment violations, failure to adequately rock-dust, and inadequate maintenance of firefighting equipment. *Id.*

21. ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, DOE/EIA-TR-0588, LONGWALL MINING, at viii (1995).

22. *Id.* at 3.

23. *Id.* at 9.

24. See *id.* at 3, 5 (explaining that longwall mining is more efficient because it is a continuous operation and allows a higher rate of production to be sustained, but that the capital costs for equipment and installation are high).

25. See *id.* at 5 (explaining that dust levels often exceed maximum limits and must be reduced by modifying the cutting sequence or increasing airflow).

26. *Id.* at 3.

27. *Id.*

28. *Id.*

bolting.<sup>29</sup>

Regardless of which type of mining is used, the environment of an underground coal mine abounds with dangers. Regulations are designed to limit those dangers, and regulations exist for almost anything that can go wrong in a mine. If the regulations were followed, few accidents would take place. If a mine roof is properly supported, it will not collapse and crush workers.<sup>30</sup> If machinery has proper visibility and operators follow safety procedures, workers will not be run over.<sup>31</sup> Others accidents, like the Upper Big Branch explosion, have more complex causes.<sup>32</sup> Still, if equipment is properly maintained, dust controlled, ventilation plans followed, and examinations performed, then explosions will not happen.<sup>33</sup> An ignition would not have been able to grow into an explosion if equipment was maintained and water sprays worked properly.<sup>34</sup> There would be no coal dust in the air to cause black lung or propagate an explosion if dust control measures were implemented.<sup>35</sup> A foreman would

29. *See id.*

30. *Cf.* 30 U.S.C. § 862(a), (f) (2006) (mandating that the mine roof in all working areas, roadways, and travelways be supported, and that operators maintain a roof control plan and perform regular safety inspections).

31. *Cf.* 30 C.F.R. § 77.1607(g) (2011) (“Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.”).

32. *See* MCATEER ET AL., *supra* note 19, at 4 (describing the combination of problems with ventilation, dust, and equipment that led to the explosion). *See generally* MINE SAFETY & HEALTH ADMIN., REPORT OF INVESTIGATION: FATAL UNDERGROUND MINE EXPLOSION APRIL 5, 2010 (2011), <http://www.msha.gov/Fatals/2010/UBB/FTL10c0331.pdf>. MSHA found that violations of twelve safety standards contributed directly to the explosion, including failing to conduct required examinations that could have revealed hazards, coal-dust accumulations violations, failure to rock-dust, failure to comply with the ventilation plan (including operating the shearer with missing and clogged water sprays), and failing to maintain the shearer. *Id.* at 9. Nine of those twelve contributory violations were also flagrant, and an additional 357 noncontributory violations were issued. *Id.* at 9. MSHA’s findings and conclusions regarding the explosion are consistent with McAteer’s; the parallel citation is only included here and McAteer’s is used as the authority throughout.

33. *See* MCATEER ET AL., *supra* note 19, at 4 (stating that the explosion was preventable and would not have happened had the company followed existing safety laws regarding ventilation, rock-dusting, coal-dust accumulations, equipment maintenance, and pre-shift and on-shift examinations).

34. *Id.* Water sprays on the shearer were clogged at the Upper Big Branch Mine. *Id.* at 23. Water sprays serve both to control dust and to douse sparks and prevent ignitions as the metal bits of the shearer hit rock. *Id.*

35. *Cf. id.* at 4. (explaining that one factor that resulted in the explosion at Upper Big Branch was the company’s failure to maintain its ventilation system in accordance with federal regulations, which resulted in an accumulation of coal dust in the system that served fuel for the explosion). Coal dust is highly explosive, and heavy dust throughout a mine can provide fuel for the explosion to continue through the whole mine rather than being contained to one section. For a short video demonstrating a coal-dust-propagated explosion,

be aware of high levels of methane or natural gas present in the mine if meters were working properly and if pre-shift examinations were performed as mandated.<sup>36</sup> Even black lung would be greatly reduced if mine operators adhered to dust control regulations.<sup>37</sup>

Though mine operators are ultimately responsible for maintaining safe mines regardless of enforcement measures, MSHA provides oversight to ensure that safety regulations are followed. MSHA inspectors may issue citations for violations of safety standards, which FMSHRC may review.

### B. *The Split Enforcement Scheme of MSHA and FMSHRC*

As an independent agency, FMSHRC is not part of the Department of Labor, nor does it share a common leadership figure with MSHA.<sup>38</sup> Under the Mine Act, MSHA is responsible for enforcement and rulemaking, and FMSHRC is responsible for adjudication.<sup>39</sup> FMSHRC consists of presidentially appointed Commissioners and ALJs.<sup>40</sup> Cases are first heard by ALJs, and the commissioners may hear appeals if they either choose to grant a party's Petition for Discretionary Review or elect to review a case independently.<sup>41</sup> Although a relevant favorable opinion from an ALJ can

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see *Performance Coal Company: Upper Big Branch Mine-South Single Source Page*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/PerformanceCoal/UBBPublic/bruceton.wvx> (last visited Apr. 22, 2012).

36. Examinations are a key tool in mine safety. A foreman must go through the mine before each shift, checking for compliance with safety standards, noting areas that require attention, and ensuring that there are not dangerous gas mixtures or other immediate risks. 30 C.F.R. § 75.360 (2011). The section foreman is also required to do examinations during shifts to check for developing problems. *Id.* § 75.362; cf. MCATEER ET AL., *supra* note 19, at 17–19 (describing the working conditions leading up to the explosion at Upper Big Branch, including oxygen deficiency, inoperable pumps, and improper air flows that were left unabated even after the foremen were put on notice).

37. Dust regulations are currently being reworked to require lower levels of dust that the miners can be exposed to because of continued incidences of black lung under the current standard. See *End Black Lung: Act Now!*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/S&HINFO/BlackLung/homepage2009.asp> (last visited May 8, 2012) (providing references to several agency actions); see also Coal Mine Dust Personal Sampler Units, 30 C.F.R. pt. 74 (2009) (discussing new technology for monitoring coal dust).

38. *E.g.*, *Frequently Asked Questions, Is the Commission Different from "MSHA"?*, FED. MINE SAFETY & HEALTH REV. COMM'N, <http://www.fmshrc.gov/faq.htm> (last visited May 8, 2012) (“The Commission is completely separate from MSHA.”).

39. See *About FMSHRC*, FED. MINE SAFETY & HEALTH REV. COMM'N, <http://www.fmshrc.gov/fmshrc.html> (last visited May 8, 2012) (describing the respective roles of MSHA and FMSHRC).

40. See *id.* (outlining the makeup of the Commission, which is composed of five members appointed by the President and confirmed by the Senate).

41. See *id.* (explaining that while most cases heard by the Commission are appealed by either an operator or the Secretary of Labor and MSHA, the Commission has the authority

be influential, ALJ decisions are not precedential, while Commission decisions are.<sup>42</sup> ALJ decisions become final if neither party appeals or if the Commission does not grant review.<sup>43</sup> Commission decisions may be appealed to the United States Courts of Appeals.<sup>44</sup>

MSHA has a relatively high level of statutory power to enforce the provisions of the Act, including at the inspector level.<sup>45</sup> MSHA inspectors do not need a warrant to enter mines, nor do they need to give notice.<sup>46</sup> Inspectors even have independent authority to shut down mines or sections of mines and withdraw miners if they find an imminent danger.<sup>47</sup>

Inspectors note the circumstances and the seriousness of a given violation, including the substantiating facts, in the citation record.<sup>48</sup> Particularly serious violations may be designated as significant and substantial (S&S), which contributes to the “gravity analysis.”<sup>49</sup> A violation is S&S if it “significantly and substantially contributes to the cause and effect of a coal or other mine safety or health hazard.”<sup>50</sup> The Commission created a four-part test to determine whether a violation is S&S:

- (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the

to elect to review cases that were not appealed as well).

42. *Id.*

43. *Id.*

44. *Id.* Mine Act cases may be appealed to “the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit.” 30 U.S.C. § 816(a)(1) (2006).

45. See R. Henry Moore, *The Doctrine of Judicial Deference and the Independence of the Federal Mine Safety and Health Review Commission*, 107 W. VA. L. REV. 187, 209–11 (2004) (comparing the lesser power given to the Occupational Health and Safety Administration with that given to MSHA, despite outwardly similar structures and missions).

46. See 30 U.S.C. § 813(a) (providing right of entry for inspectors and making it illegal for surface employees to warn underground employees of initiated inspections).

47. *Id.* § 817(a). This Comment further discusses the imminent danger standard and its interpretation, with a recommendation to strengthen inspectors’ authority. See *infra* Part III.A.

48. See *Performance Coal Company, Upper Big Branch Mine-South: Massey Energy Company*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/PerformanceCoal/PerformanceCoalRegularInspectionReports.asp> (last visited May 8, 2012) (linking to inspection reports, including citation forms with spaces for both the inspector’s record of the facts and boxes to check regarding the gravity, type of citation, and negligence level).

49. MINE SAFETY & HEALTH ADMIN., PROGRAM POLICY MANUAL: VOL. 1: INTERPRETATION AND GUIDELINES ON ENFORCEMENT OF THE 1977 ACT (1996) [hereinafter PROGRAM POLICY MANUAL], <http://www.msha.gov/regs/complian/ppmPMVOL1C.HTM> (explaining the rules and regulations to guide inspectors in enforcing the Mine Act).

50. *Id.* (quoting Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 104(d)(1), (e)(1), 91 Stat. 1290, 1301 (1977)).

violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.<sup>51</sup>

The third factor tends to be the most difficult to demonstrate because the likelihood of injury can be somewhat speculative.<sup>52</sup> S&S designations receive a great deal of attention in many Mine Act cases, particularly in determining the appropriate penalty.<sup>53</sup> Because companies are much more likely to contest citations with high penalties, and those citations are generally S&S, ALJs regularly perform the S&S analysis. ALJs apply the standard created by the Commission to determine whether the S&S designation was appropriate. The S&S analysis demonstrates the potential for questions regarding the appropriate role of the Commission in formulating standards and rules with respect to Mine Act provisions, with MSHA bound by an interpretation of the adjudicative review body.

The split enforcement scheme leaves a blurry line between the executive and quasi-legislative functions of MSHA and the quasi-judicial function of FMSHRC. The Mine Act was enacted before *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>54</sup> and does not contain language to clarify the distinct roles of the Commission and MSHA or the standard of review. While it is fairly well-settled that MSHA is entitled to *Chevron* deference,<sup>55</sup> tension remains on some issues for which the Commission has formulated standards and rules in its precedent-setting decisions.<sup>56</sup> Agency powers

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51. See *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (1984) (footnote omitted) (creating the much-cited “*Mathies* test”).

52. Cf. *Mach Mining, LLC*, 33 FMSHRC 763, 766–67 (2011) (finding that accumulations violations were not significant and substantial (S&S) without a clearly defined ignition source at the time of the inspection, making injury possible but not “reasonably likely”).

53. See, e.g., *Triad Underground Mining, LLC*, 33 FMSHRC 231, 234–37 (2011) (referencing several Commission cases clarifying the standard and criteria to be considered in an S&S determination).

54. 467 U.S. 837, 865–66 (1984) (establishing deference for reasonable agency interpretations of an agency’s own statute that Congress has authorized the agency to administer).

55. See *Energy W. Mining Co. v. Fed. Mine Safety & Health Review Comm’n*, 40 F.3d 457, 463–64 (D.C. Cir. 1994) (holding that the Commission owes the Secretary and MSHA deference, despite language in the Mine Act granting the Commission authority to review questions of law, policy, or discretion). But see *Moore*, *supra* note 45, at 190 (“The independence of a body such as the Review Commission is in direct conflict with the doctrine of judicial deference to administrative interpretations . . .”).

56. For a discussion of the rules surrounding imminent danger withdrawal orders, for which the Commission has limited MSHA’s enforcement authority, see *infra* Part III.A. The standards for S&S designations discussed above are another example of Commission-created policy that is narrower than an MSHA standard would likely be.

reach their zenith with notice-and-comment rulemaking or formal adjudication with the force of law.<sup>57</sup> When an agency's interpretation can be found in less formal agency materials, such as letters, guidelines, or policy statements, courts are to view it as persuasive and entitled to respect, but not necessarily entitled to full *Chevron* deference.<sup>58</sup> However, the United States Court of Appeals for the D.C. Circuit has held that even MSHA's litigation positions before the Commission are entitled to *Chevron* deference.<sup>59</sup> No matter the level of deference, as in any court, certain functions are judicial by nature and must be left to FMSHRC. For those cases in which the Commission does overstep its proper role, appeals to the United States Courts of Appeals can both protect the measure in question and rein in the Commission and ALJs. While MSHA can use rulemaking and appeals to protect policy positions and interpretations of many provisions of the Mine Act, the Commission and ALJs retain the power to review MSHA's enforcement measures. ALJs and the Commission also have discretion regarding penalty assessments,<sup>60</sup> making it difficult for MSHA to impose consistently higher penalties within the discretionary range without acquiescence from the Commission.

## II. OPTIMAL PENALTIES TO INCREASE COMPLIANCE WITH SAFETY PROVISIONS

Increased penalties for violations of the Mine Act could increase compliance, but only if the penalties are set sufficiently high and consistently levied against wrongdoers to alter the current profit motives

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57. Cf. Matt Kenna, *Chevron Deference to Agencies: A Two-Way Street*, 15 SOUTHEASTERN ENVTL. L.J. 395, 400 (2007).

58. See *id.* at 399–400 (explaining that deference is granted in a continuum, to be determined on a case-by-case basis, with rulemaking receiving the highest degree and posthoc litigation positions unsupported by a prior agency position receiving a far lower degree of deference). The Court formulated the “power to persuade” standard in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944), and revitalized it in *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001), after *Chevron* had seemingly replaced it.

59. *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (“[I]n the statutory scheme of the Mine Act, the Secretary’s litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary’s promulgation of a . . . health and safety standard, and is therefore deserving of deference.” (alteration in original) (internal quotation marks omitted)). Despite this holding, the resurgence of lower levels of deference to certain agency decisions discussed above could mean rulemaking will be necessary in the future or that rulemaking will be needed to preserve MSHA’s interpretations before Article III courts on appeal from Commission decisions.

60. See 29 C.F.R. § 2700.30(b) (2011) (“In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.”).

that favor production over safety.<sup>61</sup> The maximum penalty under the Mine Act, except in recent cases with flagrant violations, is \$70,000 per violation.<sup>62</sup> Penalties can be assessed under a point system, which assigns point values to the size of the operator, the level of negligence, the number of miners affected, past violation history, and the gravity of the violation, among other factors.<sup>63</sup> Alternatively, MSHA can opt for a special penalty assessment if warranted.<sup>64</sup> MSHA must assess special penalties based on the following criteria: (1) the appropriateness of the penalty to the size of the operator, (2) violation history, (3) negligence, (4) gravity, (5) the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation, and (6) the effect of the penalty on the operator's ability to continue in business.<sup>65</sup>

Under the Mine Act, the goal of penalties is to deter violations.<sup>66</sup> The Senate Report from the 1977 Act explains, "Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law into compliance."<sup>67</sup> The same could be said today, despite the penalties permitted by the Mine Act, indicating that higher penalties are necessary to achieve the desired deterrent effect. At the Upper Big Branch Mine, MSHA inspectors regularly found serious problems and issued citations, with over five hundred citations and orders issued in 2009.<sup>68</sup> In 2008, inspectors issued nearly two hundred citations

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61. See A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J.L. & ECON. 133, 133 (1992) ("The optimal fine equals the harm, properly inflated for the chance of not being detected, plus the variable enforcement cost of imposing the fine."). Polinsky and Shavell's model includes variables for the cost of the harm, the benefit to the bad actor, enforcement costs, probability of detection, and the wealth of the bad actor. *Id.* at 135.

62. 30 C.F.R. § 100.3(a)(1) (2011).

63. *Id.* § 100.3(a)-(h).

64. *Id.* § 100.5(a).

65. *Id.* § 100.5(b) (referring to the six factors set out in § 100.3(a)).

66. See S. REP. NO. 95-181, at 40-41 (1977) (explaining that the goal of civil penalties is not to raise revenue but to induce compliance with the safety standards in the Act), *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 628-29 (Comm. Print 1978).

67. S. REP. NO. 95-181, at 4, *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 592 (Comm. Print 1978).

68. *Summary of Citations and Orders Issued at Upper Big Branch-South Mine*, MINE SAFETY & HEALTH ADMIN., [http://www.msha.gov/performancecoal/Violation\\_Summary.pdf](http://www.msha.gov/performancecoal/Violation_Summary.pdf) (last visited May 8, 2012).

with total proposed penalties of \$292,446.<sup>69</sup> As of April 5, 2010, the operator had paid \$47,661, an additional \$73,513 remained under contest, and settlements or penalty contest cases reduced the proposed penalties by the remaining \$171,272.<sup>70</sup> It is not clear that the full \$292,446 would have been sufficient to deter violations; paying about one-sixth of the assessed penalties over a two-year period was obviously insufficient.

ALJs consider the same factors as MSHA in determining penalties but have a great deal of discretion to impose higher or lower penalties than those assessed by MSHA.<sup>71</sup> ALJs reduce penalties in many cases, even when generally accepting MSHA's evidence and contentions.<sup>72</sup> The uncertainty created by the discretion of ALJs in assigning penalties diminishes the effectiveness of the fines in deterring violations. The tendency for ALJs to significantly reduce penalties also incentivizes contesting penalties, contributing to an extensive backlog of cases for the Solicitor of Labor and ALJs to adjudicate.<sup>73</sup> The backlog consisted of nearly 70,000 citations contested between October 1, 2007, and February 28, 2010; many of those citations have since been disposed of under the Backlog Reduction Project<sup>74</sup> implemented after the Upper Big Branch

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69. *Upper Big Branch: South Mine—Civil Penalty Summary*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/performancecoal/Upper%20Big%20Branch-South%20Mine%20Civil%20Penalty%20Summary.pdf> (last visited May 8, 2012).

70. *Id.*

71. *See, e.g.*, *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1086 (10th Cir. 1998) (“[A]dministrative law judges are accorded broad discretion in assessing civil penalties under the Mine Act.”).

72. *See, e.g.*, *Jim Walter Res., Inc.*, 27 FMSHRC 757, 757, 794–805 (2005) (dismissing most citations for lack of evidence after an explosion killed thirteen miners because the recovery effort required the mine to be flooded, thereby altering conditions). In *Jim Walter Resources, Inc.*, the administrative law judge (ALJ) found an incomplete pre-shift examination violation to be S&S, of high gravity, and the result of high negligence and unwarrantable failure, yet assessed a \$2,500 penalty where the Secretary proposed \$55,000. *Id.* at 805–12. On appeal, the Commission remanded the case for further explanation of the penalty assessment. *See Jim Walter Res., Inc.*, 28 FMSHRC 579, 607–08 (2006). Yet, the ALJ increased the penalty to a still-low \$5,000. *See Sec'y of Labor, Jim Walter Res., Inc.*, No. SE 2003-160, 2006 WL 3933270, at \*8 (FMSHRC Dec. 19, 2006).

73. *See generally* FED. MINE SAFETY AND HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, FIRST QUARTERLY PROGRESS REPORT: TARGETED CASELOAD BACKLOG REDUCTION (2010), [http://www.fmshrc.gov/DOL\\_FMSHRCReport.pdf](http://www.fmshrc.gov/DOL_FMSHRCReport.pdf).

74. The Backlog Reduction Project is a joint effort of MSHA and FMSHRC to reduce the backlog of citations and penalty cases for which both agencies received additional appropriations to hire attorneys, ALJs, and other staff. *See generally* FED. MINE SAFETY AND HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT (2011), [http://www.fmshrc.gov/4DOL\\_FMSHRC\\_report.pdf](http://www.fmshrc.gov/4DOL_FMSHRC_report.pdf).

explosion.<sup>75</sup> The backlog benefits companies by allowing them to keep violations off their records for longer and by delaying any payment, giving companies the use of the money until the final order.

Penalties available to MSHA may not be high enough to deter even if aggressively and promptly imposed. Under the point system, a relatively small coal mine operated by a relatively small controlling company with a mid-range violation history would incur a penalty of under \$10,000 for a high-negligence safety violation reasonably likely to kill three miners.<sup>76</sup> After MSHA reduces penalties to settle cases<sup>77</sup> or ALJs lower them on appeal, they are even less likely to be sufficient. The often lengthy appeals process further reduces the effectiveness of the penalties by eliminating any immediacy between the violation and the potentially much-reduced penalty, encouraging the perception that penalties are just a cost of doing business.<sup>78</sup>

#### A. *Discouraging Frivolous Appeals Through FMSHRC Reforms*

Several cases exemplify the extent to which review of cases by ALJs can diminish the effectiveness of penalties and encourage companies to contest citations. In one case, a small operator had several violations for which MSHA had assessed fairly low penalties, around \$400 per violation.<sup>79</sup> Even where the ALJ agreed with each of the inspector's findings regarding the level of negligence, the gravity of the violation, and the S&S designation, he reduced the already-low assessed penalties.<sup>80</sup> One citation for the lack of a

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75. FED. MINE SAFETY AND HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, *supra* note 73, at 7.

76. See 30 C.F.R. § 100.3(a)(2) (2011) (calculating a hypothetical penalty based on penalty point charts).

77. See, e.g., *Black Beauty Coal Co.*, 31 FMSHRC 1549, 1549–50 (2009) (expressing concern that greatly reduced penalties encourage operators to contest the penalties, and rejecting a settlement proposal on the basis that the greatly reduced penalties would not have the appropriate deterrent effect against the operator, a frequent violator with many contested penalties).

78. See *Citations and Orders Assessed: \$10,000 or More, Mine Data Retrieval System*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/drs/ASP/OtherReports.asp> (select "Get Information" without adding any information to the search criteria) (last visited May 8, 2012) (charting the status of high-dollar penalty assessments, with most remaining in contest for years).

79. See generally *John Richards Constr.*, 23 FMSHRC 1045 (2001) (reducing the penalty for twenty-one violations from the \$19,073 MSHA assessed to \$3,350).

80. *Id.* at 1066–67. For example, the Secretary assessed a \$655 penalty for lack of an emergency communication system because the operator relied on either the CB radio in a truck that was not always present or telephones at nearby homes and facilities. *Id.* Despite finding the violation S&S and the result of moderate negligence, the ALJ reduced the penalty to \$200. *Id.*

guard around moving parts on a conveyor, for which the Secretary assessed a penalty of \$399, resulted in a \$10 penalty from the ALJ, who found that it was low gravity, not S&S, and not the result of negligence.<sup>81</sup> Though it was not a serious violation, a \$10 penalty against a corporation cannot adequately serve the deterrent purpose of the Mine Act.

In another case, an ALJ reduced a penalty from \$2,200 to \$750 after finding the level of negligence to be lower than alleged.<sup>82</sup> A loader used to haul material on the mine site had weak brakes unable to stop the loader on the steep grades at the site, and the operator told the inspector that he had complained repeatedly to the foreman about the brake condition.<sup>83</sup> It took about fifteen minutes to adjust the brakes after the inspector issued an imminent danger order barring use of the loader until abatement of the violation.<sup>84</sup> The ALJ found that the operator's negligence was moderate rather than high because "the brakes did supply some stopping power."<sup>85</sup> Another ALJ agreed with each of the inspector's findings regarding gravity and negligence in a case with a truck leaking hydraulic oil, presenting danger of fire or explosion, yet reduced the penalty from \$5,503 to \$3,500.<sup>86</sup>

The outcomes in these cases explain why operators find it worthwhile to contest so many citations. In each case, the ALJ essentially agreed with MSHA inspectors' factual and legal assertions but significantly reduced the penalties. Though ALJs are accorded broad discretion,<sup>87</sup> they consider the same factors as MSHA in determining an appropriate penalty. Consistent disparity between penalties assessed at the different stages in cases in which all other findings remain unaltered suggests incorrect application of the assessment criteria.

In many other cases, ALJs reduced penalties after finding that a violation was not S&S or that the operator had not been as negligent as alleged.<sup>88</sup>

81. *Id.* at 1054–55.

82. *See* Washington Cnty. Aggregates, 25 FMSHRC 306, 307–10, 317 (2003).

83. *See id.* at 307–08 (describing the inspector's observations and interactions).

84. *Id.* at 308.

85. *Id.* at 310.

86. *See* Sequoia Energy, LLC, 32 FMSHRC 1361, 1370–71 (2010) (finding that the violation was S&S, of serious gravity, the result of at least moderate negligence, and reasonably likely to result in a fire or explosion causing serious injury or death).

87. *See* Walker Stone Co. v. Sec'y of Labor, 156 F.3d 1076, 1086 (10th Cir. 1998) (reciting the "broad discretion" standard).

88. *See, e.g.,* Sidney Coal Co., 31 FMSHRC 1197 (2009) (removing S&S designations and reducing the penalty from \$38,000 to \$20,000); Cumberland Coal Res., LP, 31 FMSHRC 137, 143, 151, 158, 166 (2009) (removing S&S designations). *Cf.* H.R. 5663, *Miner Safety and Health Act of 2010, Hearing before the H. Comm. on Educ. and Labor*, 111 Cong. 19 (2010) (Statement by M. Patricia Smith, Solicitor of Labor, U.S. Department of Labor).

For example, in one case, the ALJ found that a citation for extensive accumulations of combustible coal dust along a conveyor belt was not S&S because the ALJ considered ignition unlikely.<sup>89</sup> The inspector testified that lubricant around the metal parts of the belt dries out within hours, causing rubbing, heat, and sparks, although the bearings were not hot at the time he conducted the inspection.<sup>90</sup> The ALJ ordered a penalty of merely \$500.<sup>91</sup> Because inspectors cannot constantly be present in all mines to monitor developing conditions, they must cite conditions based on their observations during periodic inspections and their experience of how those conditions may develop. ALJs often want more definitive evidence of an ignition source than is available, though ignition sources abound in any mine from friction, electrical equipment, sparks from heavy machinery, or even miners illegally smoking while underground.

It is important to keep in mind that these penalties are being assessed against companies, not individuals. Given the profit motive of corporations, penalties need to be high enough to make it more profitable to obey the law than to violate it.<sup>92</sup> Even when companies do not rely on ALJ discretion to reduce penalties, those available to MSHA under the Mine Act may not be high enough to effectively deter some violations. Simply increasing the penalties that MSHA can impose, however, would accomplish little without corresponding policy changes at FMSHRC to ensure that higher penalties are actually imposed.

Appealing citations has other benefits for operators in addition to the eventual lower fine, which may be negated in some cases by the legal expenses of the appeal. Some of MSHA's stricter enforcement measures depend upon a history of violations, and citations still contested cannot be

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(explaining that the Commission's narrower interpretation of S&S "has hampered enforcement for many years" and listing some examples).

89. See *Freedom Energy Mining Co.*, 31 FMSHRC 1475, 1480–82 (2009) (finding that coal dust extending 320 feet along a belt line was not an S&S violation because the lack of an ignition source made it unlikely that injuries would occur).

90. See *id.* at 1481–82.

91. See *id.* at 1483.

92. Accord S. REP. NO. 95-181, at 41 (1977) ("To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."), reprinted in STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 629 (Comm. Print 1978). The Report also suggests that even low and administratively cumbersome penalties were far more effective than none in a comparison between the outcomes of regulations on coal mines with penalty provisions and metal and nonmetal mines without penalty provisions. S. REP. NO. 95-181, at 41, reprinted in STAFF OF SUBCOMM. ON LABOR, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 629 (Comm. Print 1978).

used to support those measures.<sup>93</sup> A company's violation history plays a role in assessing penalties, providing another reason to contest citations.<sup>94</sup> By keeping more citations under contest, a company can partially hide the extent of its noncompliance with safety regulations. Companies can also claim far better safety records than they actually have, winning safety awards and garnering public relations benefits.<sup>95</sup> These benefits, derived from the delay in finalizing violations, are enhanced by the backlog of contests and appeals before ALJs. The more citations companies appeal, the harder it is for the government to expedite the cases and the longer the companies can keep violations off their records.

The Backlog Reduction Project can help reduce some of the benefits of contesting citations, but it is unlikely to significantly reduce the number of frivolous appeals because companies have little to lose. One of the United Mine Workers of America's (UMWA's) recommendations after Upper Big Branch is for all assessed penalties to be paid into a non-interest bearing escrow account until a final order is reached.<sup>96</sup> This measure, like the Backlog Reduction Project, would reduce automatic, inherent benefits of contesting citations. However, companies would still have nothing to lose by contesting citations, no matter their legal and factual position, and would still have the potential to recognize significant gains. Measures that add an element of risk to the appeals would be more effective. ALJs have the authority to increase penalties as well as decrease them; if the Commission created a policy encouraging them to do so as appropriate, companies might hesitate to appeal when they lack supportive facts. A standard could be developed defining frivolous appeals for which assessed penalties would be increased.<sup>97</sup> Though such a standard would not apply

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93. UNITED MINE WORKERS OF AM., INDUSTRIAL HOMICIDE: REPORT ON THE UPPER BIG BRANCH MINE DISASTER 18 (2011), available at <http://www.umwa.org/files/documents/134334-Upper-Big-Branch.pdf> (explaining that a pattern of violations, which can halt production and increase MSHA's enforcement power, cannot be issued while the relevant violations are contested).

94. See 30 C.F.R. §§ 100.3(a)(1)(ii), 100.3(a)(2), 100.5(b) (2011) (including history of violations as a factor for penalty assessments under either the point system or special assessment).

95. See, e.g., Laura Strickler, *Massey Energy Honored with Safety Award*, CBS NEWS (May 28, 2010, 12:45 PM), [http://www.cbsnews.com/8301-31727\\_162-20006284-10391695.html](http://www.cbsnews.com/8301-31727_162-20006284-10391695.html) (reporting on a safety award Massey won not long after the Upper Big Branch explosion); see also *Massey Energy Becomes First Mining Company to Win Three Sentinels of Safety Awards in a Single Year*, PR NEWSWIRE (Oct. 28, 2009), <http://www.prnewswire.com/news-releases/massey-energy-becomes-first-mining-company-to-win-three-sentinels-of-safety-awards-in-a-single-year-66936477.html> (highlighting Massey's awards for exemplary safety in three mines).

96. UNITED MINE WORKERS OF AM., *supra* note 93, at 86.

97. See *id.* at 86–87 (suggesting application of increased penalties and fees to citations found to be frivolous).

to most appeals, if it were imposed often enough, companies would decide whether to appeal based on the strength of their legal claims rather than the magnitude of penalty to reduce or delay.

*B. The Impacts of Corporate Culture on Noncompliance with Regulations*

The conditions at Upper Big Branch prior to the disaster, combined with evidence gathered about Massey's corporate culture, demonstrate that the prospect of citations and penalties was insufficient to prompt compliance.<sup>98</sup> Don Blankenship, the former CEO of Massey Energy, sent a memo in 2005 reminding mine superintendents of the primacy of production over other concerns in mines:

If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal (i.e. build overcasts, do construction jobs, or whatever) you need to ignore them and run coal. This memo is necessary only because we seem not to understand that coal pays the bills.<sup>99</sup>

This memo was cited in a lawsuit by the widows of miners killed after a belt fire in 2006 alleging that production demands at the expense of safety measures contributed to the fire.<sup>100</sup> The conditions found at Upper Big Branch further demonstrate a continuing disregard for safety measures that would require shifting workers from production to safety or temporarily halting production to make repairs, despite past accidents.<sup>101</sup>

Some long-standing problems that contributed to the Upper Big Branch Mine explosion include inadequate rock-dusting, ventilation problems, and poorly maintained equipment.<sup>102</sup> The rock-dusting machine rarely worked, and too few workers were assigned to rock-dusting to be effective.<sup>103</sup> The

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98. See generally MCATEER ET AL., *supra* note 19; UNITED MINE WORKERS OF AM., *supra* note 93 (placing the majority of the blame for the accident on the disregard for safety exhibited by Massey, based on company culture, employee intimidation, and violation history).

99. Memorandum from Don Blankenship, CEO of Massey Coal, to All Deep Mine Superintendents (Oct. 19, 2005), *reprinted in* UNITED MINE WORKERS OF AM., *supra* note 93, app. AA—Corporate Communications, at 1.

100. Complaint at 6, *Bragg v. Aracoma Coal Co.*, No. 06-C-372-D (W. Va. Cir. Ct. 2006).

101. UNITED MINE WORKERS OF AM., *supra* note 93, at 73–80 (highlighting several Massey mines and incidents that illustrate Massey's prioritization of production over safety).

102. MCATEER ET AL., *supra* note 19, at 15–16 (outlining the primary causes of the explosion).

103. See *id.* at 50–55 (“The dusting, difficult to begin with because the small crew had to cover an extremely large area and contend with mine traffic, was further complicated by the fact that the big orange duster at UBB didn't work properly much of the time.” (footnote omitted)).

operator was well-aware of the problem and decided that a new machine or extensive repairs on the old one were too expensive.<sup>104</sup> The operator presumably chose not to assign sufficient numbers of employees to the rock-dusting crew to keep the entire mine rock-dusted.<sup>105</sup> Those choices resulted in a mine with inadequate rock-dusting, leaving combustible coal dust to propagate the explosion throughout the mine.<sup>106</sup> If the fine for coal-dust accumulations violations were sufficiently high and consistent, a profit-motivated operator would have chosen to hire the extra person and fix the machine rather than incur penalties and correct the conditions only when forced by inspectors.<sup>107</sup>

Ventilation problems abounded at the Upper Big Branch Mine as well and also contributed to the explosion.<sup>108</sup> The report on the explosion explains: “Because results for making changes to ventilation cannot be predicted, it is considered a cardinal sin to make ventilation changes with miners underground.”<sup>109</sup> At Upper Big Branch, the ventilation system apparently relied on such changes on a daily basis.<sup>110</sup> When one section

104. *See id.* (documenting testimony from workers that they had complained to management about the condition of the rock-duster and the need for a larger rock-dusting crew). Records from pre-shift examinations showed 561 rock-dusting requests were heeded only 65 times. *Id.* at 53.

105. *Id.* at 51.

106. *See id.* at 56 (explaining how coal dust, without sufficient levels of rock dust to combat its combustibility, can propagate an explosion).

107. Performance Coal Company, the Massey subsidiary that operated the Upper Big Branch Mine, was cited nearly one hundred times between early 2008 and the time of the explosion in April 2010 for accumulations of combustible material and impermissible combustible content at Upper Big Branch. *See Upper Big Branch Mine-South: Citations, Orders, and Safeguards Issued Between January 2008 and April 5, 2010*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/performancecoal/performancecoal.asp> (scroll down to “Resources” and then select link for “Citations, Orders and Safeguards Issued Between January 2008 and April 5, 2010”) (last visited May 8, 2012). Many of the proposed penalties for accumulations violations were as low as \$100, with a few—still being contested—for over \$1,000. *Id.* The highest accumulations-related penalty of \$66,142 was for extensive accumulations throughout a section that was also cited for excessive methane. *Id.* That Massey chose to either pay or contest penalties while continuing to violate the combustible accumulations standard indicates that the operator found it more economical to absorb the current level of fines than to invest in the resources necessary for compliance. *Cf.* S. REP. NO. 95-181, at 41 (1977) (suggesting that the penalties needed to be high enough to incentivize compliance), *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 629 (Comm. Print 1978).

108. *See* MCATEER ET AL., *supra* note 19, at 15–16 (stating contributing factors to the explosion).

109. *Id.* at 60. Advanced ventilation systems are needed to maintain safe air quality in deep mines that have little airflow and experience occasional releases of methane and other gases.

110. *See id.* at 61–62 (“The competition for air at Upper Big Branch led to the dangerous

foreman shut down his section for lack of air as required by law, the president of Performance Coal Company threatened to fire him.<sup>111</sup> In the long term, the company chose profit over safety by neglecting to pay engineers to create a functioning ventilation system.<sup>112</sup> In the short term, each time ventilation problems were noticed, the company violated the law and chose production over safety by refusing to withdraw miners while correcting airflow.<sup>113</sup>

To be an effective deterrent for profit-maximizing corporations, a penalty must cost more than the gain achieved by the violation after accounting for the probability of an inspection taking place.<sup>114</sup> Some violations are the result of simple carelessness,<sup>115</sup> which mine operators can discourage but not eliminate, and from which companies gain little. Others, however, result from a focus on production at the expense of safety or deliberate allocation of resources away from health-and-safety related tasks. Without regulation, some safety measures would be taken because accidents impose costs on operators in the form of lost work time and potential liability.<sup>116</sup> However, “there would be an efficient number of fatalities” that can be paid for with the additional profit earned through

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practice of ad hoc modifications of the ventilation system by foremen concerned with providing adequate air for their crews on a day-to-day or shift-by-shift basis.”)

111. *Id.* at 59. The Mine Act contains antidiscrimination rules that bar taking disciplinary action against employees who exercise their rights under the Act, including the right to refuse to work in unsafe conditions, but not all miners are aware of their rights or willing to risk the chance of losing their jobs. See 30 U.S.C. § 815(c)(1) (2006).

112. See MCATEER ET AL., *supra* note 19, at 63–64 (reporting that the ventilation plan went through frequent revisions, and that Massey’s engineers were often not well-educated or well-trained).

113. See *id.* at 60 (quoting testimony from miners regarding frequent ad hoc ventilation changes).

114. See Polinsky & Shavell, *supra* note 61, 133–35 (arguing that fines must be high enough to pay for the harm plus the enforcement, and must take into account the wealth of the wrongdoer and the benefit gained); see also Shari Ben Moussa, Note, *Mining for Morality at Sago Mine: Big Business and Big Money Equal Modest Enforcement of Health and Safety Standards*, 18 U. FLA. J.L. & PUB. POL’Y 209, 229–30 (2007) (explaining that fines under the Mine Act constitute the operator’s cost of noncompliance, so the higher the fine, the more likely the operator is to comply). Optimal penalty theory generally focuses on ensuring the fine is high enough to cover the cost to society. In the context of mine safety, the goal is to protect workers’ lives, and the competing interest for the company is profit. Therefore, eliminating any noncompliance benefit is necessary to accomplish the goals of the Mine Act.

115. For example, safety violations involving equipment, like failure to turn a machine off before doing a repair, can be blamed in part on lack of training but can also result from an individual miner’s decision.

116. See Lofaso, *supra* note 18, at 102 (charting profit versus fatalities with and without regulations).

higher production.<sup>117</sup> Regulations are designed to ensure that those deaths do not take place, and penalties must be high enough to counteract the additional profit gained through noncompliance.<sup>118</sup>

*C. The Potential for the Flagrant Violations Provision of the 2006 Amendments to Increase Compliance*

Amendments to the Mine Act made in 2006 created a subset of violations that can receive much higher penalties of up to \$220,000 for each citation.<sup>119</sup> In *Stillhouse*,<sup>120</sup> the first case litigated on the merits of the flagrant violations provision, an ALJ approved penalties of as much as \$212,700 per violation.<sup>121</sup> The facts of *Stillhouse* demonstrate the calculus noncompliant mine operators use to determine whether to follow safety regulations when they conflict with production. The ALJ summarized events as follows:

At virtually the stroke of midnight on December 3, 2006, Stillhouse secretly cut to the surface of the 002 section, turned off its mine fan, and proceeded to mine coal—all during the third-shift when it normally does not produce coal. Stillhouse disabled the alarm sounding the shutoff. . . . Stillhouse mined coal for six hours with its fan shut down, failing to withdraw miners in violation of 30 C.F.R. § 75.313.<sup>122</sup>

Before the inspectors arrived to withdraw miners, Stillhouse extracted 700 tons of coal from a section it would not otherwise have been able to legally and economically mine.<sup>123</sup> The ALJ interpreted Stillhouse's actions as a gamble that it would not get caught, noting that inspections normally took place during a later shift.<sup>124</sup>

117. *See id.* This analysis assumes perfect allocation of costs so that operators pay the full burden of the costs of noncompliance, including the “price” of injuries and fatalities. In reality, many such costs are externalized, and society or individuals bear part of the burden.

118. *See id.* at 102–03 (explaining the economic incentives but suggesting that companies be “enabled to recapture their lost profits through subsidies and tax breaks” to lessen the incentive to break the law).

119. *See* 30 U.S.C. § 820(b)(2) (2006) (defining the term *flagrant* as “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury”).

120. *Stillhouse Mining, LLC*, 33 FMSHRC 778 (2011).

121. *See id.* at 779 (upholding the fines as imposed by the Secretary for a total of \$761,000 for four violations).

122. *Id.* at 814–15.

123. *Id.* at 815.

124. *See id.* (“Stillhouse’s conduct only became known to MSHA when at the end of second-shift a concerned miner called an MSHA supervisor at his home to report dangerous roof conditions where Stillhouse was cutting to the surface. Stillhouse grossly deviated from

The size of the penalties in this case, had the company expected them, would likely have been sufficient for deterrence. However, flagrant violations can apply only to the most egregious abuses. Increased consistency in application from MSHA would likely be necessary for these penalties to have a true impact.<sup>125</sup> Even if the flagrant violations provision stops operators from engaging in behavior similar to Stillhouse's, it will not reduce the instances of more common negligence, such as the dust control and coal accumulations and inadequate pre-shift examination violations. These violations occur in sloppy and understaffed mines without anyone in a leadership position making such a blatant and deliberate decision to flout the law. Penalties for the more routine violations need to be increased to encourage operators to make safety a priority, even at the expense of production. While some of the conditions at Upper Big Branch would probably be considered flagrant violations, it was largely the combination of many common violations that led to the disaster.

In addition, the flagrant violations provision does nothing to prevent ALJs from reducing penalties with or without altering MSHA's findings on the penalty determination factors. If the flagrant violations provision included mandatory minimums, it might more effectively discourage the most blatant decisions to ignore safety standards. Mandatory minimum penalties, particularly for cases with high negligence or deliberate actions by the operator, would change the cost-benefit analysis for operators who count on the contest process to diminish any consequences. However, operators know that the risk of violations being cited is relatively low because inspectors are not always present. Any violative conditions might be cited as more or less serious depending on the inspector. Operators also know that any penalty imposed by MSHA might be greatly reduced by an ALJ or settled by an overextended MSHA. With all the ways in which even eligible flagrant violations might not result in the increased penalties, the provision is unlikely to be effective unless MSHA and FMSHRC make more consistent use of it as a policy matter. The Commission's holding in the *Stillhouse* case will largely determine whether the provision can solve even the limited portion of the compliance and enforcement problem for which it was designed.

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its regulatory obligations gambling that it would not get caught until MSHA's inspection arrived on site at the end of third-shift.").

125. See Ken Ward Jr., *Flagrant Violations: Is MSHA Using All of Its Tools?*, *Coal Tattoo*, CHARLESTON GAZETTE (Mar. 31, 2011, 8:35 AM), <http://blogs.wvgazette.com/coalattoo/2011/03/31/flagrant-violations-is-msha-using-all-of-its-tools/> (questioning whether MSHA issues flagrant violations as often as justified and appropriate, noting that through March 31, 2011, only three flagrant violations had been issued in 2011).

### III. PRODUCTION SHUTDOWNS AS AN ENFORCEMENT MECHANISM TO PROTECT MINERS AND INCREASE THE COST OF NONCOMPLIANCE

#### A. Imminent Danger Shutdowns

Under the Mine Act, inspectors have the authority to halt production and order the withdrawal of miners until a condition presenting an imminent danger is corrected.<sup>126</sup> The Commission has limited the use of imminent danger withdrawal orders,<sup>127</sup> but MSHA could promulgate a rule interpreting the standard more broadly. With *Chevron* deference,<sup>128</sup> MSHA would likely prevail, particularly because the statutory definition and early circuit court cases support a more expansive reading of the provision.<sup>129</sup> Allowing imminent danger shutdowns if there were a reasonable risk that the conditions could seriously injure miners before being abated would permit inspectors to take into account the length of time likely to pass before abatement. In a mine in which inspectors found several extensive violations, particularly if the mine also has a history of violations,<sup>130</sup> shutting down production would both protect miners during the corrective period and force the operator to refocus attention to safety.

The Commission has interpreted imminent danger to include the dictionary definition of “imminence,” rather than simply applying the statutory definition of the term.<sup>131</sup> According to accepted canons of

126. 30 U.S.C. § 817(a) (2006).

127. See *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (1991) (creating the current standard ALJs apply in reviewing imminent danger orders).

128. See generally W. Christian Schumann, *The Allocation of Authority Under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission?*, 98 W. VA. L. REV. 1063 (1996) (describing cases holding that the Commission must apply *Chevron* deference to MSHA’s policy decisions and providing legislative history and policy justifications for *Chevron* deference).

129. See 30 U.S.C. § 802(j) (defining *imminent danger* as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated”). Circuit courts interpreting the provision in the mid-1970s accepted the Secretary’s interpretation that the provision was applicable “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated*.” *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 33 (7th Cir. 1975) (citing *E. Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974)); accord *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 745 (7th Cir. 1974). These cases interpreted the imminent danger provision in the 1969 predecessor to the 1977 Coal Act. The provision remains unchanged.

130. A history of violations could be construed as relevant to determining how long abatement could take and whether harm could be caused before abatement.

131. See *Utah Power & Light Co.*, 13 FMSHRC at 1621–22 (holding that “the hazard to

statutory construction, the definition of a term contained in a statute should be applied unless it is incomplete or inapplicable to the situation.<sup>132</sup> Dictionary definitions are to be relied upon only for “[w]ords that are not terms of art and that are not statutorily defined.”<sup>133</sup> MSHA has not yet challenged the Commission’s interpretation of the imminent danger standard in a federal appeals court.

The Commission also limited the discretion of inspectors in issuing imminent danger orders, holding, “An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.”<sup>134</sup> This has limited the use of the provision in situations in which an inspector sees very dangerous conditions that could easily escalate, such as where dust and inadequate fire suppression equipment mean an ignition would lead to an explosion, but the inspector does not see the ignition. In one case, the ALJ found that the inspector abused his discretion by ordering an imminent danger withdrawal where there was a fire in a mineshaft that connected through a sealed borehole to working sections with miners present.<sup>135</sup> The company wanted to pour water down the shaft to put out the fire without removing the miners, and the inspector insisted that the miners come above ground to protect them in case of an explosion.<sup>136</sup> The ALJ found insufficient evidence to support the inspector’s

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be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of the miners. . . . To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time”).

132. See YULE KIM, CONG. RESEARCH SERV., ORDER CODE 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 5-6 (2008) (explaining when the statutory definition will be used).

133. *Id.* at 6.

134. Utah Power & Light Co., 13 FMSHRC at 1622-23. This standard allows the ALJ or the Commission to decide whether there was an imminent threat, which is precisely what the inspector should have discretion to determine. A more typical abuse of discretion standard would ask only whether the inspector could reasonably have found an imminent threat. *But see* Moore, *supra* note 45, at 209-11 (arguing that the Commission should have more discretion to review MSHA’s decisions because of the extraordinary power conferred on inspectors under the Mine Act).

135. See BethEnergy Mines, Inc., 16 FMSHRC 935, 969-74 (1993) (finding that MSHA did not present sufficient evidence that conditions in the working sections were dangerous, despite the concern that the shaft fire could cause an explosion that would spread to those sections).

136. See *id.* at 955-57 (asserting additionally that though methane measurements were low at the time, it was a gassy mine, further increasing the risks associated with an active fire).

conclusion that there was an imminent danger of an explosion in the shaft or that such an explosion could spread to the working sections.<sup>137</sup>

Reworking the imminent danger withdrawal standard would protect miners in dangerous mines when inspectors are present, and it would increase the costs to operators associated with having unsafe conditions when inspectors visit. MSHA could use the rulemaking process to develop a more favorable standard. An appeal to a U.S. court of appeals arguing that the statutory language is unambiguous and the Commission's interpretation inappropriate could also be successful.<sup>138</sup> Even with a more expansive interpretation of MSHA's authority, though, "imminent danger" can cover only conditions that reach a fairly high threshold of likelihood of harm. In addition, imminent danger shutdowns are only possible when inspectors are present, and there simply are not enough inspectors to visit all mines regularly enough to prevent dangerous conditions from developing. More actions need to be available to MSHA before conditions reach the level of an imminent danger, regardless of whether the standard is construed narrowly or broadly.

#### B. Section 104 Shutdowns

Production shutdowns are also allowable under § 104 for failure to timely abate a violative condition or for repeated unwarrantable failure violations.<sup>139</sup> More active use of this provision could encourage greater compliance, particularly after citations are issued. If waiting to correct a violation or continuing to violate the same standard after having received a citation led to a more consistent withdrawal of miners, then operators would be more likely to follow the directives of inspectors in a prompt manner.

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137. *Id.* at 974.

138. *See* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that the first step of analysis is to determine whether Congress "has directly spoken to the precise question at issue," in which case both courts and agencies "must give effect to the unambiguously expressed intent of Congress").

139. *See* Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 104(a), (b), (d)(1), 91 Stat. 1290, 1300–1301 (codified at 30 U.S.C. § 814 (2006)). Section 104(b) provides that, when a condition has not been corrected during the agreed-upon abatement period, those miners not needed to correct the condition may be withdrawn. Section 104(d) provides for withdrawal of miners not needed to correct the condition if the inspector finds an unwarrantable failure violation for the same problem multiple times during an inspection, or repeated within ninety days. Both of these are partial withdrawal orders for only the affected areas of the mine. For guidelines designed to help inspectors apply § 104, see PROGRAM POLICY MANUAL, *supra* note 49.

*C. Potential Benefits of Expanded Shutdown Authority*

Whether imminent danger and unabated violative condition shutdown provisions are interpreted more broadly or new legislation is passed, permitting shutdowns of mines where operators display disregard for safety provisions could convince those operators to change the way they do business.<sup>140</sup> Production shutdowns are very costly for operators, who must pay workers even when no coal is being produced. Withdrawing miners and then restarting production can be a lengthy process even if the condition can be abated quickly.<sup>141</sup>

Production shutdowns can be more directly connected with the safety violations than fines in many cases. Because companies contest so many violations, even fines that are upheld in full may not be paid for years.<sup>142</sup> By the time the accountant or secretary writes the check, no one even remembers that the fine resulted from the decision to have a miner work on the longwall rather than do rock-dusting. However, when an inspector arrives, sees a violation, and stops production until it is fixed, the foreman or mine superintendent can readily associate the consequences with the decision to ignore safety. Production shutdowns send the message that compliance with safety standards is a precondition that must be met before mining may take place.

MSHA could more frequently use existing authority to shut down production when operators repeatedly and unwarrantably violate mandatory health and safety standards. Using the notice-and-comment rulemaking process to solidify policy positions for the imminent danger standard would protect the more reasonable and more expansive interpretation from the Commission's narrower viewpoint. Between § 104 shutdowns, imminent danger shutdowns, and the newly revived pattern of violations standard,<sup>143</sup> MSHA has a statutory basis to use production

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140. The outraged responses of mining companies to proposed permitting changes for environmental regulations demonstrate resistance to any measures that reduce production. In addition, Massey's documented production demands display the importance placed on continued production. See MCATEER ET AL., *supra* note 19, at 22 (explaining the production costs of shutting down a longwall machine).

141. In a mine that extends for miles, it can take a long time simply to transport workers between the surface and the more remote sections of the mine. In addition, new pre-shift examinations would need to be performed, and some continuously operating mine machinery could require time and effort to stop and restart.

142. See Lofaso, *supra* note 18, at 103 (explaining that some operators try to circumvent regulation by making frivolous citation appeals).

143. See 30 U.S.C. § 814(e)(1)–(2) (2006) (outlining the pattern of violations standard, which allows the withdrawal of miners from sections of mines with violations of safety standards if MSHA has established a pattern of repeated S&S violations).

shutdowns to force operators into compliance when penalties are not working.

Reports from Upper Big Branch suggest a widespread, top-down culture that favored production at all costs and had little respect for safety regulations.<sup>144</sup> The failure of required examinations to improve conditions in the mine demonstrates the impacts and extent of this culture. Examinations are the key self-enforcement mechanisms for operators to ensure compliance with safety standards, giving foremen the chance to observe problems and direct that they be corrected before they become serious.<sup>145</sup> At Upper Big Branch, not only were recorded problems uncorrected, but foremen did not even take some required readings.<sup>146</sup> MSHA needs to develop better methods of counteracting the culture of noncompliance in companies like Massey. Allowing inspectors to halt production in mines with widespread violations of multiple safety standards would make it more difficult for operators to profitably disregard safety regulations. Even if inspections do not take place frequently enough to fully alter the cost-benefit analysis of compliance, shutting down production while the company addresses safety problems would at least ensure a clean slate after inspections so that conditions would not have the chance to continuously deteriorate. For these changes to succeed, MSHA will likely need cooperation from FMSHRC, or will have to more aggressively appeal adverse Commission decisions to the federal courts, which have traditionally been much more deferential to MSHA's policy decisions.

#### IV. OTHER SOLUTIONS AND CONCLUSIONS

##### A. *Nonadministrative Solutions*

While the focus of this Comment is on administrative solutions, those potential changes should be viewed in the context of possible non-administrative developments. Non-administrative methods of increasing compliance include increased criminal liability for certain types of violations,<sup>147</sup> more tort suits with large damage awards,<sup>148</sup> and stronger

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144. See MCATEER ET AL., *supra* note 19, at 97–102 (detailing several areas which demonstrate a “normalization of deviance”).

145. See, e.g., UNITED MINE WORKERS OF AM., *supra* note 93, at 46 (“The purpose of these examinations is to identify hazardous conditions and to ensure they are corrected.”).

146. See MCATEER ET AL., *supra* note 19, at 98 (stating that fraudulent practices of filling in the examiner's book as though readings had been taken “suggests a profoundly dangerous attitude that firebossing a mine is just another burden”).

147. See *Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 23 (2011) (statement of Joseph Main, Assistant Secretary of Labor for

union presence.<sup>149</sup> Any of these measures would likely increase compliance by increasing the costs of ignoring regulations. Unions have the potential to change the culture of the company, something that the Governor's Independent Investigation Panel suggested was of utmost importance after Upper Big Branch.<sup>150</sup> Criminal liability in some situations is already available and could be imposed more vigorously. Even without any legislative changes, members of upper management could be criminally liable for the events at Upper Big Branch. In fact, the Department of Justice has prosecuted some individuals and indicated that more criminal prosecutions may take place,<sup>151</sup> and the settlement reached on civil penalties did not rule out further individual criminal charges.<sup>152</sup> The UMWA has suggested that a grand jury be convened and subpoenas issued to determine levels of knowledge and responsibility, with indictments as appropriate.<sup>153</sup> Criminal charges against members of management would likely be an effective deterrent for other mine operators with similar disregard for safety, though the deterrent effect could wear off in the time

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MSHA) (advocating for a lower bar for criminal prosecution of operators who risk miners' lives and for extending criminal penalties to providing advance notice of inspections).

148. See, e.g., Jim Fink, *Massey Energy: A Dirty Coal Company*, INVESTING DAILY (Apr. 7, 2010), <http://www.investingdaily.com/id/17176/massey-energy-a-dirty-coal-company.html> ("Blankenship's actions over the years may have maximized Massey's earnings in the short term, but they have exposed Massey shareholders to massive litigation risk in the long term. Society will exact its revenge against Massey one of these days through a jury verdict so large that it will dwarf whatever unjust enrichment Blankenship has managed to accumulate for Massey.").

149. See Lofaso, *supra* note 18, at 106–13 (arguing that the union model should be applied to non-union mines because of strong evidence that union mines are safer).

150. See MCATEER ET AL., *supra* note 19, at 97–102 (discussing the "normalization of deviance" that developed at the Upper Big Branch Mine regarding safety).

151. See Ken Ward Jr., *Breaking News: Upper Big Branch Superintendent Charged with 'Conspiracy' in Mine Disaster Probe, Coal Tattoo*, CHARLESTON GAZETTE (Feb. 22, 2012, 10:21 AM), <http://blogs.wvgazette.com/coaltattoo/2012/02/22/breaking-news-upper-big-branch-superintendent-charged-with-conspiracy-in-mine-disaster-probe/#more-22007> (suggesting that the superintendent charged may be cooperating with prosecutors, which would suggest that there may be more people charged further up the chain of command).

152. See Ken Ward Jr., *Alpha to Pay \$200 Million in UBB Safety Deal*, CHARLESTON GAZETTE, Dec. 5, 2011, <http://wvgazette.com/News/201112050159> ("But unlike a previous government deal with Massey, the deal does not resolve any potential criminal violations by any officers or agents of Performance Coal or Massey . . .").

153. See UNITED MINE WORKERS OF AM., *supra* note 93, at 71–72, 85. This report suggests that the corporate officials who invoked the Fifth Amendment to avoid testifying about events leading up to the explosion should be subject to subpoenas and likely should be prosecuted. This includes officials who spent time underground directly after the explosion without communicating with the mine rescue teams, and who now refuse to answer questions regarding their findings and actions. *Id.*

between disasters or if prosecutors fail to bring charges consistently. To have a major effect on behavior, criminal charges against upper management would probably be necessary after serious violations that do not result in fatalities, rather than only after a major disaster like Upper Big Branch.

### B. MSHA Administrative Solutions and Current Changes

Multiple administrative tools are available to MSHA that would improve the efficacy of the agency without fundamentally altering the current regulatory framework or requiring legislative action. First, inspectors can use their authority more aggressively to issue more citations and order more withdrawals. Next, MSHA could implement a policy of imposing the highest penalty available under the point system, and using special assessments for higher penalties when companies are frequent offenders or are negligent operators.<sup>154</sup> Rulemaking could further extend MSHA authority in key areas, including shutdowns and withdrawals. An eminently sensible recommendation from the UMWA would place MSHA, rather than the operators, in charge of training miners on their rights under the Mine Act,<sup>155</sup> which could reduce the ability of management to intimidate workers.

MSHA has already begun several initiatives that at least partially address some of the problems discovered in the aftermath of the Upper Big Branch disaster. Impact inspections target mines with a history of compliance problems by sending several inspectors at once, stopping phone lines to prevent advance notice, and scheduling checks often take place at unusual times when operators do not expect an inspection.<sup>156</sup> MSHA also

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154. One of the challenges with this recommendation is that FMSHRC would need a similar policy. While it is beyond the scope of this Comment to debate the split-enforcement model or to consider changes that would require major legislative action, many of the difficulties of strong enforcement arise because of the lack of common leadership and common policy goals between FMSHRC and MSHA. Eliminating FMSHRC or placing it under the control of the Department of Labor would resolve that problem. Any concerns of ALJs would be considered in the formulation of policy, and ALJs would be informed of and bound by the same policies as the inspectors and other personnel responsible for enforcing the Mine Act.

155. See UNITED MINE WORKERS OF AM., *supra* note 93, at 87 (explaining that many miners were either unaware or uncomfortable with exercising their right to report unsafe conditions and to refuse to work in such conditions).

156. See *Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 18–19 (2011) (statement of Joseph Main, Assistant Secretary of Labor for MSHA) (detailing the successful results and many violations discovered during impact inspections).

instigated rulemaking to require correction of any violations discovered during pre-shift and on-shift examinations.<sup>157</sup> Structural changes to address workload problems at MSHA have also taken place, such as the division of the largest district, which served Upper Big Branch, into two districts with separate offices.<sup>158</sup>

### C. FMSHRC Reforms

Underlying these solutions, though, is the need for reform at FMSHRC. The D.C. Circuit held in 1994 that MSHA regulations and interpretations are entitled to *Chevron* deference from the Commission and ALJs.<sup>159</sup> It has been argued that the Commission should have the authority to review policy decisions because of the special position of the Commission as an independent agency in a split-enforcement scheme.<sup>160</sup> However, the legislative history of the Mine Act does not support that view.<sup>161</sup> In addition, MSHA inspectors, while given a great deal of authority, are required to have practical mining experience, making them uniquely qualified to exercise discretion and judgment in the course of inspecting mines.<sup>162</sup>

Legislative change is probably not necessary to challenge the Commission's forays into mine policy. Appeals to federal circuit courts would likely succeed, particularly if MSHA promulgates rules reflecting stronger enforcement.<sup>163</sup> Official rulemaking for some changes can protect

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157. *See id.* at 20 (stating that the proposed rule would reinstate requirements that were previously in place).

158. News Release, Mine Safety & Health Admin., *MSHA's Newly Formed Coal District 12 Begins Operations* (June 14, 2011), <http://www.msha.gov/media/PRESS/2011/NR110614.asp>.

159. *See* Energy W. Mining Co. v. Fed. Mine Safety & Health Review Comm'n, 40 F.3d 457, 463–64 (D.C. Cir. 1994) (holding that the Commission owes the Secretary and MSHA *Chevron* deference); *see also* Schumann, *supra* note 128, at 1095 (outlining the arguments of both sides and describing the court's holding in favor of the Secretary, rejecting the operator's argument that the Commission should have authority to decide questions of policy).

160. *See generally* Moore, *supra* note 45 (arguing that Congress intended MSHA and FMSHRC to share authority over policy matters).

161. *See* S. REP. NO. 95-181, at 49 (1977) (“[T]he Secretary’s interpretations of the law and regulations shall be given weight by both the Commission and the courts.”), *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 637 (Comm. Print 1978). *Chevron* was decided after the passage of the Mine Act, so neither the statute nor legislative history incorporates more obvious indications of the intended level of deference.

162. *See* Schumann, *supra* note 128, at 1066 (explaining that the statute requires MSHA employees, especially inspectors, to have practical mining experience).

163. *See* Kenna, *supra* note 57, at 399–400 (explaining that levels of deference can be

MSHA actions against judicial review as long as the rules are reasonable interpretations of the statute under *Chevron*.<sup>164</sup> MSHA could seek to revisit some past decisions of the Commission, like the imminent danger holdings, and those could be challenged in federal appeals court when MSHA has a good test case. This would return MSHA's enforcement capabilities to their position between the passage of the Mine Act and the early- to mid-1990s, when Commission cases contracted MSHA's authority.

Penalties imposed by ALJs are more difficult for MSHA to control. It is possible that appealing penalty determinations more often would discourage ALJs from reducing them without good reason, but the resources involved in bringing more cases before the already overloaded Commission could be prohibitive. In addition, the penalties imposed by MSHA are often too low to be effective, creating a dual need to increase penalties at the agency level and to preserve higher contested penalties. Imposing higher penalties without some change in FMSHRC could easily result in more penalties being determined by ALJs rather than by MSHA. Higher penalties are more likely to be contested already; if MSHA begins imposing higher penalties and ALJs continue to reduce them, the increased penalties would simply add to the backlog of appeals.<sup>165</sup>

Legislative action might be necessary to reduce ALJs' discretion in penalty awards, a traditional area of judicial discretion. Mandatory minimum penalties would be a fairly simple and straightforward method of reducing ALJ discretion and ensuring a floor sufficient to deter at least some noncompliance.<sup>166</sup> Minimums could be applied to several factors already considered: there could be a minimum for any S&S violation, or

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higher or lower for agency positions depending on whether the position has been formalized through some official process).

164. Deference given to agencies is greater for interpretations that have undergone notice-and-comment rulemaking or formal adjudication as opposed to less formal agency materials that may not reflect an official position. *See id.* at 400; *see also* Moore, *supra* note 45, at 193 (discussing the Supreme Court's reasoning in *Christensen v. Harris County*, 529 U.S. 576 (2000)).

165. In one case, an ALJ discussed the problem of companies increasingly contesting penalties. *See* Black Beauty Coal Co., 31 FMSHRC 1549, 1549 (2009). In addition to ALJs reducing penalties, MSHA often settles because the agency is unable to handle the volume of cases. The ALJ rejected a settlement that would have reduced the initial penalties by over eighty percent, holding that "such a reduction encourages mine operators to contest the penalties in the hope of receiving such a reduction. The fact that a mine operator can obtain such a drastic reduction does not encourage the mine to comply with the requirements of the Act." *Id.*

166. Though mandatory minimum penalties have been criticized in the criminal law context, many of the concerns would not be relevant to administrative fines imposed against companies for a strict liability statute. There is little risk of discrimination, and a well-designed rule would not risk being excessively punitive.

minimums graded with levels of negligence, gravity, or both, or some percentage of the penalty point system result could serve as a minimum.

### CONCLUSION

A variety of administrative changes at MSHA and FMSHRC could increase compliance with existing mine safety regulations. Penalties could be increased through mandatory minimums, particularly for certain classes of serious or repeated violations and through more consistent use of flagrant violations provisions. The recommendations of the UMWA regarding frivolous appeals would be a good start to reducing the collateral benefits companies receive by contesting penalties.<sup>167</sup> In addition to penalty increases, stronger enforcement mechanisms at the inspector level increase the costs of noncompliance while immediately eliminating safety hazards. The imminent danger withdrawal standard should be interpreted more broadly to allow inspectors to order withdrawal of miners when conditions are such that miners' lives could be endangered before the condition is corrected. Inspectors should also make better use of existing provisions allowing withdrawal of miners when operators repeatedly violate safety standards and do not promptly correct cited conditions. MSHA, rather than operators, should train miners on their rights under the Mine Act, which could reduce operators' ability to intimidate miners and increase miners' role in ensuring a safe workplace. A combination of increased penalties for all violations and increased enforcement measures like production shutdowns is necessary to effectively combat the disregard shown by some companies toward safety regulations. MSHA can use rulemaking and appeals to solidify inspectors' enforcement authority and to challenge constraints imposed by FMSHRC. Using such authority consistently would increase the costs of noncompliance, leading profit-motivated mine operators to comply with safety standards rather than risk high penalties and production shutdowns.

Even without official action, agency behavior will likely be altered toward increased enforcement in the aftermath of the Upper Big Branch disaster, at least temporarily. Inspectors are less likely to give warnings or overlook violative conditions. Attorneys are less likely to settle for minimal penalties. Perhaps ALJs will also prove less likely to reduce penalties to a nominal level. For a lasting impact, though, structural change is necessary to maintain the stricter enforcement measures and achieve safer mines.

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167. See UNITED MINE WORKERS OF AM., *supra* note 93, at 86–87 (recommending that assessed penalties be placed into an escrow account during the appeals process and that additional fines be imposed if the appeal is found to have been frivolous).

# FRET NO MORE: INAPPLICABILITY OF CROWDFUNDING CONCERNS IN THE INTERNET AGE AND THE JOBS ACT'S SAFEGUARDS

KARINA SIGAR\*

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## INTRODUCTION

Less than two years after the Dodd–Frank Wall Street Reform and Consumer Protection Act<sup>1</sup> significantly amended the Securities Act of 1933 and the Securities Exchange Act of 1934, and before the Securities and Exchange Commission (SEC) even had the chance to breathe before proposing approximately three-quarters of the rules mandated by that Act,<sup>2</sup> Congress passed the Jumpstart Our Business Startups Act on March 27, 2012, which President Barack Obama signed into law on April 5, 2012.<sup>3</sup> One of the contentious sections of this Act, which the Obama Administration promoted along with many entrepreneurs and scholars, is an innovative method of raising funds for entrepreneurs that has become increasingly popular in the Internet age: crowdfunding. Analogous to the earlier concept of crowdsourcing,<sup>4</sup> crowdfunding is a capital formation

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1. Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), Pub. L. No. 111-203, § 413(a), 124 Stat. 1376, 1577 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).

2. See *Implementing the Dodd–Frank Wall Street Reform and Consumer Protection Act—Accomplishments*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/dodd-frank/accomplishments.shtml> (last modified May 8, 2012). The Dodd–Frank Act contains ninety provisions that require rulemaking by the Securities and Exchange Commission (SEC). *Implementing the Dodd–Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/spotlight/dodd-frank.shtml> (last modified May 8, 2012).

3. Jumpstart Our Business Startups Act (JOBS Act), Pub. L. No. 112-106, 126 Stat. 306 (2012); see Susan Crabtree, *Jobs Act Signing a Show of Bipartisan Support*, WASH. TIMES, Apr. 5, 2012, <http://www.washingtontimes.com/news/2012/apr/5/obama-signs-bipartisan-small-business-bill/> (reporting that the JOBS Act had strong bipartisan support in Congress).

4. Crowdsourcing is the act of involving the community to collectively provide content for technological designs. See Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 177, available at <http://www.wired.com/wired/archive/14.06/crowds.html>.

strategy that raises small amounts of funds from a large group of people through online means. Currently, this fundraising strategy depends on contributions from donors who do not share ownership of the project, but rather only receive token gifts such as signed CD albums, dinner with the director of a film project, or concert tickets.

Due to the successes of raising funds through crowdfunding to jumpstart businesses,<sup>5</sup> many groups and entrepreneurs have aspired to conduct crowdfunding that would offer equity interests as opposed to mere material rewards.<sup>6</sup> These entrepreneurs urged the SEC to allow businesses to raise funds through equity-based crowdfunding by exempting crowdfunding from the registration requirements of § 5 of the Securities Act of 1933.<sup>7</sup>

Less than a year after the petition to the SEC for reforms in securities regulations to accommodate crowdfunding, Congress passed the JOBS Act, Title III of which exempts crowdfunding or small-issue offerings from registration with the SEC. The offerings must meet four criteria: (1) the total amount of securities sold by an issuer cannot exceed \$1 million; (2) the total amount sold to a single investor cannot exceed either \$2,000 or \$100,000, depending on the individual's income or net worth; (3) the transaction must be conducted either through a broker or funding portal required to register with the SEC and a self-regulatory organization (SRO); and (4) the issuer must comply with statutory requirements, such as

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5. One design project called TikTok+LunaTik Multi-Touch Watch Kits raised \$942,578 through the crowdfunding website Kickstarter in only thirty days. *See Most Funded*, KICKSTARTER, <http://www.kickstarter.com/discover/most-funded?ref=sidebar> (last visited May 14, 2012); TIKTOK+LUNATIK, <http://lunatik.com/about> (last visited May 14, 2012). Two advertisement executives experimented with crowdfunding by offering equity interest in the company Pabst Brewing Co. and had obtained a pledged amount of more than \$200 million when the SEC instituted a cease-and-desist order on June 8, 2011. *See* Chad Bray, *Huge Beer Run Halted by Those No Fun D.C. Regulators*, WALL ST. J. L. BLOG (June 8, 2011), <http://blogs.wsj.com/law/2011/06/08/huge-beer-run-halted-by-those-no-fun-d-c-regulators/>; *In re* Migliozi, Securities Act Release No. 9216, 2011 WL 2246317 (June 8, 2011) (cease-and-desist order).

6. *See Crowdfund Investing—A Solution to the Capital Crisis Facing our Nation's Entrepreneurs: Hearing Before the Subcomm. on TARP, Fin. Serv. & Bailouts of Pub. & Private Programs of the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 6 (2011) [hereinafter *Hearings*] (prepared statement of Meredith Cross, Director, Division of Corporate Finance, SEC) (describing how SEC staff met and discussed crowdfunding with business owners and representatives of small business organizations that were pushing for a regulatory reform to accommodate this financing model); Letter from Jenny Kassan, Sustainable Econ. Law Ctr., to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (July 1, 2010), available at <http://www.sec.gov/rules/petitions/2010/petn4-605.pdf> (noting that financial investment can bring greater psychological investment than mere donation and can become an even richer source of innovation and capital formation).

7. Securities Act of 1933 § 5(c), 15 U.S.C. § 77e(c) (2006) (requiring an offering to be registered).

disclosing certain financial and other information.<sup>8</sup> Additionally, one of the most contentious provisions of the crowdfunding title of the JOBS Act is § 35, which lists crowdfunding securities as “covered securities.”<sup>9</sup> As a covered security, crowdfunding issuers only need to register their offerings with the SEC, without having to register with each state that requires it.

The JOBS Act mandates the SEC issue rules pursuant to the Act, as the SEC is the main government agency responsible for regulating the securities industry. In issuing any rule, the SEC must fulfill its dual role of facilitating capital formation and protecting investors.<sup>10</sup> There is little dispute that crowdfunding would help businesses raise capital.<sup>11</sup> However, before the SEC adopts any rule regarding crowdfunding, it should carefully consider the costs, especially the need to protect investors—vulnerable investors lacking “financial sophistication” in particular—from fraud and bad investments.<sup>12</sup>

Before the JOBS Act mandated a crowdfunding exemption, there were several existing exemptions to the federal securities registration requirements available to small businesses, including Regulation A and Rules 504, 505, and 506 of Regulation D.<sup>13</sup> However, complying with

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8. JOBS Act, Pub. L. No. 112-06, § 302(a)–(b), 126 Stat. 306, 315–20 (2012) (to be codified at 15 U.S.C. §§ 77d, 77d-1).

9. *Id.* § 305(a) (to be codified at 15 U.S.C. § 77r(b)(4)); see Securities Act of 1933 § 13(a), 15 U.S.C. § 77r(a) (exempting a “covered security” from state law, rule, regulation, order, or administrative action regarding registration of securities); *NASAA: The Jobs Act Fails Investors and Entrepreneurs*, N. AM. SEC. ADMIN. ASSOC. (Apr. 5, 2012), <http://www.nasaa.org/11548/nasaa-the-jobs-act-an-investor-protection-disaster-waiting-to-happen/> (“By preempting states, the JOBS Act takes away from state regulators and puts them on us.” (quoting Steve Irwin, Chairman of North American Securities Administrator’s Association’s (NASAA’s) Committee on Federal Legislation)).

10. See *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, SEC. & EXCH. COMM’N, <http://sec.gov/about/whatwedo.shtml> (last visited May 14, 2012).

11. See C. Steven Bradford, *Crowdfunding and the Federal Securities Laws*, 2011 COLUM. BUS. L. REV. (forthcoming 2012) (manuscript at 61).

12. See Securities Act of 1933 § 2(a)(15)(ii), 15 U.S.C. § 77b(a)(15)(ii) (2006) (incorporating “financial sophistication” as one factor that would qualify an individual as an “accredited investor” and in effect provide more choices for investing); 17 C.F.R. § 230.501(a), (e)(1)(iv) (2011) (exempting securities offered to accredited investors); Daniel J. Morrissey, *The Securities Act at Its Diamond Jubilee: Renewing the Case for a Robust Registration Requirement*, 11 U. PA. J. BUS. L. 749, 771 (2009) (explaining that Regulation D’s accredited-investor exemption presumes that accredited investors are able to fend for themselves and therefore do not need the disclosure compelled in a registration statement). *But see Hearings*, *supra* note 6, at 7 (statement of Sherwood Neiss, Co-founder, FLAVORx) (criticizing securities laws for presuming that nonaccredited investors are not “‘wealthy,’ ‘smart,’ or ‘responsible’ enough to make their own decisions”).

13. 17 C.F.R. §§ 230.251–.263 (Regulation A); §§ 230.504–.506 (Regulation D).

Regulation A is prohibitively costly for small businesses due to its documentation requirements.<sup>14</sup> Regulation D exemptions are unsuitable for crowdfunding due to their prohibition on general solicitation,<sup>15</sup> which is essentially what crowdfunding is: inviting the public to invest in a business venture.

Because the idea of general solicitation is at the heart of the crowdfunding model, this Comment assesses crowdfunding's investor protection concerns by examining the rationales behind Regulation D's ban on general solicitation. Regulation D was issued three decades ago in 1982,<sup>16</sup> long before people began using the Internet to share information and knowledge with one another.<sup>17</sup> Therefore, the concerns that prompted the provisions of Regulation D may no longer be relevant in today's Internet age.

In addition, the JOBS Act includes rules for crowdfunding issuers and intermediaries that serve as safeguards for investors. This includes a requirement that intermediaries—those facilitating the transactions for crowdfunding securities—register with both the SEC and an applicable SRO the small amount of securities sold and individual investment. The Act also makes applicable the antifraud regime in the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act).

This Comment will examine whether, in light of Regulation D's ban on general solicitation in an analogous context and the statutory safeguards introduced by the JOBS Act, there are grounds for concern over crowdfunding offerings. Part I briefly discusses the mechanics of the crowdfunding process and the costs and benefits of crowdfunding. Part II discusses how the federal securities laws prior to the JOBS Act, particularly the registration exemptions of Regulations A and D, could not adequately accommodate crowdfunding offerings. Part III then discusses the crowdfunding concerns that reflect the rationales behind Regulation D's ban on general solicitation as they relate to investor protection. Part IV applies these rationales to the context of today's Internet age and analyzes

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14. *See id.* § 230.252(a) (requiring issuers to complete Form 1-A, which includes detailed information about the business).

15. Rule 502(c) prohibits general solicitation for any Regulation D offering, except if in the case of Rule 504 offerings the offering is registered or filed in the state level. *See id.* §§ 502(c), 504(b)(1).

16. Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, 47 Fed. Reg. 11,251 (Mar. 16, 1982) (codified at 17 C.F.R. pt. 230).

17. *See* Olufunmilayo B. Arewa, *Securities Regulation of Private Offerings in the Cyberspace Era: Legal Translation, Advertising and Business Context*, 37 U. TOL. L. REV. 331, 333–40 (2006) (indicating the factors distinguishing the era when the Securities Act was enacted from today's cyberspace era).

the four main statutory safeguards that Congress provides through the JOBS Act. It concludes that because investors' characteristics today are starkly different from those of the 1980s, and because there are adequate provisions in the crowdfunding laws safeguarding investors that concerns about investor protection are unfounded. Part V discusses the implication of the JOBS Act for the other exemptions in the securities laws—that they will become obsolete due to the ban on general solicitation. Finally, this Comment concludes that due to the nature of the Internet age and because of the statutory safeguards in place, the new crowdfunding exemption will not raise the investor protection issues that some fear.

## I. CROWDFUNDING: WHAT IS IT?

### A. Mechanism

Rooted in the idea of crowdsourcing (the process of creating content based on the collective effort of a large group of people<sup>18</sup>), crowdfunding is a fundraising strategy that pools capital, typically in small amounts, from a large group of people.<sup>19</sup> In addition to individual projects and companies that raise money through crowdfunding,<sup>20</sup> there are also websites that facilitate the use of crowdfunding as a capital formation strategy. Examples in the United States include Kickstarter, IndieGoGo, and RocketHub.<sup>21</sup>

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18. See Howe, *supra* note 4.

19. See Jed Cohen, *How to Explain Crowdfunding*, ROCKETHUB (Dec. 29, 2010, 5:09 PM), <http://rockethub.org/profiles/blogs/how-to-explain-crowdfunding> (analogizing the historical pattern of single wealthy patrons of the arts to many people giving small contributions to support creative projects through crowdfunding); Jonathan Crane, *Artists Cut Out the Middle Man*, WEAL, Oct. 20, 2011, <http://www.theweal.com/2011/10/20/artists-cut-out-the-middle-man/> (“Art has always been crowd-funded, but it’s only recently that someone made up a word and created a website for it . . .”). The founder of crowdfunding platform ArtistShare, Brian Camelio, recently obtained a patent for a financing model that resembles the prevalent crowdfunding model. See U.S. Patent No. 7,885,887 (filed Mar. 31, 2003); Devin Coldewey, *Kickstarter Hit With Patent Claim Over Crowdfunding*, TECHCRUNCH, Oct. 4, 2011, <http://techcrunch.com/2011/10/04/kickstarter-hit-with-patent-claim-over-crowd-funding/> (reporting that the patent owner, Camelio, has filed suit against the largest crowdfunding platform, Kickstarter, for using the crowdfunding financing model).

20. American public radio’s largest source of funds is the general public, with 34.4% of fiscal year 2009 revenue coming from individuals. *Public Radio Finances*, NAT’L PUB. RADIO, <http://www.npr.org/about/aboutnpr/publicradiofinances.html> (last visited May 14, 2012). The British band Marillion raised \$60,000 from fans to fund a tour in the 1990s by utilizing its fan e-mail database. Dave Lee, *How to Crowd-fund Your Stardom*, BBC CLICK (July 3, 2011, 9:58 AM), [http://news.bbc.co.uk/2/hi/programmes/click\\_online/9528224.stm](http://news.bbc.co.uk/2/hi/programmes/click_online/9528224.stm).

21. See INDIEGOGO, <http://www.indiegogo.com> (last visited May 14, 2012) (founded in 2008); KICKSTARTER, <http://www.kickstarter.com> (last visited May 14, 2012) (founded in

Most of the projects funded through crowdfunding websites are from creative industries, such as design, filmmaking, music performance and production, and photography.<sup>22</sup> The existing crowdfunding schemes are based on donations, not purchases of equity interests.<sup>23</sup> Crowdfunding websites like Kickstarter and IndieGoGo require fundraisers to offer material rewards—typically products that are related to or are a result of the project itself—in exchange for the contribution.<sup>24</sup>

If the crowdfunding model offers equity interests in the enterprise as

2009); ROCKETHUB, <http://www.rockethub.com> (last visited May 14, 2012) (founded in 2010); *see also* Robert Andrews, *Crowdfunding: How Does The Scene Stack up?*, PAIDCONTENT, <http://paidcontent.org/table/crowdfunding> (last visited May 14, 2012) (comparing crowdfunding platforms through the number of projects submitted, projects financed and realized, total supporters, amounts pledged and paid out, average pledge amounts, and sites' commission fees). Crowdfunding is also rampant globally, with crowdfunding websites in countries like Germany, the United Kingdom, and the Netherlands. *See, e.g.*, CROWDCUBE, <http://www.crowdcube.com> (last visited May 14, 2012) (United Kingdom); INKUBATO, <http://www.inkubato.com> (last visited May 14, 2012) (Germany); SELLABAND, <http://www.sellaband.com> (last visited May 14, 2012) (the Netherlands and Germany).

22. *See, e.g., Project Guidelines*, KICKSTARTER, <http://www.kickstarter.com/help/guidelines> (last visited May 14, 2012) (requiring creative projects and limiting them to the fields of art, comics, dance, design, fashion, film, food, games, music, photography, publishing, technology, and theater); SELLABAND, [http://www.sellaband.com/en/pages/how\\_it\\_works](http://www.sellaband.com/en/pages/how_it_works) (last visited May 14, 2012) (focusing only on music and categorizing projects based on musical genres, such as alternative, hip hop, and rock). There are also other crowdfunding platforms that are dedicated to charities, causes, and short-term projects. *See, e.g., About MicroGiving*, MICROGIVING, <http://www.microgiving.com/about-us> (last visited May 14, 2012); *How It Works*, JUSTGIVING, <http://www.justgiving.com/about-us/how-it-works/for-fundraisers> (last visited May 14, 2012); *Rally to Make Crowdfund Investing Legal*, INDIEGOGO, <http://www.indiegogo.com/Rally-to-Make-Crowdfund-Investing-Legal> (last visited May 14, 2012) (raising funds for a rally to support the crowdfunding bill, H.R. 2930, scheduled for November 17, 2011, in Washington, D.C.).

23. *See, e.g., How Kickstarter Works*, KICKSTARTER, <http://www.kickstarter.com/start> (last visited May 14, 2012) (“Kickstarter is a new form of commerce and patronage, not a place for investment or lending.”). *But see How It Works*, CROWDCUBE, <http://www.crowdcube.com/pg/how-it-works-4> (last visited May 14, 2012) (facilitating equity-based crowdfunding for entrepreneurs and business pioneers in the United Kingdom).

24. *See, e.g., Jon M. Garon, Content, Control, and the Socially Networked Film*, 48 U. LOUISVILLE L. REV. 771, 813–15 (2010) (advising filmmakers how to finance their films through crowdfunding and rewarding donors with presale goods, special thanks credit, and rough and final cuts of the film); Danae Ringelmann, *Want Ideas for VIP Perks? Listen to Nine Inch Nails' Former Drummer*, INDIEGOGO (Feb. 20, 2009, 7:23 PM), <http://www.indiegogo.com/blog/2009/02/want-ideas-for-vip-perks-listen-to-nine-inch-nails-former-drummer.html> (suggesting that material rewards should be related to the fundraiser's project assets); *see also* Steven Kurutz, *On the Web, Dreams Made Real*, N.Y. TIMES, Sept. 22, 2011, at D1 (reporting the upsides and downsides of giving material rewards in return for contributions).

opposed to mere material rewards, these interests probably constitute securities under the Securities Act, particularly if the crowdfunding issuer refers to its equity interests as stocks.<sup>25</sup> Under the category of securities known as investment contracts,<sup>26</sup> equity crowdfunding interests would constitute securities because an investor would invest money in a common enterprise and would expect profits solely from the efforts of the issuing entrepreneur.<sup>27</sup> Therefore, ownership interests in a business venture would be treated as securities, and any offerings or sales of such interests would be subject to the Securities Act and regulations made thereunder. Most importantly, the offering of such securities would be subject to the § 5 registration requirement.<sup>28</sup>

### B. *Benefits and Costs of Crowdfunding*

As an innovative Internet-based capital formation strategy, crowdfunding has costs and benefits inherent in its mechanisms that relate to its role in helping to revive the nation's economy. Crowdfunding's advantages and disadvantages impact the cost-benefit analysis of any rule the SEC could issue under the new provisions on crowdfunding in the Securities Act and the Exchange Act.

#### 1. *Crowdfunding's Benefits*

Crowdfunding has great potential to spark growth among small businesses. Even in its current form, many entrepreneurs have successfully started and developed their business ventures relying in part on crowdfunding. One of the primary challenges faced by small businesses is a

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25. See Securities Act of 1933 § 2(a)(1), 15 U.S.C. § 77b(a)(1) (2006) (listing financial instruments that constitute securities, including stocks and investment contracts); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 (1985) (holding that a real stock is per se a security).

26. See 15 U.S.C. § 77b(a)(1) (“The term ‘security’ means any . . . investment contract . . .”); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298–99 (1946) (finding that under the Securities Act “an investment contract . . . means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”).

27. The question of whether crowdfunding interests constitute securities may be open to dispute and would require an in-depth analysis that this Comment does not attempt to explore. This Comment's analysis of proposed crowdfunding exemptions is based on the assumption that crowdfunding interests constitute securities. See generally Joan M. Heminway & Sheldon R. Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879, 885–906 (2011) (analyzing whether crowdfunding interests constitute securities and concluding that they are investment contracts because they satisfy the *Howey* test).

28. 15 U.S.C. § 77e(a) (requiring registration for securities sold in interstate commerce).

capital gap<sup>29</sup>: small businesses have very limited financing options. Bank loans are often denied due to a lack of collateral, operating history, and a proven track record.<sup>30</sup> Private financing from venture capital and angel investors only fund a small number of businesses.<sup>31</sup> Crowdfunding could bridge this gap by connecting small businesses, which are marginalized from the traditional sources of funding, to the general public.

In addition to crowdfunding's financial benefit, entrepreneurs also use this fundraising method to market their products or services and obtain feedback.<sup>32</sup> Crowdfunding becomes a tool for innovators to improve on their business models or products and services before they are offered to the public. By coupling crowdfunding with crowdsourcing, the public can participate in creating these products or services.

Not only does the growth of small businesses benefit the entrepreneurs themselves, it also benefits society. Small businesses accounted for 60%–75% of new jobs created between 1993 and 2009,<sup>33</sup> and small businesses provide consumers with more product and service options.<sup>34</sup>

## 2. Crowdfunding's Costs

Crowdfunding has its downsides as well. From the investor protection perspective, it is likely that some fraud will occur through crowdfunding. The Internet, which replaces real-life encounters with virtual meetings, could make it more difficult for investors to know whether an issuer's business is legitimate.<sup>35</sup> An additional crowdfunding risk is inherent in the general nature of small businesses: uncertainty about the development of

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29. Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. SMALL & EMERGING BUS. L. 57, 60–63 (1998).

30. *See id.* at 61; Emily Maltby, *Smaller Businesses Seeking Loans Still Come Up Empty*, WALL ST. J., June 30, 2011, at B1 (reporting that most of the loan recipients in 2011 appear to be large independent businesses with multiple revenue streams and significant collateral for loans rather than smaller companies).

31. *See* Fisch, *supra* note 29, at 62–63; *see also* Rutheford B. Campbell, Jr., *Regulation A: Small Businesses' Search for "A Moderate Capital"*, 31 DEL. J. CORP. L. 77, 81 (2006) (arguing that small businesses face structural challenges when entering capital markets and that the absence of available financial intermediation services requires them to find investors on their own).

32. Paul Belleflamme, Thomas Lambert & Armin Schwienbacher, *Crowdfunding: Tapping the Right Crowd* 9 (CORE Discussion Paper No. 2011/32, 2011), available at <http://ssrn.com/abstract=1578175>.

33. BRIAN HEADD, AN ANALYSIS OF SMALL BUSINESS AND JOBS 10–11 (2010).

34. *See* Campbell, *supra* note 31, at 84–86 (reporting that the percentage of jobs created by small businesses was as high as 75% as of 2006).

35. *See* discussion *infra* Part IV.

unproven products or services.<sup>36</sup> Start-up companies are traditionally riskier and have a higher rate of failure than other businesses.<sup>37</sup>

From the business perspective, crowdfunding issuers may encounter administrative and accounting challenges, since this capital formation strategy involves a large number of investors becoming shareholders. This would require meticulous and laborious bookkeeping of all investments and shares in the business to determine the share of profits to which each investor is entitled to.<sup>38</sup> Even with the current form of crowdfunding where donors merely receive rewards, fundraisers are finding the administrative work of recording donor contributions and sending the respective rewards to be onerous.<sup>39</sup>

## II. PRE-JOBS ACT: SECURITIES LAWS WERE UNSUITABLE FOR CROWDFUNDING

Prior to the JOBS Act, the biggest challenge in transforming crowdfunding from a model that only offers token gifts to a model that offers equity in the business was that securities laws were unsuitable for this fundraising strategy. Equity-based crowdfunding cannot operate unless the company receiving the funds registered with the SEC or resorts to one of the exemptions available in the Securities Act and accompanying regulations. Registration would be prohibitively costly for small businesses, and the exemptions of Regulations A and D are unsuitable because of the prohibitive filing requirement and ban on general solicitation.

### A. Registration

Section 5(c) of the Securities Act requires business to register securities

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36. See Fisch, *supra* note 29, at 61 (acknowledging other risks as well, such as agency costs and informational asymmetries).

37. Heminway & Hoffman, *supra* note 27, at 933.

38. See Sarah E. Needleman & Angus Loten, *When “Friending” Becomes a Source of Start-Up Funds*, WALL ST. J., Nov. 1, 2011, at B1 (reporting that some believe managing cash flow for dividend payments would distract small businesses from attending to their day-to-day operations). A soon-to-be formed crowdfunding platform based in the United Kingdom, Seedrs, addresses this administrative challenge for issuers by aggregating multiple small investments in each business into one large investment. See *Hearings*, *supra* note 6, at 1–2 (statement of Jeff Lynn, CEO, Seedrs) (limiting the administrative burden by allowing fundraisers to interact with only one legal shareholder).

39. See Crane, *supra* note 19 (explaining that the campaign for a crowdfunding project is time-consuming because fundraisers must constantly utilize social media like Twitter and Facebook to maintain the momentum); Kurutz, *supra* note 24 (reporting that one crowdfunding fundraiser, TikTok, had to send 13,512 products to all its backers and the shipping and handling alone cost approximately \$70,000).

offerings with the SEC.<sup>40</sup> Registration is the process by which companies disclose material financial information, such as audited balance sheets and income statements, to prospective investors in the form of a registration statement.<sup>41</sup> An issuer may not sell securities until that registration statement has been approved and becomes effective.<sup>42</sup> Assuming that crowdfunding interests constitute securities, the issuers must submit registration statements to the SEC unless they are able to perfect an exemption.<sup>43</sup>

However, for small businesses, the costs of registration are too high and in some cases would even exceed the amount of funds they aim to raise.<sup>44</sup> These costs include registration fees, accounting fees, legal fees, and printing costs.<sup>45</sup> Understanding the prohibitive costs of registration for small businesses, Congress provided an opportunity for the SEC to create exemptions from registration requirements to help small businesses.<sup>46</sup> Therefore, like other small businesses that resort to existing exemptions due to the excessive costs of registration, the crowdfunding model also needed an exception.

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40. Securities Act of 1933 § 5(c), 15 U.S.C. § 77e(c) (2006).

41. See 17 C.F.R. pts. 210, 229 (2011).

42. 15 U.S.C. § 77b(a)(3).

43. The laws and regulations in the United Kingdom can accommodate equity-based crowdfunding platforms because of how they determine the offerings that require a prospectus. See Financial Services and Markets Act, 2000, c. 8, §§ 85(1), 86(1)(b) (U.K.) (exempting from registration those securities offered to fewer than 150 persons, and establishing that an offer made to members of a partnership constitutes an offer to a single person); see, e.g., CROWDCUBE, <http://www.crowdcube.com> (last visited May 14, 2012) (equity-based crowdfunding platform in the United Kingdom); SEEDRS, <http://www.seedrs.com/> (last visited May 14, 2012) (same); *Hearings, supra* note 6, at 39 (prepared statement of Jeff Lynn, CEO, Seedrs) (distinguishing donation-based crowdfunding platforms from Seedrs, which provides more intermediation, including disclosure review, legal due diligence, and execution management). See generally *Hearings, supra* note 6, at 39–40 (prepared statement of Jeff Lynn, CEO, Seedrs) (comparing securities laws in the United States and the United Kingdom in their suitability for crowdfunding).

44. See Bradford, *supra* note 11, at 27–28; Fisch, *supra* note 29, at 61 (arguing that many of these costs are fixed).

45. The services of lawyers and accountants are crucial to the registration process because the registration statement must include such information as financial statements, description of the securities offered, risks of the investment, and the offering price of the security. See Todd A. Mazur, Note, *Securities Regulation in the Electronic Era: Private Placements and the Internet*, 75 IND. L.J. 379, 381 (2000) (describing the laborious registration process of securities).

46. See, e.g., Small Business Initiatives, 57 Fed. Reg. 36,442 (Aug. 13, 1992) (codified at 17 C.F.R. pts. 200, 228, 229, 230, 239, 240, 249, and 260) (adopting Regulation A exemptions to facilitate capital raising by small businesses and to reduce costs of complying with federal securities laws).

### B. Regulation A

The first registration exemption available to businesses is Regulation A.<sup>47</sup> Regulation A is based on § 3(b) of the Securities Act,<sup>48</sup> which exempts offerings that do not exceed \$5 million.<sup>49</sup> Although Regulation A is meant to assist small businesses in raising funds, complying with this regulation is burdensome; it is commonly called a mini-registration due to requirements that resemble § 5 registration requirements.<sup>50</sup> Fulfilling Regulation A requirements also necessitates the services of lawyers and accountants.<sup>51</sup> Therefore, Regulation A is unsuitable for crowdfunding because many of the issuers targeted by this model would not be able to afford such services and do not have the financial or business history to complete the required information.

### C. Regulation D

The remaining exemptions available for crowdfunding prior to the JOBS Act fall under Regulation D.<sup>52</sup> The first exemption is Rule 506, which exempts transactions that do not involve a public offering<sup>53</sup> and limits the number of nonaccredited investors to thirty-five.<sup>54</sup> As crowdfunding rests on the participation of the “crowd”—which would in most cases exceed thirty-five nonaccredited investors—and would most likely constitute a public offering, this exemption does not suit, and would in fact negate, the nature of the crowdfunding model.

Exemptions in Rule 504<sup>55</sup> and 505<sup>56</sup> of Regulation D would be ideal for crowdfunding, since these rules impose caps on the aggregate amount of the offering at \$1 million and \$5 million, respectively;<sup>57</sup> however, the main

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47. Regulation A, 17 C.F.R. §§ 230.251–263 (2011).

48. *Id.* § 230.251.

49. Securities Act of 1933 § 3(b), 15 U.S.C. § 77c(b) (2006); 17 C.F.R. § 230.251(b).

50. See 7 J. WILLIAM HICKS, EXEMPTED TRANSACTIONS UNDER THE SECURITIES ACT OF 1933 § 6:5 (1999); see, e.g., 17 C.F.R. § 230.252(a) (requiring issuers to complete Form 1-A, which includes such information as plan of distribution, officers and key personnel of the company, and businesses and properties).

51. See *supra* text accompanying note 45.

52. 17 C.F.R. § 230.501–.508.

53. *Id.* § 230.506(a).

54. *Id.* § 230.506(b)(2)(i)–(ii) (limiting the number of purchasers of securities to thirty-five); *id.* § 230.501(e)(1)(iv) (excluding an “accredited investor” in calculating the number of purchasers).

55. *Id.* § 230.504.

56. *Id.* § 230.505.

57. *Id.* § 230.504(b)(2) (aggregate amount limited to \$1 million); *id.* § 230.505(b)(2)(i) (\$5 million).

barrier that renders Rule 504 and 505 of Regulation D unsuitable for crowdfunding is their prohibition on general solicitation.<sup>58</sup> Again, the essence of crowdfunding is obtaining capital from the general public through the Internet, where anyone can gain the equity interests offered by the fundraiser.

### 1. *The Ban on General Solicitation*

Scholars have criticized the ban on general solicitation since the SEC introduced it in Rule 146, the predecessor of Rule 502(c).<sup>59</sup> They contend that the ban lacks justification<sup>60</sup> and severely inhibits the growth of small businesses.<sup>61</sup> The ban is particularly problematic for crowdfunding because publishing the business plan and offering an equity interest to the “crowd” is central to the idea of crowdfunding.

General solicitation is not defined in the SEC regulations, but the SEC has determined that permissible solicitation of investment requires a preexisting substantive relationship between the issuers or their representatives and the potential investors.<sup>62</sup> Preexisting relationship refers to relationships established prior to the solicitation for the offering,<sup>63</sup> and *substantive* means that the relationship is such that the issuer can be aware of the financial circumstances or sophistication of the potential investors.<sup>64</sup> People who fall under this category are typically friends and family members of the issuer. For offerings that involve brokers and dealers, the network of potential investors expands to their customers and clients.<sup>65</sup>

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58. 17 C.F.R. § 230.502(c) (banning issuers from offering or selling securities by any form of general solicitation or general advertising).

59. See Patrick Daugherty, *Rethinking the Ban on General Solicitation*, 38 EMORY L.J. 67, 87 (1989) (stating that two years after Rule 146 was adopted, the SEC began asking for public comment as to whether the rule should be rescinded).

60. See *infra* Part IV.

61. See Daugherty, *supra* note 59, at 70 (describing the ban on general solicitation as “unconscionably vague”).

62. See generally *id.* at 104–08 (discussing SEC staff’s interpretive letters of circumstances that do and do not meet the preexisting substantive relationship requirement of permissible solicitation under Regulation D); William K. Sjostrom, Jr., *Relaxing the Ban: It’s Time to Allow General Solicitation and Advertising in Exempt Offerings*, 32 FLA. ST. U. L. REV. 1, 13–14 (2004) (discussing the SEC’s no-action letters to companies confirming that their modes of solicitation do not constitute general solicitation). Daugherty argues the SEC should define such a crucial rule provision through the notice-and-comment procedure to allow the public to address its needs and concerns regarding the rule. See Daugherty, *supra* note 59, at 106–07 n.184.

63. See E.F. Hutton & Co., SEC No-Action Letter, 1985 SEC No-Act. LEXIS 2917, at \*2 (Dec. 3, 1985); see also Sjostrom, *supra* note 62, at 13.

64. Sjostrom, *supra* note 62, at 13.

65. There are limitations on the scope of efforts by brokers and dealers in soliciting for

This benefit, however, does not extend to all small businesses because many cannot afford the services of brokers and dealers. Additionally, brokers typically impose commission fees of up to 10% of the gross offering;<sup>66</sup> they usually will not take clients whose offering prices are not high and would therefore result in a small commission for the brokers. Consequently, many small businesses are left with the limited option of resorting to only their friends and families for capital.

This interpretation of general solicitation is highly problematic for crowdfunding because it prohibits entrepreneurs from having a special page online, like the ones on Kickstarter<sup>67</sup> and IndieGoGo, where anyone can access and gain information about the business plan and invest money.<sup>68</sup> The whole purpose of crowdfunding is to unlock the door to a limitless pool of capital facilitated by the Internet connecting strangers with one another. Getting funds from people with whom the issuer has no preexisting relationship is a crucial part of a crowdfunding scheme; therefore, the ban on general solicitation makes the Regulation D offerings unsuitable for crowdfunding.

### III. WORRIES ABOUT CROWDFUNDING REFLECT RATIONALES BEHIND THE RULE 502(C) BAN ON GENERAL SOLICITATION

Having summarized the benefits and costs of crowdfunding, it is also important to analyze the investor protection concerns related to this new fundraising model, even though the JOBS Act has exempted crowdfunding from registration requirements. At the heart of crowdfunding is the idea of

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investment that would be permissible for Regulation D exemptions, such as the use of questionnaires and predeveloped customer lists. *See* Daugherty, *supra* note 59, at 104–08.

66. Sjostrom, *supra* note 62, at 15 (explaining that investment banking firms get compensated with either a commission fee, common stock warrants, or the contractual right to participate in future company offerings).

67. A fundraising project page on Kickstarter typically consists of a video explaining the project, a description of the project and the people behind it, and the tranches of donations and their corresponding material rewards. *See* KICKSTARTER, <http://www.kickstarter.com> (last visited May 14, 2012).

68. The Rule 504-based crowdfunding platform ProFounder facilitates entrepreneurs' fundraising campaigns, but only allows people with whom the entrepreneurs have preexisting substantive relationships to access the relevant entrepreneurs' pages to invest. *Hearings, supra* note 6, at 25 (prepared statement of Dana Mauriello, President, ProFounder). Issuers using ProFounder's services send e-mails to people with whom they have preexisting substantive relationships through a ProFounder application allowing only the e-mail recipient to view the private fundraising website. *Id.* These e-mail invitations contain a unique link that only the recipient can open that cannot be forwarded or shared with others. *Id.* Since its inception in 2009, ProFounder has enabled nineteen companies to raise funds in the totaling more than \$612,000 from 356 investors who are classmates, customers, family members, and friends of the entrepreneurs. *Id.* at 3.

appealing to the general public based on the merits of the business idea and soliciting funds via the Internet to help the business grow. This is essentially synonymous with general solicitation as interpreted by the SEC. To examine crowdfunding's investor protection concerns, it is thus useful to analyze the rationale behind banning general solicitation and to assess whether the underlying concerns that prompted such a rule are still relevant in today's Internet age.

The overarching rationale for prohibiting general solicitation is to protect investors, which is one of the dual functions of the SEC.<sup>69</sup> Specifically, the SEC intended Rule 502(c) of Regulation D to reduce the potential for abuse by people who would take advantage of a flexible regulation and harm others by advertising offerings and reselling the fraudulent securities to the general public.<sup>70</sup>

The SEC's first justification for Rule 502(c) is in the context of Rule 506's private placement. The SEC believes that prohibiting general solicitation for private placement ensures the private nature of such offerings.<sup>71</sup> This rationale is reasonable for Rule 506 because it is based on § 4(2) of the Securities Act, which exempts transactions that do not involve public offerings.<sup>72</sup> However, unlike Rule 506, which expressly specifies § 4(2) as the statutory basis for the rule exemption, Rule 504 of Regulation D does not,<sup>73</sup> and Rule 505 is based on § 3(b) of the Securities Act, which does not exclude public offerings.<sup>74</sup> Before the SEC rescinded the ban on general solicitation in 1992,<sup>75</sup> it had never declared another rationale;<sup>76</sup>

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69. See Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Securities Act Release No. 7,644, 69 SEC Docket 364 (Feb. 25, 1999) (reiterating that provisions of Regulation D, which include the prohibition on general solicitation, are based on the mandate of investor protection).

70. See *id.* (promulgating an amended rule as a result of "recent fraudulent secondary transactions").

71. See Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6339, 23 SEC Docket 446 (Aug. 7, 1981); Integration of Abandoned Offerings, Securities Act Release No. 7943, 74 SEC Docket 571, 574 (Jan. 26, 2001) (interpreting general solicitation to "impart a public character to an offering").

72. Securities Act of 1933 § 4(2), 15 U.S.C. § 77d(2) (2006); 17 C.F.R. § 230.506(a) (2011).

73. 17 C.F.R. § 230.504(a).

74. *Id.* § 230.505(a).

75. See Small Business Initiatives, 57 Fed. Reg. 36,442, 36,443 (Aug. 13, 1992) (codified at 17 C.F.R. pts. 200, 228, 229, 230, 239, 240, 249, and 260) (declaring that "there is no proscription on general solicitation" for Rule 504 securities).

76. See Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6339, 23 SEC Docket 446 (Aug. 7, 1981) (stating only the rule and its

accordingly, commentators criticized the rule for lacking strong ideological foundation.<sup>77</sup>

After the SEC rescinded the rule prohibiting general solicitation, it justified the ban when reintroducing the provision as serving to prevent the “pump and dump” abuses that occurred in the 1990s.<sup>78</sup> Years after removing the ban on general solicitation, the SEC reinstated it in 1999 due to the recurring pump and dump schemes that took advantage of Rule 504.<sup>79</sup> These stock manipulation schemes occurred in penny stocks—stocks sold for less than \$1 a share—where unscrupulous brokers entered the market cheaply, marketed the shares through the phone and Internet, and sold them to investors right before they dumped their own holdings and left investors with deflated shares.<sup>80</sup>

The criticisms against crowdfunding exemptions echo the concerns that prompted the ban on general solicitation for Regulation D securities. In her discussion of a possible crowdfunding exemption, SEC Chairman Mary Schapiro underscored the importance of taking the pump and dump experience into account for future exemptions on general solicitation and resale.<sup>81</sup> Critics are concerned that this exemption would bring back the “boiler rooms” of the 1990s Internet stock bubble that financially harmed many investors.<sup>82</sup>

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similarity with its predecessor, Rule 146(c)); Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, Securities Act Release No. 6389, 24 SEC Docket 1166 (Mar. 8, 1982) (same).

77. See Sjostrom, *supra* note 62, at 34 (“The ban is simply the product of the historic statutory basis of the private placement exemptions . . .”).

78. See Revision of Rule 504 of Regulation D, the “Seed Capital” Exemption, Securities Act Release No. 7644, 69 SEC Docket 364, 366 (Feb. 25, 1999) (arguing that banning general solicitation is an effective way to combat pump and dump abuses); Michael Schroeder, *Despite Reforms, Penny-Stock Fraud Is Roaring Back*, WALL ST. J., Sept. 4, 1997, at A12 (stating that Rule 504 had become a “popular loophole for fraud” and a “playground for the unscrupulous”).

79. See Revision of Rule 504 of Regulation D, the “Seed Capital” Exemption, Securities Act Release No. 7644, 69 SEC Docket 364 (Feb. 25, 1999) (employing interdictions on general solicitation due to misuses of Rule 504).

80. See John R. Stark, *EnforceNet Redux: A Retrospective of the SEC’s Internet Program Four Years After Its Genesis*, 56 BUS. LAW. 105, 110–12 (2001) (citing examples of “familiar frauds” emerging in the age of the Internet); Schroeder, *supra* note 78.

81. Letter from Mary L. Schapiro, Chairman, Sec. & Exch. Comm’n, to Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform 23 (Apr. 6, 2011), available at <http://www.sec.gov/news/press/schapiro-issa-letter-040611.pdf>; see also *Hearings*, *supra* note 6, at 11 (prepared statement of Meredith Cross, Director, Division of Corporate Finance, SEC) (emphasizing the importance of considering the “pump and dump” experience to assess any possible exemption for crowdfunding).

82. Jonathan Weisman, *Final Approval by House Sends Jobs Bill to President for Signature*, N.Y. TIMES, Mar. 27, 2012, at A12.

#### IV. REMOVING CONCERNS: THE INTERNET AGE AND THE JOBS ACT'S SAFEGUARDS

Although the investor protection concerns that prompted the general solicitation ban may have been applicable in the 1990s when the Internet was only in its nascent stage, such concerns no longer apply today. In addition, the JOBS Act introduces several rules to accompany the crowdfunding exemption that further protect investors. Therefore, as the investor protection concerns no longer apply in today's Internet age and there are new provisions in the federal securities laws that are designed to prevent fraud, criticisms against crowdfunding are simply unfounded.

##### *A. Rationales Behind the Ban on General Solicitation Do Not Apply to the Current Tech-Savvy Market*

The rationale behind fraudulent abuses in the 1990s that prompted the prohibitions on general solicitation and resale do not apply to crowdfunding today. The pump and dump schemes were hatched by brokers and dealers who purchased securities of companies without real products or operations and resold them to unknowing investors.<sup>83</sup> Unlike investors in the 1990s, people today are equipped with advanced tools to obtain enormous amounts of specific information at any time. In 1990, approximately 2.2 million people in the United States had access to the Internet.<sup>84</sup> The Internet was mostly in the hands of professional traders, and until 2006 online use of corporate information was limited to large corporations and institutional investors.<sup>85</sup> In 2010, the number of Internet users had increased to nearly 240 million people, comprising 77.3% of the U.S. population.<sup>86</sup> Additionally, of the American population today, 52% use the Internet for commercial activities, 58% use research products and services online, and 46% use social networking sites.<sup>87</sup> This growing trend shows that the Internet is becoming an increasingly important space for commercial activities.

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83. See Revision of Rule 504 of Regulation D, the "Seed Capital" Exemption, Securities Act Release No. 7,644, 69 SEC Docket 364, 366 (Feb. 25, 1999); Schroeder, *supra* note 78.

84. *Internet Users 1990*, WORLDMAPPER, <http://www.worldmapper.org/display.php?selected=335> (last visited May 14, 2012).

85. Arewa, *supra* note 17, at 335 n.21.

86. *United States of America: Internet Usage and Broadband Usage Report*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm> (last visited May 14, 2012).

87. Jim Jansen, *Online Product Research: 58% of Americans Have Researched a Product or Service Online*, PEW INTERNET & AMER. LIFE PROJECT 2-3 (Sept. 29, 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP%20Online%20Product%20Research%20final.pdf>.

In addition, among Internet users, the younger the age group the higher the degree of usage. People between the ages of eighteen and thirty-three comprise 35% of the Internet-using population and those between thirty-four and forty-five comprise 21%, with the older age groups comprising less.<sup>88</sup> This generational gap illustrates that the way of the future lies in cyberspace, as the younger generation conducts many of its activities through the Internet.

Increasing Internet use has also coincided with, if not created, a cyberculture of information sharing. Not only do people provide content for the development of a single product, people also communicate with one another and verify facts as part of their consumption and investment decisionmaking. With advancement in technology and people's shrewdness in utilizing online tools, the growth of crowdfunding platforms will be accompanied by the growth of online information sharing.<sup>89</sup>

Among Internet users, 32% have posted online product comments and 78% have conducted product research online.<sup>90</sup> As for investments, information on issuers available on the Internet can typically be found on a company's home page, which has product and financial information, broker-dealer websites, financial portals, active message boards, and chat rooms frequented by market participants.<sup>91</sup> Unlike in the 1980s, when people had to depend on brokers and dealers to obtain information about a company, today's conscientious citizenry can obtain information themselves by maneuvering through the increasingly simple and user-friendly Internet infrastructure.<sup>92</sup>

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88. Kathryn Zickuhr, *Generations 2010*, PEW INTERNET & AMERICAN LIFE PROJECT 4 (Dec. 16, 2010), [http://pewinternet.org/~media/Files/Reports/2010/PIP\\_Generations\\_and\\_Tech10.pdf](http://pewinternet.org/~media/Files/Reports/2010/PIP_Generations_and_Tech10.pdf).

89. Equity-based crowdfunding investors will probably write reviews on business ventures—as donors to donation-based crowdfunding projects are already doing—and will collectively become a “self-policing community,” like users on eBay and TripAdvisor. *Hearings*, *supra* note 6, at 54 (prepared statement of Sherwood Neiss, Cofounder, FLAVORx). *But see* Merrill Goozner, *Cyberforce Patrols the Internet: as Stock Chat Fraud Mounts, SEC Takes Action*, CHI. TRIB., (Jan. 24, 1999), available at [http://articles.chicagotribune.com/1999-01-24/business/9901240315\\_1\\_sia-stock-fraud-stock-promoters](http://articles.chicagotribune.com/1999-01-24/business/9901240315_1_sia-stock-fraud-stock-promoters) (reporting the scheme of scam artists who gave false information in online chat groups that triggered the SEC's creation of Cyberforce).

90. Jansen, *supra* note 87, at 2.

91. *See* Robert N. Sobol, *The Benefit of the Internet: The World Wide Web and the Securities Law Doctrine of Truth-on-the-Market*, 25 J. CORP. L. 85, 86–87 (1999); Caroline Bradley, *Information Society Challenges to Financial Regulation*, 37 U. TOL. L. REV. 307, 309–10 (2006) (adding that investors can also access more traditional forms of information through print and broadcast media).

92. *See* John S. D'Alimonte, Mary C. Carty & Thomas Finkelstein, *Securities Law in the New Millennium*, 75 ST. JOHN'S L. REV. 49, 66 (2001) (contending that such Internet access

Public access to information also strengthens the prospective investors' bargaining position vis-à-vis the issuer. The aforementioned data show an increasing number of people accessing the Internet. The Internet reduces the problem of information asymmetry—an imbalance of access to information between issuers and investors<sup>93</sup>—and therefore prevents the incidence of fraud resulting from the monopoly over information by a small group of people who would take advantage of this position.

Although the large quantity of information available on the Internet may raise questions about its quality and whether prospective investors would know how to use it in their decisionmaking,<sup>94</sup> people in today's Internet age are quick to respond to issues by utilizing online tools. It is not such a far-fetched idea to expect people to create websites, software, or online tools that could separate the good from the bad and relevant information from irrelevant information. In fact, since the JOBS Act was introduced in Congress on December 8, 2011,<sup>95</sup> companies, associations, and websites have emerged that attempt to address the concerns about online crowdfunding.

The National Crowdfunding Association (NLCFA) is an association of crowdfunding portals, venture capital firms, attorneys, and other crowdfunding industry participants that formed in March 2012.<sup>96</sup> As a trade association, NLCFA will be providing annual trade conferences, education materials and opportunities, and even group insurance for its members.<sup>97</sup>

One example of a grassroots crowdfunding tool is Open Crowdfund. Open Crowdfund is an online reputation-checking system that will allow investors to review reports on the companies in which they consider investing.<sup>98</sup> This project has yet to be launched, and the development of

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enables investors to make comparable investment decisions to those by Wall Street professionals); Nikki D. Pope, *Crowdfunding Microstartups: It's Time for the Securities and Exchange Commission to Approve a Small Offering Exemption*, 13 U. PA. J. BUS. L. 973, 982–83 (2011) (comparing investors' access to information during the formative years of the SEC and today).

93. Bernard S. Black, *Information Asymmetry, the Internet, and Securities Offerings*, 2 J. SMALL & EMERGING BUS. L. 91, 92 (1998).

94. *See id.* (arguing that investors' easy access to information on the Internet can encourage issuers to lie about their securities); Bradley, *supra* note 91, at 309–10.

95. *Bill Summary & Status 112th Congress (2011–2012) H.R.3606*, LIBRARY OF CONG.: THOMAS (last visited May 14, 2012), <http://thomas.loc.gov/home/thomas.php> (search for “H.R. 3606”).

96. *About Us*, NAT'L CROWDFUNDING ASS'N, <http://www.nlcfa.org/NLCFA/About.html> (last visited May 14, 2012).

97. *Id.*

98. OPEN CROWDFUND, <http://launch.opencrowdfund.com/> (last visited May 14,

the system itself will be crowdsourced—the public is invited to collaboratively design the program that would best meet the public’s needs.<sup>99</sup> Open Crowdfund also plans to introduce a “radical transparency process” that will allow investors to see how companies they are investing in are spending the capital they provide, thereby enhancing accountability.<sup>100</sup>

Another example of a quick public response to problems and issues surrounding crowdfunding is Cal-X Crowdfund Connect Software.<sup>101</sup> This software has fifty-two indicators that help determine a company’s probability-of-survival score before it gets listed in a crowdfunding site.<sup>102</sup> This company seeks to become a marketplace where fundraisers meet investors.

These tools and associations are only a couple of examples of innovative crowdfunding-related projects that are rapidly flourishing in cyberspace. This organic growth within the market illustrates the power and capacity of the public in quickly responding to concerns by creating online solutions to regain information symmetry. They also reflect the way the public resolves its own problems, as enabled by the creativity, online resources, and wisdom of the crowd.<sup>103</sup>

In addition, the common concerns raised by general solicitation do not apply to crowdfunding because today’s advanced technology, and people’s impressive abilities to adjust to it, eliminates the information asymmetry between issuers and the general public.<sup>104</sup> The Internet has changed the information market and leveled the playing field between the issuers and the prospective investors. One of the key investor protection concerns underlying the general solicitation ban is information asymmetry, where some people who lack financial sophistication must be protected because they cannot gain information about the issuing company.<sup>105</sup> The

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2012).

99. *Id.*

100. *Id.* (internal quotation marks omitted).

101. *What We Do*, CAL. STOCK EXCH., <http://www.calstockexchange.com/what-we-do.php> (last visited May 14, 2012).

102. *Id.*

103. *See also* World Econ. Forum, CROWD WISDOM: USER-CENTRIC INNOVATION 4–7 (2000), *available at* [http://www3.weforum.org/docs/WEF\\_TP\\_Brochure\\_2008.pdf](http://www3.weforum.org/docs/WEF_TP_Brochure_2008.pdf) (observing the growing trend of companies recognizing that customers can play a valuable role in creating new ideas, and providing examples of offline user-centric innovation where users innovate collaboratively to address problems).

104. *See Mazur, supra* note 45, at 380 n.9 (arguing that the Internet makes obsolete the legal concepts underlying the federal securities regulation that were premised on a paper-based information technology).

105. *See Hearings, supra* note 6, at 12 (prepared statement of Meredith Cross, Director, Division of Corporate Finance, SEC) (arguing that this imbalance of information is a

preexisting substantive relationship requirement for permissible solicitation presumes that investors who have such a relationship with the issuer know something about the issuer or have access to material information about the securities offered.<sup>106</sup>

However, since the Internet dispenses with the need for a personal relationship to exist for people to obtain material information, its use undermines one of the principal rationales of the ban on general solicitation.<sup>107</sup> In addition to people's active pursuit of knowledge by researching on the Internet, the Internet is also flooded with active forums where people share and discuss information.<sup>108</sup> Such methods of communication are currently employed by existing crowdfunding platforms, like Kickstarter and IndieGoGo, that have discussion forums where donors can discuss the projects to which they are about to contribute.

Just as crowdsourcing rests on the collective intellect and knowledge of people to enhance the quality of a product, it also depends on the public—not only for its capital, but also to determine, at the very least, which investments to avoid, if not also which investments are best.<sup>109</sup> With the help of technology, investors can scrutinize investments and the people behind them by communicating with others.

Relatedly, in *SEC v. Ralston Purina Co.*<sup>110</sup> the Supreme Court held that if the investors have the bargaining power to demand effective disclosure, there is no practical need to afford them the protection of the registration requirements.<sup>111</sup> One of the driving forces behind crowd- or community-based efforts is the idea of the power or wisdom of the crowd.<sup>112</sup> Such

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concern independent from the viability of the business venture or the entrepreneur's commitment).

106. See Daugherty, *supra* note 59, at 80.

107. *But see* D'Alimonte, Carty & Finkelstein, *supra* note 92, at 66–67 (arguing that the flood of information available on the Internet only reinforces the importance of protecting investors from manipulative practices).

108. See *supra* notes 83–93.

109. The public is both the potential investor and the consumer base that determines the value of products and services. See *Hearings*, *supra* note 6, at 55 (prepared statement of Sherwood Neiss, Cofounder, FLAVORx) (recognizing that the public adds “valuation sophistication” in that the crowd places values on things in the market). *But see* Angus Loten, *Avoiding the Equity Crowd-Funding*, WALL ST. J. BLOGS (Mar. 28, 2012, 3:00 PM), <http://blogs.wsj.com/deals/2012/3/28/angel-investors-some-entrepreneurs-skeptical-about-benefits-of-equity-crowd-funding> (reporting some angel investors worry that with a lot of unsophisticated investors in the crowdfunding market, they will be unable to get the valuation right).

110. 346 U.S. 119 (1953).

111. *Id.* at 124–25.

112. See *Hearings*, *supra* note 6, at 55 (prepared statement of Sherwood Neiss, Cofounder,

collective efforts provide the group with heightened bargaining power. Despite the small amounts of individual investments, prospective investors are able to create leverage with the issuer by coming together as a group. This bargaining power is further strengthened through popular online forums where people share and discuss information.

Therefore, the nature of the Internet age, as exemplified in both the tools and the people using them, removes some of the concerns about crowdfunding, which resemble those underlying the general solicitation ban.

### B. *The JOBS Act's Safeguards*

In addition to the inherent protections that the Internet age provides, the JOBS Act implements safeguards in the crowdfunding provisions of the Securities Act and the Exchange Act. First, the JOBS Act limits the total amount of funds raised and the amount of individual investment for crowdfunding securities. Second, transactions on these securities can only be done through a broker or funding portal, either of which must register with the SEC and applicable SRO. The issuer must also register with the SEC. Both of these registrations require the issuer and intermediary to disclose information. Third, SROs will effectively complement the monitoring and regulating role of the SEC, further protecting investors. Lastly, parties to crowdfunding are still subject to the fraud provisions of the Securities Act and the Exchange Act as well as state enforcement on fraud.

#### 1. *Limitations on Amounts Raised and Individual Investments*

The first safeguard that addresses investor protection concerns is the *de minimis* nature of crowdfunding: a low maximum on the offering size and a low maximum on the individual investment. The amended Securities Act exempts crowdfunding securities only if the total amount raised is not more than \$1 million and the maximum amount of individual investment does not exceed the statutory cap, which is based on the investor's annual income or net worth.<sup>113</sup> These two components—though not required—are also in keeping with the criteria of § 3(b) of the Securities Act which

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FLAVORx) (arguing that one reason to trust the crowd is its collective IQ that comprises the diversity of different IQs of Internet users).

113. JOBS Act, Pub. L. No. 112-106, § 302(a), 126 Stat. 306, 315 (2012) (to be codified at 15 U.S.C. § 77d). If the income or net worth is less than \$100,000, individual investment is capped at the greater of \$2,000 or 5% of the investor's annual income or net worth. If the income or net worth is equal to or more than \$100,000, individual investment is capped at the lesser of \$100,000 or 10% of the investor's annual income or net worth. *Id.*

allows the SEC to issue an exemption that can protect investors by virtue of the small amount involved.<sup>114</sup> The underlying rationale behind such provision also applies to the *de minimis* nature of crowdfunding: a low cap on the aggregate amount of offering mitigates the negative impact on the market as a whole.

Unlike Regulation D, which places no limit on individual investments while banning general solicitation,<sup>115</sup> the crowdfunding exemption's low cap on individual investment would also mitigate potential harm to investors. A loss on a small investment would not significantly affect the investor's financial condition.<sup>116</sup> Losing \$1,000, for example, would not necessarily destroy a person's entire savings.

Additionally, to calculate an investor's income and net worth to determine the individual's cap on investment, the JOBS Act employs the calculation used for an accredited investor<sup>117</sup> as delineated in the new Rule 215 under the Securities Act, an amendment mandated by the Dodd-Frank Act.<sup>118</sup> In determining whether an individual qualifies as an accredited investor as of 2010, when the Dodd-Frank Act was passed, the calculation of a person's net worth no longer includes a primary residence as an asset.<sup>119</sup> This in effect narrows the number of individuals who can invest in crowdfunded securities and excludes those who presumably have more to lose.<sup>120</sup>

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114. See 15 U.S.C. § 77c(b) (2006) (permitting exemptions that can protect investors "by reason of the small amount involved"). Regulation A and Rules 504 and 505 of Regulation D were issued pursuant to § 3(b) of the Securities Act. See 17 C.F.R. §§ 230.251, .504(a)(3), .505(a) (2011).

115. Exemptions under Regulation D only have ceiling amounts for the aggregate offering for a twelve-month period and no limit for private placements. See 17 C.F.R. § 230.504(b)(2) (\$1 million); *id.* § 230.505(b)(2)(i) (\$5 million); *id.* § 230.506 (no cap on aggregate offering).

116. See *Hearings, supra* note 6, at 24 (prepared statement of Mercer E. Bullard, Associate Professor of Law, The University of Mississippi) (arguing that the small size of the investors' potential losses does not trigger the concerns upon which the registration requirement is based).

117. JOBS Act § 302(b) (to be codified in 15 U.S.C. § 77dA(h)(2)) ("The income and net worth of a natural person under section 4(6)(B) [for limitation on individual investment] shall be calculated in accordance with any rules . . . regarding the calculation of the income and net worth, respectively, of an accredited investor.").

118. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 413(a), 124 Stat. 1376, 1577 (2010) (mandating the SEC exclude "primary residence" from the calculation of an individual's net worth); 17 C.F.R. § 230.215 (definition of *accredited investor*).

119. 76 Fed. Reg. 81,793, 81,805 (Dec. 29, 2011) (to be codified at 17 C.F.R. § 230.215(e)(1)(i) ("The person's primary residence shall not be included as an asset . . .").

120. See Eric Alden, *Primum Non Nocere: The Impact of Dodd-Frank on Silicon Valley*, 8 BERKELEY BUS. L.J. 107, 111 (2011) (referencing SEC Commissioner Luis Aguilar's

## 2. *Fraud Provisions Still Apply*

As with all other exempt securities and offerings regulated by the SEC, crowdfunding securities are still subject to the fraud provisions in the Securities Act and the Exchange Act even though they are exempt from the registration requirement.<sup>121</sup> The antifraud regime consists of § 17 of the Securities Act and Rule 10b-5 under the Exchange Act.<sup>122</sup> Not only could the SEC bring an action against the fraudulent actor, but the buyer or seller who suffers from the fraud could also bring an action against the fraudulent actor.<sup>123</sup> The JOBS Act also permits purchasers of crowdfunding securities to bring an action against the issuer for any material misstatements or omissions.<sup>124</sup> Together, these provisions not only deter people from committing fraud,<sup>125</sup> but also instill public confidence in the market.<sup>126</sup>

Additionally, even though crowdfunding securities are covered securities, the JOBS Act preserves state enforcement authority, including enforcement against fraud.<sup>127</sup> In fact, the JOBS Act extends the reach of state

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argument that without this change in definition there could be investors who would otherwise meet the accredited investor criteria only by virtue of the rise in real estate value that has nothing to do with the investor's financial sophistication). *But see* Net Worth Standard for Accredited Investors, 76 Fed. Reg. at 81,796 (noting that some commenters argued to the SEC that the primary residence exclusion could encourage investors to increase the amount of debt secured by their primary residence to purchase other assets in order to increase their net worth and qualify as accredited investors).

121. JOBS Act § 302(b) (to be codified in 15 U.S.C. § 77dA(h)(2)). *But see* Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 152 (2010) (arguing that government agencies typically do not intervene in most fraud cases until much of the damage has already occurred); Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN. ST. L. REV. 189, 220 (2008) (asserting that retail securities fraud is considered a "low-risk crime" because it is difficult to detect and is therefore only treated as a civil matter with such minimal sanctions as cease-and-desist orders, injunctions, disgorgement orders, and civil penalties).

122. 15 U.S.C. § 77q(a)–(b) (2006); 17 C.F.R. § 240.10b-5 (prohibiting any person from manipulating, misleading, or employing fraud in the sale or purchase of any security).

123. *See* Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 12–13 (1971) (recognizing that there is an implied private right of action under Rule 10b-5).

124. JOBS Act § 302(b) (to be codified in 15 U.S.C. § 77dA(c)).

125. *See* Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 557 (1981) (arguing that plaintiffs function as "private attorneys general" by bringing lawsuits and thereby deterring securities violations); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 103–04 (2005) (emphasizing that private rights of action implied in regulations, like the antifraud regime in securities laws, deter wrongful conduct and supplement governmental regulatory resources).

126. *See* United States v. Brown, 555 F.2d 336, 339 (2d Cir. 1977) (holding that Congress intended the antifraud provision, § 17(a) of the Securities Act, to protect the integrity of the marketplace).

127. JOBS Act § 305(b) (to be codified at 15 U.S.C. § 774(b)(4)); *see* Securities Act of

jurisdiction regarding fraud from that conducted by brokers or dealers to also include fraud committed by crowdfunding portals and issuers.<sup>128</sup>

In facing potential fraud problems, the SEC would most likely respond through reformed policies and strategies, as it has always done in the past.<sup>129</sup> For example, in response to the fraud cases in the 1990s, the SEC reinforced its program to fight against Internet fraud through the concerted effort of various SEC divisions and offices: Division of Enforcement, Division of Corporate Finance, Division of Market Regulation, Office of Compliance Inspections and Examinations, Office of the General Counsel, and Office of Investor Education and Assistance.<sup>130</sup>

The SEC has responded to increasing Internet fraud by training seventy staff members to maintain surveillance on the Internet and creating the Office of Internet Enforcement, the most notable division of the antifraud program.<sup>131</sup> People can also report possible securities fraud to the SEC through the Enforcement Complaint Center, which could lead to an SEC investigation.<sup>132</sup> The Enforcement Division created this program to tap into the self-policing culture; more than 75% of these complaints have been useful for investigations or referrals.<sup>133</sup>

The SEC also created Cyberforce, a special task force to monitor online bulletin boards and chat rooms, a force consisting of hundreds of lawyers, accountants, and investigators.<sup>134</sup> The development of this internal structure not only shows the SEC already has resources to deal with Internet fraud, but exemplifies the agency's adaptability and responsiveness

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1933 § 18(c)(1), 15 U.S.C. § 77r(c)(1) (preserving state jurisdiction to bring enforcement actions regarding fraud or deceit). *But see NASAA: The JOBS Act an Investor Protection Disaster Waiting to Happen*, N. AM. SEC. ADM'RS ASS'N (Mar. 22, 2012), <http://www.nasaa.org/11548/nasaa-the-jobs-act-an-investor-protection-disaster-waiting-to-happen/> (quoting the NASAA President, who argues states can only take action after a fraudulent sale is made, which provides "little comfort to an investor whose money has been stolen").

128. JOBS Act § 305(b)(2) (to be codified at 15 U.S.C. § 77r(c)(1)).

129. See Joseph J. Cella III & John R. Stark, *SEC Enforcement and the Internet: Meeting the Challenge of the Next Millennium*, 52 BUS. LAW. 815, 835 (1997) (explaining the SEC's regulatory response to changing industry practices in protecting investors from unethical conduct).

130. Stark, *supra* note 80, at 111–12 (describing the SEC's team effort in combating Internet securities law violations).

131. See MICHAEL J. KAUFMAN, *SECURITIES LITIGATION: DAMAGES* § 5:12 (2011), available at Westlaw SECLITD; Stark, *supra* note 80, at 112–16 (elaborating on the work of the Office of Internet Enforcement).

132. See *Questions and Complaints*, SEC. & EXCH. COMM'N, <http://www.sec.gov/complaint/select.shtml> (last visited May 14, 2012).

133. Cella & Stark, *supra* note 129, at 844–45.

134. See Stark, *supra* note 80, at 113 (explaining the work of Cyberforce, including special projects such as internal "surf days").

to market changes.

Moreover, fraud is a major investor-protection concern that permeates all kinds of offerings—even private ones; therefore, federal securities laws and regulations incorporate a safeguard against this crime. Section 17 of the Securities Act and Rule 10b-5 under the Exchange Act are the principal regulatory tools to address fraud by penalizing fraudulent communication over the Internet.<sup>135</sup> With a private right of action and basis for prosecution, this antifraud regime not only punishes the fraudulent actor, it also deters people from committing fraud.

### 3. *Registration Requirements for Issuers and Intermediaries*

The new Securities Act as amended by the JOBS Acts requires both issuers and intermediaries, through whom crowdfunding transactions can be conducted, to register with the SEC.<sup>136</sup> As part of this registration, issuers are required to provide information to the SEC.<sup>137</sup> This allows the SEC to review and monitor the issuers and the securities they offer to the public.<sup>138</sup> Such disclosure is in line with the SEC's approach in regulating securities sold to the public, as evident not only in the general § 5(e) registration requirement but even in the streamlined registration requirements of Regulation A and Regulation D exemptions.<sup>139</sup>

Section 4A of the Securities Act as amended by the JOBS Act requires

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135. Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a) (2006) (prohibiting fraudulent interstate transactions); Manipulative and Deceptive Devices and Contrivances, 17 C.F.R. § 240.10b-5 (2011) (prohibiting the employment of manipulative and deceptive devices); see also Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing "The Reasonable Investor" with "The Least Sophisticated Investor" in Inefficient Markets*, 81 TUL. L. REV. 473, 501–02 (2006) (proposing that the materiality standard for federal securities fraud be a misrepresentation or omission of information found material by "the least sophisticated investor," thereby further protecting underclass investors).

136. JOBS Act, Pub. L. No. 112-106, § 302(b), 126 Stat. 306, 315–20 (2012) (to be codified at 15 U.S.C. § 77a(a)(2)).

137. *Id.* (requiring issuers to provide such information as physical address, names of directors, officers, each shareholder who owns more than 20% of the issuer's shares, description of business, financial condition, and how the securities are being valued).

138. *But see NASAA: The JOBS Act an Investor Protection Disaster Waiting to Happen*, N. AMER. SEC. ADM'RS ASS'N (Mar. 22, 2012), <http://www.nasaa.org/11548/nasaa-the-jobs-act-an-investor-protection-disaster-waiting-to-happen/> (arguing the SEC has neither the resources nor the time to police the small securities offerings effectively).

139. See Securities Act of 1933 § 5(c), 15 U.S.C. § 77e(c) (2006) (registration requirement); 17 C.F.R. § 230.252 (Regulation A's documentation requirement); *id.* .502(c)(2) (Regulation D notice of sales requirement for securities solicited through a seminar or meeting). See generally Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1068–76 (1995) (explaining the history behind SEC's disclosure approach as codified in the Securities Act).

intermediaries for crowdfunding securities to register with both the SEC and an applicable SRO as either a broker or a crowdfunding portal.<sup>140</sup> While the immense amount of information available on the Internet reinforces people's ability to make informed investment decisions, the flood of data could potentially lead to serious abuses by fraudulent actors who would take advantage of such easy access.<sup>141</sup> Requiring intermediaries to register would further protect investors<sup>142</sup> as it would pressure them to verify the issuers and oversee online forums where investors share and discuss information about the business ventures. Requiring these securities to be offered through registered crowdfunding portals could also enhance investor confidence in the crowdfunding market.<sup>143</sup>

#### 4. *Self-Regulatory Organization for Crowdfunding Portals*

In addition to registering with the SEC, intermediaries are required to register with an applicable SRO.<sup>144</sup> This additional set of eyes on activities in the new crowdfunding industry helps to further protect investors. SROs typically establish codes of ethics and rules that apply to members of the industry that they regulate, violations of which are disciplined.<sup>145</sup> These SEC codes and rules address the concerns about fraudulent actors that may emerge in the market.

Congress did not specify in the JOBS Act whether there should be a new SRO or whether crowdfunding portals can register with any existing SRO, such as the Financial Industry Regulatory Authority (FINRA), which

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140. JOBS Act § 201 (to be codified at 15 U.S.C. § 77d(b)).

141. See D'Alimonte, Carty & Finkelstein, *supra* note 92, at 66–67.

142. See *Hearings*, *supra* note 6, at 40–43 (prepared statement of Jeff Lynn, CEO, Seedrs) (arguing that investors will hesitate to use platforms that lack some sort of regulatory “seal of approval,” and that such platforms will be most effective if the investors are involved in executing the investment transactions and in managing the post-completion investment); *id.* at 75 (prepared statement of Mercer E. Bullard, Associate Professor of Law, The University of Mississippi) (asserting that as a repeat player, an intermediary would incur relatively low fixed costs in complying with a crowdfunding rule exemption that would otherwise be overly burdensome for the issuers).

143. See *id.* at 75–76 (prepared statement of Mercer E. Bullard, Associate Professor of Law, The University of Mississippi).

144. JOBS Act § 302(b) (to be codified at 15 U.S.C. § 77a(a)(2)).

145. See, e.g., *FINRA Manual: FINRA Rules: 2000. Duties and Conflicts*, FIN. INDUS. REGULATORY AUTH., (2008), [http://finra.complinet.com/en/display\\_main.html?rbid=24-3&element\\_id=5502](http://finra.complinet.com/en/display_main.html?rbid=24-3&element_id=5502) (last visited May 14, 2012) (regulating the duties of broker firms and associated persons); *Ethics & Independence*, PUB. CO. ACCOUNTING OVERSIGHT BD., <http://pcaobus.org/Standards/EI/Pages/default.aspx> (last visited May 14, 2012) (listing rules for public accounting firms that have been approved by the SEC); see also 15 U.S.C. § 78o-3(b)(7) (requiring registered securities associations to discipline their members by such measures as expulsion, fine, censure, or bar).

regulates securities firms and brokers to protect investors.<sup>146</sup> The JOBS Act requires crowdfunding portals to be members of a securities association before they facilitate a transaction or solicit the purchase or sale of any security.<sup>147</sup> Whichever SRO a crowdfunding portal registers with, one important underlying fact remains: another body is monitoring and regulating the portal. The shared regulatory role between an SRO and the SEC for crowdfunding is important in two respects.

First, SROs can effectively complement the SEC in regulating the market and the industry's players due to the flexibility of SROs compared to government agencies, the expertise of SRO members, and the inherent incentives of SROs.<sup>148</sup> Because SROs are not government agencies, they are not subject to the direct monitoring of Congress, constitutional constraints,<sup>149</sup> or the extensive rules of the Administrative Procedure Act.<sup>150</sup>

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146. See FIN. INDUS. REGULATORY AUTH., GET TO KNOW US 2–3 (2011) (listing the Financial Industry Regulatory Authority's duties, such as enforcing industry rules and federal securities laws, reviewing communications from broker firms to investors, and monitoring markets). Any self-regulatory organization (SRO)—existing or soon-to-be-formed—in the securities industry must comply with the Exchange Act, which governs registered securities associations as one form of SRO. See 15 U.S.C. § 78c(a)(26) (defining *self-regulatory organization* as any national securities exchange, registered securities association, or registered clearing agency); *id.* 78o–3 (regulating registered securities association).

147. JOBS Act § 304(a) (to be codified in 15 U.S.C. § 78c(h)(1)–(2)).

148. See Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 197 (2008) (explaining that one of SROs' advantages over government agencies is that they can issue rules that are more realistic than government regulations). See generally Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOK. J. INT'L L. 665 (2010) (discussing the various advantages that SROs have over government agencies in regulating the financial industry); J.W. Verret, *Dr. Jones and the Raiders of Lost Capital: Hedge Fund Regulation, Part II, A Self-Regulation Proposal*, 32 DEL. J. CORP. L. 799, 817–20 (2007) (same).

149. Courts may still subject SROs to the same constitutional constraints that apply to government agencies if they find that the SRO is essentially acting as the state. See, e.g., *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) (finding that Amtrak is part of the government for purposes of the First Amendment); see also Karmel, *supra* note 148, at 155–59 (describing the two doctrines—public entity doctrine and state action doctrine—that underlie the determination of whether the Constitution should apply to private entities).

150. Rules issued by SROs must still obtain SEC approval. 15 U.S.C. § 78s(b) (delineating the SEC approval process for SROs' proposed rules). The rulemaking process of SROs in the securities industry also resembles the process mandated by the Administrative Procedure Act applying to government agencies. Compare 15 U.S.C. § 78s(b) (requiring the SEC to notify the public about SROs' proposed rules and allow the public to submit comments), and *Financial Industry Regulatory Authority (FINRA) Rulemaking*, SEC. & EXCH. COMM'N, <http://www.sec.gov/rules/sro/finra.shtml> (last visited May 14, 2012) (inviting public comments on FINRA's proposed rules), with 5 U.S.C. § 553(c) (2006) (requiring agencies to give notice to the public about their proposed rules and an opportunity to participate in the rulemaking process by submitting comments).

In addition, because the regulating members of the SROs are players in the industry, they have the ability to be among the first to access information—crucial to properly regulating the rapidly evolving securities market.<sup>151</sup> SROs will also be quicker and more efficient in responding to the market by issuing rules and disciplining bad actors because they are relatively free from bureaucratic constraints, unlike government agencies.

Additionally, SROs have a strong incentive to regulate their respective industries because as members they have a vested interest in maintaining the credibility of the industry to which they belong. Bad actors undermine the industry, which causes potential investors to lose confidence in the market and could destroy the market entirely.<sup>152</sup> Consequently, the industry would deteriorate along with the market. This domino effect motivates SROs to function efficiently—possibly even more efficiently than their government agency counterparts.

In these early stages of developing the crowdfunding industry, governing members of the relevant SRO may be even more zealous in regulating and monitoring the industry players, particularly with the looming skepticism that has dominated much of the discussion around crowdfunding.<sup>153</sup> Additionally, this incentive to protect the industry by regulating itself is balanced by both the SEC's direct supervision as well as the representation of issuers and investors in the SROs' governing bodies.<sup>154</sup>

Second, the shared role between an SRO and the SEC with regard to crowdfunding is particularly important given the substantial overhaul of

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151. See Omarova, *supra* note 148, at 669–70 (arguing that the industry has superior ability to assess market information and monitor and regulate business operations on a global basis); Verret, *supra* note 148, at 817–20 (comparing the government with SROs in their respective capacities to efficiently regulate).

152. See Omarova, *supra* note 148, at 674 (describing the views of SRO proponents who argue that SROs enhance a sense of ownership and participation in the rulemaking process); cf. Verret, *supra* note 148, at 816–17 (identifying that SROs have an interest in protecting the market from instability caused by deviant behaviors of investment managers).

153. See, e.g., *The Jobs Act Fails Investors and Entrepreneurs*, N. AM. SEC. ADM'RS ASS'N (Apr. 5, 2012), <http://www.nasaa.org/12092/the-jobs-act-fails-investors-and-entrepreneurs/> (quoting the Chairman of NASAA's Committee on Federal Legislation, Steve Irwin, who criticized the crowdfunding exemption as very risky, as it exposes “unsophisticated, gullible, and vulnerable” investors to fraudulent actors).

154. See Securities Exchange Act of 1934 § 15A(b)(4), 15 U.S.C. § 78o-3(b)(4) (requiring the national securities association to have one or more directors who represent issuers and investors and are not associated with a member of the association, broker, or dealer); Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 997–98 (2005) (characterizing SROs in the securities industry, unlike those in other fields, as essentially an arm of the government). *But see* Karmel, *supra* note 148, at 197 (arguing the SEC or Congress should refrain from interfering too much with the SROs so they can effectively respond to the needs and concerns of the securities industry).

securities laws in the past two years and the budget restraints of the main government agency responsible for both creating and enforcing the rules. The Dodd–Frank Act contains ninety provisions that require rulemaking by the SEC,<sup>155</sup> a long process that ends with SEC rules being potentially invalidated by courts.<sup>156</sup> Though SROs in the securities industry are not government agencies, the Exchange Act governs the structure and rulemaking of SROs<sup>157</sup> and places them under the direct supervision of the SEC. Particularly with regard to the SEC’s function in preventing fraud, an SRO for crowdfunding could be more efficient in monitoring fraud, as the governing members are from the industry and have first-hand knowledge of what is happening in the field.<sup>158</sup>

#### V. IMPLICATION OF CROWDFUNDING PROVISIONS IN THE JOBS ACT ON OTHER EXEMPTIONS

After concluding that concerns regarding crowdfunding are unfounded given the various characteristics of today’s Internet age and statutory safeguards in the securities laws, it is also important to analyze one significant implication of the new crowdfunding laws. The exemption for crowdfunding, which in effect allows general solicitation for small issue

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155. See *supra* note 2 and accompanying text; see also Sarah N. Lynch, *SEC Chairman Pitches Budget Boost to Congress*, REUTERS (Mar. 6, 2012, 10:16 AM), <http://www.reuters.com/article/2012/03/06/us-sec-budget-idUSTRE8250VG20120306> (reporting that the SEC chairman, Mary Schapiro, requested an 18.5% budget increase to carry out the new responsibilities under the Dodd–Frank Act); Charles Riley, *Broken Budget Process Hurts Wall Street Reform*, CNNMONEY (Feb. 10, 2012, 5:07 AM) [http://money.cnn.com/2012/02/10/news/economy/cftc\\_sec\\_budget/index.htm](http://money.cnn.com/2012/02/10/news/economy/cftc_sec_budget/index.htm) (reporting that according to the SEC, the trading volume in the securities markets has more than doubled over the past decade, while the number of staff monitoring and regulating the markets has not changed since 2005).

156. See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149–51 (D.C. Cir. 2011) (striking down the SEC’s proxy access rule, which was issued pursuant to the Dodd–Frank Act, for failing to meet stringent economic analysis based on available empirical data).

157. Securities Exchange Act of 1934 § 15A, 15 U.S.C. § 78o–3(a) (requiring associations of brokers and dealers to register with the SEC as a national securities association); *id.* § 78o–3(b) (listing requirements for SROs, such as issuing rules designed to prevent fraud, disciplining members for violating securities laws and regulations, and assuring a fair representation of its members in the SRO’s board of directors); *id.* § 78s(b) (regulating SROs’ rulemaking process).

158. See 15 U.S.C. § 78o–3(b)(6) (requiring an SRO to design rules that would prevent fraud), *id.* § 78o–3(b)(7) (permitting an SRO to discipline its members for violating the Exchange Act, its regulations, or the SRO’s rules). Compare Karmel, *supra* note 148, at 197 (explaining that SROs can hire experts to be their employees and higher salaries can be financed by assessments on the securities industry), with Lynch, *supra* note 155 (reporting that the SEC Chairman, Mary Schapiro, asked Congress to raise the budget for the SEC to improve outdated technologies and hire experts), and Riley, *supra* note 155 (predicting that Congress will reject additional funding and instead decrease the budget).

offerings, could and should prompt the SEC to reevaluate the unaltered ban on general solicitation for other exemptions. This reassessment would be in line with the recent executive order that instructs government agencies to reevaluate existing rules and regulations.<sup>159</sup> Additionally, as crowdfunding offerings are covered securities and therefore do not have to be registered with states, the crowdfunding exemption could cause the other exemptions, particularly Rule 504 and 505, to become idle or even obsolete.

The same implication may be felt most by states' securities regulators given that Rule 504 and 505 offerings are the only remaining registration exemptions they still have jurisdiction over.<sup>160</sup> Although the presidential order does not extend to state agencies, state securities regulators may also want to reevaluate the ban on general solicitation for Rule 504 and 505 offerings based on the discussions above regarding the obsolete rationale behind this ban.<sup>161</sup>

Before the entrance of the crowdfunding exemption, Rule 504 and 505 were rarely used, as businesses used Rule 506 more.<sup>162</sup> 78.6% of Regulation D offerings of \$1 million or less were offered under Rule 506, which is the offering size Rule 504 was intended for, while only 14.3% of those were offered under Rule 504.<sup>163</sup> 91.9% of Regulation D offerings between \$1 million and \$5 million, which is the range of offering size Rule 505 was designed to serve, were offered under Rule 506, with only 3.9% of these offerings made using Rule 505.<sup>164</sup>

Some argue that the reason behind the popularity of Rule 506 offerings over Rule 504 and 505 is that the securities of the former are covered

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159. Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).

160. Compare Rutheford B. Campbell, Jr., *The Wreck of Regulation D: The Unintended (and Bad) Outcomes for the SEC's Crown Jewel Exemptions*, 66 BUS. LAW. 919, 940–42 (2011) (arguing that state authority over all Regulation D offerings must be removed in order to restore the intended use of such offerings for small business capital formation), with Jennifer J. Johnson, *Private Placements: A Regulatory Black Hole*, 35 DEL. J. CORP. L. 151, 188–97 (2010) (proposing a return to state supervision of Rule 506 private placements to enhance capital formation and protect investors), and *NASAA: The JOBS Act an Investor Protection Disaster Waiting to Happen*, N. AM. SEC. ADMR'S ASS'N (Mar. 22, 2012), <http://www.nasaa.org/11548/nasaa-the-jobs-act-an-investor-protection-disaster-waiting-to-happen/> (criticizing the preemption of states from reviewing crowdfunding offerings that, given the foreseeable lack of scrutiny by the SEC, would result in many fraudulent transactions).

161. See *supra* Part IV.A.

162. See 17 C.F.R. § 230.504(b)(2) (2011) (limiting the size of securities sold to \$1 million), *id.* § 230.505(b)(2)(i) (limiting the size of the securities sold to \$5 million); *id.* § 230.506 (providing no limit on the size of the offering).

163. Campbell, *supra* note 160, at 928.

164. *Id.*

securities while those of the latter are not.<sup>165</sup> Even though Rule 504 does not require issuers to disclose financial or other information to the purchasers and has no limitation on the number of purchasers, issuers still elect to offer securities under Rule 506 instead.<sup>166</sup> This is so even though Rule 506 has many criteria, such as requiring that the purchasers have knowledge and experience in financial and business matters, that they meet the criteria to qualify as an accredited investor, and that their total number does not exceed thirty-five.<sup>167</sup> However, despite the requirements, Rule 506 issuers need only register with the SEC and do not need to register with any state agency, unlike Rule 504 and 505 issuers whose securities are not included in the list of covered securities.

With a crowdfunding exemption now in place, Rule 504 and 505 exemptions will further dissipate in use. Not only can crowdfunding securities be offered to a larger pool of investors,<sup>168</sup> many of whom were previously unable to invest, but they must only be registered with a single agency as opposed to multiple agencies across the nation.<sup>169</sup> If Congress has gone so far with the JOBS Act as to allow crowdfunding and even lifted

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165. See Securities Act of 1933 § 13(a), 15 U.S.C. § 77r(a) (2006) (“[N]o law, rule, regulation, or order, or other administrative action of any State . . . requiring, or with respect to, registration or qualification of securities . . . shall directly or indirectly apply to a security that (A) is a covered security . . .”); *id.* § 13(b)(4)(D) (including as covered securities those securities sold pursuant to Section 4(2) of the Securities Act); 17 C.F.R. § 230.506(a) (basing Rule 506 offerings on § 4(2) of the Securities Act); Campbell, *supra* note 160, at 932–33. Peculiarly, the JOBS Act frees Rule 506 offerings from the restriction on general solicitation, while preserving the ban for Rules 504 and 505 offerings. JOBS Act § 201, Pub. L. No. 112-106, 126 Stat. 306 (2012) (to be codified at 15 U.S.C. § 77d(b)) (exempting Rule 506 offerings from the ban on general solicitation).

166. See 17 C.F.R. § 230.502(b) (requiring issuers selling securities under Rules 505 or 506 to any purchaser who is not an accredited investor to provide such information as an audited balance sheet, marketing arrangements, and risk factors).

167. See 17 C.F.R. § 230.506(b)(2) (listing the criteria for purchasers of Rule 506 securities), *id.* § 230.501(e)(1)(iv) (excluding accredited investor from the calculation of number of purchasers for purposes of Rules 505 and 506), *id.* § 230.501(a) (defining accredited investor).

168. Because Rule 504 and 505 securities cannot be solicited to people with whom there is no preexisting relationship—as a consequence of the ban on general solicitation—the sale of securities is in effect restricted to family and friends of the issuers. See *supra* notes. 59–68 and accompanying text. Conversely, with no such limitation on the manner of crowdfunding offerings, crowdfunding issuers can sell their securities not only to their family and friends, but also to the general public.

169. Rule 504 and 505 issuers must register their securities with the relevant state agencies, unless the securities or offerings are exempt in the respective states. Such state securities laws are commonly referred to as “blue sky laws.” See Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 229 (2003) (tracing the history behind blue sky laws).

the ban on general solicitation for Rule 506 nonpublic offerings,<sup>170</sup> then the Rule 502(c) prohibition on general solicitation for the remaining exemptions should also be removed. Even prior to the JOBS Act, many scholars had already questioned the need for the ban.<sup>171</sup>

As the President has recently instructed government agencies to conduct a retrospective analysis of rules that may be outmoded and modify them,<sup>172</sup> the SEC should reevaluate the general solicitation provision in Rule 502(c) that still applies to Rule 504 and 505 offerings. The ban availability in the Securities Act was already in question when the crowdfunding exemption was introduced in the JOBS Act.<sup>173</sup> Although some attribute the idleness of Rule 504 and 505 to the fact that the Rules are not covered securities, the ban on general solicitation may also be part of the reason. Unless the SEC removes the ban on general solicitation for these exemptions, crowdfunding offerings may dominate the small business offerings market, making Rule 504 and 505 superfluous.

#### CONCLUSION

In light of growing concerns about the stagnant economy and the state of small businesses, the public celebrated the passing of the JOBS Act. Under its theme of capital formation, the Act recognizes the popularity and effectiveness of crowdfunding as a viable financing model by exempting it from registration requirements with the SEC. As with every novel idea, it does not come as a surprise that many are concerned about this new model. Much of this concern is shadowed by the penny-stock fraud incidents in the 1990s that traumatized people in the securities industry and led to Regulation D's ban on general solicitation.

However, these worries about investor protection are unfounded in light of the characteristics of the public and the tools available in this Internet age. The democratization of access to information—facilitated by the Internet—levels the playing field between issuers and prospective investors. In addition, the JOBS Act puts in place sufficient safeguards to remove concerns about investor protection. The *de minimis* amounts of securities and individual investments permitted mitigate an extensive negative impact on either an individual's or the nation's economic condition. Though

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170. JOBS Act § 201(a)(1) (to be codified at 15 U.S.C. § 77d(b)) (mandating that the SEC revise Rule 506 by exempting it from the ban on general solicitation so long as the purchasers of Rule 506 securities are accredited investors).

171. See, e.g., C. Steven Bradford, *The Cost of Regulatory Exemptions*, 72 UMKC L. REV. 857 (2004); Daugherty, *supra* note 59; Sjostrom, *supra* note 62.

172. Exec. Order No. 13,563 § 6(a), 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

173. See *supra* note 171 and accompanying text.

crowdfunding is now exempted from the § 5 registration requirements, issuers must still register with the SEC, and intermediaries must register with both the SEC as well as an applicable SRO. Further, as none of the other exemptions stand outside the antifraud regime in securities laws, neither does the crowdfunding exemption.

The JOBS Act potentially makes crowdfunding the most popular exemption that businesses could use to raise funds. Issuers need only file basic information with the SEC; they do not have to register with any state because crowdfunding securities are covered securities, and crowdfunding allows them to solicit investments from virtually the whole nation. Such advantages would effectively render the other exempt securities and offerings—Rule 504 and 505—obsolete. In light of President Obama’s recent directive to reevaluate existing rules while maintaining a regulatory system that promotes “economic growth, innovation, competitiveness, and job creation,”<sup>174</sup> the SEC should reevaluate the ban on general solicitation that still applies to these other small-offering exemptions.

With the nature of today’s tech-savvy market and the JOBS Act safeguards in place, skeptics should join in the celebration for the great prospects that crowdfunding has to offer to the economy, particularly small businesses.

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174. Exec. Order No. 13,563 § 1(a), 76 Fed. Reg. at 3821.

# RECENT DEVELOPMENT

## THE SOCIAL SECURITY ADMINISTRATION'S CONDONING OF AND COLLUDING WITH ATTORNEY MISCONDUCT

DREW A. SWANK\*

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## INTRODUCTION

Why would a federal agency prohibit its employees from reporting attorney misconduct to state bar associations? Why would a federal agency wish to shield attorney misconduct? How is the Social Security Administration—the federal agency in question—serving the American public if one of its employees discovers attorney misconduct but is not only prohibited from reporting that misconduct to a state bar, but may even be threatened with criminal prosecution for doing so? This Article examines the Social Security Administration’s prohibition against reporting attorney misconduct, how that prohibition forces the lawyers and administrative law judges it employs potentially to violate the rules of their own state bars, and how it harms the American public. Ultimately, this Article illustrates that the legal basis for the prohibition is meritless and the prohibition needs to be vacated to not only allow Social Security Administration employees to comply with the ethical requirements of their state bars, but even more importantly, to protect the tax-paying public from unchecked attorney misconduct resulting in improperly paid Social Security disability benefits.

## I. THE PROHIBITION

The *Chief Administrative Law Judge Bulletin 09-04 (CJB 09-04)* from the Social Security Administration’s Office of Disability Adjudication and Review (ODAR) describes the policy in question.<sup>1</sup> Modifying a prior policy,<sup>2</sup> the new guidance dictates that any Social Security administrative law judge, hearing office manager, or staff member who suspects representative misconduct is to report it to the Hearing Office Management Team.<sup>3</sup> Furthermore, it instructs the employee to “not report suspected

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1. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, OFFICE OF THE CHIEF ADMIN. LAW JUDGE, PROCEDURES FOR REFERRING OBSERVED OR SUSPECTED MISCONDUCT BY CLAIMANT REPRESENTATIVES, CJB 09-04 (2009) [hereinafter CJB 09-04], available at <http://www.ssd-forms.com/SSDFacts/ChiefJudge.pdf> (select “CJB 09-04”).

2. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, HALLEX: HEARINGS, APPEALS & LITIGATION MANUAL at I-1-1-50.A, I-1-2-81 (2005) [hereinafter HALLEX], available at [www.ssd-forms.com/SSDFacts/HALLEX.pdf](http://www.ssd-forms.com/SSDFacts/HALLEX.pdf). HALLEX I-1-1-50.A required any staff person who observed or detected suspected violations of the rules pertaining to a representative’s conduct to report that information to the Office of General Counsel, but there was no provision prohibiting reporting suspected misconduct to a state bar or other state disciplinary agency. See HALLEX, *supra*, at I-1-1-50 (B)(9). The other outdated provision, HALLEX I-1-2-81, dealt with violations of charging and collecting of fees by representatives.

3. CJB 09-04, *supra* note 1 (requiring that attorney misconduct be reported to the Office of General Counsel for the Social Security Administration, and that only if the Commissioner finds misconduct will it be reported to the relevant state bar association

violations to the alleged violator's state bar association. Any such report could constitute a violation of the Privacy Act, 5 U.S.C. § 552a and Section 1106 of the Social Security Act, both of which carry criminal penalties.<sup>4</sup> It ends by stating that if the Commissioner of the Social Security Administration suspends or disqualifies a representative, the Office of General Counsel (OGC) will inform relevant state bars of the sanction imposed as with the previous regulation.<sup>5</sup>

An individual serving as an administrative law judge for the Social Security Administration or any other federal agency must possess a professional license to practice law and be authorized to practice law under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the U.S. Constitution.<sup>6</sup> To maintain that professional license, he or she has to abide by the rules set forth by the state bar or other entity that granted the professional license, and many state bar associations require its members to report attorney misconduct.

## II. STATE BARS' RULES AND THE REPORTING OF ATTORNEY MISCONDUCT

The various state bars have taken several different approaches to reporting rules for attorney misconduct.<sup>7</sup> These rules range from requiring the reporting of *any* discovered attorney misconduct to having no requirement to report any attorney misconduct at all. For example, Alabama,<sup>8</sup> Iowa,<sup>9</sup> and Illinois<sup>10</sup> require mandatory reporting of *any* unprivileged knowledge of attorney misconduct that violates their respective rules of professional conduct. Louisiana and Ohio require the reporting of attorney misconduct that raises any questions as to a lawyer's

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pursuant to HALLEX I-1-50(B)(9)). This policy was since added to the Hearing Appeals and Litigation Manual in 2011. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION & REVIEW, HALLEX: HEARINGS, APPEALS AND LITIGATION MANUAL at I-1-1-50 (2011) [hereinafter HALLEX II], available at [http://www.ssa.gov/OP\\_Home/hallex/I-01/I-1-1-50.html](http://www.ssa.gov/OP_Home/hallex/I-01/I-1-1-50.html).

4. CJB 09-04, *supra* note 1.

5. *Id.*

6. 5 C.F.R. § 930.204(b)(1) (2011).

7. See generally Julie L. Hussey, *Reporting Another Attorney for Violating the Rules of Professional Conduct: The Current Status of the Law in the States Which Have Adopted the Model Rules of Professional Conduct*, 23 J. LEGAL PROF. 265 (1999) (comparing misconduct reporting requirements across jurisdictions).

8. ALA. RULES OF PROF'L CONDUCT R. 8.3(a)-(b) (2011).

9. IOWA RULES OF PROF'L CONDUCT R. 32:8.3(a) (2010).

10. ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

honesty, trustworthiness, or fitness as a lawyer.<sup>11</sup> Kansas, on the other hand, requires an attorney to report conduct that in his or her own opinion constitutes professional misconduct.<sup>12</sup> Alabama's rule is by far the most stringent in that it still provides that the failure to report attorney misconduct is in itself attorney misconduct<sup>13</sup>—a proposition that the American Bar Association's *Model Rules of Professional Conduct* (*Model Rules*) and many states have rejected as “unenforceable.”<sup>14</sup> On the other end of the spectrum, California does not require its members to report any attorney misconduct.<sup>15</sup> Georgia and Washington fall in the middle of the spectrum, as they do not require reporting but suggest that an attorney who discovers professional misconduct “should” report it.<sup>16</sup>

Generally, most states are between the two extremes and follow either a duplicate or a close variation of the Model Rule 8.3.<sup>17</sup> The *Model Rules*

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11. LA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011), *available at* <http://www.ladb.org/publications/ropc.pdf>; OHIO RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

12. KAN. RULES OF PROF'L CONDUCT R. 226 8.3(a) (2007), *available at* <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorney&r2=3>.

13. *See* ALA. RULES OF PROF'L CONDUCT R. 8.3(a)–(b) (mandating that a lawyer “shall” report unprivileged knowledge of an attorney’s misconduct to the state bar and “shall reveal fully” that information if it is requested).

14. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2011); NEB. RULES OF PROF'L CONDUCT § 3-508.3(a) cmt. 3 (2005), *available at* <http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf>; N.M. RULES OF PROF'L CONDUCT R. 16-803 cmt. (2008); N.C. REV. RULES PROF'L CONDUCT R. 8.3 cmt. 4 (2008).

15. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 264 & n.18 (2003) (citations omitted) (stating that in lieu of mandatory reporting of attorney misconduct, California has instead relied upon seven triggering events that require automatic reporting such as when a court determines there has been misconduct). While California does not require attorneys to report other attorney professional misconduct, its *Rules of Professional Conduct* do prohibit threatening to report attorney misconduct so as to obtain a litigation advantage in a civil case. CAL. RULES OF PROF'L CONDUCT R. 5-100 (2012), *available at* [http://www.ethics-lawyer.com/images/2009\\_Rules\\_Professional-Conduct.pdf](http://www.ethics-lawyer.com/images/2009_Rules_Professional-Conduct.pdf).

16. GA. RULES OF PROF'L CONDUCT R. 8.3(a) (2001), <http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=157>; WASH. RULES OF PROF'L CONDUCT R. 8.3(a) (2012).

17. ALASKA RULES OF PROF'L CONDUCT R. 8.3(a) (2011); ARIZ. RULES OF PROF'L CONDUCT R. 8.3(a) (2010); ARK. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); COLO. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); CONN. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* [http://www.jud.ct.gov/publications/PracticeBook/PB\\_2012.pdf](http://www.jud.ct.gov/publications/PracticeBook/PB_2012.pdf); DEL. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); FLA. RULES OF PROF'L CONDUCT R. 4-8.3(a) (2008); HAW. RULES OF PROF'L CONDUCT R. 8.3(a) (1994), *available at* [http://www.courts.state.hi.us/docs/court\\_rules/rules/hrpcond.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.pdf); IDAHO RULES OF PROF'L CONDUCT R. 8.3(a) (2004), *available at* <http://isb.idaho.gov/pdf/rules/irpc.pdf>; IND. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); KY. RULES OF PROF'L CONDUCT R.

provide, "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."<sup>18</sup> Naturally, there are some variations that can further limit reporting misconduct beyond the requirement that the conduct raise "a substantial question"<sup>19</sup> as to an attorney's ability to practice law. Michigan, for example, requires an attorney to report a "significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer,"<sup>20</sup> whereas Virginia requires the individual reporting misconduct to have "reliable information"

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3.130(8.3(a)) (2009), *available at* [http://www.kybar.org/documents/scr/scr3/scr\\_3.130\\_\(1.2\).pdf](http://www.kybar.org/documents/scr/scr3/scr_3.130_(1.2).pdf); ME. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); MD. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); MASS. RULES OF PROF'L CONDUCT R. 3.07 § 8.3(a) (2008); MISS. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); MO. RULES OF PROF'L CONDUCT R. 4-8.3 (2007), *available at* <http://www.courts.mo.gov/page.jsp?id=667>; MONT. RULES OF PROF'L CONDUCT R. 8.3(a) (2004); NEB. RULES OF PROF'L CONDUCT § 3-508.3(a) (2005), *available at* <http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf>; NEV. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); N.H. RULES OF PROF'L CONDUCT R. 8.3 (2012), *available at* <http://www.courts.state.nh.us/rules/pcon/>; N.J. RULES OF PROF'L CONDUCT R. 8.3(a) (2004), *available at* <http://www.judiciary.state.nj.us/rules/apprpc.htm#x8dot3>; N.M. RULES OF PROF'L CONDUCT R. 16-803(A) (2008); N.Y. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), *available at* <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf>; N.C. REV. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); N.D. RULES OF PROF'L CONDUCT R. 8.3(a) (2006), *available at* <http://www.ndcourts.gov/rules/conduct/contents.htm>; OKLA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), *available at* <http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKRUPR&level=1>; OR. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* [http://www.osbar.org/\\_docs/rulesregs/orpc.pdf](http://www.osbar.org/_docs/rulesregs/orpc.pdf); PENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), *available at* <http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf>; R.I. RULES OF PROF'L CONDUCT R. 8.3(a) (2007), *available at* <http://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf>; S.C. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); S.D. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); TENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03(a) (2005), *available at* [http://www.texasbar.com/AM/Template.cfm?Section=Grievance\\_Info\\_and\\_Ethics\\_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96](http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96); UTAH RULES OF PROF'L CONDUCT R. 8.3(a) (2012), *available at* <http://www.utcourts.gov/resources/rules/ucja/>; VT. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), *available at* [http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct\\_withamendmentssthroughJune2011.pdf](http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentssthroughJune2011.pdf); W. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); WIS. RULES OF PROF'L CONDUCT R. 20:8.3(a) (2009); WYO. RULES OF PROF'L CONDUCT R. 8.3(a) (2011), *available at* [http://courts.state.wy.us/courtrules\\_entities.aspx?RulesPage=AttorneysConduct.xml](http://courts.state.wy.us/courtrules_entities.aspx?RulesPage=AttorneysConduct.xml).

18. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

19. *Id.*

20. MICH. RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

regarding the misconduct.<sup>21</sup> No states' rules of professional conduct, however, *prohibit* reporting attorney misconduct to the state bar.

Just as there is a spectrum of what is to be reported, there is also a range of options as to whom the misconduct is to be reported. Of those states that require reporting of attorney misconduct, the following require the misconduct to be reported to one specified entity:

- Kentucky (Association's Bar Counsel)<sup>22</sup>
- Louisiana (Office of Disciplinary Counsel)<sup>23</sup>
- Massachusetts (Bar Counsel's Office of the Board of Bar Overseers)<sup>24</sup>
- Michigan (Attorney Grievance Commission)<sup>25</sup>
- North Dakota (Disciplinary Board of the North Dakota Supreme Court)<sup>26</sup>
- Oregon (Oregon State Bar Client Assistance Office)<sup>27</sup>
- Tennessee (Disciplinary Counsel of the Board of Professional Responsibility)<sup>28</sup>

Other states that require reporting of attorney misconduct give options as to whom the misconduct needs to be reported—normally expressed as either the state bar (or disciplinary agency) or an “appropriate professional authority”<sup>29</sup> as recommended in Model Rule 8.3.<sup>30</sup> North Carolina,

21. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

22. RULES SUP. CT. KY. R. 3.130(8.3(a)) (2009), available at [http://www.kybar.org/documents/scr/scr3/scr\\_3.130\\_\(1.2\).pdf](http://www.kybar.org/documents/scr/scr3/scr_3.130_(1.2).pdf).

23. LA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011), available at <http://www.ladb.org/publications/ropc.pdf>.

24. MASS. RULES OF PROF'L CONDUCT R. 3.07 § 8.3(a) (2008).

25. MICH. RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

26. N.D. RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2006), available at <http://www.ndcourts.gov/rules/conduct/contents.htm>.

27. OR. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), available at [http://www.osbar.org/\\_docs/rulesregs/orpc.pdf](http://www.osbar.org/_docs/rulesregs/orpc.pdf).

28. TENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

29. ALA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); ARIZ. RULES OF PROF'L CONDUCT R. 8.3(a) (2010); ARK. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); COLO. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); DEL. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); FLA. RULES OF PROF'L CONDUCT R. 4–8.3(a) (2008); HAW. RULES OF PROF'L CONDUCT R. 8.3(a) (1994), available at [http://www.courts.state.hi.us/docs/court\\_rules/rules/hrpcond.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.pdf); IDAHO RULES OF PROF'L CONDUCT R. 8.3(a) (2004), available at <http://isb.idaho.gov/pdf/rules/irpc.pdf>; ILL. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); IND. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); IOWA RULES OF PROF'L CONDUCT R. 32:8.3(a) (2010); KAN. RULES OF PROF'L CONDUCT R. 226 8.3(a) (2007), available at <http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=3>; ME. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); MD. LAW. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); MISS. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); MO. RULES OF PROF'L CONDUCT R. 4–8.3(a) (2007), available at <http://www.courts.mo.gov/>

however, specifies that lawyers report attorney misconduct to either the state bar or to the court that has jurisdiction over the matter at issue.<sup>31</sup>

What exactly is an “appropriate professional authority”? The Maine *Rules of Professional Conduct* define it as “the Maine Board of Overseers of the Bar, or in certain circumstances . . . the Maine Assistance Program for Lawyers.”<sup>32</sup> Other states’ rules of professional conduct likewise indicate that a report of misconduct “should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.”<sup>33</sup> The *Texas Disciplinary Rules of Professional Conduct* provide that for attorneys to fulfill their ethical duty of reporting attorney misconduct, they must either initiate a disciplinary

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page.jsp?id=667; MONT. RULES OF PROF'L CONDUCT R. 8.3(a) (2004); NEB. RULES OF PROF'L CONDUCT § 3-508.3(a) (2005), available at <http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf>; NEV. RULES OF PROF'L CONDUCT R. 8.3(a) (2007); N.H. RULES OF PROF'L CONDUCT R. 8.3(a) (2012), available at <http://www.courts.state.nh.us/rules/pcon>; N.J. RULES OF PROF'L CONDUCT R. 8.3(a) (2004); N.M. RULES OF PROF'L CONDUCT R. 16-803(A) (2008); N.Y. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), available at <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf>; OHIO RULES OF PROF'L CONDUCT R. 8.3(a) (2011); OKLA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), available at <http://www.oscn.net/applications/oscn/index.asp?ftdb=STOKRUPR&level=1>; PENN. RULES OF PROF'L CONDUCT R. 8.3(a) (2008), available at <http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf>; R.I. RULES OF PROF'L CONDUCT R. 8.3(a) (2007), available at <http://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf>; S.C. RULES OF PROF'L CONDUCT R. 8.3(a) (2012); S.D. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.03(a) (2005), available at [http://www.texasbar.com/AM/Template.cfm?Section=Grievance\\_Info\\_and\\_Ethics\\_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96](http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96); UTAH RULES OF PROF'L CONDUCT R. 8.3(a) (2012), available at <http://www.utcourts.gov/resources/rules/ucja/>; VT. RULES OF PROF'L CONDUCT R. 8.3(a) (2009), available at [http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct\\_withamendmentsthroughJune2011.pdf](http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentsthroughJune2011.pdf); VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2011); W. VA. RULES OF PROF'L CONDUCT R. 8.3(a) (2008); WIS. RULES OF PROF'L CONDUCT R. 20:8.3(a) (2009).

30. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2011).

31. N.C. REV. RULES OF PROF'L CONDUCT R. 8.3(a) (2008).

32. ME. RULES OF PROF'L CONDUCT R. 8.3(a) n.6 (2011).

33. CONN. RULES OF PROF'L CONDUCT R. 8.3 cmt. (2012); DEL. LAW. RULES OF PROF'L CONDUCT R. 8.3 cmt. (2008); HAW. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (1994), available at [http://www.courts.state.hi.us/docs/court\\_rules/rules/hrpcond.pdf](http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.pdf); PENN. RULES OF PROF'L CONDUCT R. 8.3 cmt. 5 (2008), available at <http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf>; see also VT. RULES OF PROF'L CONDUCT R. 8.3 cmt. 3 (2009), available at [http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct\\_withamendmentsthroughJune2011.pdf](http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentsthroughJune2011.pdf) (“A report should be made to the bar disciplinary agency unless some other agency, such as the court in which the violation occurred, is more appropriate in the circumstances.”).

investigation with an appropriate authority, or when the situation involves “chemical dependency on alcohol or drugs or by mental illness, [lawyers must] initiate an inquiry by an approved peer assistance program.”<sup>34</sup>

A great deal of literature addresses attorney misconduct linked to substance abuse or mental impairments.<sup>35</sup> It is well documented that the legal profession has vastly higher incidence rates of substance abuse and mental illness than the general population.<sup>36</sup> Substance abuse rates among attorneys (including alcoholism) have been cited as being at least twice as high as those in the general population, and indeed, 70% of attorneys are “likely candidates for alcohol-related problems at some time within the duration of their legal careers.”<sup>37</sup> Merely having a substance abuse problem or a mental impairment is not in itself punishable by state legal disciplinary authorities.<sup>38</sup> If, however, substance abuse or a mental impairment *materially* affects an attorney’s representation of a client or his or her conduct in practicing law, the corresponding misconduct can be actionable against the impaired attorney, and state rules of professional responsibility may require nonoffending attorneys to report such action to the state bar or other disciplinary authority.<sup>39</sup> While exact numbers are not known, various studies have shown that anywhere between 40% to 75% of

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34. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 8.03 cmt. 2 (2005), available at [http://www.texasbar.com/AM/Template.cfm?Section=Grievance\\_Info\\_and\\_Ethics\\_HelpLine&Template=/CM/ContentDisplay.cfm&ContentFileID=96](http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_HelpLine&Template=/CM/ContentDisplay.cfm&ContentFileID=96).

35. See, e.g., Page Thead Pulliam, *Lawyer Depression: Taking a Closer Look at First-Time Ethics Offenders*, 32 J. LEGAL PROF. 289, 289 (2008) (listing recent articles that address mental impairments, attorney discipline, and the practice of law); Fred C. Zacharias, *A Word of Caution for Lawyer Assistance Programming*, 18 GEO. J. LEGAL ETHICS 237, 238 n.5 (2004) (listing articles that argue disciplinary authorities, such as the state bars, should focus more on protecting the public from substance-abusing attorneys than on the attorneys’ rehabilitation or livelihood).

36. Robert Dowers, *Duties Invoked Under the Model Rules of Professional Conduct by a Mentally Impaired Lawyer*, 19 GEO. J. LEGAL ETHICS 681, 681 (2006); see also George Edward Bailly, *Ethics and Professional Responsibility: Impairment, the Profession and Your Law Partner*, 15 ME. BAR J. 96, 96 (2000) (stating that attorneys are particularly vulnerable to psychological distress). It should be noted, however, that at least one author suggests that while greater numbers of attorneys suffer from substance abuse or mental impairment issues, the actual number of cases that these attorneys will negatively affect due to their abuse or impairments is probably rather small based on the overall number of attorneys and the cases they handle. See Len Klingen, Comment, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157, 161–62 (2002).

37. Bailly, *supra* note 36, at 97 (citation omitted); see Patricia Sue Heil, *Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 ST. MARY’S L.J. 1263, 1264 (1993) (providing additional statistics, such as one in five attorneys have substance abuse problems).

38. Dowers, *supra* note 36, at 685; Klingen, *supra* note 36, at 160.

39. Dowers, *supra* note 36, at 685–86; see also Bailly, *supra* note 36, at 100 (listing assistance programs for impaired attorneys to prevent them from making material errors).

attorney disciplinary proceedings involve substance abuse.<sup>40</sup>

Because of the number of attorneys with substance abuse or mental impairments, state bar associations have created lawyers assistance programs, which offer support groups for a variety of impairments (including gambling addiction, substance abuse, and psychological disorders) and provide referrals to other agencies for counseling.<sup>41</sup> The first lawyer assistance program began in Washington in 1975, and now all fifty states have some sort of program to assist attorneys with substance abuse or mental health issues separate from the disciplinary authority of the state.<sup>42</sup> The *Model Rules* and many state bar rules “shield lawyers who participate in such programs from disclosure of violations or impairments that may come out in the course of attending such a program”<sup>43</sup> or provide them with immunity from disciplinary action as long as they have joined the program prior to being notified of any disciplinary actions being initiated against them.<sup>44</sup> Depending upon the specific state rules, however, misconduct discovered while an attorney is attending a lawyer assistance program may still be reported to the state bar regardless of the nature of an impairment of the attorney in question.<sup>45</sup>

Obviously, the Social Security Administration is not a lawyer assistance group providing substance abuse or mental health treatment to attorneys as defined by the various state bars’ rules of professional conduct. As discussed *infra*, while the Social Security Administration can ban attorneys and nonattorney representatives from representing claimants before it,<sup>46</sup> it

40. Bailly, *supra* note 36, at 97–98 (citations omitted) (between 50% and 75% in Georgia); Nathaniel S. Currall, Note, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease Within the Profession*, 12 GEO. J. LEGAL ETHICS 739, 741 (1999) (as low as 40%, as high as 70%); see also Heil, *supra* note 37, at 1265 (stating that untreated alcoholism will likely become the subject of grievance committee investigations).

41. Currall, *supra* note 40, at 748; Dowers, *supra* note 36, at 688; Heil, *supra* note 357, at 1284–85. See generally Jeffrey J. Fleury, Comment, *Kicking the Habit: Diversion in Michigan—The Sensible Approach*, 73 U. DET. MERCY L. REV. 11 (1995) (detailing Michigan’s substance abuse program for lawyers, which is completely autonomous from public formal disciplinary proceedings, for the impaired lawyer who has engaged in professional misconduct).

42. Bailly, *supra* note 36, at 100; see Stephen M. Hines, Note, *Attorneys: The Hypocrisy of the Anointed—The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings*, 49 OKLA. L. REV. 731, 746 & n.158, 747 (1996) (discussing a program that many states have called “Lawyers Helping Lawyers,” which helps members who have personal problems that may affect their practices); see also Heil, *supra* note 37, at 1284 (discussing Lawyers Assistance Programs that protect the public from attorney misconduct).

43. Dowers, *supra* note 36, at 688.

44. Pulliam, *supra* note 35, at 303.

45. Dowers, *supra* note 36, at 688–89.

46. 20 C.F.R. § 404.1745 (2011); HALLEX II, *supra* note 3, at I-1-1-50.C(5).

is neither a state bar that licenses attorneys to practice law nor an “appropriate professional authority”<sup>47</sup> for reporting attorney misconduct to, as specified by the various states’ rules of professional conduct. Merely reporting attorney misconduct to the Social Security Administration would not comply with many state bars’ rules.

Social Security Administration administrative law judges and attorneys who belong to state bars that require reporting of attorney misconduct are therefore placed in an untenable situation if they discover attorney misconduct in a disability case. They can either report the misconduct as possibly required by their state bar and violate CJB 09-04, or they can comply with CJB 09-04’s prohibition of reporting attorney misconduct and possibly violate the rules of their state bar. Either way, they are potentially violating the rules of their state bar or those of the Social Security Administration. One should not be forced to violate one’s own ethical duty to hide the misconduct of another, but CJB 09-04’s prohibition on reporting attorney misconduct does exactly that. While other federal agencies require their employees to abide by their respective state bar rules regarding reporting attorney misconduct,<sup>48</sup> the Social Security Administration places its employees in a position where they may have to violate their own state bar’s rules to comply with internal reporting requirements.

### III. WHY REPORTING ATTORNEY MISCONDUCT IS IMPORTANT

Attorneys defend individuals’ rights and strive to protect their clients’ interests. For the system to work fairly, practicing attorneys must follow established ethical rules. The objectives of these rules are “(1) to protect the public; (2) to protect the integrity of the legal system; (3) to insure the administration of justice; and (4) to deter further unethical conduct.”<sup>49</sup> Stated another way, “Ethical parameters for lawyers are designed to shape conduct in an effort to ensure client confidences, maintain the quality of the profession, and combat the countervailing negative view of legal practice.”<sup>50</sup>

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47. See *supra* note 29 and accompanying text.

48. See, e.g., DEP’T OF THE ARMY REG. 27–26, RULES OF PROF’L CONDUCT FOR LAWYERS R. 8.3 (1992) (delineating the requirements of Army judge advocates for reporting professional misconduct). Rule 8.3(d) notes that the Army’s rules for reporting attorney misconduct do “not affect any reporting requirements a lawyer may have under other rules of professional conduct” mandated by the state bar in which the lawyer is admitted to practice. *Id.*

49. Cynthia L. Gendry, Comment, *Ethics—An Attorney’s Duty to Report the Professional Misconduct of Co-Workers*, 18 S. ILL. U. L.J. 603, 605–06 (1994).

50. Thomas A. Kuczajda, Note, *Self Regulation, Socialization, and the Role of Model Rule*

There is, however, no government agency that monitors lawyers' behavior.<sup>51</sup> Rather, the practice of law in the United States is self-regulating.<sup>52</sup> In order for the profession to self-regulate, clients, fellow attorneys, and judges have to report misconduct to those entities that are willing and able to investigate complaints and, if warranted, take disciplinary action.<sup>53</sup> Of these groups, lawyers and judges are in the best position to report attorney misconduct because clients are not schooled in what constitutes ethical behavior.<sup>54</sup> In order to enforce ethical rules and maintain self-regulation of the profession, attorneys and judges have to report misconduct.<sup>55</sup>

#### IV. WHY WOULD THE SOCIAL SECURITY ADMINISTRATION WANT TO PROHIBIT THE REPORTING OF ATTORNEY MISCONDUCT?

But why would the Social Security Administration not want to protect the public from attorney misconduct? The answer appears to be that the agency prioritizes eliminating the backlog of disability cases over the conduct of the attorneys who appear before it.<sup>56</sup> In 2010, one source estimated that approximately 3.3 million people would apply for disability

5.1, 12 GEO. J. LEGAL ETHICS 119, 119 (1998).

51. Lindsay M. Oldham & Christine M. Whitlege, *The Catch-22 of Model Rule 8.3*, 15 GEO. J. LEGAL ETHICS 881, 881 (2002).

52. E.g., Greenbaum, *supra* note 15, at 269; Douglas R. Richmond, *The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation*, 12 GEO. J. LEGAL ETHICS 175, 175 (1999); Brenda Smith, Comment, *Civility Codes: The Newest Weapons in the "Civil" War Over Proper Attorney Conduct Regulations Miss Their Mark*, 24 DAYTON L. REV. 151, 175 (1998); Ryan Williams, Comment, *Reputation and the Rules: An Argument for a Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct*, 68 LA. L. REV. 931, 941 (2008).

53. See, e.g., Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 753 (1997) (discussing the importance of reporting attorney misconduct in the context of confidentiality in mediation sessions). But see Greenbaum, *supra* note 15, at 267–68 (questioning whether mandatory reporting of attorney misconduct by other attorneys is necessary to protect the public image of the legal profession).

54. See Smith, *supra* note 52, at 175 (“[T]he best method of ensuring that attorneys are living up to their responsibilities of professional and civil behavior is to ensure that the members of the profession are, in fact, regulating one another.”).

55. See Williams, *supra* note 52, at 941; Gendry, *supra* note 49, at 605–606.

56. See, e.g., Damian Paletta, *Disability-Claim Judge Has Trouble Saying “No”*, WALL ST. J., May 19, 2011, at A1, A14 (“Critics blame the Social Security Administration, which oversees the disability program, charging that it is more interested in clearing a giant backlog than ensuring deserving candidates get benefits.”); Amy Reifenrath, *Cheaters Cost Social Security Billions*, OREGONIAN (Dec. 8, 2008, 7:18 AM), [http://www.oregonlive.com/news/index.ssf/2008/12/disability\\_fraud\\_saps\\_social\\_s.html](http://www.oregonlive.com/news/index.ssf/2008/12/disability_fraud_saps_social_s.html).

benefits.<sup>57</sup> That figure estimated 300,000 more applications than the Administration received in 2009, and 700,000 more than it did in 2008.<sup>58</sup> A source in 2011 reported a 50% increase in applications that year over the number of applications in 2006.<sup>59</sup> The main reason for this huge increase in applications has been the poor economy and not an increase in disabling injuries or illnesses—even though Social Security disability benefits were never designed to be a safety net for the jobless or a substitute for unemployment insurance compensation.<sup>60</sup> Because of this growth in applications for Social Security disability benefits, in fiscal year 2010 there were 705,370 disability hearings pending.<sup>61</sup> This backlog of disability cases has been growing over the past five years, and it is only getting worse.<sup>62</sup>

Congress has consistently investigated, criticized, and publically chastised the Social Security Administration for this backlog.<sup>63</sup> In response

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57. Stephen Ohlemacher, *Social Security Disability System Bogged Down With Requests*, ONEIDA DAILY DISPATCH (May 9, 2010), <http://www.oneidadispatch.com/articles/2010/05/09/news/doc4be763e825022593194203.txt?viewmode=fullstory>.

58. *Id.*

59. Gilda Mehraban, *The SSA's New Methods for Improving the Disability Claim Backlog*, PRWEB (Feb. 2, 2011), <http://prweb.com/releases/2011/2/prweb8104909.htm>.

60. *Id.*; see *Disability Payments: The Elephant in the Waiting-Room*, ECONOMIST, Mar. 12, 2011, at 36 [hereinafter *Disability Payments*]; Russell Grantham, *Some Gains Made on Social Security Backlog*, ATLANTA JOURNAL-CONSTITUTION (Nov. 1, 2010, 9:21 AM), <http://www.ajc.com/business/some-gains-made-on-709806.html>; Damian Paletta, *Insolvency Looms as States Drain U.S. Disability Fund*, WALL ST. J., Mar. 22, 2011, at A1; Lisa Rein, *Claims for Social Security Benefits on the Rise*, WASH. POST (Mar. 28, 2011), [http://www.washingtonpost.com/politics/claims\\_for\\_social\\_security\\_benefits\\_on\\_the\\_rise/2011/03/28/AFTPNgrB\\_story.html?wprss=rss\\_politics](http://www.washingtonpost.com/politics/claims_for_social_security_benefits_on_the_rise/2011/03/28/AFTPNgrB_story.html?wprss=rss_politics). Since the ultimate question in a Social Security disability decision is whether an individual can work, the fact that many of these individuals are applying for disability benefits because they had been working but lost their jobs due to the downturn in the economy, and not their disabilities, seems to answer the question as to whether they can work.

61. Rein, *supra* note 60.

62. Mehraban, *supra* note 59. Another obstacle in trying to combat the backlog of disability cases has been budget problems. Recent Social Security Administration budgets have not covered the increase in claims and the backlog in appeals. Because of the 2011 budgetary crisis, the Social Security Agency suspended efforts to open eight new hearing offices, eliminated overtime, and instituted a hiring freeze—all of which make it much more difficult to attempt to reduce the backlog of disability claims. With the government operating spring 2011 on continuing resolutions for funding, the Social Security Administration lost \$200 million that was designed to address the claims backlog, delaying the processing of claims for about 700,000 people. See Rein, *supra* note 60.

63. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-667T, MANAGEMENT OF DISABILITY CLAIMS WORKLOAD WILL REQUIRE COMPREHENSIVE PLANNING (2010) (representing one example of such an investigation); Ed Madrid, *Benefits Backlog Swells as Social Security Slims*, OREGONIAN (Aug. 4, 2008, 3:35 PM), [http://www.oregonlive.com/special/index.ssf/2008/08/benefits\\_backlog\\_swells\\_as\\_soc.html](http://www.oregonlive.com/special/index.ssf/2008/08/benefits_backlog_swells_as_soc.html) (noting that Congress has

to this criticism, the Social Security Administration has repeatedly stated that the elimination of the backlog—and the source of public and Congressional disapproval—is a main priority.<sup>64</sup> In fiscal year 2008, the Social Security Administration's Office of Disability Adjudication and Review focused its annual report entirely on its plans to eliminate the hearing backlog.<sup>65</sup> Another Social Security Administration publication offers information on twenty-two program initiatives that are being used to reduce the backlog.<sup>66</sup> Investigating representative misconduct takes agency resources, such as time and people, away from this goal of eliminating the backlog.

*A. The Failure of the Social Security Administration to Pursue Misconduct*

Critics have faulted the Social Security Administration for prioritizing the quick processing of cases over making accurate determinations.<sup>67</sup> That the Agency fails to report attorney misconduct, despite its ability to do so,<sup>68</sup> further demonstrates the Agency's emphasis on speed over accuracy. While the Social Security Administration regulations describe its authority to investigate and take action against representative misconduct,<sup>69</sup> it is extremely unlikely to do so. As of 2007, there were approximately 31,000 attorney and nonattorney representatives participating in Social Security Administration disability hearings.<sup>70</sup> Since 1980, when records were first maintained, a total of 178 attorneys and nonattorneys have been suspended

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“consistently failed to meet [the Social Security Administration's] budget requests”).

64. See, e.g., *Eliminating the Social Security Disability Backlog*, Hearing Before the H. Comm. on Ways & Means, 111th Cong. 12–29 (2009) (statement of Michael J. Astrue, Comm'r, Soc. Sec. Admin.); *Clearing the Disability Backlog: Giving the Social Security Administration the Resources It Needs to Provide the Benefits Workers Have Earned: Hearing Before the H. Comm. on Ways and Means*, 110th Cong. 9–16 (2008) (statement of Michael J. Astrue, Comm'r, Soc. Sec. Admin.); News Release, Soc. Sec. Admin., Soc. Sec. Admin. Attacks Disability Backlog (Oct. 9, 2007), <http://www.ssa.gov/pressoffice/pr/disability-backlog-pr.htm>.

65. See SOC. SEC. ADMIN., PLAN TO ELIMINATE THE HEARING BACKLOG AND PREVENT ITS RECURRENCE: FY 2008 SSA ANNUAL REPORT (2008), [http://www.ssa.gov/appeals/Backlog\\_Reports/Annual\\_Backlog\\_Report\\_FY\\_2008-Jan.pdf](http://www.ssa.gov/appeals/Backlog_Reports/Annual_Backlog_Report_FY_2008-Jan.pdf).

66. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION AND REVIEW, HEARING BACKLOG INITIATIVES (2011) (on file with Author).

67. See, e.g., Paletta, *supra* note 56.

68. See *supra* note 46 and accompanying text (describing the Agency's authority to suspend or disqualify individuals from appearing before it in a representative capacity).

69. 20 C.F.R. § 404.1745 (2011).

70. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REPORT A-12-07-17057: CLAIMANT REPRESENTATIVES BARRED FROM PRACTICING BEFORE THE SOCIAL SECURITY ADMINISTRATION 1 n.3 (2007), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-07-17057.pdf> (stating that of the 31,000 representatives, 26,000 were attorneys and 5,000 were nonattorneys).

or disqualified from representing claimants before the Social Security Administration.<sup>71</sup> This averages annually to 5.56 of the estimated total 31,000 attorney and nonattorney representatives—or .018%—being suspended or disqualified by the Social Security Administration per year. Of the 178 representatives, 77 have been attorneys and 101 have been nonattorney representatives.<sup>72</sup> The average number of attorneys (as opposed to nonattorneys) suspended or disqualified each year by the Social Security Administration is 2.4, or .009% of the estimated total number of attorney representatives.<sup>73</sup> This percentage of suspended or disqualified attorneys is sixteen times less than the number of attorneys disbarred in an average year in either Georgia or Maryland.<sup>74</sup> Considering that disbarment or other punishment by a state bar has been historically very rare,<sup>75</sup> it is incredible that the Social Security Administration disbars attorneys at the equivalent rate of sixteen times fewer than do state bars. To put this in perspective, the odds of an attorney being suspended or disqualified by the Social Security Administration are the same as the odds that an American service member will win the Congressional Medal of Honor.<sup>76</sup> It is something that just does not happen very often.

Could it be that the attorneys who appear before the Social Security Administration are sixteen times more ethical than attorneys in general? The anecdotal evidence would suggest the opposite.<sup>77</sup> Why then are so few

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71. SOC. SEC. ADMIN., OFFICE OF DISABILITY ADJUDICATION AND REVIEW, LIST OF SANCTIONED REPRESENTATIVES (2011) (on file with author).

72. *Id.*

73. Of those attorneys suspended or disqualified by the Social Security Administration, the majority were already sanctioned by their own state bar, and the Social Security Administration's disciplinary action was merely to prohibit those individuals from representing claimants before it based on the action of their respective state bar and not because the agency had pursued its own misconduct investigations regarding the conduct of those attorneys. Newsletter and President's Report, Ass'n of Admin. L. Judges (June 13, 2011) (on file with author).

74. See, e.g., THE ATTORNEY GRIEVANCE COMM'N OF MD., 33RD ANNUAL REPORT, at 4, 14 (2008), <http://www.courts.state.md.us/attygrievance/pdfs/annualreport.pdf> (reporting that in Maryland in fiscal year 2008, forty-five of the approximately 33,400 attorneys in the state were disbarred or suspended, totaling 0.14% of attorneys); STATE BAR OF GA. BD. OF GOVERNORS, 2010 REPORT OF THE OFFICE OF THE GENERAL COUNSEL, YEAR 2009–2010, at 9 (2010) (on file with author) (demonstrating that fifty-nine attorneys were either disbarred or suspended out of a total of 36,500, equaling 0.16% of attorneys).

75. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2594 (1999) (suggesting that studies of the lawyer discipline system show that “lawyers rarely suffer any consequences for incompetence or other failings”); see also *National Affairs: Disbarred*, TIME, Nov. 27, 1939, at 15 (demonstrating that even over seventy years ago, disbarment was not common).

76. THE ODDS #1, <http://www.funny2.com/odds.htm> (last visited May 10, 2012).

77. It has already been acknowledged that some claimants (and some representatives)

representatives disqualified or suspended by the Social Security Administration? Just as the reporting of attorney misconduct by its employees to state bars would take employees' time away from processing disability cases, so too would the Agency's enforcement of its own disciplinary policies divert the Agency's resources away from furthering the single, overarching goal of processing disability cases as quickly as possible to eliminate the backlog.

#### V. WHY BOTHER PURSUING ATTORNEY MISCONDUCT IF THE CASE IS MERELY GOING TO BE PAID ANYWAY?

Before a case reaches a Social Security administrative law judge, it has already been adjudicated with adverse decisions issued twice by the state-level Social Security Administration Disability Determination Services.<sup>78</sup> Social Security Administration doctors and trained policy experts render both state-level decisions by applying the exact same rules and regulations that administrative law judges use. At the initial level, the Disability Determination Services deny a high percentage of claims; in 2009, approximately 63% of Social Security disability claims were denied at this stage.<sup>79</sup> Of those claimants who appealed the initial determination, approximately 86% were denied at the Disability Determination Services' reconsideration level in that year.<sup>80</sup> In 2009, on average almost half (46%) of all applications were paid through the first two levels of review at the state level and the case never had to reach an administrative law judge.<sup>81</sup>

While the hearings before the administrative law judges are *de novo*, traditionally there are three basic rationales for an administrative law judge

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have learned how to game the system by determining which doctors to see to support their claims of disability and which administrative law judges to appear before, which explains the high concentration of beneficiaries in certain areas. Paletta, *supra* note 60; *see also* Sam Dolnick, *Suit Alleges Bias in Disability Denials by Queens Judges*, N.Y. TIMES, Apr. 13, 2011, at A23 (stating that some attorneys advise their clients to move to different locations so as to select offices with higher payment rates of disability benefits).

78. Grantham, *supra* note 60. The Social Security Administration experimented in ten states with having only a single review, eliminating the reconsideration step at the state-level. This experiment was a failure. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-322, DISAPPOINTING RESULTS FROM SSA'S EFFORTS TO IMPROVE THE DISABILITY CLAIMS PROCESS WARRANT IMMEDIATE ATTENTION 14, 19-24 (2002), <http://www.gao.gov/new.items/d02322.pdf>.

79. Ohlemacher, *supra* note 57.

80. *Id.*

81. *Id.*; *see also* Grantham, *supra* note 60 (noting that in Georgia, 70% of claims are denied initially, less than half of those people appeal, and 85% of those appeals are denied again; but 60% of those who appeal to the Social Security Administration will win their claims).

to issue a different decision than the one issued by the state-level agency: (1) the state agency made the wrong decision regarding the evidence and the application of the Social Security Administration's rules and regulations; (2) new evidence that was not before the state agency has subsequently been submitted to the administrative law judge that justifies paying the claim for disability benefits; or (3) due to a change in the claimant's age since the date of the state-agency determination, the rules and regulations would require the paying of the case upon reaching the later age category.

Each year, the Social Security Administration's administrative law judges issue over 700,000 decisions utilizing this basic paradigm.<sup>82</sup> As each of these cases had already been denied twice by the doctors and policy specialists who work at the state level using the same rules and regulations that administrative law judges use, it is surprising that administrative law judges pay a substantial number of these claims. In 2009, the Social Security Administration's administrative law judges paid around 63% of the cases.<sup>83</sup> Even more remarkable, in fiscal year 2010, thirty-one administrative law judges reversed state agencies' decisions (i.e., paid) 95% or more of the time.<sup>84</sup> One hundred administrative law judges likewise reversed the state agency decisions 90% or more of the time.<sup>85</sup> Two administrative law judges reversed the decisions of the state agency over 99.7% of the time—one paying 1,371 out of 1,375 cases and the other paying 748 out of 750 cases, even though they are supposed to be applying the same rules and regulations as the state agencies that twice denied each of these cases.<sup>86</sup> Of the top five administrative law judges who have issued the most dispositions, three have paid over 95%—with respective amounts of 1,242 out of 1,302, 1,371 out of 1,375, and 1,785 out of 1,855 cases paid.<sup>87</sup>

The Social Security Administration claims a nearly perfect accuracy rate in its decisions.<sup>88</sup> That claim does not explain, however, the number of times that the Social Security Administration Appeals Council and federal district courts remand administrative law judges' decisions for another de

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82. *Information About Social Security's Office of Disability Adjudication and Review*, SOC. SEC. ADMIN., [http://www.ssa.gov/appeals/about\\_odar.html](http://www.ssa.gov/appeals/about_odar.html) (last updated 2011).

83. Ohlemacher, *supra* note 57.

84. SOC. SEC. ADMIN., ALJ DISPOSITION DATA FY 2010, HEARINGS & APPEALS (2011) [hereinafter ALJ DISPOSITION DATA FY 2010], [http://www.ssa.gov/appeals/DataSets/Archive/03\\_FY2010/03\\_September\\_ALJ\\_Disposition\\_Data\\_FY2010.pdf](http://www.ssa.gov/appeals/DataSets/Archive/03_FY2010/03_September_ALJ_Disposition_Data_FY2010.pdf); *see also Disability Payments*, *supra* note 60, at 36; Paletta, *supra* note 56; Paletta, *supra* note 60.

85. ALJ DISPOSITION DATA FY 2010, *supra* note 84; *see also* Paletta, *supra* note 56.

86. *See* ALJ DISPOSITION DATA FY 2010, *supra* note 84.

87. *Id.*

88. *See, e.g.*, Paletta, *supra* note 60 (describing an external review finding that "cases in Puerto Rico were decided accurately 99% of the time in 2010").

novo hearing.<sup>89</sup> In fiscal year 2007, the Appeals Council and the federal district courts remanded 34,700 out of 550,000 decisions issued.<sup>90</sup> If the initial decisions were overwhelmingly correct, only a very small percentage of those decisions would ever need to be remanded—not the 6.3% that were remanded in fiscal year 2007.<sup>91</sup> The actual number of incorrect decisions is naturally higher than the number of decisions appealed because neither the claimant nor his or her representative has an incentive to appeal an erroneous award of lifetime benefits. Only unfavorable decisions are appealed to the Appeals Council and subsequently to the federal district court.<sup>92</sup> Nor does the claim of a nearly perfect record of accurate decisions match with an analysis the agency conducted of its own administrative law judges' decisions, which found that 15% of the decisions to grant benefits and 8% of the decisions to deny benefits were not supported by even a preponderance of the evidence.<sup>93</sup> Given that Social Security administrative law judges issue over 700,000 cases per year<sup>94</sup> with an average total lifetime benefit amount of \$300,000,<sup>95</sup> a 15% error rate equals billions of dollars each year in improperly awarded benefits.

What is also not explained is that the number of favorable disability benefits decisions has risen 28% since 2007, even though there has been absolutely no evidence of a 28% rise in the number of disabilities in the United States since 2007.<sup>96</sup> In 2010, the Social Security Administration approved 489,488 disability cases—the largest amount ever.<sup>97</sup> The Social

89. See, e.g., SOC. SEC. ADMIN., SSA PUB. NO. 05-10041, THE APPEALS PROCESS (2008), <http://www.ssa.gov/pubs/10041.pdf> (describing that the Appeals Council reviews appeals from decisions rendered by the administrative law judge and federal courts review the decisions of the Appeals Council).

90. OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REPORT A-12-08-28036: HEARING OFFICE REMAND PROCESSING 2 (2008) [hereinafter HEARING OFFICE REMAND PROCESSING], <http://oig.ssa.gov/sites/default/files/audit/full/html/A-12-08-28036.html>.

91. See *id.*

92. The Appeals Council randomly conducts “own motion” reviews of less than 0.8% (eight-tenths of a percent) of decisions where the claimant is paid benefits; more than in 99.2% of the decisions where claimants are paid, benefits are never reviewed. SOC. SEC. ADMIN., ANNUAL NATIONAL JUDICIAL EDUCATION PROGRAM (2011) (on file with Author).

93. SOC. SEC. ADMIN., OFFICE OF QUALITY PERFORMANCE, DISABILITY CASE REVIEW OF ADMINISTRATIVE LAW JUDGE HEARING DECISIONS 1 (2011) (on file with Author).

94. *Information About Social Security's Office of Disability Adjudication and Review*, *supra* note 82.

95. Paletta, *supra* note 60. This amount is merely for the average of Social Security disability benefits, and not the total amount, which could include additional government benefits that can become available—such as Medicaid—with a grant of Social Security benefits.

96. *Disability Payments*, *supra* note 60, at 36.

97. Paletta, *supra* note 60.

Security Administration claims that the rise in the approval rate of disability claims is due to it having hired more people to process applications, which in turn “expedite[s] the process.”<sup>98</sup>

While an increase in staff may explain why more cases are being paid, since more cases have been processed overall in recent years, it cannot explain an increase in the *approval rate* or percentage of cases being awarded benefits. Increases in staff or improved efficiency should have no effect whatsoever on the *rate* at which disability cases are approved, but rather result in merely more cases being processed overall. There must be some other reason for the 28% rise in the approval rate of Social Security disability cases in just a few years. It could be attributed to something that has also risen during this same time period: the Social Security Administration’s interest in reducing the disability case backlog.

Of course the Social Security Administration does not care if cases are paid by their administrative law judges.<sup>99</sup> If a claimant is paid, then no one—not the claimant, not the claimant’s family, not even the claimant’s congressman—complains. This is obviously not true if the case is denied. Better yet, the backlog is reduced with every case that is paid, which is not true if an administrative law judge denies a case.

For example, if an administrative law judge denies benefits, the Appeals Council, or subsequently the federal district court, may remand the case back to the administrative law judge for a *de novo* hearing. There were 34,700 such remands in fiscal year 2007.<sup>100</sup> The denied and remanded disability case needs to be docketed and heard like any other disability case, which adds to the backlog. Often, in addition to filing appeals, the claimant will file a *new* application for disability. Until July 2011, there was no limit on how often a person could file an application for Social Security disability benefits,<sup>101</sup> and there is never a cost to the person to do so. The

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98. *Id.*

99. As opposed to a private insurer, because someone else pays the bills (e.g., the taxpayer), there is no incentive for the Social Security Administration to keep the number of cases paid low. *See id.* (discussing the common belief of claimants that “big, rich Uncle Sam’s money” pays for their Social Security disability benefits, when in reality it is the American taxpayer).

100. HEARING OFFICE REMAND PROCESSING, *supra* note 90, at 2.

101. Beginning July 28, 2011, a claimant who has a claim pending in the Social Security Administration’s administrative review process may not file a new claim of the same benefit type until the previous claim is adjudicated. There is neither a prohibition on filing a different type of claim (for instance, filing a Title XVI claim if there is already a Title II claim) nor any limit on the total number of claims that may be filed during a person’s lifetime. Social Security Ruling 11-1p; Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits, 76 Fed. Reg. 45,309, 45,309–11 (July 28, 2011).

cost to the taxpayer, however, of processing the case through the state level and preparing it for a hearing before an administrative law judge is substantial.<sup>102</sup> With each new application for disability benefits filed, the backlog grows. When a claimant both appeals a denial of benefits and files a new application for benefits, the backlog grows by two cases. Only when a case is *paid* by the administrative law judge is the backlog diminished to the satisfaction of the Social Security Administration and the ever-watchful Congress.<sup>103</sup>

So if 90%, 95%, or 99% of the disability cases are going to be paid anyway, why should the Social Security Administration worry if the claimant's representatives were unethical in the pursuit of their client's claim? If the representative falsified evidence or suborned perjury, who cares since the Social Security Administration just wants the case to go away, seemingly regardless of the merits, thus reducing the backlog by one case?<sup>104</sup>

#### VI. WHY DOES IT MATTER?—THE HARM OF THE SOCIAL SECURITY ADMINISTRATION'S BAN ON REPORTING MISCONDUCT

But what is the harm to the public of the ban on Social Security Administration employees reporting attorney misconduct? Presently, 6,246,920 individuals receive Title XVI disability benefits, with an average award of \$493.70 per month,<sup>105</sup> and 7,426,691 individuals receive Title II disability benefits, with an average award of \$1,063.10 per month.<sup>106</sup> The latter amount is equal to the amount an individual would earn working a full-time, minimum-wage job for forty-four weeks a year.<sup>107</sup> Additionally,

102. Tim Moore, *How Much Does it Cost to Process a Social Security Claim?*, MY DISABILITY BLOG (June 8, 2008, 1:37 PM), <http://disabilityblogger.blogspot.com/2008/06/how-much-does-it-cost-to-process-social.html> (stating that the cost to the taxpayer to process a case through the initial state level is \$1,180, while the cost to the taxpayer of a case reaching the administrative law judge level is \$4,759).

103. See Paletta, *supra* note 56 (discussing the pressure put on Social Security administrative law judges to process cases and how some judges, by paying all of their cases after only a cursory review, process the most).

104. *Id.* (noting that some believe the Social Security Administration is more interested in clearing out the backlog of cases rather than ensuring that candidates who really need benefits receive them).

105. SOC. SEC. ADMIN., SSA PUB. NO. 05-10041, ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2009, at 5.55 (2010) [hereinafter ANNUAL STATISTICAL SUPPLEMENT], <http://www.ssa.gov/policy/docs/statcomps/supplement/2009/supplement09.pdf>.

106. *Id.* at 5.59; Paletta, *supra* note 60.

107. Paletta, *supra* note 60 (noting that applicants should be unable to work in a "substantial, gainful way" when applying for benefits); *Wages: Minimum Wage*, U.S. DEP'T OF

154,230 spouses and 1,691,873 children of disabled individuals are eligible to receive benefits due to the award of Title II benefits.<sup>108</sup> All told, this equals over \$138 billion per year. On average, the successful Title II claimant receives \$300,000 in disability benefits over his or her lifetime.<sup>109</sup> In addition to direct monetary payments, receiving Social Security disability benefits opens up access for recipients to other government programs—such as Medicare or Medicaid—multiplying the ultimate cost to taxpayers many times over.<sup>110</sup> Whether Title II or Title XVI, there is a lot of taxpayer money at stake.

Each disability case that is improperly paid due to attorney misconduct, therefore, has huge monetary consequences for the taxpayer. The system is rife with corruption,<sup>111</sup> but it is unknown exactly how much attorney misconduct there is in Social Security disability cases because of the prohibition on reporting attorney misconduct and the agency's failure to discipline misconduct through its internal policies. For example, if even 1% of cases were improperly paid due to representative misconduct (such as in manufacturing false medical evidence or suborning perjury) that would equate to almost \$1.4 billion a year in improperly paid benefits. If 5% of disability cases were improperly paid due to attorney misconduct that would equal almost \$7 billion per year in improperly paid benefits. Even by government standards, either figure is "real" money.

The consequences of the Agency improperly paying benefits are dire due to the financial insolvency of the Social Security disability programs. In 2005, the Title II program began spending more money than it brought in

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LABOR, <http://www.dol.gov/dol/topic/wages/minimumwage.htm> (stating that federal minimum wage is currently \$7.25 per hour).

108. ANNUAL STATISTICAL SUPPLEMENT, *supra* note 105, at 2. The average amount paid to eligible spouses ranges from \$229.40 to \$287.60 per month, and children receive an average of \$317.60 per month in addition to what the disabled individual receives. *Id.* at 5.60.

109. Paletta, *supra* note 60.

110. *Disability Payments*, *supra* note 60; Paletta, *supra* note 60.

111. *See, e.g.*, Paletta, *supra* note 60. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-849, SUPPLEMENTAL SECURITY INCOME, PROGRESS MADE IN DETECTING AND RECOVERING OVERPAYMENTS, BUT MANAGEMENT ATTENTION SHOULD CONTINUE 1-3 (2002), <http://www.gao.gov/new.items/d02849.pdf>; SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., AUDIT REPORT A-01-08-18022, SUPPLEMENTAL SECURITY INCOME RECIPIENTS WITH EXCESS INCOME AND/OR RESOURCES (2008), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-08-18022.pdf>; SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GEN., AUDIT REPORT, A-01-04-24022, SUPPLEMENTAL SECURITY INCOME OVERPAYMENTS (2004), <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-01-04-24022.pdf>; *Social Security Fraud*, 52 U.S. ATT'YS BULL., No. 6, 2004, [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab5206.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab5206.pdf) (publishing several articles on the problem caused by Social Security Fraud).

through tax receipts.<sup>112</sup> Within the next three years, it is projected to spend \$22 billion more than it receives.<sup>113</sup> The Title II trust fund that has been accruing for years is projected to expire in 2018, twenty-two years prior to the Social Security retiree trust fund.<sup>114</sup>

Beyond the monetary cost to the taxpayer, attorney misconduct that results in improper payment of Social Security disability benefits undermines the legitimacy and integrity of the entire system. Fraudulently paid disability claims stigmatize the people who properly received disability benefits, as it calls into question the validity or degree of their own disabilities.<sup>115</sup> “[T]he fact that some people cheat the welfare system can lead to suspicion that anyone or even everyone receiving benefits is likewise cheating, which is clearly not true.”<sup>116</sup> Individuals whose attorneys did not cheat are also harmed by improperly awarded disability benefits. “It is fundamentally unfair that individuals who intentionally cheat can get benefits, while those who follow the rules may not.”<sup>117</sup>

In addition to these groups of people, the Social Security Administration’s ban on reporting attorney misconduct clearly harms its own employees who take their ethical obligations seriously. An administrative law judge who discovers attorney misconduct is prohibited, on the threat of criminal prosecution, from reporting it to the state bar, even though there may be a legal requirement to do so. It is inconceivable that an organization would willingly create policies that actually require its members to commit ethical violations.<sup>118</sup>

“[T]he taxpaying, voting public will only support need-based welfare programs if they believe that those actually in need of aid are the ones actually receiving the aid.”<sup>119</sup> Thus, the Social Security Administration’s failure to pursue its own mechanisms for dealing with attorney misconduct and its prohibition on allowing its employees to fulfill their ethical obligation to report attorney misconduct to their respective state bars harms the very same people the agency is supposed to be helping and the taxpaying public that supports it.

112. Paletta, *supra* note 60.

113. *Id.*

114. *Disability Payments*, *supra* note 60, at 37; Paletta, *supra* note 60 (projecting that the Social Security Disability Program will run out of money in the next four to seven years).

115. See generally Drew A. Swank, *Welfare, Income Detection, and the Shadow Economy*, 8 RUTGERS J. L. PUB. POL’Y 614 (2011); Grantham, *supra* note 60.

116. Swank, *supra* note 115, at 639.

117. *Id.*

118. This is so with the exception of organizations such as the mafia or drug cartels.

119. Swank, *supra* note 115, at 639–40.

## VII. SOLUTIONS

Possibly the worst problem with the Social Security Administration's ban on reporting attorney misconduct to state bar associations is that the philosophy behind the policy is legally flawed. Neither the Privacy Act, 5 U.S.C. § 552a, nor 42 U.S.C. § 1306(a)(1) require the ban on reporting attorney misconduct as claimed in CJB 09-04. The Privacy Act governs the collection, storage, and dissemination of information maintained by the federal government on individuals.<sup>120</sup> Section (b) provides subject to certain exceptions, "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains."<sup>121</sup> An individual is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence."<sup>122</sup> A record is defined as the following:

any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph . . .<sup>123</sup>

Nothing in the Act, however, applies to an individual's attorney or representative—their actions and their information are not protected as they are not the "individual" for whom "records" are maintained. Rather, the claimant is the individual for whom records are maintained, so the Privacy Act should not apply.

Furthermore, the Privacy Act specifically allows for civil and criminal law enforcement entities—which would include state bars or other disciplinary agencies—to request information from a federal agency that would normally be protected by the Act if it is made in writing and specifies the civil or criminal law enforcement activity for which the records are being sought.<sup>124</sup> Reporting attorney misconduct, therefore, does not necessarily disclose any privacy-related information regarding the claimant, but rather merely provides information on the conduct of the representative

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120. 5 U.S.C. § 552a (2006).

121. *Id.* § 552a(b).

122. *Id.* § 552a(a)(2).

123. *Id.* § 552a(a)(4).

124. *Id.* § 552(b)(7). *See generally* Covert v. Harrington, 876 F.2d 751, 753 (9th Cir. 1989); Doe v. Naval Air Station, 768 F.2d 1229, 1233 (11th Cir. 1985); Stafford v. SSA, 437 F. Supp. 2d 1113, 1121 (N.D. Cal. 2006) (finding, in part, that the state agency that contacted and requested information from the Social Security Administration failed to do so in writing).

that is neither privileged nor confidential. Any reference to the claimant or to any of his or her information that is protected by the Privacy Act or other statute can be appropriately redacted, thereby preserving the claimant's privacy while still appropriately reporting the attorney's misconduct. A Social Security administrative law judge could inform his or her state bar of the name of the attorney, the type of misconduct, and the jurisdictional information (such as the location and date of the misconduct) as appropriate under that judge's own specific state bar rules without reference to the protected individual's information, which could be kept confidential in accordance with the Privacy Act. The state bar or other appropriate authority could then contact the Social Security Administration if it needed any additional information, which would be subject to disclosure under the enumerated exception to the Privacy Act. Thus, the individual's information remains protected as required by the Privacy Act, and the administrative law judge is able to perform his or her ethical duty of reporting attorney misconduct.

Just as the Privacy Act has an exception that would allow employees of the Social Security Administration to comply with their ethical obligations, 42 U.S.C. § 1306(a)(1) likewise contains a provision that information may be disclosed if "the head of the applicable agency may by regulations prescribe and except as otherwise provided by Federal law."<sup>125</sup> The Social Security Administration, as part of its employee administrative grievance process, allows for the disclosure of any information it maintains "[t]o an appropriate licensing organization or Bar association responsible for investigating, prosecuting, enforcing or implementing standards for maintaining a professional licensing or Bar membership, if the Social Security Administration becomes aware of a violation or potential violation of professional licensing or Bar association requirements."<sup>126</sup>

The purpose of allowing the release of information maintained by the Social Security Administration to state bars is for when the agency wishes to punish one of its own employees and further seek to have that employee disbarred. It is ironic that the Social Security Administration has no apparent qualms about disclosing information for the purpose of disciplining one of its own employees but takes the position that it cannot release that exact same information to allow an administrative law judge to report an attorney's misconduct. Regardless of the motive behind it, the provision announced in the *Federal Register* allows for information from hearings to be reported to state bars or other appropriate professional

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125. 42 U.S.C. § 1306(a)(1) (2006).

126. Social Security Administration Notice of System of Records Required by the Privacy Act of 1974, 71 Fed. Reg. 1862, 1863 (Jan. 11, 2006).

authorities that otherwise would be prohibited by 42 U.S.C. § 1306.<sup>127</sup> Therefore, the two statutes the Social Security Administration cites as the basis for prohibiting its employees to fulfill their ethical duties by reporting attorney misconduct to state bars both contain exceptions allowing the release of this information, which negates the legal authority cited in CJB 09-04.

#### CONCLUSION

The Social Security Administration needs to take seriously its obligation to prevent and report attorney misconduct. Even though the Social Security Administration can bar individuals from practicing before the Agency for misconduct, it rarely does so. Instead, it prohibits its employees—on the threat of criminal prosecution—from complying with their ethical obligations, forcing them in some cases to face the possibility of being disbarred for failing to report attorney misconduct. The legal basis cited for the prohibition on reporting attorney misconduct in the *Chief Judge Bulletin* is legally flawed, as both of the statutes cited as its basis allow for information regarding misconduct to be transmitted to state bars. The *Chief Judge Bulletin* needs to be rescinded to allow Social Security Administration employees to fulfill their ethical requirements.

The Social Security Administration's position on barring its employees from reporting attorney misconduct harms its employees, the disabled people it serves, and the American taxpayer. Nothing and no one benefit from its prohibition on reporting attorney misconduct, except for the attorneys who cheat and their clients who receive disability benefits for which they do not qualify. If the Social Security Administration will not rescind this policy, then Congress should force it to do so. All Americans, whether disabled or not, are owed at least that much.

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127. This is contrary to the justifications cited in CJB 09-04, *supra* note 1.

# ESSAY

## 2012 Gellhorn–Sargentich Law Student Essay

### PRESERVING THE ARK OF OUR SAFETY: HOW A STRONGER ADMINISTRATIVE APPROACH COULD SAVE SECTION 5 OF THE VOTING RIGHTS ACT

AARON M. MOORE\*

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In our system, the first right and most vital of all our rights is the right to vote. Jefferson described the elective franchise as “the ark of our safety.” It is from the exercise of this right that the guarantee of all our other rights flows.<sup>1</sup>

—Lyndon B. Johnson

## INTRODUCTION

On July 27, 2006, President George W. Bush signed into law the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (2006 Reauthorization Act).<sup>2</sup> The twenty-five year extension of the Voting Rights Act of 1965 (VRA)<sup>3</sup> included the controversial yet undeniably successful Section 5.<sup>4</sup> The VRA identifies districts with the worst histories of voting discrimination and subjects those “covered jurisdictions” to the obligations of Section 5. Section 5 requires jurisdictions within its coverage to apply for and receive approval, or “preclearance,”<sup>5</sup> from the Attorney General<sup>6</sup>

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1. Special Message to the Congress on the Right to Vote, 1 PUB. PAPERS 288 (Mar. 15, 1965). In 1801, Thomas Jefferson wrote, “The elective franchise, if guarded as the ark of our safety, will peaceably dissipate all combinations to subvert a Constitution, dictated by the wisdom, and resting on the will of the people.” Letter from Thomas Jefferson to Benjamin Waring (Mar. 1801), in THE JEFFERSONIAN CYCLOPEDIA 841 (John P. Foley ed., 1900).

2. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; see Associated Press, *Bush Signs Voting Rights Act Extension Amid Midterm Election Season*, USA TODAY (July 27, 2006, 10:17 AM), [http://www.usatoday.com/news/Washington/2006-07-27-bush-votingrights\\_x.htm](http://www.usatoday.com/news/Washington/2006-07-27-bush-votingrights_x.htm).

3. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006)).

4. 42 U.S.C. § 1973c (2006).

5. 28 C.F.R. § 51.2 (2011).

6. The Attorney General has, for almost every circumstance, delegated this authority to the Assistant Attorney General for the Civil Rights Division. *Id.* § 51.3.

or the U.S. District Court for the District of Columbia before making *any* voting-related changes.<sup>7</sup> It has been an effective means of dismantling and preventing barriers to minority participation in the political process.<sup>8</sup> Despite this success, the current system, in which the Department of Justice (DOJ) is confined to a specific set of covered jurisdictions and relatively static procedures, lacks the adaptability necessary to effectively combat voting discrimination in an ever-changing society.

Section 5 covers any state or political subdivision that, for the presidential elections of 1964, 1968, or 1972, (1) used a “test or device”<sup>9</sup> as a precursor for voting and (2) had voter registration or voter turnout below 50%.<sup>10</sup> Despite appeals to modify Section 5’s coverage by updating the data used for this “coverage formula” in the 2006 Reauthorization Act,<sup>11</sup>

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7. See 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.10.

8. See *infra* Part I.A.2.

9. See 42 U.S.C. § 1973b(c) (defining this phrase). Congress concluded that tests and devices, such as literacy tests and proof of “understanding of constitutional provisions . . . or good moral character, as prerequisites to voting” were often used to deny minorities the right to vote. H.R. REP. NO. 89-439, at 11–12 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2443. In *South Carolina v. Katzenbach*, the Supreme Court accepted this basis for Section 5 coverage, concluding that “[t]ests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil.” 383 U.S. 301, 330 (1966). Examples of this include requiring African-Americans to “interpret obscure sections of state constitutions” or answer questions such as “how many bubbles does a bar of soap contain” as a prerequisite for voter registration. Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL’Y 41, 44 (2007) (internal quotation marks omitted); see BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE* 18 (2007) (noting that in response to the concern “that black voters would begin to have a voice in Alabama politics,” the Alabama Democratic Party sponsored and successfully adopted the Boswell Amendment in 1946, which “required that an applicant be able to understand and explain any article of the constitution of the United States” (internal quotation marks omitted)). In 1975, Congress amended the term “test or device” to include the practice of providing voting material exclusively in English during the 1972 election in jurisdictions where over 5% of the voting age citizens were “members of a single language minority.” Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401–02 (codified as amended at 42 U.S.C. § 1973b(f)). Congress concluded that providing voting material only in English could effectively deny language minorities the right to vote. See *id.*

10. 42 U.S.C. § 1973b(b); see H.R. REP. NO. 89-439, at 13–14 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2444 (providing evidence and arguments that the presence of these two factors indicates the “strong probability” the tests or devices are being used to discriminate against minorities); see also 28 C.F.R. app. pt. 51 (listing the currently covered jurisdictions).

11. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 85 (2006) (statement of Ronald Keith Gaddie, Professor of Political Science, The University of Oklahoma); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once*

Congress chose to retain 1964, 1968, and 1972 as the baseline years. This failure to alter the coverage formula has created diverse criticism.<sup>12</sup> It has also fueled continuing concerns over the constitutionality of Section 5.

The constitutional foundation of Section 5 and the protection it affords may be on the verge of collapse.<sup>13</sup> This is a worrisome prospect. Professor Cashin concludes that as long as “pronounced racial cleavages remain evident in party affiliation” there will be a significant risk of voting discrimination.<sup>14</sup> Perhaps the single most effective and important tool in the battle against voting discrimination, the end of Section 5 would be a monumental blow to the civil rights movement.<sup>15</sup> Further, it is unclear what, if any, phoenix would rise from the ashes of Section 5.<sup>16</sup>

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*and Future Remedy?*, 81 DENV. U. L. REV. 225, 278–82 (2003).

12. See, e.g., S. REP. NO. 109-295, at 25–36 (2006) (additional views of Senators John Cornyn and Tom Coburn) (providing data that show significant improvement in African-American voter registration and turnout in the covered jurisdictions, and arguing that the “systematic, invidious practices that plagued our election system 40 years ago” no longer exist and, thus, an alternative or updated coverage formula should have been considered); Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL’Y 561, 581 (2007) (concluding that the coverage formula no longer has “any rhyme or reason” and that it must be updated so that the coverage reflects the current state of the country); Carol M. Swain, *Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America*, 5 GEO. J.L. & PUB. POL’Y 29, 29 (2007) (asserting that Congressional failure to update the coverage of Section 5 missed an opportunity to extend protection to areas that truly need it and continued coverage for some jurisdictions where the situation no longer requires it or even where there was never any history of discrimination).

13. See *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 129 S. Ct. 2504, 2512 (2009) (recognizing Section 5’s federalism costs and asserting, in dicta, that if voting discrimination is no longer concentrated in the covered jurisdictions, Section 5’s application may not be “sufficiently related to the problem that it targets” and, thus, Section 5 may be unconstitutional); see also Robert Barnes, *Voting Rights Provision in Peril*, WASH. POST, Feb. 10, 2012, at A2; *infra* notes 127–129 and accompanying text.

14. Sheryll D. Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever Be Obsolete?*, 22 WASH. U. J.L. & POL’Y 71, 74 (2006).

15. Accord Luis Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 102 (2007) (calling a potential challenge to Section 5 a “showdown for the ages, a clash of principles between 1960s liberalism and 1990s conservatism”); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006) (describing Section 5 as the “most powerful weapon in the civil rights arsenal”). Section 5 directly confronted the serious problems of case-by-case adjudication, including the fact that once one practice was deemed illegal, “local officials would [simply] switch to another” discriminatory practice. *Id.* at 711. It thus solved the difficulties surrounding the enforcement of the right to vote by effectively preventing new discriminatory voting practices from ever being put into effect. See *id.*

16. This idiom finds its inception in a clever question posed by Adam Finkel and Jason Sullivan. See Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the*

Since Congress passed the VRA in 1965, the Supreme Court has upheld the constitutionality of Section 5 on numerous occasions.<sup>17</sup> In so doing, the Court acknowledged the questionable constitutional standing of Section 5 but recognized that “exceptional conditions” and “unique circumstances” may “justify legislative measures not otherwise appropriate.”<sup>18</sup> The debate over the current state of Section 5’s constitutionality thus focuses on whether those conditions and circumstances that justified Section 5 in the past, or their modern day equivalents, still exist. Ultimately, this question will be framed by the standard of review the Supreme Court uses to determine the constitutionality of Section 5<sup>19</sup> and whether, under that standard, the legislative record is sufficient to justify the continuing need for Section 5’s prophylactic approach to voting discrimination.

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“Substantially Similar” Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (*Ergonomics*) Again?, 63 ADMIN L. REV. 707, 709 (2011) (“What kind of phoenix, if any, is allowed to rise from the ashes of a dead regulation?”).

17. See, e.g., *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–84 (1999) (recognizing the federalism concerns with Section 5 but holding that the Fifteenth Amendment permits intrusion into “areas traditionally reserved to the States” and thus ruling that the Voting Rights Act (VRA) was a permissible exercise of Congressional authority); *Georgia v. United States*, 411 U.S. 526, 535 (1973) (reaffirming the reasoning of *Katzenbach* that Section 5 is “a permissible exercise of congressional power under § 2 of the Fifteenth Amendment”); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In *Katzenbach*, the Court recognized the enduring problem of voting discrimination, the ineffectiveness of past methods of enforcement, and that discrimination was concentrated in certain areas of the country, thus ruling that Section 5 was a “permissible method of dealing with the problem” of voting discrimination. *Id.* at 328–29.

18. *Katzenbach*, 383 U.S. at 334–35 (1966) (holding that the fact that the covered states were continuously developing and enacting new discriminatory rules with the clear purpose of evading unfavorable court rulings were “unique circumstances” and Section 5 was a reasonable congressional response); see also *NAMUDNO*, 129 S. Ct. at 2510 (stating that past decisions upheld the VRA since “circumstances continued to justify the provisions”); *id.* at 2525–26 (Thomas, J., concurring in the judgement in part and dissenting in part) (arguing the discrimination justifying the previous decisions no longer exists).

19. Compare *Katzenbach*, 383 U.S. at 324 (finding Section 5 constitutional by applying the rational means test) and *Nw. Austin Mun. Util. Dist. No. One v. Murkasey*, 573 F. Supp. 2d 221, 241–46 (D.D.C. 2008) (holding that the rational means test should still apply), *rev’d on statutory grounds*, *NAMUDNO*, 129 S. Ct. 2504, with *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 449 (D.D.C. 2011) (“*Boerne’s* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach*, and hence provides the appropriate standard of review to assess Shelby County’s facial constitutional challenge to Section 5 and Section 4(b).”), and *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (ruling that statutes passed by Congress under § 5 of the Fourteenth Amendment will be reviewed using the “congruence and proportionality” test), and *Clegg & Chavez*, *supra* note 12, at 569–70 (predicting the Supreme Court will review Congress’s Fifteenth Amendment enforcement authority under the “congruence and proportionality” test outlined in *City of Boerne*).

This Essay argues that a stronger and more dynamic administrative approach, one that includes the authority to adjust the coverage and procedures of Section 5, can help ensure the continued constitutionality of Section 5 by better tailoring it to changing demographics and evolving needs. This would directly respond to the Supreme Court's concern that the current coverage may not be "sufficiently related to the problem that it targets"<sup>20</sup> by allowing coverage to be continuously adjusted to include the areas where problems exist. This Essay also maintains that an agency with authority to adjust both the procedures and coverage of Section 5 will be far more effective at combating modern-day voting discrimination on a national scale. Finally, this Essay posits that greater transparency in the preclearance process, along with specific reporting requirements and avenues to appeal grants of preclearance, will help reduce the risk of political abuse.

Part I of this Essay gives an overview of Section 5, the effect it has had in the covered jurisdictions, and the role of DOJ in its enforcement. Part II examines the constitutionality of Section 5, looking both at why it was constitutional in 1965 and why it remains constitutional today. Finally, Part III proposes that Congress amend the VRA to strengthen the reporting requirement for preclearance decisions, allow for the appeal of grants of preclearance, create a means by which jurisdictions may be added to Section 5 coverage, and establish a more efficient way for the removal of jurisdictions from coverage. This Essay is in no way meant to assert that Section 5, in its current form, is ineffective or unnecessary. It simply attempts to suggest reforms that would greatly strengthen the effectiveness and constitutional foundation of Section 5's protection now and in the future.

## I. OVERVIEW

Congress passed the VRA in an attempt to remedy what it called the "painfully slow" progress in enforcement of the Fifteenth Amendment<sup>21</sup> and the voting rights statutes in effect at the time.<sup>22</sup> It attributed this slow progress to the "intransigence of State and local officials" and the prolonged and costly judicial process of a case-by-case enforcement approach.<sup>23</sup> While the VRA has other important remedial provisions,<sup>24</sup>

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20. *NAMUDNO*, 129 S. Ct. at 2512.

21. U.S. CONST. amend. XV (stating that the right to vote cannot be denied on the basis of race).

22. H.R. REP. NO. 89-439, at 9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

23. *Id.* at 9-10 (stating that trial preparation for a voting rights case filed by the Justice Department involves an enormous amount of time and often, since new discriminatory

Section 5 is the primary focus of this Essay.

#### A. Section 5

Section 5 was included in the VRA as a temporary provision.<sup>25</sup> It was subsequently reauthorized and amended in 1970,<sup>26</sup> 1975,<sup>27</sup> and 1982;<sup>28</sup> in 2006 it was extended for an additional twenty-five years.<sup>29</sup> While technically temporary, Section 5 represents the central provision of Congress's solution to ineffective and costly case-by-case adjudication of the continuously evolving methods of voting discrimination.<sup>30</sup> Section 5

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schemes are being continuously developed, causes “no change in result, only in methods”); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) [hereinafter Persily, *Promise and Pitfalls*] (“Such a remedy was necessary because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order.”).

24. There are other vitally important provisions of the VRA. Section 2 represents the statutory embodiment of the Fifteenth Amendment's right to vote. It bans any voting practice or procedure “which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.” 42 U.S.C. § 1973(a) (2006). Section 4 contains a provision that lists the requirements by which jurisdictions may bail out of Section 5 coverage, *see id.* § 1973b(a), the coverage formula, *see id.* § 1973b(b), and the statutory definitions of *test* and *device* used in the coverage formula, *see id.* § 1973b(c), (f)(3). Section 10 unequivocally bans the use of “poll taxes” as a prerequisite to the right to vote. *See id.* § 1973h. Finally, Section 203 requires that any jurisdiction where more than 5% or 10,000 citizens are “members of a single language minority and are limited-English proficient” must offer bilingual voting material. *Id.* § 1973aa-1a.

25. Technically the expiring provision is Section 4(a), codified in 42 U.S.C. § 1973b(a)(8), and applies only to Section 4, but since Section 5's coverage is specified in Section 4, the expiration of Section 4 would impliedly mean the end of Section 5. In addition to Section 4 and Section 5, the other temporary provision is Section 203, codified in 42 U.S.C. § 1973aa-1a.

26. Voting Rights Act Amendments of 1970, Pub. L. No. 91-284, 84 Stat. 314.

27. Pub. L. No. 94-73, 89 Stat. 400 (1975).

28. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

29. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577, 581.

30. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 680 (2008) (recognizing Section 5 as *the* remedy to the ineffective case-by-case approach to voter discrimination). Congress recognized that in addition to the fact that a case-by-case approach was both slow and costly, it also often “caused no change in result, only in methods,” as offenders would simply devise a new means by which to discriminate. H.R. REP. NO. 89-439, at 10 (1965), *reprinted in* 1965 U.S.C.A.N. 2437, 2441; *cf.* Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 692–93 (2009) (discussing the damages that stem from allowing a discriminatory voting law to be enforced while it is being

accomplishes its purpose by automatically requiring examination of any proposed change to voting practices in a covered jurisdiction and shifting the burden to the jurisdiction to prove that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race.”<sup>31</sup> Thus, covered jurisdictions are barred from enforcing any changes to voting practices without first meeting this burden of proof in the eyes of either the U.S. Attorney General or, alternatively, the U.S. District Court for the District of Columbia.<sup>32</sup> This prophylactic approach to voting discrimination was unique and innovative,<sup>33</sup> but given certain states’ prior success thwarting Congress’s attempts to enforce the guarantees of the Fifteenth Amendment, it was exactly what was needed.

Even though Congress has not updated the coverage formula for Section 5 since the 1975 reauthorization,<sup>34</sup> coverage is not inherently static. There is a “bailout” provision in the VRA that provides covered jurisdictions with a means of ending coverage by seeking declaratory judgment from the District Court of the District of Columbia.<sup>35</sup> The provision requires the jurisdiction to prove conformity with specific factors for the preceding ten years to a three-judge panel.<sup>36</sup> Broadly, the requirements demand that the panel find a “record of nondiscriminatory voting practices and current efforts to expand minority participation in all aspects of the political

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challenged in court and concluding “case-by-case adjudication through as-applied challenges is too slow to vindicate” the right to vote).

31. 42 U.S.C. § 1973c(a) (2006); see Kousser, *supra* note 30, at 680 (asserting that shifting the burden of proof to the jurisdiction, along with the scrutiny of every voting change, was necessary to combat the innovative means of discriminating continuously implemented by the South); see also 28 C.F.R. § 51.54(b) (2011) (stating that a discriminatory effect will be found if the proposed voting change results in retrogression of a minority group’s “effective exercise of the electoral franchise”).

32. See 42 U.S.C. § 1973c.

33. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) (calling the VRA an “inventive” exercise of Congress’s Fifteenth Amendment authority); Persily, *Promise and Pitfalls*, *supra* note 23, at 177, 216 (“The preclearance procedures in section 5 are completely unlike anything else in the U.S. Code, given their inversion of the normal federal–state relationship.”).

34. Pub. L. No. 94-73, sec. 202, 89 Stat. 400, 401 (1975) (adding data from the 1972 presidential election to the coverage formula).

35. See 42 U.S.C. § 1973b(a) (setting forth the evidentiary and procedural requirements for a successful bailout from Section 5 coverage); 28 C.F.R. § 51.5(b); see also Christopher B. Seaman, *An Uncertain Future For Section 5 of the Voting Rights Act: The Need for A Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9, 18 (2010) (“[B]ailout was designed as a ‘safety valve’ to release from coverage jurisdictions that could establish they had not discriminated against minority voters.”).

36. See 42 U.S.C. § 1973b(a)(1)(A)–(F), (a)(4)–(5).

process.”<sup>37</sup> Additionally, even if the plaintiff jurisdiction successfully meets its evidentiary burden, the court retains jurisdiction for the succeeding ten years and must reopen the proceedings upon a “motion of the Attorney General or any aggrieved person alleging that conduct has occurred which, had that conduct occurred during the ten-year periods” preceding the bailout litigation, “would have precluded the issuance of a declaratory judgment” for the jurisdiction.<sup>38</sup> If the violating conduct is proven, the declaratory judgment is vacated and Section 5 coverage is reinstated.<sup>39</sup> Despite this mechanism allowing a jurisdiction to escape Section 5 coverage, as of 2009, only seventeen out of over twelve thousand covered jurisdictions had successfully utilized the provision.<sup>40</sup> The reason for this low number is unclear, but it implies the bailout mechanism may need reform.<sup>41</sup>

### 1. *The Department of Justice and the Opportunity for Political Abuse*

The DOJ is vital to the success of Section 5,<sup>42</sup> yet its role is surprisingly limited. Congress restricted DOJ’s power by denying it meaningful regulatory authority over Section 5 and its coverage.<sup>43</sup> DOJ’s accountability for its decisions is also significantly curtailed since grants of preclearance are not judicially reviewable<sup>44</sup> and need not be explained or

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37. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 257, 262–63 (Ana Henderson ed., 2007) (restating the specific requirements).

38. 42 U.S.C. § 1973b(a)(5).

39. *Id.*

40. *NAMUDNO*, 129 S. Ct. 2504, 2519 & n.1 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part).

41. See Persily, *Promise and Pitfalls*, *supra* note 23, at 213–14 (advancing multiple possible theories as to why so few jurisdictions have bailed out); Pitts, *supra* note 11, at 284–85 (blaming the difficulty of the bailout provision for the low number of successful bailouts). *But see* Hebert, *supra* note 37, at 257 (“My experience indicates that the standards for establishing bailout eligibility that currently exist have proven to be both workable and practical.”). See the entire Hebert article for a description of the bailout provision, including its history, a discussion of its requirements and the process that successful jurisdictions have followed, and a convincing case for why the current procedures work and the burden on jurisdictions is reasonable.

42. See 42 U.S.C. § 1973c(a) (outlining the role of the Attorney General in the preclearance process).

43. Kousser, *supra* note 30, at 683 (recognizing that the Department of Justice (DOJ) is restricted to the issuance of guidelines or procedures instead of “rules,” and “its objection letters [do] not have precedential force”).

44. *Morris v. Gressette*, 432 U.S. 491, 500–07 (1977) (concluding that the VRA precludes judicial review of the Attorney General’s decision to grant preclearance); 28

rationalized.<sup>45</sup> There is potential for inconsistent results as the personnel—or political leanings—of the Executive Branch change.<sup>46</sup> After preclearance is granted, while parties can pursue legal action against the voting changes under Section 2 of the VRA<sup>47</sup> or another legal theory, the benefits of Section 5 are lost. This means the voting changes can be enforced, absent a court injunction, and the burden of proof is shifted away from the jurisdiction and onto the plaintiff alleging illegal voting discrimination.

Even before initial passage in 1965, some members of Congress raised concerns about the “multitude of opportunities for political manipulation by an Attorney General who is inclined to do so.”<sup>48</sup> Politics may very well have been the reason for the painfully slow implementation and enforcement of Section 5 after its enactment in 1965.<sup>49</sup> Since DOJ is an executive agency and the Attorney General is a member of the President’s Cabinet, an Attorney General may be receptive to the political motivations and considerations of the President’s party. Absent adequate safeguards, political manipulation is almost a certainty. Three recent examples deserve mention.

*2001 Mississippi Redistricting Plan*

Mississippi is covered by Section 5<sup>50</sup> and must obtain preclearance

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C.F.R. § 51.49 (2011); see Gerken, *supra* note 15, at 718 (citing the increasing politicization of DOJ as reason to allow judicial reviewability of grants of preclearance).

45. 28 C.F.R. § 51.41 (requiring only notice of a decision not to object to a voting change).

46. Additionally, despite operating under the leadership of a President who has pledged a transparent government, it is difficult to describe the current DOJ as an agency open to public scrutiny. See *Justice Department Wins Rosemary Award For Worst Open Government Performance in 2011*, NAT’L SEC. ARCHIVE (Feb. 14, 2012), <http://www.gwu.edu/~nsarchiv/news/20120214/index.htm>; see also Al Kamen, *Justice Department Wins Secrecy Prize*, WASH. POST, Feb. 14, 2012, [http://www.washingtonpost.com/politics/2012/02/14/gIQA9W6SER\\_story.html](http://www.washingtonpost.com/politics/2012/02/14/gIQA9W6SER_story.html) (calling the DOJ secrecy policies “in practical rebellion against President Obama’s 2009 open-government orders”).

47. See 42 U.S.C. § 1973 (barring any voting practice that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color”). Even Section 2 litigation is not insulated from political ideology. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 21 (2008) (finding that judges appointed by Democratic presidents ruled for plaintiffs 36.2% of the time compared to 21.2% for Republican appointees).

48. H.R. REP. NO. 89-439, at 46 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2475.

49. See Kousser, *supra* note 30, at 684–85, 688 (noting the weak and inefficient early enforcement and the fact that the DOJ did not draft any guidelines until Congress pressured it to do so in 1971).

50. 28 C.F.R. app. pt. 51 (2011).

before implementing any new redistricting plan.<sup>51</sup> While its 2001 proposal was still pending at DOJ, the Mississippi Republican Party convinced a federal judge to adopt a separate, Republican-favored redistricting plan if DOJ failed to grant preclearance within sixty days.<sup>52</sup> After review, career staff unanimously found that the proposal did not negatively affect minority voters and recommended DOJ grant preclearance.<sup>53</sup> DOJ's Republican political staff rejected the recommendations and extended the review past the sixty-day window,<sup>54</sup> causing the federal court to implement the Republican-favored redistricting plan.<sup>55</sup> The reasoning for the delay was suspicious, and DOJ's inaction was widely condemned as being the product of political influence.<sup>56</sup>

#### *2003 Texas Redistricting Plan*

Like Mississippi, Texas is covered by Section 5.<sup>57</sup> After submission to DOJ, career staff members analyzed the redistricting plan and produced a unanimous memorandum concluding that Texas had failed to prove that the "redistricting plan [would] not have a discriminatory effect."<sup>58</sup> Thus,

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51. 28 C.F.R. § 51.13(e).

52. See *Smith v. Clark*, 189 F. Supp. 2d 512, 512 (S.D. Miss. 2002); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 83 (2009) (citing DOJ political staff's rejection of the agreed-upon plan as evidence of politicization among appointed officials).

53. Joseph D. Rich et al., *The Voting Section*, in *THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION* 32, 37 (William L. Taylor et al. eds., 2007) (describing how staff attorneys were overruled by appointees in the Assistant Attorney General's office).

54. The Republican Staff extended review by requesting more information from Mississippi. See 28 C.F.R. § 51.37 (allowing a request for more information which then resets the sixty-day preclearance decision requirement).

55. *Smith*, 189 F. Supp. 2d at 559 (ordering the Mississippi Secretary of State to use the congressional redistricting adopted by the court); see also Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL'Y REV. 211, 219 & n.34 (2008) (noting that political interference with Section 5 enforcement began at the very outset of the Bush presidency).

56. See Liu, *supra* note 52, at 82–83 (“[T]he political staff rejected the recommendation [of the career staff] and instead extended the review period to seek more information from the state on whether the fact that a state court, not a state legislature, had ordered the [redistricting] plan would affect preclearance, despite no legal basis to think it would.”); Rich et al., *supra* note 53, at 36–37 (finding the delay “highly irregular” since the requested information would not affect the ultimate preclearance decision and that it was “perhaps unprecedented for the Division’s political staff to override a unanimous staff recommendation to preclear a submitted change”).

57. See 28 C.F.R. app. pt. 51.

58. Memorandum from the Dep’t of Justice Voting Section on Section 5 Recommendation 66, 69 (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf> (finding that the plan also has the effect of diminishing, or retrogressing, the voting strength of minorities in the state).

they recommended that preclearance be denied.<sup>59</sup> The Attorney General ignored the staff's recommendations and granted preclearance six days later.<sup>60</sup> The decision by a Republican Attorney General in support of a redistricting plan that strongly favored Republicans was roundly criticized as representing political manipulation of the preclearance process.<sup>61</sup> Since grants of preclearance need not be explained and are not reviewable,<sup>62</sup> opponents had no real recourse.

*2005 Georgia Voter Identification Law*

The 2005 Georgia law required that voters show government-issued photo identification before voting.<sup>63</sup> After analysis, career staff at DOJ concluded Georgia had failed to prove the law would not have a discriminatory effect and recommended preclearance be denied.<sup>64</sup> The DOJ staff expressed concern that the facts indicated a drastically disproportionate number of African-Americans, as compared to whites, lacked the requisite identification.<sup>65</sup> Preclearance was granted the day after

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59. *Id.* at 71.

60. See Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 811 (2006) (noting that the lack of transparency in the decisionmaking process makes the "reasoning behind the decision to preclear opaque," but that some outside the process have stated their opinion that politics played a hand in the outcome).

61. See Kennedy, *supra* note 55, at 219–20 & n.35 (noting that those responsible for the redistricting plan publically admitted that its sole purpose was to increase the political strength of Republicans in Texas); Mark Posner, *Evidence of Political Manipulation at the Justice Department: How Tom DeLay's Redistricting Plan Avoided Voting Rights Act Disapproval*, FINDLAW.COM (Dec. 6, 2005), [http://writ.news.findlaw.com/commentary/20051206\\_posner.html](http://writ.news.findlaw.com/commentary/20051206_posner.html) (stating that in the past, both Democratic and Republican administrations have rarely overridden the recommendations of career staff members, and that the decision to preclear the redistricting plan was a marked deviation from that practice). *But see* Edward Blum et al., *Who's Playing Politics?*, AM. ENTERPRISE INST. FOR PUB. POLY RES. (Jan. 2006), [http://www.aei.org/docLib/20060125\\_0219561OTIBlum\\_g.pdf](http://www.aei.org/docLib/20060125_0219561OTIBlum_g.pdf) (arguing that the Texas plan was justified and blaming the career staffers for engaging in partisan actions).

62. See *supra* notes 44–45 and accompanying text (explaining why grants of preclearance are not subject to judicial review and need not be explained).

63. See H.B. 244, 148th Gen. Assemb., Reg. Sess. § 59 (Ga. 2005), available at [http://www1.legis.ga.gov/legis/2005\\_06/pdf/hb244.pdf](http://www1.legis.ga.gov/legis/2005_06/pdf/hb244.pdf).

64. Section 5 Recommendation Memorandum from Robert Berman et al., Dep't of Justice, Re. Act No. 53 (H.B. 244) (2005), at 51 (Aug. 25, 2005), available at <http://www.truthaboutfraud.org/pdf/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf>.

65. See Tokaji, *supra* note 60, at 815 (noting that the DOJ staff memo, using Department of Transportation statistics, found the following: 14% of Georgia voters did not have a drivers license; African-Americans were four to five times more likely to not have access to a car; and the cost of procuring a photo ID would have a greater impact on those in poverty, a disproportionate number of whom are African-American); *cf.* MARK A.

the memorandum was issued<sup>66</sup> and this decision was decried as being the product of political abuse.<sup>67</sup> Interested parties subsequently challenged the Georgia law in federal court where a judge issued a preliminary injunction halting the enforcement of the law and citing the “severe restrictions” the law imposed on the right to vote.<sup>68</sup> While leaving open the question of the law’s standing under the VRA, the court tellingly noted that “the Photo ID requirement [was] most likely to prevent Georgia’s elderly, poor, and African-American voters from voting.”<sup>69</sup> Additionally, while the rationale of the law was to prevent voter fraud, it made absentee voting—historically much more fraught with fraud—easier.<sup>70</sup> Further, whites were found to be

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POSNER, AM. CONST. SOC’Y FOR L. & POL’Y, THE POLITICIZATION OF JUSTICE DEPARTMENT DECISIONMAKING UNDER SECTION 5 OF THE VOTING RIGHTS ACT: IS IT A PROBLEM AND WHAT SHOULD CONGRESS DO? 14 (2006), <http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf> (advancing that photo-ID requirements “erect barriers to voting” that have a disparate impact on minority voters); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep’t of Justice, to C. Havird Jones, Jr., S.C. Assistant Deputy Attorney Gen. (Dec. 23, 2011), *available at* <http://s3.documentcloud.org/documents/279907/doj-south-carolina-voting.pdf> (denying preclearance to South Carolina’s voter ID law, noting that “minority registered voters were nearly 20% more likely to lack” the requisite identification and that while “non-white voters comprised 30.4% of the state’s registered voters, they constituted 34.2% of registered voters who did not” possess the mandated identification).

66. See Tokaji, *supra* note 60, at 816–17 (suggesting the appearance of political motivation created by granting preclearance apparently without even considering the prepared memorandum of the career staff); POSNER, *supra* note 65, at 15 (noting that, despite a longstanding practice, the memorandum was not even sent to the Assistant Attorney General before preclearance was granted).

67. See Kennedy, *supra* note 55, at 220 (observing that, of the investigation team, those who had recommended denying preclearance were reprimanded while the lone supporter of preclearance was financially rewarded); POSNER, *supra* note 65, at 13–15 (concluding that the lack of consideration given the recommendations of the career staff raises “questions about the DOJ’s commitment to nonpolitical decisionmaking”); see also Dan Eggen, *Staff Opinions Banned in Voting Rights Cases*, WASH. POST, Dec. 10, 2005, at A3 (discussing a new Justice Department policy of excluding the recommendations of staff members from preclearance decisions).

68. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005) (internal quotation marks omitted).

69. *Id.*

70. *Id.* at 1332–33 (citing a statement by Secretary Cox in which she noted that in the nine preceding years there had not been a “single case or complaint of a voter impersonating another voter at the polls,” while during the same period there had been consistent cases of fraud involving absentee voting); David H. Harris, Jr., *Georgia Photo ID Requirement: Proof Positive of the Need to Extend Section 5*, 28 N.C. CENT. L.J. 172, 185 (2006) (noting that under the new law, any voter could receive an absentee ballot without the need to provide any proof of identification).

significantly more likely to vote absentee than African-Americans.<sup>71</sup> Subsequently, Georgia abandoned the law and amended it with a new statute in 2006.<sup>72</sup>

The infiltration of politics into the decisionmaking process vitiates Section 5 and these examples of potential political abuse beg for reform to better ensure protection and insulation of the system from bias.

## 2. *The Effects of Section 5*

Section 5 has been tremendously successful. Since its passage in 1965, the covered jurisdictions have experienced massive gains in minority voter registration and turnout.<sup>73</sup> Enormous increases in the number of minority elected officials correspond with this growth in registration and turnout. In 1965 there were roughly 300 African-American elected officials nationally,<sup>74</sup> compared to over 9,100 in 2006.<sup>75</sup> Over 46% of these 9,100 officials hold office in covered jurisdictions.<sup>76</sup> While these numbers alone cannot show the entire picture, they suggest a transformation of the political system in the covered jurisdictions into something more in line with the ideals of the Fifteenth Amendment.

## II. THE DEBATE ON SECTION 5'S CONSTITUTIONALITY

### A. *Why It Was Constitutional*

When Congress passed the VRA in 1965, it did so by reference to section 2 of the Fifteenth Amendment, identifying the VRA as "appropriate legislation" to enforce the prohibitions against abridgments on the right to

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71. *Common Cause/Georgia*, 406 F. Supp. 2d at 1353 (citing statistics from the 2004 Georgia elections showing that 12% of registered white women compared to 7% of registered African-American women voted absentee, and 11% of white men compared to 6% of African-American men voted absentee).

72. Harris, *supra* note 70, at 188.

73. See S. REP. NO. 109-295, at 11 (2006). Voter registration for African-Americans in all the covered states was over 50% in 2004 with seven states boasting rates higher than the national average of 64.3%. *Id.* There are also some notable examples of massive improvement, such as Mississippi's increase from a registration rate of 6.4% in 1965 to a registration rate of 76.1% in 2004, and Alabama's increase from a rate of 18.5% in 1965 to a rate of 72.9% in 2006. *Id.*

74. Charles S. Bullock, III & Ronald Keith Gaddie, *Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 GEO. J.L. & PUB. POL'Y 1, 7 (2007).

75. S. REP. NO. 109-295, at 12 (noting that there are also roughly 6,000 Latino public officials nationally).

76. Bullock & Gaddie, *supra* note 74, at 7.

vote.<sup>77</sup> Almost immediately, South Carolina challenged the constitutionality of some key sections, including Section 5 and the coverage formula in Section 4(b).<sup>78</sup> While South Carolina asserted multiple objections to provisions of the VRA, the core question before the Court became whether “Congress exercised its powers under the *Fifteenth Amendment* in an appropriate manner with relation to the States.”<sup>79</sup> In determining the standard of review, the Court stated that when considered “against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting.”<sup>80</sup> The reasonable and vitally important implication is that the Fifteenth Amendment, and “appropriate legislation” passed in its enforcement, supersedes the constitutional rights of the states.<sup>81</sup>

In its analysis, the Supreme Court recognized that Section 5 may be an “uncommon exercise of congressional power” but it also stated that whether the legislation is appropriate depends on the conditions and circumstances facing Congress.<sup>82</sup> The Court acknowledged that case-by-case litigation had been ineffective at dealing with voting discrimination,

77. See U.S. CONST. amend. XV, § 2 (granting Congress the authority to enforce the Fifteenth Amendment through “appropriate legislation”); see also H.R. REP. NO. 89-439, at 17–19 (1965) (arguing that given the situation of “persistent racial discrimination,” the VRA is “appropriate legislation” to enforce the right to vote). But see *id.* at 73–76 (views of Representative William M. Tuck) (stating that the coverage formula of the VRA is “arbitrary and indiscriminate” and that the Act is a “flagrant violation of the Constitution”).

78. *South Carolina v. Katzenbach*, 383 U.S. 301, 317 (1966).

79. *Id.* at 323–24 (emphasis added). The Court dismissed South Carolina’s contention that the coverage formula is a violation of due process, “constitute[d] a forbidden bill of attainder,” and infringed on the principle of separation of powers, ruling that these protections were only available to “individual persons and private groups” and were thus not applicable to States. See *id.*

80. *Id.* at 324–26 (emphasis added) (internal quotation marks omitted) (reaching this standard based on the fact that the Constitution supersedes state law, explicitly grants Congress power to enforce the right to vote “by appropriate legislation,” and prior precedent has granted Congress “full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”). The Court quoted precedent concerning Congress’s power under the Civil War Amendments:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

*Id.* at 327 (quoting *Ex parte Virginia*, 100 U.S. 339, 345–46 (1879)).

81. See *id.* at 325 (recognizing that “the Fifteenth Amendment supersedes contrary exertions of state power” and that Congress is granted express authority to enforce the guarantees of the Amendment).

82. See *id.* at 334.

noting for emphasis a suit in Dallas County that lasted over four years and had no marked effect on minority voter registration.<sup>83</sup> The Court then turned to the coverage formula and found that Congress had reliable information indicating most of the covered jurisdictions had engaged in voting discrimination.<sup>84</sup> The Court ultimately upheld Section 5 with its decision hinging on two key findings: first, Congress knew of the persistence and creativity of the methods of voting discrimination; and second, Congress had reason to believe the covered states “might try similar maneuvers in the future in order to evade the remedies” of the VRA.<sup>85</sup> Given these “exceptional conditions” and “unique circumstances,” the Court concluded that the VRA, including Section 5, was appropriate legislation under section 2 of the Fifteenth Amendment.<sup>86</sup>

South Carolina also challenged the coverage formula by arguing voting discrimination did not exist in *all* of the covered jurisdictions. The Court was not swayed, holding instead that the formula “was relevant to the problem of voting discrimination,” and thus Congress could “infer a significant danger of the evil in [those] few remaining” covered jurisdictions.<sup>87</sup> By looking to aggregate inferences, the Court thereby indicated it would not require evidence of discrimination in every political subdivision that was brought under Section 5 coverage.

#### B. Section 5’s Continuing Constitutionality

The question of the present constitutionality of Section 5 is the subject of vigorous legal discussion. While this debate has persisted since the initial enactment of the VRA and Section 5, the ever-increasing age of the coverage formula and the clear advancements in racial equality have sharpened the disagreement. In particular, the dicta of the 2009 Supreme Court decision in *Northwest Austin Municipal Utility District Number One v. Holder* (*NAMUDNO*)<sup>88</sup> greatly increased the probability of the Supreme Court

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83. *See id.* at 314–15 (noting that at the end of the four years, only 383 of about 15,000 voting age African-Americans were registered to vote in Dallas County, indicating almost no improvement in voting equality as a result of the litigation). The Court noted that Congress viewed this as an example of the “ineffectiveness of existing legislation” and a clear indication of the need for new means of enforcing the constitutional guarantees of the Fifteenth Amendment. *Id.*

84. *See id.* at 329–30 (requiring nothing more than “reliable evidence” of voting discrimination and a coverage formula that is “relevant to the problem” to hold that coverage is constitutional).

85. *Id.* at 335.

86. *Id.* at 334–35.

87. *Id.* at 329.

88. 129 S. Ct. 2504 (2009).

overturning Section 5 in its current form.

1. *Concerns About the Coverage Formula*

A central issue in the debate on Section 5's constitutionality is the coverage formula. Congress set out an explicit formula in the VRA, and DOJ has no authority to modify it.<sup>89</sup> Despite calls by some prominent legal scholars to update the coverage of Section 5 in the 2006 Reauthorization Act,<sup>90</sup> Congress chose not to amend the formula.<sup>91</sup> Considering the political issues involved with any attempt to reform the coverage of Section 5, this is not surprising.<sup>92</sup> But this means that coverage continues to be based on the conditions of the country in 1964, 1968, and 1972.

One of the most common criticisms of the coverage formula is that the outdated formula results in coverage that is increasingly both over- and under-inclusive.<sup>93</sup> While any set coverage formula will inevitably be imperfect, those imperfections will be exacerbated as the underlying data age and demographics change. Congress did, however, amass an extensive record of evidence supporting the proposition that purposeful voting discrimination is still a significant problem in many of the covered jurisdictions.<sup>94</sup> Since the Supreme Court has never required Congress to

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89. See 42 U.S.C. § 1973b(b) (2006) (basing coverage on a static set of data from the 1964, 1968, and 1972 elections).

90. See, e.g., *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School) (noting the inconsistency between the data on which Congress relied and the voter turnout today, and calling for a new coverage formula that better represents the location of current and future voting discrimination); Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 HOW. L.J. 717, 723–24, 727–30 (2006) [hereinafter Persily, *Options and Strategies*] (arguing that the currently covered jurisdictions may no longer represent the worst offenders of voting rights and advancing possible triggers based on patterns of legal violations or “some measure of partisan competition” within the jurisdiction); *supra* note 11 and accompanying text.

91. See Persily, *Promise and Pitfalls*, *supra* note 23, at 207.

92. See *id.* at 210–11 (discussing political obstacles to expanding the coverage of Section 5 including the fact that Congress was controlled by Republicans when many of the uncovered jurisdictions with significant and recent alleged voting discrimination were Republican-leaning districts).

93. See 152 CONG. REC. 14,273–74 (2006) (statement of Rep. Charlie Norwood) (arguing that the VRA has resolved the offenses that it targeted in 1964 and that the coverage formula should be updated to ensure protection for all areas needing it); Thornstrom, *supra* note 9, at 47, 72–76 (calling the current coverage “increasingly arbitrary” as demographics shift and race relations evolve); see also *supra* note 12 and accompanying text.

94. See, e.g., *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the*

prove the existence of voting discrimination in *all* the jurisdictions that ultimately fall under coverage, it is possible the Supreme Court may find this legislative record sufficient to justify the reauthorization of Section 5.<sup>95</sup> But beyond the Supreme Court's potential concerns, the over- and under-inclusiveness of the coverage formula raises issues of effectiveness and fairness. Congress confronted the problem of over-inclusiveness by implementing a bailout provision.<sup>96</sup> While this provision is not perfect,<sup>97</sup> it does provide covered jurisdictions with an avenue to remove coverage and thus, to some degree, allows coverage to adapt to advances in voting equality. Congress also confronted the issue of under-inclusiveness through Section 3(c), sometimes referred to as the "pocket trigger" or "bail-in mechanism,"<sup>98</sup> which allows a court, in granting relief in a voting rights proceeding, to "retain jurisdiction for such period as it may deem appropriate" and thus essentially require the jurisdiction seek preclearance from that court or from DOJ.<sup>99</sup> Despite their usefulness, these two provisions have been used sparingly and have not had much effect on Section 5's coverage.<sup>100</sup>

While the over-inclusiveness of the coverage formula may pose a significant challenge to the constitutionality of Section 5, its under-inclusiveness will also be an important factor. Indeed, some of the most

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*Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Voting Rights Act: Evidence of Continued Need*] (consisting of a record of over four thousand pages supporting the continued need for coverage in many of the currently covered areas); *infra* note 105 and accompanying text.

95. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 329 (1966) (finding the evidence that voting discrimination existed in a "great majority" of the covered jurisdictions sufficient).

96. *See* 42 U.S.C. § 1973b(a) (2006) (allowing jurisdictions to bail out of coverage if they prove a specific set of factors); *see supra* note 35–41 and accompanying text.

97. *See supra* note 41 and accompanying text.

98. Travis Crum, Note, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 *YALE L.J.* 1992, 1997 (2010).

99. 42 U.S.C. § 1973a(c); 28 C.F.R. § 51.8 (2011).

100. *See NAMUDNO*, 129 S. Ct. 2504, 2519 & n.1 (2009) (Thomas, J., concurring in the judgement in part and dissenting in part) (noting that only seventeen jurisdictions have successfully bailed out of Section 5 coverage, and all were within the state of Virginia and represented by the same attorney); NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 34 (2006), available at <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/lccr2.pdf> (stating that Section 3(c), called the "pocket trigger," has been used sparingly but has "served as an important deterrent to discrimination where it has been used"); *cf. Jeffers v. Clinton*, 740 F. Supp. 585, 600 (E.D. Ark. 1990) (observing the scarcity of cases discussing Section 3(c) and noting that none clarify the situations under which Section 3(c) should be used). For a historical account of Section 3(c), see Crum, *supra* note 98, at 2010–15.

flagrant violations of voting rights occur in uncovered jurisdictions.<sup>101</sup> It is unclear if any of these violations represent a systematic discriminatory approach, thus warranting possible Section 5 coverage. What is clear is that in analyzing Section 5's constitutionality, the Supreme Court will consider whether voting discrimination is "concentrated in the jurisdictions singled out for preclearance."<sup>102</sup> In answering this question, both the over- and under-inclusiveness of the coverage will be carefully examined. Thus, any recommended reforms aimed at strengthening the constitutionality of Section 5 must confront both issues.

## 2. *Why Section 5 Remains a Constitutional Exercise of Congressional Power*

Congress created Section 5's coverage formula to single out those jurisdictions with the "longest and most egregious histories of entrenched voting discrimination."<sup>103</sup> Thus, evidence of voting discrimination in uncovered jurisdictions, standing alone, is insufficient to support a conclusion that Section 5 is no longer constitutional. To answer the question of constitutionality, it must be determined whether voting discrimination and the risk of future discrimination still exist in covered jurisdictions at sufficient levels to justify singling them out for coverage.<sup>104</sup> The record Congress amassed in support of the 2006 Reauthorization Act is enormous, numbering over 15,000 pages and including numerous hearings, statements, studies, and documented instances of

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101. See Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 654–58 (2006) (discussing voting discrimination cases since 1982 and finding significant violations in both covered and uncovered jurisdictions); Persily, *Promise and Pitfalls*, *supra* note 23, at 208 (noting that Section 5 "does not cover counties in Ohio and Florida with the most notorious voting rights violations in recent elections"); Swain, *supra* note 12, at 32 (listing some of the voting rights violations that have occurred in uncovered states and advocating an expansion of coverage).

102. *NAMUDNO*, 129 S. Ct. at 2512 (majority opinion).

103. Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 389 n.16 (2008) (noting that the coverage formula was never meant to cover *all* jurisdictions that engaged in voting discrimination and that other sections of the VRA provide remedies to voters in those uncovered jurisdictions); see also *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 506 (D.D.C. 2011) (recognizing that by not changing the coverage formula in the 2006 Reauthorization Act, "Congress ensured that Section 4(b) would continue to focus on those jurisdictions with the worst *historical* records of voting discrimination").

104. See *NAMUDNO*, 129 S. Ct. at 2510, 2512 (recognizing that Section 5 had been upheld in the past based on a determination that "circumstances continued to justify the provisions," and questioning whether coverage still accurately represented jurisdictions with a disproportionate tendency towards racial discrimination).

discrimination.<sup>105</sup> It provides convincing support for the continued need for Section 5.

Despite the undeniable improvement in overall race relations, strong evidence exists to support the assertion that voting discrimination is still entrenched in many of the covered jurisdictions.<sup>106</sup> Voting discrimination lawsuits filed under Section 2 of the VRA<sup>107</sup> provide a means for comparison between covered and uncovered jurisdictions. These lawsuits could support a finding that covered areas still warrant being singled out. In a comparison of 331 lawsuits involving alleged Section 2 violations since 1982, a study by the Voting Rights Initiative found that of the 123 that resulted in a successful outcome for the plaintiff, 68 (about 55%) came from covered jurisdictions.<sup>108</sup> This is especially significant considering that less than 25% of the national population resides in covered jurisdictions.<sup>109</sup>

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105. S. REP. NO. 109-295, at 10 (2006). Rep. Chabot noted that since October 2005, the Subcommittee on the Constitution alone “held 12 hearings, heard from 47 witnesses, and compiled over 12,000 pages on the Voting Rights Act.” 152 CONG. REC. 14,222 (2006) (statement of Rep. Chabot). Representative Sensenbrenner called the record “one of the most extensive considerations of any piece of legislation that the United States Congress [had] dealt with” during his twenty-seven years in Congress. *Id.* at 14,230 (statement of Rep. Sensenbrenner).

106. *See* H.R. REP. NO. 109-478, at 25–53 (2006) (outlining the committee’s findings of the continued existence of substantial discrimination in the covered areas). In a statement given on the floor of the Senate in support of the 2006 VRA reauthorization, Senator Kennedy recognized the “unimaginable” amount of progress that has been made since the VRA was first passed in 1965, but went on to note:

While we have made enormous progress, it takes time to overcome the deep-seated patterns of behavior that have denied minorities full access to the ballot. Indeed, the worst thing we could do would be to allow that progress to slip away because we ended the cure too soon. We know that the act is having an impact. We know that it is deterring discrimination. And we know that despite the act, racial bloc voting and other forms of discrimination continue to tilt the playing field for minority voters and candidates. We need to ensure that jurisdictions know that the act will be in force for a sufficiently long period that they cannot simply wait for its expiration, but must eliminate discrimination root and branch.

152 CONG. REC. 15,279 (2006) (statement by Sen. Kennedy).

107. 42 U.S.C. § 1973 (2006) (prohibiting any voting procedure or practice that “results in a denial or abridgement of the right . . . to vote on account of race” and applying this prohibition to all jurisdictions).

108. Katz *et al.*, *supra* note 101, at 654–56. This also translated into a higher success rate for plaintiffs in covered jurisdictions, who won 42.5% of their lawsuits compared to 32.2% for plaintiffs in uncovered jurisdictions. *See id.* at 656. This study only encompasses a fraction of the total Section 2 litigation since there are many factors such as settlement, failure to pursue a claim, or failure to publish an opinion, which make the total number unknown. *See id.* at 654.

109. *See id.* at 655. In the oral arguments for *NAMUDNO* before the Supreme Court, Neal Katyal, Counsel for the Department of Justice, cited this statistic in response to Justice

This disparity is even more substantial because the covered jurisdictions have what Professor Karlan has called the added “deterrent” and “blocking” effects of Section 5.<sup>110</sup> Such studies support the assertion that voting discrimination has not been purged from the covered jurisdictions and is still present at a disproportionate level when compared to the uncovered jurisdictions.

Proposed voting changes and corresponding preclearance objections also provide evidence of continued entrenchment of racial discrimination in covered jurisdictions. In a study analyzing DOJ preclearance objections, discriminatory intent or purpose was a legal basis for 74% of objections handed down in the 1990s.<sup>111</sup> This further supports the contention that intentional voter discrimination is still present in the covered jurisdictions. Notably, between 1965 and 2005, not one Louisiana redistricting plan, in its initially submitted form, has received preclearance.<sup>112</sup> Louisiana is not

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Kennedy’s question of whether the situation continued to justify the “differentiation between the States.” Transcript of Oral Arguments at 35, *NAMUDNO*, 129 S. Ct. 2504 (2009) (No. 08-322), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-322.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf).

110. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 22 (2007) (describing Section 5 as having a “blocking function” that prevents the enactment of discriminatory changes through the denial of preclearance and a “deterrent function” that inhibits covered jurisdictions from even attempting to make a change they know will likely be denied); *see also* LAUGHLIN McDONALD & DANIEL LEVITAS, *THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT: VOTING RIGHTS LITIGATIONS, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION* 4 (2006), [http://www.aclu.org/files/votingrights/2005\\_report.pdf](http://www.aclu.org/files/votingrights/2005_report.pdf) (stating that since 1982 there have been over 1,000 instances in which DOJ has denied preclearance for voting changes). It is important to note that preclearance objections have dropped off significantly since the mid 1990s. *See* Bullock & Gaddie, *supra* note 74, at 18 (citing a notable drop in Mississippi from a high of sixty-seven to a low of eleven from 1975 to 1984 and 1995 to 2005, respectively). This is due, at least in part, to the Supreme Court’s decision in *Reno v. Bossier Parish School Board*, where the Court limited the purpose prong of Section 5 to prohibit only those voting changes enacted with a retrogressive purpose, and not those enacted with merely a discriminatory purpose. 528 U.S. 320, 341 (2000). This was subsequently reversed in the 2006 reauthorization when Congress amended Section 5 to state, “The term ‘purpose’ . . . shall include any discriminatory purpose.” Fannie Lou Harris, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5(3), 120 Stat. 577, 581 (codified at 42 U.S.C. § 1973c(c)).

111. *See* Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292–99 (2006) (compared to 47% of objections in the 1980s).

112. *See* *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2005) (statement of Marc Morial, President and CEO, National Urban League) (“In other words, in the last 40 years, every single State House redistricting plan adopted immediately after the census and submitted for preclearance in Louisiana has been found both by Republican and

the only jurisdiction to have its redistricting proposals denied preclearance, and if not for Section 5 these redistricting plans might have significantly reduced the voting power of minorities in those jurisdictions.<sup>113</sup> Considering that redistricting plans are often in effect for at least a decade, they can be an extremely effective means of marginalizing the voting power of minorities: in this regard, the importance of Section 5 cannot be overstated.<sup>114</sup> Beyond examples of attempted voting discrimination, there is the additional deterrent effect of preclearance, which has likely prevented numerous discriminatory changes from ever being proposed—but this deterrent effect is so far impossible to measure.<sup>115</sup>

Unlike most situations where a court analyzes the constitutionality of a remedial statute, this is not a case where Congress promulgated the statute for the first time.<sup>116</sup> In reauthorizing the VRA, Congress dealt with an existing statute, and courts should acknowledge that for the past forty-seven years Section 5 has been actively preventing the type of discrimination that initially justified it as a constitutional remedy.<sup>117</sup> The very effectiveness of Section 5 will thus have an obvious and significant impact on the ability of Congress to amass evidence of continued need.<sup>118</sup> While a court should not simply show obeisance to Congress and defer to its conclusions, it should

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Democratic Attorneys General to abridge the right to vote on account of race or color or membership in language in a minority group.”).

113. In 2001, Texas proposed a redistricting plan that, despite increases in the Latino population, would have eliminated four Latino majority districts while adding only one such district. *See id.* at 19 (statement of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Educational Fund). A proposed 1982 Louisiana redistricting plan would have resulted in “one majority-African-American district and 4 majority-white districts in a ward that was 61% African American.” *Voting Rights Act: Evidence of Continued Need*, *supra* note 94, at 4532–33 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.).

114. *See Voting Rights Act: Evidence of Continued Need*, *supra* note 94, at 4534 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.) (“Section 5’s role in ensuring that minority political opportunities do not get trampled during redistricting has protected the rights of untold numbers of minority voters.”).

115. *See id.* at 4529 (reasoning that jurisdictions are less likely to enact discriminatory voting changes if they know they will have to seek preclearance and thus publically explain and defend those proposed changes); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 192 (2005).

116. Persily, *Promise and Pitfalls*, *supra* note 23, at 193 (“The new VRA was quite different from other laws either upheld or struck down post-*Boerne*: (1) the bill proposed renewal of existing legislation, not drafting a law from scratch; and (2) the law would not apply nationwide.” (footnotes omitted)).

117. *See id.* at 193–94; *supra* note 110 and accompanying text.

118. *See* Hasen, *supra* note 115, at 188; Persily, *Promise and Pitfalls*, *supra* note 23, at 207; Pitts; *supra* note 11, at 257–58.

judge the VRA accordingly by applying a slightly different measure than it would in the examination of a newly passed statute. It should place greater weight on evidence indicating possible deleterious effects of removing the statute,<sup>119</sup> and correspondingly require less evidence of the egregious types of violations the statute was intended to prevent.

Congress enacted the VRA “to foster our transformation to a society that is no longer fixated on race.”<sup>120</sup> This has yet to be fully realized. While Section 5 has prevented the enforcement of discriminatory practices, it has yet to cure the behavior and mentality that is the root of the problem.<sup>121</sup> Since case-by-case adjudication of voting discrimination remains as ineffective today as it was in 1965,<sup>122</sup> and there is still a disproportionate risk of voting discrimination in the covered jurisdictions,<sup>123</sup> the circumstances continue to justify Section 5.<sup>124</sup> Section 5 therefore remains a constitutional exercise of Congress’s power.<sup>125</sup>

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119. See Persily, *Promise and Pitfalls*, *supra* note 23, at 194 & n.76 (“Evidence that a law is being complied with is not a reason to do away with it. If there were an environmental regulation that limited pollution levels, cleaner air would not signify that it is no longer needed, but rather that it is sufficiently serving its purpose. So long as the risk of pollution continues that law would need to be renewed.” (quoting *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 62 & n.34 (2006) (statement of Anita Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights)); see also H.R. REP. NO. 109-478, at 57 (2006) (calling the advancement made by minorities in the covered jurisdictions “fragile”); Karlan, *supra* note 110, at 21–22 (arguing that there is a significant risk “that backsliding could occur in the absence of the Act’s substantive and procedural protections”); cf. Hasen, *supra* note 115, at 188 (“If Congress cannot point to actual incidents of discrimination, it might examine instead the hypothetical question whether covered jurisdictions would engage in intentionally discriminatory voting practices and procedures if Section Five were *not* renewed.”).

120. *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003).

121. See, e.g., Karlan, *supra* note 110, at 21–22; *supra* notes 106–15 and accompanying text.

122. If anything, it is less effective today. See Douglas, *supra* note 30 (discussing the effects of the Courts recent movement toward allowing only as-applied challenges to election laws).

123. See *supra* notes 106–115 and accompanying text.

124. *NAMUDNO*, 129 S. Ct. 2504, 2510 (2009).

125. See, e.g., *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011); A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 614–15 (2010) (arguing that the Constitution, and in this case the Reconstruction Amendments, gives Congress the discretion to choose what remedies are appropriate to combat unconstitutional behavior); Clarke, *supra* note 103, at 432–33 (noting the substantial legislative record that Congress amassed in support of the continued need for Section 5 protections, asserting that it is similar to the records supporting past reauthorizations, and concluding that courts will continue to hold Section 5 constitutional); Mark A. Posner, *Time is Still on Its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to Our Nation’s*

C. *What's Next?*

Since a Supreme Court decision on the constitutionality of Section 5 will likely come down to whether it deems the legislative findings adequate to support the need for Section 5, the outcome implicitly depends on “judicial attitudes and the Justices [sic] own views about the legislation under review.”<sup>126</sup> For those who support Section 5 and its continuation, the Supreme Court’s decision in *NAMUDNO* brought dark tidings. While technically avoiding the issue of constitutionality and instead reaching a decision based on statutory interpretation,<sup>127</sup> the Court included language that clearly indicates it has serious concerns about the constitutional muster of Section 5. One of these concerns centers on whether the coverage of Section 5 represents the “current political conditions,” given that the data used for the coverage formula is over thirty-five years old.<sup>128</sup> The Court recognized Section 5’s success, but made clear that “the Act imposes current burdens and must be justified by current needs.”<sup>129</sup> While the Court did not clarify whether it would apply the new “congruence and proportionality” standard established in *City of Boerne v. Flores*,<sup>130</sup> or the traditional, less demanding<sup>131</sup> “rational means” test used in *South Carolina v. Katzenbach*,<sup>132</sup> it recognized “serious constitutional questions under either

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*History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51, 87–105, 130–31 (2006) (providing an in-depth analysis of how the congruence and proportionality test applies to Section 5 and concluding that if the Court applies this standard correctly and gives proper deference to the legislative record, it should uphold the constitutionality of Section 5).

126. Fuentes-Rohwer, *supra* note 15, at 104, 130 (concluding that the question of the constitutionality of Section 5 will also come down to “whether the Court can muster the will to strike down the most effective civil rights statute in history”); see Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 701 (2009) (asserting that in the past the Court has deferred to Congress and refused to subject the VRA to serious scrutiny, thus making the future question of constitutionality simply a matter of whether the Court will continue this deference).

127. See *NAMUDNO*, 129 S. Ct. at 2516–17 (avoiding the constitutional question and instead ruling that “political subdivisions,” within the meaning of the VRA, includes the appellant and thus allows the appellant to apply for a bailout from coverage).

128. *Id.* at 2512.

129. *Id.*

130. 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”); see also *Shelby Cnty.*, 811 F. Supp. 2d at 461–62 (concluding that the congruence and proportionality test is the appropriate standard for reviewing Section 5).

131. See *Crum*, *supra* note 98, at 2002 & n.53.

132. 383 U.S. 301, 324 (1966) (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”); see also *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 241 (D.D.C. 2008) (ruling that the rational means test governs the review of

test.”<sup>133</sup> Because the Court avoided the constitutional question, much of its discussion on this issue had nothing to do with the ultimate holding—which makes such dicta portentous. The *NAMUDNO* opinion seems to go out of its way to question the constitutional standing of Section 5 even while ultimately avoiding the issue, and this may be a not-so-thinly veiled warning of things to come.

Any defense of the constitutionality of Section 5 must center on its current need and the legislative record compiled during its passage. To justify the continued differential treatment of covered areas, Congress must not only show the subsistence of voting rights violations, but also that some “systematic *differences* exist between the currently covered and non-covered jurisdictions.”<sup>134</sup> In his testimony to Congress, Professor Pildes stressed that modern-day voter discrimination, which often involves vote dilution instead of outright violence, is different from the issues for which the VRA was originally created to target and is no longer “concentrated in any one discrete part of the country.”<sup>135</sup>

Also important to the debate is the undeniable success of Section 5. This success has, in many cases, prevented discriminatory actions by covered jurisdictions from ever going into effect, either through deterrence or denial of preclearance, and has thus further diminished the evidence of purposeful discrimination in covered areas.<sup>136</sup> These factors have led some scholars to question seriously whether Section 5 will survive the Supreme Court’s test for constitutionality.<sup>137</sup>

Despite the tone of the *NAMUDNO* decision, which is somewhat hostile to Section 5, the Supreme Court did not actually strike down Section 5. Scholars have advanced some possible explanations for this: first, and most hopeful for supporters of Section 5, is that there simply were not enough

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Section 5), *rev'd on statutory grounds*, *NAMUDNO*, 129 S. Ct. 2504.

133. *NAMUDNO*, 129 S. Ct. at 2513.

134. *The Continuing Need For Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2006) (statement of Professor Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law).

135. *Id.* at 202.

136. See Hasen, *supra* note 115, at 188; Pitts, *supra* note 11, at 257–58.

137. See, e.g., Clegg & Chavez, *supra* note 12, at 564, 580–81 (arguing that the lack of an adequate legislative record, when combined with the violation of federalism, makes Section 5 an unconstitutional exercise of Congress’s authority); Hasen, *supra* note 115, at 206–07 (concluding that it is unclear whether Congress will be able to amass sufficient evidence to satisfy the congruence and proportionality test especially considering the increased weight the Court has put on federalism concerns in recent years); Pitts, *supra* note 11, at 249–68 (providing an in-depth discussion on this question and concluding that Section 5 will likely not meet the congruence and proportionality test).

votes;<sup>138</sup> and second, that the conservatives on the Supreme Court did not want the inevitable political firestorm that would have resulted had the Court struck down the VRA in what would likely have been a 5–4 decision.<sup>139</sup> This second explanation—undeniably implicating the politics of the Court—means that the future of Section 5 may hinge on the unpredictability of the Supreme Court’s tolerance for controversy and the willingness of the individual justices to dismantle “one of the crown jewels of the civil rights movement.”<sup>140</sup> A third possible explanation views *NAMUDNO* as a call on Congress to act and amend the VRA.<sup>141</sup> One thing is certain: the constitutionality of Section 5 under the current Supreme Court is highly questionable at best.<sup>142</sup> The following recommendations will bring Section 5’s scope and application more clearly

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138. See Richard L. Engstrom, *NAMUDNO: A Curveball on Voting Rights*, 30 JUST. SYS. J. 351, 358 (2009); Linda Greenhouse, *There’s Always Another Day*, SLATE.COM (June 22, 2009, 1:39PM), [http://www.slate.com/articles/life/the\\_breakfast\\_table/features/2009/the\\_supreme\\_court\\_breakfast\\_table/theres\\_always\\_another\\_day.html](http://www.slate.com/articles/life/the_breakfast_table/features/2009/the_supreme_court_breakfast_table/theres_always_another_day.html).

139. See Engstrom, *supra* note 138, at 358; E.J. Dionne, Jr., *Court Immunity?*, NEW REPUBLIC (July 1, 2009, 12:00 AM), <http://www.tnr.com/article/politics/court-immunity> (“What’s likely is that one or two conservative justices (probably Anthony Kennedy or possibly Samuel Alito) realized that overturning an act of Congress simply because a narrow court majority decided it was outdated would be rightly seen as an outrageous form of judicial activism.”).

140. Fuentes-Rohwer, *supra* note 15, at 130.

141. Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 999 (2009) (“The [*NAMUDNO*] Court structured its opinion to encourage, to prod, and—almost certainly—to require Congress to act.”).

142. Multiple cases concerning the constitutionality of Section 5 are making their way through the judicial system and it seems inevitable that at least one will make its way to the Supreme Court, possibly even before the 2012 presidential election. One such case, currently before the U.S. Court of Appeals for the District of Columbia Circuit, is *Shelby County v. Holder*, 811 F. Supp. 2d 424, 508 (D.D.C. 2011) (granting summary judgment for the Attorney General). In a second case, which involves Texas’s request for preclearance for a voter ID law and is currently before a three-judge panel of the District Court for the District of Columbia, Texas recently filed an amended complaint raising a direct challenge to Section 5’s constitutionality. See Tim Eaton, *State Tries to Force Challenge of U.S. Voting Law*, AUSTIN AM.-STATESMAN (Mar. 14, 2012, 10:50 P.M.), [http://www.statesman.com/news/texas-politics/state-tries-to-force-challenge-of-u-s-2238744.html?cxttype=rss\\_texas-politics](http://www.statesman.com/news/texas-politics/state-tries-to-force-challenge-of-u-s-2238744.html?cxttype=rss_texas-politics). Since a decision by the three-judge panel is appealable directly to the Supreme Court, and a denial of that appeal, unlike a denial of certiorari, is considered a “decision on the merits” and an affirmation of the lower court opinion, it is possible that this case will leapfrog *Shelby County* and could even be decided by the Supreme Court in 2012. See Richard L. Hasen, *Holder’s Voting Rights Gamble*, SLATE (Dec. 30, 2011, 1:09 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/the\\_obama\\_administration\\_s\\_risky\\_voter\\_id\\_move\\_threatens\\_the\\_voting\\_rights\\_act.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_obama_administration_s_risky_voter_id_move_threatens_the_voting_rights_act.html); Richard Hasen, *Texas Ups Ante in Its Voter ID Case, Says Voting Rights Act is Unconstitutional: Case Could Reach SCOTUS Before Election*, ELECTION L. BLOG (Mar. 14, 2012, 10:14 PM), <http://electionlawblog.org/?p=31583>.

within the Court's constitutional limits and thus help save this foundational measure of the Civil Rights movement.

### III. RECOMMENDATIONS

The United States has made great strides toward equality since the passage of the Voting Rights Act.<sup>143</sup> Despite this, discrimination still poisons the voting system. While blatant acts of racism have decreased, there are still concerted and consistent efforts to discriminate against minority voters.<sup>144</sup> The coalescence of minorities toward a common political party<sup>145</sup> can transform discussions of institutionalized discrimination into a less polarized vocabulary as voting discrimination is more easily attributed to political motivations and biases.<sup>146</sup> Since case-by-case adjudication remains inefficient and ineffective,<sup>147</sup> Section 5 is an invaluable weapon in the enforcement of Fifteenth Amendment rights. Successful reforms must accomplish three things: first, they must reinforce the constitutionality of Section 5; second, they must increase its effectiveness at preventing voting discrimination; finally, they must help guard against political abuse in the enforcement of Section 5.

#### A. Reforms to Confront Political Bias

“A democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.”<sup>148</sup> Accordingly, to confront the potential for political bias within the preclearance decisionmaking process, Congress should enact specific reporting requirements for Section 5 and allow limited appeals of grants of preclearance. This would add more transparency and accountability to the system, and would serve as a significant safeguard for ensuring the apolitical bases for preclearance decisions.

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143. See *supra* notes 73–76 and accompanying text.

144. See *supra* Part II.B.2.

145. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 213 (rev. ed. 2009) (“By the late 1960s, all southern states contained a large bloc of black voters whose loyalty to the Democratic Party had been cemented by the events of the Kennedy and Johnson years . . . . At the same time, conservative white Southerners, joined by some migrants into the region, flocked to the Republican Party . . . .”).

146. See Cashin, *supra* note 14, at 92–103.

147. See *supra* note 122 and accompanying text.

148. Statement by the President upon Signing the “Freedom of Information Act,” 2 PUB. PAPERS 699 (July 4, 1966).

1. *Requirement for an Inclusive Administrative Record*

One such reporting requirement should be the creation of a public administrative record for every preclearance decision.<sup>149</sup> There already is a record requirement for all Section 5 submissions,<sup>150</sup> but it should be expanded and codified by statute.<sup>151</sup> This requirement should be modeled after DOJ's own 1999 guidance document and include all "documents and materials which were before or available to the decision-making office at the time the decision was made."<sup>152</sup> Additionally, to ensure transparency of the decisionmaking process, the record should also include "[d]ocuments that relate to both the substance and procedure of making the decision."<sup>153</sup> If preclearance is either denied or explicitly granted, the record should include an order laying out the evidence relied upon, the conclusions drawn from that evidence, and the reasoning behind the ultimate decision, including why any contradictory evidence was unconvincing.<sup>154</sup> There are also those situations in which DOJ simply does not respond to a request for preclearance within sixty days, thus effectively granting preclearance.<sup>155</sup> To confront this, any affected party<sup>156</sup> should be allowed to submit a request to DOJ demanding a reasoned explanation for a decision at any time up to

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149. Cf. Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Actions*, 35 OHIO N.U. L. REV. 575, 577 (2009) ("Agencies' administrative records serve as both the public's and reviewing courts' sole window on the actions and decisions of those agencies.").

150. See 28 C.F.R. § 51.50 (2011).

151. See generally James N. Saul, Comment, *Overly Restrictive Administrative Records and the Frustration of Judicial Review*, 38 ENVTL. L. 1301 (2008) (discussing ways in which agencies can limit the contents of an administrative record, thus frustrating judicial review and limiting the availability of the information, and examining possible solutions).

152. ENV'T & NATURAL RES. DIV., U.S. DEP'T OF JUSTICE, GUIDANCE TO FEDERAL AGENCIES ON COMPILING THE ADMINISTRATIVE RECORD 2 (1999) [hereinafter DOJ RECORD GUIDANCE], available at [http://environment.transportation.org/pdf/programs/usdoj\\_guidance\\_re\\_admin\\_record\\_prep.pdf](http://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf).

153. Memorandum from Pete Raynor, Assistant Solicitor, Fish Wildlife & Envtl. Prot. Branch, U.S. Dept. of the Interior to Dir., U.S. Fish and Wildlife Serv., on Guidance on Compiling an Administrative Record (Jan. 7, 2000), [http://www.fws.gov/habitatconservation/FERC\\_Policies.pdf](http://www.fws.gov/habitatconservation/FERC_Policies.pdf); see also DOJ RECORD GUIDANCE, *supra* note 152, at 2 (requiring that an administrative record "include[ ] documents and materials relevant to the process of making the agency's decision").

154. A denial of preclearance must be explained, see 28 C.F.R. § 51.44, and so should a grant of preclearance.

155. 28 C.F.R. § 51.1(a)(2).

156. The exact meaning and limitations of this term should be subject to clarification through DOJ regulation.

fourteen days after the expiration of the initial sixty days. Once a request is submitted, the jurisdiction should not be allowed to enforce the change for which they are seeking preclearance until DOJ releases an official decision, complete with all the requirements mentioned above.

Requiring an inclusive record would better ensure the process is open to public and political scrutiny, creating additional pressure to make reasoned decisions based on the law as opposed to political bias. This may result in a heavier workload for DOJ, but it is a reasonable price to pay given the importance and lasting effect of preclearance decisions.

## 2. *Allow the Appeal of Grants of Preclearance*

A record would also serve a vital role during an appeal of DOJ preclearance decisions.<sup>157</sup> Currently, a DOJ denial of preclearance is not appealable, though the jurisdiction may subsequently request preclearance—called declaratory judgment in the VRA—from the District Court for the District of Columbia, essentially resulting in a new preclearance proceeding.<sup>158</sup> This would not change. The record would serve no inherent role in the preclearance process unless the parties choose to use it in their case, and even then it would be subject to no deference.

Congress should also allow appeals of granted preclearance<sup>159</sup> to be brought by qualifying persons<sup>160</sup> before the District Court for the District of Columbia, with a two-tier system of review. For decisions that concern redistricting or explicit preconditions to voting or registering to vote—such as identification requirements or good behavior prerequisites—the standard of review should be *de novo*. This standard represents the importance of

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157. See 5 U.S.C. § 706 (2006); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (reversing and remanding based on the fact that the record before the court was not “the full administrative record that was before the Secretary at the time he made his decision”).

158. 28 C.F.R. § 51.11 (2011); see 42 U.S.C. § 1973c(a) (2006).

159. Gerken, *supra* note 15, at 718, 728 & n.65 (“[T]hose representing minority voters should have a chance to police the policer by challenging the DOJ’s decisions to preclear a change in court.”); Tokaji, *supra* note 60, at 830–32 (proposing allowing the appeal of grants of preclearance as one possible means of combating political manipulation of the Section 5 preclearance process); see Rohlf, *supra* note 149, at 577 (“With the rise of the modern administrative state and consequent influence of decisions by federal agencies over many aspects of daily life in the United States, protecting the courts’ role in reviewing the validity of federal agency decisions is crucial to safeguarding American democracy itself.”).

160. Not just anyone should be allowed to appeal a decision. One possibility is to limit it to those “who submitted letters to the DOJ when it was considering the preclearance submission.” Persily, *Options and Strategies*, *supra* note 90, at 732. At the very least, it should be limited to persons who are residents and eligible voters of the jurisdiction seeking preclearance.

decisions regarding redistricting and prerequisites to voting as well as these techniques' heightened ability to successfully discriminate against minority voters.<sup>161</sup> For appeals of other voting changes, the court should analyze DOJ's decision under the *Chevron* doctrine and overturn it only if it is "arbitrary, capricious, or manifestly contrary to the statute."<sup>162</sup> This deference would help prevent overloading the court with cases by allowing the quick dismissal of decisions reasonably supported by the record and the law. At the same time, it would help prevent politically biased preclearance decisions by permitting the court a means of overturning such cases.

### B. Reform the Bailout Provision

It is not immediately clear why so few jurisdictions have utilized the current bailout provision,<sup>163</sup> but the fact that they have not raises serious concerns about its effectiveness. To remedy this, Congress should allow the creation of a tiered bailout system with each tier representing different classes of voting changes. Congress should mandate that the current bailout requirements remain for the top tier, which would include redistricting changes and imposition of explicit prerequisites to vote or register to vote, but should give DOJ the authority to decide, through notice-and-comment rulemaking,<sup>164</sup> the specifics of the remainder of the new bailout system.<sup>165</sup> This should include the types of voting-related

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161. See Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 950 (2011) ("The minority voters' ability to elect representatives has historically been undermined through the use of the redistricting process to dilute votes from minority communities."); *supra* note 114 and accompanying text; cf. H.R. REP. NO. 89-439, at 11-12 (1965) (recognizing the prevalent use of tests and devices as prerequisites to voting in "violation of the 15th amendment"); Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 89 (2010) ("The number of redistricting plans designed to prevent minorities from exercising their voting strength is significant.").

162. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

163. Compare Hebert, *supra* note 37, at 272 (asserting that the bailout provision is "not too onerous, nor are the costs too high" and that the most likely reason so few jurisdictions have bailed out is that they simply do not know about the process), with Pitts, *supra* note 11, at 284-85 (charging that the difficulty of the bailout provision is the reason so few jurisdictions have utilized it).

164. See 5 U.S.C. § 553 (2006).

165. Cf. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 99 (1985) ("[D]elegation to administrators may become particularly attractive where the alternative preference orderings that would produce collective intransitivities are interpreted as conditional on alternative perceptions of states of the world. For in this situation it is possible that administrative research, fact-finding, or 'natural' experimentation with alternative policies will produce a unified view . . ." (citation omitted)). Given the importance and lasting effect of this reform, and the likely significant

changes comprising each tier and the applicable evidentiary requirements for a successful bailout at each level. A tiered system would allow a nondiscriminating jurisdiction, which may be discouraged by the cost and difficulty of meeting the evidentiary burden of the current bailout provision, to choose a less onerous bailout level and regain some independence over its voting system.<sup>166</sup>

The reformed bailout provision should make clear that, like the current provision, any proven acts of voting discrimination within the succeeding ten years would result in reversion to complete coverage.<sup>167</sup> This reform strengthens the constitutionality of Section 5 by directly confronting the concern of the Supreme Court that the current provision may make it too difficult for jurisdictions with no history of discrimination to bailout.<sup>168</sup> Further, as more jurisdictions successfully utilize this bailout provision, DOJ's preclearance workload would be reduced, freeing up scarce resources and increasing the agency's effectiveness at enforcing the VRA and preventing voting discrimination.

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disagreement between covered jurisdictions and minority stakeholders, DOJ should consider using consensual rulemaking and allow “[s]takeholders [to] participate directly in the development of rules rather than merely commenting on agency action.” Steven J. Balla & John R. Wright, *Consensual Rule Making and the Time It Takes to Develop Rules*, in *POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY* 187, 191 (George A Krause & Kenneth J. Meier eds., 2003) (“Given their enhanced involvement and interaction, stakeholders have incentives to eschew extreme positions, prioritize their preferences, exchange information, and in general search for common ground that can provide the basis for mutually acceptable rules.” (citations omitted)).

166. Cf. *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 223–24 (2006) [hereinafter *Introduction to the Expiring Provisions*] (statement of Professor Samuel Issacharoff, New York University School of Law) (arguing that the current bailout provision “appears unduly onerous”).

167. See 42 U.S.C. § 1973b(a)(5) (2006).

168. See *NAMUDNO*, 129 S. Ct. 2504, 2518–19 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (stating that given the combination of both objective and subjective requirements, “Bailout eligibility is a distant prospect for most covered jurisdictions [and Congress’s] promise of a bailout opportunity has, in a great majority of cases, turned out to be no more than a mirage”); *Introduction to the Expiring Provisions*, *supra* note 166, at 223–24 (“A liberalized bailout provision . . . would alleviate some of the constitutional pressure on the most suspect of the Act’s current features: the extension of the original coverage formula.”); see also *id.* at 19 (statement of Prof. Richard Hasen, Loyola Law School) (“One thing that I think would go a long way toward helping the constitutional case and also take off some of the burden in a lot of these jurisdictions is to ease the bailout requirements.”).

C. *A Means to Add Jurisdictions to Coverage*

The relatively static structure of Section 5 means that coverage cannot be adapted to respond to changes and developments in demographics, motivations, or constitutional interpretation.<sup>169</sup> As seen with certain responsibilities, such as monetary policy, the slow-moving and politically shackled arms of Congress are often not a successful means of responding to new contingencies or shifting circumstances.<sup>170</sup>

The complex responsibility of updating the coverage of Section 5 is better suited for an agency than it is for Congress. For all the congressional hearings and debates on the coverage formula during the 2006 reauthorization, changes never really stood a chance.<sup>171</sup> This is not to say that DOJ should be able to completely scrap and replace the old coverage. There is a strong rationale behind the current coverage and it should not be easily dismissed.<sup>172</sup> Congress should thus set the current coverage as the starting point, but give DOJ the ability to initiate legal proceedings by which jurisdictions may be added to Section 5 coverage.<sup>173</sup> This would

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169. See *supra* note 89 and accompanying text.

170. Cf. Alberto Alesina & Guido Tabellini, *Bureaucrats or Politicians? Part I: A Single Policy Task*, 97 AM. ECON. REV. 169, 177 (2007) (“Bureaucrats want to signal their competence for career concerns, politicians for reelection purposes. . . . Politicians are preferable if ability is less important than effort or if there is little uncertainty about whether the policymaker has the required abilities; bureaucrats are preferable in the opposite case. This result is consistent with the observation that highly technical tasks (monetary policy, regulatory policies, public debt management) are typically delegated to high-level bureaucrats.”); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 777 (1999) (arguing that because of reelection concerns politicians “may neglect longer term social problems whose solutions require immediate sacrifices for delayed gains, problems that demand as much of the legislators’ attention, prudence, and political courage as they can muster”). Additionally, public participation at the agency level can mean better and more effective solutions and approaches. *Id.* at 781–83 (“[T]he agency is where the public can best educate the government about the true nature of the problem that Congress has tried to address. Only the interested parties, reacting to specific agency proposals for rules or other actions, possess (or have the incentive to acquire) the information necessary to identify, explicate, quantify, and evaluate the real-world consequences of these and alternative proposals.”).

171. See Seaman, *supra* note 35, at 42–43 (“[A]ny dramatic change to Section 5’s scope—no matter how effective or well-intentioned—probably was politically unfeasible because it could have caused an unraveling of the bipartisan coalition that shepherded the bill to passage.”); *supra* note 92 and accompanying text. There was also the difficulty of finding a new “neutral” coverage formula that would have successfully extended coverage to the desired jurisdictions. Persily, *Promise and Pitfalls*, *supra* note 23, at 209.

172. See *supra* note 103 and accompanying text.

173. Cf. *supra* note 101 and accompanying text (recognizing flagrant voting rights violations in uncovered jurisdictions).

allow Section 5 coverage to be tailored to new and changing circumstances and expanded to areas where it is needed.

To add a jurisdiction to Section 5 coverage, Congress should require that DOJ prove, by a preponderance of the evidence and before a three-judge panel of the U.S. District Court for the District of Columbia, a consistent pattern of voting discrimination—either intentional, effectual, or both—and a strong likelihood of continuance into the future absent the requirement of preclearance. The intricacies of this evidentiary requirement should be deciphered in significantly greater detail through regulations promulgated by DOJ using notice-and-comment rulemaking.<sup>174</sup> This would greatly increase the effectiveness of Section 5 by ensuring that coverage represents, as closely as possible, the areas with the greatest propensity toward discrimination. This reform would also strengthen Section 5's constitutionality<sup>175</sup> by allowing DOJ to extend coverage to jurisdictions where discrimination exists and, when combined with a reformed bailout provision, to ensure that coverage more accurately represents the current state of the country.<sup>176</sup>

#### CONCLUSION

Section 5 has been an extremely successful tool in the fight against voting discrimination.<sup>177</sup> It has helped produce remarkable increases in minority voter registration and minority representation at all levels of government.<sup>178</sup> The right to vote, the ark of our safety, is more secure today because of this essential provision. Despite this, voting discrimination still persists and the need for protection remains.<sup>179</sup> Section 5 must be reformed both to increase its effectiveness in a new, ever-changing society, and to ensure that

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174. See 5 U.S.C. § 553 (2006).

175. The proposed approach would also alleviate the concern that any congressional change to the coverage formula might create additional constitutional infirmities to the entirety of Section 5. Persily, *Promise and Pitfalls*, *supra* note 23, at 194, 209. By having DOJ promulgate regulations specifying the evidentiary requirements needed to add a jurisdiction to Section 5's coverage, a court could find the regulations unconstitutional without endangering Section 5's statutory foundation. Additionally, a court would have an opportunity to review each individual attempt to add a jurisdiction to coverage and would thus rule on the legality and constitutionality of each, as opposed to the entire coverage formula.

176. See *NAMUDNO*, 129 S. Ct. 2504, 2512 (2009) (“The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute’s coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.”).

177. See *supra* Part I.A.2.

178. See *id.*

179. See *supra* Part II.B.2.

it remains a constitutional assertion of congressional power. The apolitical goal of voting equality must guide this debate as well as inspire those in power to tackle this issue now.