The Editor's Page

Sharing our Riches

Members of the Section of Labor and Employment Law present some outstanding papers at our midwinter meetings. The topics are of keen interest to practitioners, and the papers are often inspired by cases that the lawyer has worked on. Undoubtedly, one inducement to prepare these papers is that they are presented at meetings held in warm, sunny places on the ocean. Most of us don't have the luxury of being able to attend many of these meetings, so the Section looks for ways to publicize these important papers and make them available to our members.

For the past several years, these papers have been posted on the Section's web site, and we've published some of them in The Labor Lawyer. The Section has begun an exciting new initiative of pulling together "The Best" of these midwinter papers, and presenting them in a series of Teleconferences. The first series was held during the fall of 2005, and offered CLE credit.

We'd like to tap this wealth of materials, and identify papers from the midwinter meetings as well as the annual Section meeting that will interest our audience and that are suitable for publication as scholarly articles. We present three articles in this issue of The Labor Lawyer that are adapted from presentations at midwinter meetings this year. Two were given before the Committee on Developing Law under the NLRA. Alexia Kulwiec's "On the Road Again (to Organizing)" deals with the NLRB's reconsideration of the extent to which voluntary recognition of a union, as contrasted with certification of a union, will serve as a "recognition bar" to the holding of a Board election. Anna Wermuth's "Union Gamble" article criticizes the NLRB's recent decision to assert jurisdiction over commercial enterprises owned and operated by Native-American governing bodies on reservations. We plan to present another view on this topic in the next issue of The Labor Lawyer. Stacey Eisenstein and Mathew Swaya provide an analysis of the risks to employers posed by rapidly emerging new technologies for communication in the workplace, such as email, Instant Messaging and Web Logs. The article discusses the limitations upon employer monitoring of employee use of these technologies.

The remaining articles came to us through our normal channels of regular mail or email. Bryan Schwartz and Edward Passman discuss the threat posed by the Homeland Security Act upon rights that are safeguarded under collective bargaining agreements and labor relations statutes. Connie Bertran and Lesley Pate provide the latest word on protections provided to whistleblowers under Sarbanes-Oxley.

Our editing process is thorough and demanding. Papers that are presented at conferences often need to be extensively edited for publication as scholarly articles. We work closely with the authors to ensure the accuracy and thoroughness of their citations. I'm pleased that my faculty colleague, Kathleen Dole, has joined me in supervising the editing of The Labor Lawyer. Her name now appears on our masthead. Kate, who has a wealth of experience in practice and as counsel to a state Senator, teaches legal writing at the College of Law. She will apply her skills to help oversee the editorial process, while I will continue to work with authors in selecting high quality articles of interest to our readers. I welcome Kate to our enterprise.

Robert J. Rabin
Editor in Chief

The Labor Lawyer
2006 Student Writing Competition

The Labor Lawyer's annual student writing competition is open to students at all ABA-accredited law schools. Papers may be written on any topic in the field of labor and employment law and will be reviewed by the staff of *The Labor Lawyer.* A $500 prize will be awarded to the winning paper, which will be published in *The Labor Lawyer.*

Papers must not exceed forty double-spaced pages (including double-spaced endnotes). Papers must follow the format detailed in the editorial guidelines on page ii.

Papers must be postmarked by the submission deadline:
August 31, 2006

Send all papers to Professor Robert J. Rabin, Editor
The Labor Lawyer, Syracuse University College of Law
E. I. White Hall, Syracuse, NY 13244-1030

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Emerging Technology in the Workplace

Matthew E. Swaya and Stacey R. Eisenstein*

I. Introduction

As innovations in technology continue to proliferate, employees working in the modern workplace have access to an ever-increasing number of new technologies. In many ways, these technologies enable employees to increase their efficiency and productivity. At the same time, however, the use of new technology provides a ready distraction and diversion for employees. In addition, employees' use of communication systems such as e-mail and instant messaging (IM) along with electronic devices such as handheld computers and camera cell phones can lead to a litany of risks for employers, including the unauthorized disclosure of a company's proprietary and confidential information, exposure of the company's computer network to viruses and security breaches, and claims of copyright infringement, harassment, and defamation. These risks also exist as a result of the recent surge in the use of Web logs, both inside and outside of the workplace.

Notwithstanding these risks, innovations in technology also have provided employers with enhanced capabilities for safeguarding their property and monitoring employees' usage of their computer networks to ensure compliance with their policies and the law. Among other things, employers have begun to utilize screening and blocking software, keystroke logging, as well as global position satellite (GPS) systems as a means of protecting their property and enforcing their workplace policies.

Thus far, the courts generally have recognized that private employers have the right to monitor their employees' use of computer networks, particularly where employers maintain policies expressly reserving such a right. It remains to be seen, however, whether emerging monitoring devices also will be deemed lawful given their potential to be seen as unduly intrusive. At a minimum, employers should review their policies to ensure that they clearly inform employees of their right

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to monitor and dispute any notion of employees' right to privacy on their employers' computers and other electronic systems. The policies also should be broad enough to encompass new technologies introduced to the workplace by employees.

II. New Technologies for Employees

By now, the majority of companies whose employees have access to e-mail and the Internet have become familiar with the potential risks associated with their usage. Many companies have faced claims of harassment and discrimination based on the transmission of inappropriate and offensive e-mails and Internet content by their employees in the workplace. In addition, many companies defending employee lawsuits have struggled with the parameters of electronic discovery including their obligations to retain and retrieve employees' e-mail.[1] In fact, the 2004 Workplace E-Mail and Instant Messaging Survey conducted by the American Management Association and the ePolicy Institute (hereinafter E-Mail and IM Survey) estimates that one in five companies have had employees' e-mail and IM subpoenaed in a lawsuit or regulatory proceeding.[2] In response to these and similar risks, many employers have issued policies to curb improper usage of e-mail and the Internet by their employees. The E-Mail and Instant Messaging Survey found that 79 percent of companies surveyed had promulgated e-mail policies, and 25 percent of respondents reported discharging an employee based on a violation of an e-mail policy.[3]

While e-mail and Internet usage policies remain essential in mitigating the risks of employees' use of technology in the workforce, employers should ensure that their technology policies more globally address employees' use of newer online trends and technologies such as blogs, IM, and camera cell phones.

A. Blogs

Web logs, otherwise known as blogs, are essentially journals and diaries posted online that discuss topics ranging from family to politics. While blogs typically are written and maintained by one person or a

1. In recent years, courts have discussed the scope of the duty to preserve e-mail and other electronically stored documents. *See, e.g.*, Thompson v. U.S. Dep't of Hous. and Urban Dev., 219 F.R.D. 93, 100 (D. Md. 2003) (awarding sanctions based on defendant's failure to preserve e-mails of employees who employment ended while lawsuit was pending); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (recognizing employer's duty to preserve e-mails related to pending employment discrimination lawsuit). While these decisions do not provide definitive guidance on the extent of those obligations, at a minimum, they suggest that companies should maintain and follow record retention policies pertaining to electronic storage of e-mails and their retention in the event of litigation.

2. *See* Nancy Flynn, *2004 Survey on Workplace E-Mail and IM Reveals Unmanaged Risks–55% Lack Retention Policies, 21% of E-mail Subpoenaed*, ePolicy Institute, *available at* www.epolicyinstitute.com/survey.

3. *See id.*

small group of individuals, their content generally can be read by any reader with access to the Internet. According to a recent survey by the Pew Internet & American Life Project, blog readership jumped to 58 percent in 2004, and approximately 12 percent of Internet users have used blogs to post comments.[4] The Pew survey further estimates that 8 million American adults maintain blogs.[5] Many authors of blogs, otherwise known as bloggers, report posting to their blog and reading other blogs multiple times a day, often as a way to procrastinate or pass the time while at work.[6]

Despite the significant increase in blogging, very few employers report maintaining policies addressing blogging, and only a handful of employers have begun to take disciplinary action against their employees as a result of their blogs.[7] In a survey conducted earlier this year by the Society for Human Resources Management, 3 percent of 279 human resources professionals surveyed reported disciplining their employees based on blogging compared to 30 percent of the respondents who reported disciplining employees based on their Internet use.[8]

Those employers who choose to discipline employees for blogging outside of the workplace should consider the impact of various state laws that proscribe employers from taking adverse action based on an employee's off duty conduct. New York, for example, prohibits employers from discriminating or taking adverse action against employees based on their political or recreational activities conducted while off-duty and outside of their employers' premises.[9] California similarly prohibits employers from discharging or otherwise discriminating against

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4. *See* Lee Raine, *The State of Blogging*, Pew Internet & American Life Project, Jan. 2, 2005, *available at* www.pewInternet.org/pdfs/PIP_blogging_data.pdf.

5. *See id.*

6. *See* Katie Hafner, *For Some, the Blogging Never Stops*, N.Y. TIMES, May 27, 2004, at G1.

7. While the majority of employees blogging at work tend to be unsanctioned by their employers, several companies, including Microsoft Corporation and General Motors, have created their own blogs, for use by both customers and current and prospective employees. *See* Patricia Kitchen, *Change at Work: Blogging Bluepoint: Keys to Writing a Web Journal That Can Help Your Career, Not Harm It*, NEWSDAY, Dec. 3, 2004, at E40.

8. *See* Deborah Billings, *Blogs Can Have Adverse Consequence for Employers and Workers, Analysts Warn*, DAILY LAB. REP. (BNA), Feb. 9, 2005, at C-1.

9. N.Y. LAB. LAW § 201-d(2) (McKinney 2004). This provision does contain an exception for activity that "creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest." *See id.* § 201-d(3)(a). In addition, at the time he signed this legislation, the governor noted that it was meant to "properly strike the difficult balance between the right to privacy in relation to non-working hours activities of individuals and the right of employers to regulate behavior which has an impact on the employee's performance or on the employer's business." *See* Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct as the Basis for Adverse Employment Decision*, 6 U. PA. J. LAB. & EMP. L. 625, 653 (2004) (citing Devine v. N.Y. Convention Ctr. Operating Corp., 639 N.Y.S.2d 904, 905 (Sup. Ct. 1996) (citations omitted). Accordingly, it may not significantly restrict employers in disciplining employees for their use of blogs where such use could be viewed as creating a conflict of interest.

employees based on their lawful off-duty conduct away from their employers' premises.[10]

In addition to state laws regulating off-duty conduct, both union and nonunion employers also should be cognizant of the potential application of the National Labor Relations Act (NLRA) before disciplining employees based on blog postings pertaining to their terms and conditions of employment. Under the NLRA, employers are prohibited from disciplining employees because of their protected activities. The National Labor Relations Board has recognized that e-mails regarding employees' terms and conditions of employment can constitute a protected activity.[11] Thus, the Board has held that where an employee sends an e-mail that constitutes concerted activity, such as an e-mail to coworkers to garner support in opposition to employer policies, the employer may not make an adverse employment decision based on that e-mail.[12] While the Board has yet to rule on this issue specifically with regard to blogging, both nonunion and union employers should exercise caution prior to disciplining an employee based on a blog posting that criticizes the terms and conditions of her employment.[13]

Beyond the NLRA, it may be difficult for employers to apply consistent standards to employee blogging. For one thing, many bloggers anonymously maintain their blogs. In addition, given the multitude of blogs, it is unlikely that a company could identify and monitor all blogs maintained by its employees, and locating and monitoring blogs may be time-consuming and costly. In one instance, Delta Airlines allegedly fired an employee based on photographs uploaded to her blog of the employee wearing her uniform.[14] Following her termination, the employee filed a charge with the Equal Employment Opportunity Commission, alleging that the employer had discriminated against her based on her sex. Specifically, the employee claimed that because the employer had not disciplined its male employees for similar incidents, taking adverse action against her constituted discrimination.[15]

Maintaining a policy of monitoring blogs may have other attendant

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10. CAL. LAB. CODE § 98.6(a) (West 2002). The California Court of Appeals limited the application of this section to terminations based on "conduct asserting a recognized constitutional right." Grinzi v. San Diego Hospice Corp., 14 Cal. Rptr. 3d 893, 902 (Ct. App. 2004). Based on this decision, the impact of § 98.6 on a private employer's right to discipline employees for blogging is unclear and may be limited.

11. *See, e.g*, Timekeeping Systems, 323 N.L.R.B. 244, 154 L.R.R.M. (BNA) 1233 (1997).

12. *See id.*

13. The NLRA does not prohibit an employer from disciplining or discharging an employee for acts of disloyalty, such as a blog posting critical of products manufactured by the employer. *See* N.L.R.A. § 10(c), 29 U.S.C. § 160(c) ("No order of the Board shall [provide relief to] an employee . . . suspended or discharged . . . for cause"); NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 472 (1953) ("There is no more elemental cause for discharge of an employee than disloyalty to his employer.").

14. *See* Kitchen, *supra* note 7, at E40.

15. *See id.*

risks. For instance, an employer who has knowledge of the content in a blog potentially could be held liable for a discriminatory or harassing posting made by one of its employees about another.[16]

To mitigate the potential negative consequences of employee blogging, employers should ensure that the terms of their technology policies are broadly defined to cover blogging. Among other things, a blogging policy might prohibit employees from making disparaging comments about the company's products and from revealing any proprietary information.

B. Instant Messaging

Employers' technology policies also should address employees' use of IM software. IM is an electronic communications software that is similar to e-mail but that allows its users to have real time conversations. An estimated 7 billion instant messages were sent each day in 2004.[17] Millions of employees have downloaded IM programs onto their work computers and use them to communicate both internally with colleagues and externally with clients or personal friends during the workday.[18] While many companies provide IM software on their network, many employees simply download the software onto their work computers without informing their employer.[19]

Most employers maintain e-mail policies, but very few have policies that cover IM use or the software required to log and retain IM communications.[20] As with e-mail, IM creates a written record that can be subpoenaed and used as evidence in a lawsuit or administrative proceeding, and provides a forum for harassment and the transmission of proprietary materials. IM also can distract workers from doing their jobs when it is used for nonwork purposes.[21] Further, employers in heavily regulated industries that fail to implement IM retention poli-

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16. *See* Charles Duhigg, *World Wide Water Cooler: Can You Be Fired for Complaining about Your Boss Online*? LEGAL AFF. 8, March/April 2004, *available at* http://www.legalaffairs.org/issues/March-April-2004/scene_duhigg_marapr04.msp.

17. *See* William E. Hartsfield, *Instant Messages*, INVESTIGATING EMPLOYEE CONDUCT § 6:11 (2004).

18. Approximately ninety percent of businesses already use some form of IM, which includes nearly 25 million employees who download public programs. *See* Erika D. Smith, *It's Time to Limit IM Instant Message to Bosses: Deal with It, or Face Trouble*, AKRON BEACON JOURNAL, Jan. 17, 2005, at 1.

19. Only 18 percent of 50 Fortune 500 companies deploy IM products to employees. *See* Kevin Jepsen, *FYI. IM Brings :) 2 1 CU's IT Dept.*, CREDIT UNION JOURNAL, Jan. 17, 2005.

20. Only about 20 percent of employers have IM policies, compared with nearly 80 percent that have e-mail rules. *See* Rachel Osterman, *Popular Technology Makes Cyberspace Talk Fast, Convenient, Dangerous; As Use in Business Grows, So Do Abuses*, SEATTLE POST-INTELLIGENCER, Jan. 31, 2005, at C1.

21. Approximately twenty-nine percent of surveyed workers report that instant messaging can be a distraction. *See* Rachel Osterman, *Fast Contact, Few Limits; Instant Messaging Is Used at 85 Percent of Firms, Researchers Report, but Experts Say Most Firms are Ignoring the Risks*, SACRAMENTO BEE, Jan. 3, 2005, at D1.

cies may be exposed to liability for failing to comply with statutory record-keeping and privacy requirements.[22] Unauthorized IM use also can present significant security concerns by exposing the employer's network to viruses and hackers that may not be detected through the employer's virus identification software.[23] Employees' reported tendency to communicate more informally over IM than over e-mail only compounds these risks.[24]

Given these risks, employers should ensure that their policies regarding e-mail also govern employees' use of IM. In addition, where employers elect not to provide IM software to their employees, they might consider prohibiting employees from downloading the software from another source. Employees also should be advised that the employer maintains the right to monitor their use of IM.[25]

C. Cell Phones

1. Cell Phone Use While Driving

Employees' use of cell phones, while perhaps not new, also raises a host of issues for employers to consider. Employers may be held liable for employee automobile accidents that occur while using cell phones and driving on company business.[26] A recent study by the National Highway & Traffic Safety Administration estimated that each on-the-job employee automobile accident costs an employer an average of nearly $16,500.[27] For each injury, that number jumps to over $76,000.[28] These figures include the costs of health care, workers' compensation,

22. *See* Melanie Turek, *Messaging Compliance: Why It Matters*, BUS. COMM. REV. 39 (Oct. 1, 2004) (noting that the Sarbanes-Oxley Act, the Heath Insurance Portability and Accountability Act, the Gramm-Leach-Bliley Financial Modernization Act, the USA PATRIOT Act, the California Security Breach Law, Security and Exchange Commission rule 17a-4, the CAN-SPAM Act and others have requirements for storing and retrieving IM and e-mail exchanges).

23. *See* Melanie Turek, *Practice Safe Chat; Unprotected Messaging Can Cause Serious Security and Compliance Problems*, NETWORK WORLD, Aug. 2, 2004.

24. *See* Ann Pomeroy, *Business 'Fast and Loose' with E-mail, IMs—Study*, HR MAGAZINE, Nov. 1, 2004.

25. As with blogging and e-mail, employers, including nonunion employers, should consider any potential implications of the NLRA before taking disciplinary action against employees based on their use of IM . . . However, the General Counsel of the National Labor Relations Board has recognized that it is permissible under the NLRA to promulgate a policy giving the employer the right to monitor e-mail and Internet usage. *See* In re Banco di Roma, Case 13-CA-41283-1, 2004 WL 3093490, at *4 (N.L.R.B.G.C.) (Nov. 26, 2004).

26. *See* King v. Pagliaro Bros. Stone Co., 703 A.2d 1232, 1233 (D.C. 1997) (employer sued for negligence when employee truck driver collided with plaintiff while talking on his cell phone).

27. *See* Nat'l Highway & Traffic Safety Admin., *The Economic Burden of Traffic Crashes on Employers*, 6–7 (2003), *available at* www.nhtsa.dot.gov/people/injury/alcohol/Economic Burden/pages/WhatDOTCCost.html.

28. *Id.*

higher insurance premiums, and loss of productivity, as well as liability for losses by others.[29]

In 1999, Smith Barney was sued when one of its employees hit and killed a man while conducting Smith Barney business on his cell phone.[30] The employee, a stockbroker, was driving while making a sales pitch at 9:00 P.M. on a Saturday night, using his own personal cell phone.[31] Although the company claimed that it neither provided cell phones nor required its stockbrokers to have them, the plaintiff alleged that evidence existed that the company had an established policy that its brokers make calls outside normal business hours to reach potential customers.[32] Faced with a jury trial, Smith Barney settled the lawsuit in February 1999 for $500,000.[33]

More recently, in 2001, a California-based law firm was sued when one of its attorneys hit and killed a child while using her cell phone and driving.[34] The lawsuit alleged that the attorney was talking on her cell phone, doing work for the firm, at the time her vehicle swerved and hit the child.[35] Prior to the trial, in September 2004, the employer law firm settled with the victim's family for an undisclosed amount.[36] The case against the employee went to trial, and a jury awarded the victim's family $2 million in compensatory damages.[37]

In light of the many dangers posed by the use of cell phones while driving, New York, New Jersey, and the District of Columbia have all passed laws prohibiting cell phone use while driving unless using hands-free device.[38] In fact, the D.C. law prohibits any distracted driving, including not only cell phone use, but also eating, reading, writing, grooming, and using handheld computers.[39] A recent study by the University of Utah, however, questions the effectiveness of such laws, finding that drivers using hands-free cell phones were just as dangerous as drivers using handheld devices.[40]

To reduce liability exposure for employee accidents caused by cell phone use while driving, employers should consider either adopting a

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29. *Id.*
30. Terry Carter, *Crash Course for Business: Companies Can Be Liable for Accidents Resulting from Job-Related Cell Phone Use*, 85 A.B.A. J. 40 (Aug. 1999).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Crime & Justice*, WASH. POST, Jun. 15, 2001, at B2.
35. *Id.*
36. *Id.*
37. *Id.*
38. *See* N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2002); N.J. STAT. ANN. § 39:4–97:3 (West 2004); D.C. CODE ANN. § 50-1731.01 (2004).
39. *Id.*
40. *Study: Cell Phones Turn Teens into Old Drivers*, ST. PETERSBURG TIMES, Feb. 3, 2005, at 3A.

company policy similar to the prohibitions enacted in New York, New Jersey, and D.C., or following the lead of some employers, such as ExxonMobil, that have adopted a policy banning cell phone use altogether while driving on company business.[41]

2. Camera Cell Phones

Cell phones that include cameras capable of taking digital photographs pose an additional threat to employers—the risk of theft and disclosure of an employer's proprietary and confidential information. This risk is exacerbated by emerging technology that equips camera phones with high resolution scanning capability, allowing users to scan and send a copy of a document to a fax machine or an e-mail account.[42] Such developments increase the ease with which a disgruntled or dishonest employee could transfer confidential or proprietary information to a competitor. Camera phones in the workplace also create another avenue for potential harassment of employees by coworkers, particularly given their potential use in employers' gyms, changing rooms, and restrooms.[43]

As a result of these risks, employers should consider prohibiting camera phones from work areas in which its most confidential and proprietary information is kept, as well as from any areas in which camera phones could be used to harass employees. Many employers have banned camera phones altogether from some of their offices and worksites, including Samsung Corp. and DaimlerChrysler.[44]

III. New Technology for Employers

To combat the potential risks created by the infusion of new technology in the workplace, employers have begun to step up their monitoring efforts through the use of monitoring devices such as blocking software, keystroke logging, and GPS systems. Employers reportedly spent as much as $9 billion in 2004 to purchase and install these and other monitoring devices.[45]

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41. *See* Morgan O'Rourke, *Considering Cell Phone Bans*, RISK MANAGEMENT, Oct. 1, 2004.

42. *Realeyes3D Introduces First Commercial Scan Service for Camera Phones,* M2 PRESSWIRE, Feb. 15, 2005.

43. There has been at least one reported lawsuit by an employee whose picture was taken from behind by a coworker without her permission. *See* Kathryn Terrell, *HR Professionals Get the Picture, Camera Phones Could Expose Employers to New Risks* (2004), *available at* www.hrinprint.com.

44. *See* Sherri C. Goodman, *Camera Phones Pose Security Threat in Workplace*, AP NEWSWIRE, Sept. 9, 2004; James B. Brown and Kimberly A. Craver, *Can You See Me Now? Are You Phoning Someone or Just Taking Photos of My Secret Documents?* PITTSBURGH POST-GAZETTE, Feb. 24, 2004, at C2.

45. *See* Chana R. Schoenberger, *The Insider; Companies Spend Billions to Protect Themselves from Hackers Attacking from the Outside. What About the Danger Within?* FORBES, May 10, 2004, at 82.

A. Blocking Software and Flagging

With the Internet continuing to be a prevalent breeding ground for hostile work environment claims, employers increasingly have begun to utilize blocking software to prevent employees' access to Web sites and content on the Internet that the employer deems inappropriate. In addition to blocking Web sites with content deemed inappropriate by the employer, blocking software also can be used to prohibit employees from accessing personal e-mail accounts, as well as those Web sites that tend to generate a substantial number of pop-ups that can burden a network server. Of the human resources professionals recently surveyed by the Society for Human Resource Management regarding their company's monitoring policies, 28 percent reported utilizing software to block access to personal e-mail accounts and 41 percent reported use of software to prevent employees from instant messaging in the workplace.[46]

Companies also have begun to utilize software that screens employee e-mails for potentially offensive messages and monitors the potential disclosure of trade secrets and other proprietary information. This "flagging" software scans employee e-mails to search for words deemed inappropriate by the employer. Both the Department of Justice and Department of Energy, for example, reportedly installed software that censored employee e-mails containing inappropriate language.[47] Similarly, employers concerned about the dissemination of either offensive materials or large files that can clog their networks can install software that tracks messages with ".jpg" attachments, or attachments that generally contain photographic images.[48] Flagged messages are then sent to a company representative responsible for monitoring and enforcing the employer's electronic communications policy.

B. Keystroke Logging

A new and developing method of monitoring employees is keystroke logging. Some keystroke logging devices record the identity of employees who access employer databases and can track what the employees viewed.[49] Other keystroke logging devices are more precise, logging every key touched by a particular employee, and saving that information on a separate server.[50]

Keystroke logging devices may help employers identify and pros-

46. *See* Society for Human Resource Management and CareerJournal.com, *Workplace Privacy*, Jan. 2005, at 27, *available at* www.shrm.org.

47. *See* Al Kamen, *British Diplomat Ducks His Gaffe*, WASH. POST, Sept. 24, 2004. The Justice Department reportedly removed this "net nanny" program after several employees complained. *See id.*

48. *See* Lyda Phillips, *Employees Use of Personal Accounts, Wireless Communications, Among Growing E-Concerns*, DAILY LAB. REP. (BNA), Oct. 27, 2004, at C-1.

49. *See* Schoenberger, *supra* note 45, at 82.

50. *Id.*

ecute former employees who have stolen proprietary information. For instance, in April 2003, an employer filed a civil suit against a former employee, alleging breach of contract for stealing trade secrets and using them to benefit a competitor.[51] The employer discovered, through its keystroke logging technology, that the former employee had accessed, printed, and/or downloaded to CDs numerous client files and documents.[52] The case is still pending.

To ward off employee hostility or privacy violation allegations, employers seeking to use these keystroke logging devices should establish and publicize a company policy explaining such monitoring.

C. GPS

In addition to monitoring employees' computer use, employers increasingly have begun to utilize global satellite position ("GPS") technology to monitor their employees' whereabouts.[53] GPS units already can be found on the majority of cell phones, and many employers have installed the units in company vehicles and trucks.[54] In that setting, GPS systems enable employers to track employees' location, the speed of employees' vehicles, and the amount of time employees spend at a particular location.[55] Not all employers report using GPS systems for monitoring purposes, however. Other companies, such as UPS, use GPS to provide more specific driving instructions to their drivers, thereby improving customer service.[56]

Notwithstanding the potential benefits of GPS, privacy advocates warn of the potential for abuse by employers. In particular, they argue that the use of GPS units is overly invasive, particularly to the extent they track employee movements and activity during off-duty hours and collect information beyond that which is relevant to business purposes.[57] Employers using GPS technology are well advised to inform employees prior to the installation of GPS units and to amend their workplace policies to specifically address the technology.

IV. The Right to Monitor Employees' Use of Technology in the Workplace

Employers electing to monitor their employees' use of technology in the workplace are susceptible to challenges from employees and pri-

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51. *Id.*
52. *Id.*
53. *Bulletin to Management, Do You Know Where Your Workers Are? GPS Units Aid Efficiency, Raise Privacy Issues*, BNA INC. (July 22, 2004).
54. *See id.*
55. *Employment Law: Employee Tracking Technology Raises Privacy Concerns and Potential Employee Backlash*, DAILY LAB. REP. (BNA), Apr. 27, 2004, at C-1.
56. *See* Karen Dybis, *Privacy Ends at the Office Door*, DETROIT NEWS, Jan. 16, 2005, at 13.
57. *See* John Sullivan, *Privacy Rights: Use of GPS Tehcnology Said to Be Growing, but Monitoring Leads to Privacy Concerns*, DAILY LAB. REP. (BNA), Nov. 29, 2004, at A-5.

vacy advocates contending that such monitoring violates employees' right to privacy. In addition, employees may argue that monitoring violates the Electronic Communications Privacy Act ("ECPA") and state wiretap and monitoring laws.

A. Electronic Communications Privacy Act Claims

Generally, there is no general federal right of privacy implicated by an employer engaging in surveillance of its employees. However, employees fired or disciplined as a result of their employers' monitoring their use of electronic communications such as e-mail or IM may bring claims under the Electronic Communications Privacy Act.[58] Pursuant to Title I of the ECPA, the Wiretap Act, it is unlawful to intentionally intercept wire, oral, or electronic communications including e-mail.[59] The majority of cases considering claims under the Wiretap Act have determined that the interception of e-mails must occur contemporaneously with their transmission to violate the ECPA.[60] Based on this interpretation of "intercept," an employer who retrieves e-mail from an employee's mailbox following the transmission of the e-mail has not violated the Wiretap Act.

In addition, there are three principal exemptions to the Act that militate against holding employers liable under the ECPA: (1) consent of *one* party to the communication; (2) "business extension" exemption—when the employer uses a telephone extension to monitor employees in the ordinary course of business; and (3) "provider" exemption—permits providers of wire communication services (such as telephone companies) to monitor calls for mechanical or service checks.[61] These exceptions, along with the requirement that communications be intercepted during transmission, generally have led the courts to refrain from finding employers liable under the ECPA for monitoring and retrieving employee e-mail maintained on the employer's network.[62]

A recent case illustrates the limited success that employees have had in bringing claims alleging violations of the Wiretap Act based on their employers' access and retrieval of stored e-mails. In *Fraser v. Nationwide Mutual Ins. Co.*, the defendant terminated the plaintiff for breaching his duty of loyalty to the company.[63] Prior to his termination, the Defendant had concerns that the plaintiff might have disseminated confidential information about the company to its competitors.[64] Ac-

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58. 18 U.S.C. §§ 2510–20, 2701–07 (2004).

59. *See id.* at §§ 2510–22.

60. *See, e.g.*, Konop v. Hawaiian Airlines, Inc., 302 F.3d 868, 878 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003) (holding electronic communications in storage cannot be unlawfully intercepted); United States v. Steiger, 318 F.3d 1039, 1047 (11th Cir. 2003).

61. *See* 18 U.S.C. §§ 2510–22 (1986).

62. *See, e.g.*, Borninski v. Williamson, No. CIV.A.3:02CV1014-L, 2005 WL 1206872, at *13 (N.D. Tex. May 17, 2005); Fraser v. Nationwide Mut. Ins. Co., 352 F.3d. 107, 114 (3d Cir. 2003).

63. *See Fraser*, 352 F.3d at 109.

64. *Id.* at 109–10.

cordingly, the defendant searched plaintiff's e-mail files stored on the company's main server.[65] Following his termination, the plaintiff sued for, among other causes of action, damages under the ECPA based on the claim that the defendant intercepted his e-mails.[66] Agreeing with the Fifth, Ninth, and Eleventh Circuits, the Third Circuit rejected plaintiff's claim, finding that "an 'intercept' under the ECPA must occur contemporaneously with transmission."[67] In other words, because the defendant retrieved the messages while in storage, it did not intercept the plaintiff's e-mail within the meaning of the ECPA.[68]

While cases like *Fraser* and the broad exceptions to the ECPA suggest that employers can continue electronic monitoring without violating the Wiretap Act, the application of the ECPA to newer technologies remains largely untested. However, at least one court has ruled that keystroke logging devices do not violate the federal Wiretap Act.[69] In *United States v. Ropp*, the court determined that a keystroke device planted on an employee's computer by her coworker, did not constitute an "electronic communication" within the meaning of the Wiretap Act.[70] In reaching this conclusion, the court determined that, although the employee's computer was connected to the Internet via the company's national server, the interception of keystrokes on a computer prior to any transmission did not affect interstate or foreign commerce as required under the Wiretap Act.[71]

B. State Law Considerations

In addition to claims brought under the ECPA, employers also should be cognizant of state laws governing their right to monitor employees' use of technology in the workplace. Several states have laws that essentially mirror the Wiretap Act, including its exceptions.[72] Other state laws impose additional requirements on employers. For example, employers in Connecticut should be familiar with its electronic monitoring law that requires them to conspicuously post a notice informing employees of the specific types of electronic monitoring being used by the employer.[73] Similarly, Delaware requires employers to notify employees prior to monitoring their e-mail or Internet usage.[74]

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65. *Id.* at 110.
66. *Id.* at 113.
67. *Id.* at 114.
68. *Id.*
69. United States v. Ropp, 347 F. Supp. 2d 831, 832 (C.D. Cal. 2004).
70. *Id.*
71. *Id.*
72. *See* Merrick T. Rossein, *Monitoring the Workplace: Electronic Communication and Other Technologies*, EMPLOYMENT LAW DESKBOOK FOR HUMAN RESOURCES PROFESSIONALS, Jan. 2005, § 24:10, at 1 (citing N.J. STAT. ANN. § 2A:156A-1 *et seq*; 18 PA. CONST. STAT. ANN. § 5702 *et seq*; CAL. PENAL CODE § 631; MD. CODE ANN. §§ 10-4A-01 to 10-4A-08; N.Y. CRIM. PROC. art. 700).
73. *See* CONN. GEN. STAT. ANN. § 31-48d(b)(1) (West 2003).
74. *See* DEL. CODE ANN. tit. 19 § 705 (2001).

Other states also have considered legislation pertaining to electronic monitoring in the workplace. Recently, the California legislature passed a bill that would have extended privacy protections to employee Internet and e-mail usage at work.[75] While Governor Schwarzenegger recently vetoed this bill, the law would have required employers to notify their employees prior to monitoring their e-mail and Internet usage, and before installing surveillance systems such as GPS units to monitor employees' locations.[76] Commentators predict that a similar bill will be introduced again in the near future.[77]

C. Invasion of Privacy Claims

Beyond state statutory claims, employees subject to electronic monitoring may assert that the monitoring violates their common law right to privacy. In considering invasion of privacy claims, courts generally weigh the employee's expectation of privacy against the employer's asserted business purposes for monitoring its employees. Courts have recognized that notice and consent typically serve as a defense to employees' invasion of privacy claims based on workplace monitoring.

There are four well-recognized common law claims for invasion of privacy that may be implicated by an employer's monitoring of an employee:

Intrusion into Seclusion or the Private Affairs of Another. This invasion of privacy claim consists of an unreasonable intrusion into one's physical solitude, seclusion, or private affairs, and could be implicated by an employer's search or surveillance of its employees.[78] This tort consists of three elements: (1) a prying or intrusion (2) that is offensive or objectionable to a reasonable person (3) into a place or into affairs that are private and are entitled to be private.[79]

Public Disclosure of Private Facts. The second invasion of privacy tort is the unwarranted disclosure of private facts. This claim could arise in the context of employer monitoring if the employer is not careful to limit disclosure of information it obtains through monitoring.[80] The tort consists of four elements: (1) public disclosure (2) of a private fact (3) that would be offensive and objectionable to a reasonable person and (4) that is not of legitimate public concern.[81]

75. *See* Allan Holmes, *Riding the California Privacy Wave*, CIO MAGAZINE, Jan. 15, 2005.

76. *See id.*

77. There may be additional state laws relevant to electronic monitoring such as those that require either one or all parties to consent prior to the recording of a conversation. *See generally*, Rossein, *supra* note 72, at 1.

78. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

79. *See id.*

80. *Id.* § 652D (1977).

81. *Id.*

False Light Invasion of Privacy. The third privacy tort is the "false light" invasion of privacy claim. This claim might be made when an employee is subject to monitoring or surveillance in the course of an investigation, and the employer later reveals the results of the investigation to the employee's detriment.[82] A person who publicizes a matter that places another in a false light before the public is subject to liability for this tort if (1) the false light would be highly offensive to a reasonable person and (2) the publisher had knowledge, or acted in reckless disregard, of the falsity of the publication.[83]

Appropriation of Name or Likeness. Many state laws prohibit the use of a person's name, portrait, or picture for advertising purposes or for the purposes of trade without the person's written consent. Thus, if employer monitoring captures an employee's image, the image should not be used without the employee's consent.

Generally speaking, claims for invasion of privacy under these common theories have had limited success in the context of employer monitoring of employees' e-mail, particularly where employers maintain policies expressly notifying employees that their e-mail will be monitored.[84] On the other hand, courts have acknowledged that employees maintain a heightened expectation of privacy with regard to their personal e-mail accounts, even where accessed through their employer's server.[85]

In *Fischer v. Mt. Olive Lutheran Church*, for example, the employer hired a computer expert to access his employee's personal Hotmail e-mail account based on the employer's suspicion that the employee, a church pastor, had used the employer's Internet access to facilitate sexual relationships on his e-mail account.[86] The expert accessed the pastor's personal account using the employer's computer and by guessing the pastor's password.[87] Finding it disputable whether accessing an employee's personal e-mail account could be highly offensive to the rea-

82. *Id.* § 652E (1977).

83. *Id.*

84. *See, e.g.*, TBG Ins. Servs. Corp. v. Zieminski, 96 Cal. App. 4th 443, 451–52 (Ct. App. 2002) (defendant had no right to privacy regarding data on home computer provided by employer after signing computer monitoring policy); Garrity v. John Hancock Mut. Life Ins. Co., No. Civ. A. 00-12143-RWZ, 2002 WL 974676, at *2 (D. Mass. May 7, 2002) (employee's right to privacy regarding e-mail could be eliminated by either employee's acknowledgment that e-mails he sent could be forwarded by others or by employer's legitimate interest in protecting its other employees from harassment); Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) (employees had no right to privacy in e-mails sent through employer's computer system, despite employer's assurances that employee e-mail was confidential and would not be intercepted).

85. *See, e.g.*, Thygeson v. U.S. Bancorp., No. CV-03-467-ST, 2004 WL 2066746, at *21 (D. Or. Sept. 15, 2004); Fischer v. Mt. Olive Lutheran Church, 207 F. Supp. 2d 914, 928 (W.D. Wis. 2002).

86. *See Fischer*, 207 F. Supp. 2d at 920.

87. *See id.*

sonable person, the court refused to grant summary judgment on the employee's intrusion upon seclusion invasion of privacy claim.[88]

In contrast, the court in *Thygeson v. U.S. Bancorp* rejected an employee's invasion of privacy claim based on the employer's access of personal e-mails and other materials stored by the employee in personal folders on his office computer.[89] The employer in *Thygeson* reviewed the employee's Internet activity and e-mails stored on the employer's network after receiving complaints from the employee's coworkers that he had sent e-mails to them with "inappropriate attachments."[90] Based on this review, conducted remotely through the employer's computer network, the employer learned that the employee had spent an average of four hours a day for a twelve-day period browsing Internet sites on his work computer despite the fact that his position did not require him to visit any Web sites.[91] Additionally, the employer discovered e-mails containing "pictures of nudity and sexually offensive jokes" saved by the employee on the employer's network.[92] Upon his termination for this discovery, the employee filed suit alleging invasion of privacy based on (1) the employer's access of personal folders maintained on his work computer and (2) the employer's review of the Web sites visited by the plaintiff.[93]

Rejecting both claims, the court determined that the employee could not have a reasonable expectation of privacy by saving personal e-mails to a file marked "personal" on the employer's network in light of the employer's explicit policy prohibiting personal use of its computers and reserving the right to monitor any use of its computers.[94] In addition, the court emphasized that U.S. Bancorp did not view the actual content of the Web sites visited by the plaintiff, but collected only the addresses of the Web sites visited by the plaintiff.[95] Accordingly, the court held that plaintiff could not have a reasonable expectation of privacy in using his work computer or the Internet access provided by U.S. Bancorp.[96]

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88. *See id.* at 928. The Court did not discuss whether the employer maintained any policies regarding the use of its computers or notifying employees of any right to monitor their computer usage. It is not clear whether such a policy might have affected the court's ruling.

89. *See Thygeson*, 2004 WL 2066746, at *22.

90. *Id.* at *3.

91. *See id.*

92. *See id.*

93. *See id.* at *1.

94. *See id.* at *19.

95. *See id.* at *22. While the court acknowledged a heightened expectation of privacy with regard to e-mails maintained on personal accounts such as Hotmail, it determined that this expectation was diminished by the employer's unambiguous policy advising its employees of its right to monitor use of company computers. In addition, the court contrasted the decision in *Fischer* by noting that U.S. Bancorp never accessed the employee's personal Hotmail e-mail account. *See id.* at *21.

96. *See id.*

Based on the reasoning in *Thygeson*, an express policy reserving the right to monitor employees' use of company computers and networks should undermine invasion of privacy claims. However, employers may want to consider implementing blocking software that prohibits employees from accessing personal e-mail accounts while at work in light of the decision in *Fischer* and the court's acknowledgment of a heightened expectation of privacy in *Thygeson.* In addition, because courts reviewing invasion of privacy claims consider the employer's stated interest in the type of monitoring at issue, employers should exercise caution to ensure that their use of monitoring devices such as GPS systems do not unnecessarily track employees' nonwork-related activities.

Employers also should ensure that their computer systems adequately safeguard any electronically stored personal employee information. Under the recently amended Immigration and Nationality Act, for example, employers may store Employment Eligibility Verification forms, or I-9 forms, electronically.[97] Because the I-9 forms contain employees' social security numbers, companies electing to store the forms electronically should consider security measures such as the installation of a firewall to prevent unintended access or disclosures.[98] Similar steps should be taken with regard to other personal employee information, including information regarding employees' medical information. In the absence of such measures, employees' personal information could be subject to unauthorized or inadvertent disclosure, exposing employers to potential invasion of privacy claims.

V. Conclusion and Recommendations

As noted above, a policy enacted by the employer and reviewed with all employees can provide significant protection to the employer. Under federal and most states' laws, employer monitoring will be viewed as lawful where the employee consents to being monitored. By disseminating a policy informing employees of monitoring, the employer is obtaining implied consent. The most prudent course of action also dictates that employers obtain a signed statement from employees indicating that they have received and reviewed the policy.

Having a good policy also may prevent misuse of company systems. Additionally, an effective policy will make it easier (in terms of both employee expectations and defending claims) for employers to discipline employees for improper use/overuse of company systems. Employers also may be able to rely on a well drafted policy in support of an affirmative defense against harassment claims if it can show that it

97. *See* 8 U.S.C. § 1324a(b)(3) (2004); Nikki Swartz, *Electronic I-9 Forms Now Allowed*, INFO. MGMT. J., Jan. 1, 2005, at J11.

98. *See* Kathy Gurchiek, *New Law Allows Electronic Completion, Storage of Form I-9*, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, Dec. 20, 2004.

took sufficient steps to prevent and correct harassment by its employees. Implementing and enforcing a policy that specifically prohibits accessing, storing, and sending offensive materials may be particularly helpful in establishing this affirmative defense.

Among other things, employers should consider the following in devising an electronic communications and monitoring policy:

- Explain when and how monitoring of employees will occur.
- Identify company property and define it broadly.
- Ensure that the policy applies to any electronic device used to communicate ortransmit information internally or externally.
- Clearly state that employees should have no expectation of privacy.
- Identify appropriate use of company property.
- Address whether personal use is allowed, and if so, set out guidelines to prevent excessive personal use.[99]
- Prohibit inappropriate, offensive, harassing, discriminatory or defamatory content in all electronic communications, personal or business-related.
- Identify prohibited uses of company property.
- Prohibit unauthorized internal or external communication of confidential or proprietary information.
- Remind employees that deleted information may be kept on back-up tapes and recovered at a later date.
- Allow for future changes in the policy by the company.
- Distribute the policy, have it signed, and redistribute it on a regular basis.
- Include a splash screen on your computer system stating that electronic messages, including e-mail and IM, sent through company property are subject to scrutiny and contain no personal right of privacy.

99. Generally speaking, it is as impractical to maintain a policy that restricts use of employer property for business use only as it is difficult to enforce. In fact, maintaining such a policy may violate the NLRA in those workplaces where employees regularly communicate via e-mail. *See* Pratt & Whitney, NLRB Gen. Couns. Mem., No. 12-CA-18446, 1998 WL 1112978, at *2–4 (Feb. 23, 1998).

19

Sarbanes-Oxley: A New Whistle Stop for Whistleblowers

Connie N. Bertram and Lesley A. Pate*

In the wake of recent revelations of corporate corruption and calamitous bankruptcies, Congress enacted in 2002 the Sarbanes-Oxley Act (SOX),[1] legislation designed to protect the public from corporate mismanagement. Less well-publicized than its securities fraud and corporate responsibility provisions, section 806 of SOX also contains new protections for "whistleblowers" at publicly traded companies.[2]

The law provides that publicly traded companies may not discriminate or retaliate against employees who lawfully provide information to or assist an investigation of conduct that they reasonably believe constitutes a violation of securities laws or any federal law relating to shareholder fraud.[3] To fall within the protection of the statute, the employee's acts must be lawful and the information must be provided to a federal regulatory or law enforcement agency, a member of Congress, or, significantly, "[a] person with supervisory authority over the employee."[4] The law also protects employees who file, testify, or participate in, or otherwise assist, government proceedings involving such laws.[5]

The law creates a new enforcement scheme and new substantive rights for covered employees. Under the law, employees who believe they have been discharged or otherwise retaliated against because of their protected activities may file a complaint with the secretary of the Department of Labor (DOL).[6] Such complaints must be filed within ninety days of the date of the claimed violation.[7] If the investigation is not completed within 180 days of the filing of the complaint (unless that delay is due to the bad faith of the claimant), the claimant may file suit in federal district court.[8] Employees may be entitled to all relief necessary to make them "whole," including reinstatement, back pay

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1. Pub. L. No. 107–204 (2002).
2. 18 U.S.C. § 1514(A) (1994 & Supp. 2005).
3. *Id.* § 1514A(a)(1).
4. *Id.* § 1514A(a)(1)(A)–(C).
5. *Id.* § 1514A(a)(2).
6. *Id.* § 1514A(b)(1)(A).
7. *Id.* § 1514A(b)(2)(D).
8. *Id.* § 1514A(b)(1)(B).

with interest, and compensation for special damages, including litigation costs, expert witness fees, and reasonable attorneys' fees.[9]

The provision allowing for the recovery of civil damages is not the only protection afforded to whistleblowers. The law also provides that anyone who knowingly retaliates against or takes any action "harmful" to any person, including interfering with his employment, for providing truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense can be subject to criminal sanctions.[10] Unlike the civil remedies provision, this section is not limited to employees of publicly traded companies.[11]

I. Filing a Whistleblower Complaint Under SOX

To pursue a claim under section 806 of SOX, a complainant must file with the DOL a written complaint, including a statement of the acts and omissions that violate section 806, within ninety days of the alleged SOX violation.[12] The ninety-day limitations period commences "when the discriminatory decision has been both made and communicated to the complainant."[13] The administrative law judges (ALJs) and the courts have strictly construed the complaint filing and exhaustion requirements of SOX. In *Powers v. Pinnacle Airlines*, for instance, the plaintiff attempted to add Northwest Airlines as a party at the formal hearing stage after OSHA concluded that Pinnacle, a subsidiary of Northwest, was not a publicly traded company.[14] The ALJ concluded that the plaintiff could not assert claims against Northwest because (1) the plaintiff had not named Northwest or asserted claims against it in the original complaint; (2) the complaint against Northwest was filed more than ninety days after the challenged adverse employment action; and (3) the plaintiff was never employed by Northwest, which is required by the Act.[15]

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9. *Id.* § 1514A(c).
10. *Id.* § 1513(e).
11. *Id.*
12. 18 U.S.C. § 1514A(b)(2)(D) (1994 & Supp. 2005); 29 C.F.R. § 1980.103(d) (2004).
13. *Id. See also* Carter v. Champion Bus, Inc., 2005 SOX 23, 2–3 (ALJ Mar. 17, 2005) (finding 90-day limitations period began when complainant informed of decision to terminate him, not "when talks about severance compensation concluded nor when the consequences of the act became most painful"); Lawrence v. AT&T Labs, 2004 SOX 65, 6 (ALJ Sept. 9, 2004) (finding limitations period began to run when complainant was advised of termination, even though complainant could have sought another position with the company); Halpern v. XL Capital, Ltd., 2004 SOX 54, 4 (ALJ June 7, 2004) (finding limitations period commenced when complainant was informed of his termination, not when he discovered allged discriminatory reason for termination at a later date); Flood v. Cendant, 2004 SOX 16, 2 (ALJ Feb. 23, 2004) (90-day limitaitons period begins to run on date that complainant was notified of adverse employment action, not date when adverse employment action becomes effective), *aff'd*, Arb. 04–069 (ARB Jan. 25, 2005).
14. Powers v. Pinnacle Airlines, Inc., 2003 AIR 12, 4 (ALJ Mar. 5, 2003).
15. *Id. See also* Willis v. Vie Fin. Group, Inc., 2004 WL 1774575, *3–6 (E.D. Pa. Aug.

II. Retroactive Application of SOX

DOL ALJs have consistently held that SOX does not apply retroactively.[16] It is unclear, however, whether claimants will be able to sustain a SOX claim if the protected conduct occurred before the enactment of SOX, but the retaliatory conduct occurred after.[17]

III. Covered Employers

The following categories of employers are covered by section 806:

(1) Employers that are required to file reports under section 15(d) of the Securities and Exchange Act of 1934; and
(2) Foreign employers that have a class of securities registered under section 12 of the Securities and Exchange Act of 1934.[18]

In addition, the statute expressly prohibits retaliation by employees, officers, contractors, subcontractors and agents of covered companies.[19]

To pursue a claim under section 806, a complainant must file a timely complaint against a publicly traded entity that falls within this

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6, 2004) (finding failure to exhaust administrative remedies precluded plaintiff from pursuing a retaliatory termination claim); Harvey v. Home Depot, 2004 SOX 20, 21 (ALJ May 28, 2004) (finding no waiver of 90-day limitations period where complainant incorrectly believed that his letters asserting "violations of federal labor laws" constituted SOX complaints); Cunningham v. Washington Gas Light Co., 2004 SOX 14, 2 (ALJ Apr. 2, 2004) (finding complaint filed four years after alleged retaliatory termination untimely); Flood, 2004 SOX 16, 2 (dismissing complaint filed 96 days after notification of termination as untimely); Foss v. Celestica, Inc., 2004 SOX 4, 3 (ALJ Jan. 8, 2004) (finding complaint untimely when filed 102 days after termination); Moldauer v. Canandaigua Wine Co., 2003 SOX 26, 4 (ALJ Nov. 14, 2003) (finding timely filing of complaints with other agencies did not toll the limitations period for filing a SOX complaint with the DOL); Walker v. Aramark Corp., 2003 SOX 22, 4 (ALJ Aug. 26, 2003) (finding SOX complaint untimely where complainant did not initiate contact with OSHA until 105 days after his termination).

16. *See* McIntyre v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 2003 SOX 23, 12 (ALJ Jan. 16, 2004), *as corrected*, 2003 SOX 23, 1–2 (ALJ Jan. 30, 2004) (finding no protected activity when reports of suspected violations were made prior to the effective date of SOX); Kunkler v. Global Futures & Forex, Ltd., 2003 SOX 6, 3 (ALJ Apr. 24, 2003) (finding claim not actionable where alleged retaliatory conduct occurred two months prior to enactment of SOX); Gilmore v. Parametric Tech. Corp., 2003 SOX 1, 3–4 (ALJ Feb. 6, 2003) (finding no viable SOX claim where complainant was terminated prior to enactment of SOX).

17. *See* Lerbs v. Buca di Beppo, Inc., 2004 SOX 8, 11 (ALJ June 15, 2004) (finding claim permissible where alleged retaliation occurred after effective date of SOX, even though alleged protected activity occurred before SOX was enacted).

18. 18 U.S.C. § 1514A (1994 & Supp. 2005); 29 C.F.R. §§ 1980.101, 1980.102 (2004). ALJs and at least one court have held that the protections of section 806 do not apply to employees working outside of the United States. *See* Ede v. Swatch Group, 2004 SOX 68, 2 (ALJ Jan. 14 2005) (finding SOX only applies to employees working in the United States); Concone v. Capital One Fin. Corp., 2005 SOX 6, 4 (ALJ Dec. 3, 2004) (dismissing SOX complaint filed by a foreign national who worked exclusively overseas); Carnero v. Boston Scientific Corp., 2004 WL 1922132, 2 (D. Mass. Aug. 27, 2004) (same).

19. 18 U.S.C. § 1514A(a) (1994 & Supp. 2005).

definition.[20] Most DOJ ALJs have held that SOX does not protect employees of nonpublicly traded subsidiaries of publicly-traded corporations, unless the complainant names both the publicly traded parent and the nonpublicly traded subsidiary as respondents.[21] As the ALJ in *Grant v. Dominion East Ohio Gas* explained, "[t]he plain language of the statute provides no cause of action against a non-public subsidiary standing alone. Thus, Complainant simply cannot maintain the instant claim unless he names a publicly traded company as Respondent, and establishes that the Respondent is actually covered by the Act."[22] Moreover, even in situations where the publicly traded parent or affiliate is named in the complaint during the ninety-day filing period, the complainant cannot pursue a whistleblower claim under the Act unless he shows that the publicly traded parent or affiliate was his "employer" under an alter-ego or another theory.[23]

The statue expressly prohibits retaliation by employees, officers, contractors, subcontractors and agents of covered companies.[24] At least one ALJ has recognized that a nonpublicly traded company is not subject to SOX under this provision simply because it is affiliated with a publicly traded company or engages in financial dealings with such a company.[25] In *Roulett v. American Capital Access*, the complainant argued that SOX extended to the respondent, a nonpublicly traded entity, because the respondent acted as a "company representative" for publicly traded companies.[26] In rejecting this argument, the ALJ stated,

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20. *See, e.g.*, Minkina v. Affiliated Physician's Group, 2005 SOX 19, 5–6 (ALJ Feb. 22, 2005) (finding respondent not covered by SOX because it is not a publicly traded company); Weiss v. KDDI America Inc., 2005 SOX 20, 1 (ALJ Feb. 11, 2005) (dismissing SOX complaint where it was conceded that respondent was not a publicly traded corporation); Flake v. New World Pasta Co., 2003 SOX 18, 5 (ALJ July 7, 2003), *aff'd* (ARB Feb. 25, 2005) (finding employer not subject to SOX because it was not publicly traded and was not required by federal law to file reports with the SEC).

21. *See* Grant v. Dominion E. Ohio Gas, 2004 SOX 63, 33 (ALJ Mar. 10, 2005); Hughart v. Raymond James & Assocs., Inc., 2004 SOX 9, 45 (ALJ Dec. 17, 2004) (Sarbanes-Oxley complaint that only named a nonpublicly traded subsidiary of publicly traded parent company permissible where complainant amended his complaint to name the parent company); Klopfenstein v. PCC Flow Tech. Holdings, Inc., 2004 SOX 11, 10–12 (ALJ July 6, 2004) (dismissing Sarbanes-Oxley claim where complaint named only a wholly owned subsidiary of a publicly traded parent company); Morefield v. Exelon Servs., Inc., 2004 SOX 2, 6–7 (ALJ Jan. 28, 2004) (finding employees of nonpublic subsidiary permitted to maintain a SOX claim because they named both subsidiary and parent company); *Powers*, 2003 AIR 2 at 4 (dismissing Sarbanes-Oxley complaint where complainant added a publicly traded parent as a respondent after the expiration of the 90-day filing period).

22. *Grant*, 2004 SOX 63 at 33.

23. *See* Platone v. Atlantic Coast Airlines Holdings, Inc., 2003 SOX 27, 21 (ALJ Apr. 30, 2004) (employee of nonpublicly traded subsidiary could maintain SOX claim against publicly traded parent company because the companies shared some senior management and interchanged corporate logos and titles); *Powers*, 2003 AIR 2 at 4 ("[n]or was the Complainant an employee of [the publicly traded parent], as required by the Sarbanes-Oxley Act").

24. 18 U.S.C. § 1514A(a) (1994 & Supp. 2005).

25. *See* Roulett v. American Capital Access, 2004 SOX 78, 9 (ALJ Dec. 22, 2004).

26. *Id.* at 8.

"[t]he fact that publicly traded companies rely upon Respondent's services and purchase its products does not make Respondent their contractor, subcontractor or agent."[27]

IV. Elements of a Section 806 Claim

To establish a violation of section 806 of SOX, a complainant must establish by a preponderance of the evidence that (1) he engaged in protected activity as defined by the Act, (2) his employer was aware of the protected activity, (3) he suffered an adverse employment action, and (4) the circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable action.[28] If a claimant establishes these elements by a preponderance of the evidence, a respondent may avoid liability by presenting clear and convincing evidence that it would have taken the same unfavorable personnel action absent any protected activity.[29] The application of this standard involves the five distinct inquiries discussed below.

A. Did Complainant Engage in Protected Activity?

There are two separate categories of "whistleblowing" protected by section 806. First, subsection (a)(1) protects employees who "provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of" specified federal securities and anti-fraud laws.[30] Second, subsection (a)(2) protects employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with knowledge of the employer) relating to an alleged violation" of the enumerated federal provisions.[31] Employers are prohibited from retaliating against employees who engage in protected conduct, which is defined to include conduct such as discharge, demotion, suspension, threats, harassment, or any other form of discrimination.[32]

By its terms, section 806 only protects an employee who "reasonably believes" that the information reported constitutes a violation of the federal mail, wire, bank, or securities fraud statues, any rule or

27. *Id.* at 8–9.

28. 29 C.F.R. §§ 1980.104(b), 1980.109(a) (2004); *Grant*, 2004 SOX 63 at 35; Allen v. Stewart Enter. Inc., 2004 SOX 60, 81 (ALJ Feb. 15, 2005); Taylor v. Wells Fargo, Texas, 2004 SOX 43, 10 (ALJ Feb 14, 2005); Jayaraj v. Pro-Pharmaceuticals, Inc., 2003 SOX 32, 16 (ALJ Feb. 11, 2005); Barnes v. Raymond James & Assocs., 2004 SOX 58, 5 (ALJ Jan. 10, 2005); Hendrix v. American Airlines, Inc., 2004 SOX 23, 9 (ALJ Dec. 9, 2004); Richards v. Lexmark Int'l, Inc., 2004 SOX 49, 12 (ALJ Oct. 1, 2004); Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1375 (N.D. Ga. 2004).

29. *See* 29 C.F.R. § 1980.109(a) (2004). S*ee also Grant*, 2004 SOX 63 at 36; *Taylor*, 2004 SOX 43 at 10; *Jayaraj*, 2003 SOX 32 at 28; *Barnes*, 2004 SOX 58 at 6; *Hendrix*, 2004 SOX 23 at 19; *Richards*, 2004 SOX 49 at 13; *Collins*, 334 F. Supp. 2d at 1376.

30. *See* 18 U.S.C. § 1514A(a) (1994 & Supp. 2005).

31. *See id.* § 1514A(a)(2).

32. *See id.* § 1514A(a).

regulations of the SEC, or any federal law relating to fraud against shareholders.[33] A complainant's belief, therefore, "must be scrutinized under both subjective and objective standards, i.e., he must have actually believed the employer was in violation of the relevant laws or regulations and that belief must be reasonable."[34] The reasonableness of a complainant's belief "is to be determined on the basis of the knowledge available to a reasonable person in the circumstances with the employee's training and experience."[35]

To determine whether the complainant possessed a reasonable belief that the conduct complained of violated one of the enumerated laws, ALJs examine the totality of the circumstances revealed by the record evidence.[36] Where such an inquiry reveals that a reasonable person would not have concluded that the respondent engaged in conduct prohibited by the federal securities laws, the claim has been dismissed. In *Barnes v. Raymond James & Assocs.*, for example, the complainant informed a company official that she believed that her supervisor was knowingly conducting improper "switches" of mutual fund accounts in order to generate additional, unnecessary fees.[37] In assessing the reasonableness of the complainant's belief, the ALJ reviewed the complainant's own testimony that her supervisor engaged in more "exchanges" than switches and considered her failure to raise her complaints at an earlier opportunity.[38] The ALJ concluded that "complainant's belief regarding [her supervisor's] alleged unethical conduct simply cannot be

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33. *See id.* § 1514A(a)(1).

34. *Grant*, 2004 SOX 63 at 36. *See also Allen*, 2004 SOX 60 at 83; Tuttle v. Johnson Controls, 2004 SOX 76, 3 (ALJ Jan. 3, 2005); *Lerbs*, 2004 SOX 8 at 13.

35. *Id. See also Jayaraj*, 2003 SOX 32 at 16.

36. *See* Nixon v. Stewart & Stevenson Servs., Inc., 2005 SOX 1, 13 (ALJ Feb. 16, 2005) (finding no evidence that complainant provided information that he reasonably believed to be a violation of an SEC rule); *Barnes*, 2004 SOX 58 at 8 (holding complainant's belief that her boss engaged in improper mutual fund switches in order to generate unnecessary client fees was not reasonable given the lack of evidence of any such transactions); *Tuttle*, 2004 SOX 76 at 4 (finding no evidence that complainant objectively or actually believed that company was violating any of the enumerated laws); Henrich v. Ecolab, Inc., 2004 SOX 51, 8 (ALJ Nov. 23, 2004) (finding complainant reasonably believed that conpany's shareholders may be subjectetd to fraud by alleged "cheating" in accounting for inventory, material losses, and labor costs); Gonzalez v. Colonial Bank, 2004 SOX 39, 6 (ALJ Aug. 20, 2004) (finding complainant's persistence in raising his concerns, including multiple conversations with company officials, demonstrated his reasonable belief); *Lerbs*, 2004 SOX 8 at 16 (finding no evidence that complainant reasonably believed challenged practices were illegal at time of complaint); *Platone*, 2003 SOX 27 at 23 (finding that complainant's disclosure and her attempt to follow up on her suspicions supported the conclusion that she had a reasonable belief that fraud was being perpetrated); Halloum v. Intel Corp., 2003 SOX 7, 15 (ALJ Mar. 4, 2004) (finding complainant reasonably believed that he had been asked to commit an illegal activity even though a subsequent investigation concluded otherwise); Welch v. Cardinal Bankshares Corp., 2003 SOX 15, 55 (ALJ Jan. 28, 2004) (finding objective assessment of evidence revealed that most of complainant's allegations were based upon a reasonable belief that SOX violations were being committed).

37. Barnes, 2004 SOX 58 at 6–7.

38. *Id.* at 7.

found reasonable when the only objective evidence of record weighs against such a belief."[39]

Moreover, to qualify as protected activity under section 806, a complainant must have provided the information or assistance to (1) a "Federal regulatory or law enforcement agency," (2) any "member of Committee of Congress,"[40] or (3) anyone "with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover or terminate misconduct)."[41] The third category has been broadly interpreted by DOL ALJs and courts.[42] Thus, this provision may cover complaints (1) transmitted through hotlines and audit committees established pursuant to SOX and (2) depending on the structure of the employer's organization, to executives, human resources professionals, and, possibly, supervisors. In most situations, given their inability to investigate and address misconduct, complaints to co-workers will not constitute protected activity.

B. Was the Employer Aware of the Protected Activity?

To satisfy the second element of a prima facie case under section 806, a complainant must prove by a preponderance of the evidence that the employer had actual or constructive knowledge of the protected activity.[43] A complainant is not, however, required to prove that the employer's final decision maker had "direct personal knowledge" of the protected activity.[44] Rather, constructive knowledge may be attributed to the ultimate decision maker.[45] Thus, a complaint to a supervisor or

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39. *Id.* at 8.

40. With respect to this second category, it is unclear whether complaints to a member of Congress are protected if the member is not conducting an ongoing investigation within the jurisdiction of a particular congressional committee. As the legislative history of SOX indicates, the White House maintained that the congressional investigations covered by the statute are limited to those "authorized by the rules of the Senate or House of Representatives and conducted for a proper legislative purpose." Sarbanes-Oxley Act of 2002: Statement by the President of the United States, 2002 U.S.C.C.A.N. 543 (July 30, 2002). Yet an administrative decision under a similar whistleblower statute held that complaints to a member of Congress concerning environmental crimes litigation were protected even though the member of Congress was not conducting an authorized investigation. *See* Sasse v. Office of U.S. Attorney, 1998-CAA-7, 19–20 (May 8, 2002).

41. *See* 18 U.S.C. § 1514A(a)(1) (1994 & Supp. 2005). *See also Halloum*, 2003 SOX 7 at 15 (holding complaint to SEC was protected activity).

42. *See Collins*, 334 F. Supp. 2d at 1378 (finding protected activity because vice presidents to whom complaints were addresssed "understood the nature and type of allegations that she made and that those allegations were in the zone of protection afforded by" SOX); *Gonzalez*, 2004 SOX 39 at 5 (rejecting company's argument that complainant's reports were not protected activity because, even though there was evidence that complainant viewed the company official as his subordinate, the company official was actually a superior and drafted and executed complainant's termination notice); Getman v. Southwest Secs., Inc., 2003 SOX 8, 22 (ARB July 29, 2005) (reversing ALJ and holding that complainant's refusal to change her rating in the presence of her managers did not constitute an act of whistleblowing covered by SOX).

43. *See* 29 C.F.R. § 1980.104(b)(1)(ii) (2004).

44. *Platone*, 2003 SOX 27 at 24.

45. *Id. See also Henrich*, 2004 SOX 51 at 9.

other company official may put the employer on constructive notice of the protected activity.[46] At least one ALJ, however, has dismissed a SOX claim where there was no evidence that any manager with actual knowledge of the complainant's protected activity played any role in initiating or determining discipline and the decision maker did not know about the complainant's allegations until after the complainant had been suspended.[47]

C. Did Complainant Suffer an Adverse Employment Action?

SOX prohibits a covered employer from taking an adverse employment action against an employee because he or she engaged in protected activity.[48] Under the express language of the statute, suspensions and terminations constitute adverse employment actions.[49] In determining what other actions qualify as adverse employment actions, ALJs have looked to administrative decisions under other whistleblower statutes and Title VII precedent.[50] In *Dolan v. EMC Corp.*, an ALJ ruled that "[a]n adverse employment action must have some tangible job consequence."[51] The ALJ held that a negative performance evaluation that did not result in a lower salary, jeopardize the employee's job security, or cause any tangible job detriment could not be considered an adverse employment action.[52]

Other ALJs have defined the phrase "adverse employment action" more liberally. For example, the ALJ in *Halloum v. Intel Corp.* held that an "employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures."[53] The ALJ concluded that, although an original corrective action plan was not an unfavorable personnel action, the modifications to that plan, which eliminated complainant's supervisory responsibilities and permanently reassigned his

46. *See Hughart*, 2004 SOX 9 at 47–48 (finding complainant reported his allegations to multiple supervisors); *Richards*, 2004 SOX 49 at 14 (finding complaint to direct supervisor placed employer on notice of protected activity); *Collins*, 334 F. Supp. 2d at 1378 (finding defendant aware of plaintiff's protected activity because plaintiff complained to her supervisors); *Halloum*, 2003 SOX 7 at 15 (finding complaint to CEO made employer aware of protected activity); *Welch*, 2003 SOX 15 at 61 (finding correspondence to CEO and meeting minutes "leave no doubt that Respondent was fully aware of each one of Welch's allegations").

47. *See Grant*, 2004 SOX 63 at 45.

48. 18 U.S.C. § 1514A(a) (1994 & Supp. 2005); 29 C.F.R. § 1980.102(b) (2004).

49. *See Grant*, 2004 SOX 63 at 46 (finding 10-day suspension was an adverse employment action); *Taylor*, 2004 SOX 43 at 11 (finding discharge was an adverse employment action); *Platone*, 2003 SOX 27 at 26 (finding suspension and then termination were adverse employment actions); *Welch*, 2003 SOX 15 at 61 (finding termination was an unfavorable personnel action).

50. *See Hendrix*, 2004 SOX 23 at 12; Dolan v. EMC Corp., 2004 SOX 1, 3 (ALJ Mar. 24, 2004); *Halloum*, 2003 SOX 7 at 14.

51. *Dolan*, 2004 SOX 1 at 4.

52. *Id.* at 4-5.

53. *Halloum*, 2003 SOX 7 at 15–16.

subordinates, qualified as adverse employment actions.[54] Similarly, in *Hendrix v. American Airlines*, the ALJ concluded that complainant's placement on a layoff list constituted an adverse employment action because "an employee who is placed on a lay-off list reasonably fears that he will lose his job when that list goes into effect" and, therefore, would be deterred from blowing the whistle for fearing of losing his job.[55]

In assessing whether a complainant suffered an adverse employment action, at least one ALJ has utilized both the tangible job consequence analysis and the more liberal deterrence analysis.[56] In *Allen v. Stewart Enter.*, the complainants alleged, *inter alia*, that the increased error rates assigned to them and the relocation of their workspace constituted adverse employment actions.[57] The ALJ found the increased error rates did not negatively impact the complainants' employment because they continued to receive good work evaluations and the new work stations did not compromise complainants' ability to complete their assigned job duties.[58] The ALJ further found that the complainants did not show that either challenged job action would have deterred other employees from engaging in protected activity.[59] The ALJ distinguished the complainants' circumstances from *Halloum v. Intel Corp.*, stating that "[u]nlike *Halloum*, Complainants in this present matter have failed to establish that either the increased error rates or the workspace relocation had any actual adverse effect on the terms of their employment."[60]

D. Was the Protected Activity a Contributing Factor in the Adverse Employment Action?

Under the evidentiary framework established by the regulations, a complainant must establish by a preponderance of evidence that the circumstances surrounding the challenged adverse action raise an inference that the protected activity was a "contributing factor" in the adverse action.[61] Courts have interpreted "a contributing factor" to mean any factor tending to affect the decision to take adverse action."[62] In applying this standard, ALJs review the totality of the circumstances revealed by the record evidence.

In *Hendrix v. American Airlines*, for instance, the complainant claimed that he had been placed on the company's layoff list because

54. *Id.* at 17.
55. *Hendrix*, 2004 SOX 23 at 14–15.
56. *See Allen*, 2004 SOX 60 at 94–95.
57. *Id.* at 94.
58. *Id.* at 95.
59. *Id.*
60. *Id.*
61. 29 C.F.R. § 1980.109(a) (2004).
62. *Hendrix*, 2004 SOX 23 at 18. *See also Jayaraj*, 2003 SOX 32 at 25, *Henrich*, 2004 SOX 51 at 10; *Richards*, 2004 SOX 49 at 14; *Collins*, 334 F. Supp. 2d at 1379.

he received a poor performance review for participating in an investigation regarding another employee's use of company resources to make sculptures from aircraft parts.[63] The ALJ reviewed the evidence surrounding the investigation and the layoff decision and found that there was "ample evidence in the record" to show that the investigation was not a contributing factor in his placement on the layoff list.[64]

The ALJ explained that

> Significantly, the conduct of the various management officials involved in the Alderman investigation is hardly the kind of secretive behavior one would expect in a conspiracy to silence a whistleblower. Management supported the Alderman investigation from its inception. In fact, it was Purcell, a PPM manager, who involved Complainant in the investigation in the first place. Moreover, it was Martins who suggested that Complainant go outside his department and alert both corporate security and management advisory services. I find it difficult to believe that management would have encouraged Complainant's participation and encourage him to involve internal security officials if it had something to hide.[65]

In *Richards v. Lexmark Int'l*, Lexmark terminated Richards' employment in January 2003, allegedly for poor performance.[66] Richards claimed that Lexmark terminated him in violation of SOX because he had reported problems with Lexmark's inventory accounting method.[67] Lexmark argued that it made the decision to terminate Richards prior to any alleged protected activity and that, therefore, Richards could not establish the requisite causal relationship.[68] Reviewing the record evidence, the ALJ found that the written documents were vague and inconclusive.[69] As the ALJ explained, "[i]f Richards' communication with his supervisor on Friday, January 3, 2003 in any way affected the events regarding his termination, then the protected activity may have also been a contributing factor."[70]

In making this assessment, ALJs consider the temporal proximity of the adverse employment action to the date the employer learned of the protected activity.[71] In *Collins v. Beazer Homes*, for instance, the plaintiff was fired fourteen days after she complained to her supervisor about the accounting practices of other employees.[72] The court found that "the temporal proximity between the time when plaintiff made her complaints and the time when she was terminated is sufficient to es-

63. *Hendrix*, 2004 SOX 23 at 8.
64. *Id.*
65. *Id. See also Henrich*, 2004 SOX 51 at 10.
66. *Richards*, 2004 SOX 49 at 6.
67. *Id.* at 5–6.
68. *Id.* at 15.
69. *Id.*
70. *Id.*
71. *See Collins*, 334 F. Supp. 2d at 1379; *Platone*, 2003 SOX 27 at 28.
72. Collins, 334 F. Supp. 2d at 1379.

tablish circumstances which suggest that [the] protected activity was a contributing factor to the unfavorable personnel action."[73]

However, ALJs have found that temporal proximity alone is insufficient to raise an inference of retaliatory intent, particularly where there is a legitimate intervening basis for the adverse action.[74] In *Grant v. Dominion E. Ohio Gas*, for instance, the alleged protected activity occurred approximately one month prior to the adverse employment action.[75] As the ALJ noted, other than this temporal proximity, the complainant could not provide any circumstantial evidence from which the ALJ could infer that the alleged protected activity was a contributing factor in the adverse employment decision.[76] The ALJ noted that the respondent "produced a legitimate intervening basis for [the adverse employment action] sufficient to sever any causal connection remotely suggested because of the temporal proximity."[77] The ALJ concluded that the "temporal proximity upon which Grant has hung his hat is not enough to infer discriminatory animus on the part of Respondent."[78]

Similarly, in *Taylor v. Wells Fargo*, the complainant was terminated only nine days after she engaged in protected activity by contacting her supervisor and the company's in-house counsel regarding the backdating of letters of credit.[79] While noting the close temporal proximity between the protected activity and the adverse employment action, the ALJ found that the timing of complainant's termination did not give rise to an inference of discrimination because complainant had a documented history of poor work performance and unprofessional conduct.[80]

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73. *Id. See also Jayaraj*, 2003 SOX 32 at 28 (finding complainant who was sent home on the day that she engaged in protected activity and then terminated ten days later established that her protected activity was a contributing factor); *Richards*, 2004 SOX 49 at 15 (findings termination on the next business day after allegedly protected activity clearly gives rise to an inference of causation); *Gonzalez*, 2004 SOX 39 at 8 (finding genuine issue of material fact as to causation where complainant terminated one day after he wrote a letter with his complaints to company officials); *Halloum*, 2003 SOX 7 at 18 (finding causal relationship established where protected activity occurred five months prior to unfavorable personnel action); *Welch*, 2003 SOX 15 at 62 (finding proximity of seven weeks between protected activity and adverse action is sufficient to create an inference of unlawful discrimination).

74. *See Grant*, 2004 SOX 63 at 46.

75. *Id.*

76. *Id.*

77. *Id.* at 47.

78. *Id.*at 46.

79. *Taylor*, 2004 SOX 43 at 12.

80. *Id.* at 13. *See also Barnes*, 2004 SOX 58 at 13 (finding timing of termination not suspicious where it is credibly explained by a nonretaliatory motive); *Hendrix*, 2004 SOX 23 at 18 (even assuming temporal proximity, allegedly protected activity not a contributing factor in adverse employment action); *Henrich*, 2004 SOX 51 at 10 (finding no causation where evidence established that complainant's falsification of inspection records provided the impetus for termination).

E. If Complainant Establishes a Prima Facie Case, Can the Employer Show That It Would Have Taken the Same Action Absent Any Protected activity?

The regulations provide that, if a complainant establishes a prima facie violation of section 806, a respondent can avoid liability by demonstrating "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior."[81] An employer potentially can carry this burden by establishing through clear and convincing evidence a legitimate, nondiscriminatory reason, such as poor work performance or a violation of company policy, for the adverse employment action. For instance, in *Halloum v. Intel Corp.*, the employer terminated the complainant because he secretly tape-recorded conversations with his co-workers in violation of company policy and because of his poor work performance.[82] The complainant alleged retaliation based upon his reports to the SEC and the company CEO of what he perceived to be improper accounting practices.[83] The ALJ concluded that the employer demonstrated by clear and convincing evidence that it would have fired the complainant for his policy violations and for his poor performance regardless of his protected disclosures to the SEC or the company CEO.[84]

Similarly, in *Hendrix v. American Airlines*, the ALJ found that the evidence concerning complainant's poor work performance and lack of interpersonal skills clearly and convincingly demonstrated that American Airlines would have placed the complainant on the layoff list regardless of whether he participated in the investigation.[85] In so finding, the ALJ noted that the "[c]omplainant's history of difficulties at American preceded his involvement with the investigation."[86]

However, in *Collins v. Beazer Homes*, the employer was unable to present evidence sufficient to prevail on summary judgment on this issue.[87] The employer claimed that it terminated Collins for poor performance and for her inability to get along with co-workers.[88] Collins claimed that her termination violated SOX because she had reported on several occasions to company officials that other employees were attempting to circumvent the company's internal accounting controls

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81. 29 C.F.R. § 1980.109(a) (2004). *See also Hendrix*, 2004 SOX 23 at 19; *Collins*, 334 F. Supp. 2d at 1380.

82. *Halloum*, 2003 SOX 7 at 19.

83. *Id.* at 1.

84. *Id.* at 20.

85. *Hendrix*, 2004 SOX 23 at 19.

86. *Id. See also Grant*, 2004 SOX 63 at 49 (finding employer established by clear and convincing evidence that it would have suspended complainant for his violation of company policy regarding employee behavior even absent any allegedly protected activity); *Klopfenstein*, 2004 SOX 11 at 14 (finding violation of company policy was a legitimate, nondiscriminatory reason for termination).

87. *Collins*, 334 F. Supp. 2d at 1380–81.

88. *Id.* at 1380.

system.[89] In its ruling denying the employer's motion for summary judgment, the court found that there was conflicting evidence as to whether personality conflicts existed between Collins and her colleagues and that there was evidence that the employer had not discussed the alleged performance problems with Collins prior to her termination.[90] Likewise, in *Richards v. Lexmark Int'l*, the ALJ denied the employer's motion for summary judgment because it did not "establish that the timing of the decision to terminate [Richards] was not influenced by his alleged protected activity."[91]

Moreover, ALJs have found a violation of section 806 and awarded relief when the employer fails to clearly and convincingly establish that it would have taken the same personnel action in the absence of any protected activity.[92] In *Platone v. Atlantic Coast Airlines*, for instance, the employer suspended and terminated Platone, claiming that she had engaged in an inappropriate relationship with another employee.[93] Platone alleged that she had been terminated because she had reported her suspicion that the senior director of Labor Relations and other management officials were improperly compensating union members in order to obtain cost concessions in contract negotiations.[94] The ALJ determined that it was impossible to separate the legitimate and illegitimate motives for Platone's suspension and termination.[95] The ALJ held that, because the employer was unable to show by clear and convincing evidence that it would have suspended and terminated Platone solely as a consequence of her relationship with another employee, Platone was entitled to relief under SOX.[96]

V. Remedies for Violations of the Whistleblower Provisions of SOX

An employee who prevails in a proceeding under section 806 is entitled to "make whole relief," including

(1) Reinstatement with seniority;
(2) Backpay with interest; and
(3) Compensation for special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees.[97]

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89. *Id.* at 1372.
90. *Id.* at 1380–81.
91. *Richards*, 2004 SOX 49 at 15–16.
92. *See Jayaraj*, 2003 SOX 32 at 28; *Platone*, 2003 SOX 27 at 27; *Welch*, 2003 SOX 15 at 36.
93. *Platone*, 2003 SOX 27 at 30.
94. *Id.* at 18.
95. *Id.* at 30.
96. *Id.* at 30.
97. 18 U.S.C. § 1514A(c)(2)(A)–(C) (1994 & Supp. 2005). *See also Jayaraj*, 2003 SOX 32 at 29; *Platone*, 2003 SOX 27 at 31; *Welch*, 2003 SOX 15 at 47.

At least one court has held that "make whole relief" includes damages for loss of reputation.[98] The statute does not expressly authorize the award of compensatory or punitive damages.[99]

VI. Administrative Enforcement Procedures

The procedures for filing complaints under SOX track in large part the procedures of several other whistleblower statutes administered by DOL, including the Wendell H. Ford Aviation and Reform Act for the 21st Century, the Energy Reorganization Act, and the Surface Transportation Assistance Act.[100] These procedures contain strict filing deadlines and require investigations and determinations by a series of decision makers. Within DOL, the Occupational Safety and Health Administration (OSHA) is responsible for receiving and investigating SOX complaints.

As the Final Rules note, the DOL generally will not prosecute violations of section 806. The preamble to the Final Rules states that, although the assistant secretary has the authority to participate as a party in proceedings under the statute, his involvement should be limited to "appropriate cases," such as cases involving important or novel legal issues, a large number of employees, alleged violations that appear egregious, or where the interests of justice require the participation of the assistant secretary.[101]

The deadlines and procedures for the processing and review of section 806 complaints are detailed in the Regulations:

1. As discussed above, the complainant first must file a written complaint with the DOL within ninety days of the alleged SOX violation.

2. OSHA is required to give written notice to the employer and other named parties of the complaint. The employer has twenty days to submit written materials and statements to OSHA and request a meeting to present its position.

3. OSHA must dismiss the complaint at the initial review stage unless the complainant establishes a prima facie violation of SOX. Even if the complainant establishes a prima facie violation, OSHA will terminate its proceedings if the employer establishes by "clear and convincing evidence" that it would have taken the same action in the absence of the protected activity. If the employer fails to make this showing, OSHA must, within sixty days of the filing of the complaint, conduct an investigation to determine whether there is reasonable cause to believe that the complaint is meritorious.

4. Prior to issuing its findings and preliminary order, if OSHA has reasonable cause to believe that the employer violated SOX and that

98. *See* Hanna v. WCI Cmty., Inc., 348 F. Supp. 2d 1332, 1333–34 (S.D. Fla. 2004).
99. *Id.* at 1333.
100. 29 C.F.R. § 1980.100 *et seq.* (2004).
101. 69 Fed. Reg. 52110 (2004).

preliminary reinstatement is warranted, it must notify the charged party "to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation."[102] The charged party then has ten business days in which to submit a written response, meet with investigators, and present legal and factual arguments.

5. If OSHA determines that there is reasonable cause to believe that the complaint is meritorious, it must notify the charged party of the finding and issue a preliminary order curing the alleged violation, restoring the employee to his or her prior position (with seniority), and providing for other affirmative relief available under the statute. The preamble to the Final Rules notes that reinstatement may not be an appropriate interim remedy where the employer establishes that the complainant is or has become a security risk based on information uncovered since his termination. Moreover, OSHA has the option of giving the complainant "economic reinstatement" and ordering that he receive the same pay and benefits that he received prior to his termination, but not actually return to work.

6. Within thirty days of this initial determination, either party may file objections and request a hearing before a DOL ALJ. If there are no objections lodged, the findings become conclusive and are not subject to judicial review. If objections are lodged and a hearing is held, the ALJ must issue a decision within 120 days of the hearing. All relief ordered by OSHA, other than reinstatement, is stayed while the complaint is being litigated before an ALJ. Formal rules of evidence do not apply in proceedings before the ALJ. In addition, the regulations note that, in order to expedite the hearing, ALJs have broad discretion to limit discovery. If the ALJ determines that the complaint was frivolous or was brought in bad faith, it may award the employer a reasonable attorneys' fee, not to exceed $1,000.

7. The ALJ's decision becomes the final decision of the Department unless a party appeals the decision to the DOL's Administrative Review Board (ARB). Final orders of the ARB may be appealed to the court of appeals for the circuit where the alleged violation occurred or where the complainant resided at the time of the alleged violation.

8. If a final order has not been issued within 180 days of the date that the complaint was filed with DOL and the complainant is not responsible for the delay, the complainant may withdraw his administrative complaint and file an action in federal district court for de novo review.[103] Complainants are required to provide the DOL with fifteen

102. 29 C.F.R. § 1980.104(e) (2004).

103. *See, e.g.*, Livingston v. Wyeth Pharm., 2003 SOX 25, 1 (ALJ Oct. 6, 2003) (finding complainant had right to file in federal district court because there had been no final decision within 180 days); Willy v. Ameritron Prop., Inc. 2003 SOX 9, 1–2 (ALJ June 27, 2003) (granting complainant's motion to withdraw his administrative claim to file in

days' notice prior to filing a complaint in federal district court. The same standards and burdens of proof that apply in proceedings before OSHA apply to district court proceedings.

The preamble to the Final Rules notes that DOL anticipates that federal courts will apply the doctrines of issue and claim preclusion in situations where a claimant brings a new suit in federal court after extensive litigation before the DOL that resulted in a decision by an ALJ or the secretary.[104] In such a situation, a district court may choose to treat the complaint as a writ of mandamus and compel DOL to complete the administrative proceeding under specified time frames.[105]

In *Murray v. TXU Corp.*, a federal district court in Texas addressed the district court's jurisdiction over section 806 claims.[106] The court ruled that, given the statutory and regulatory prerequisites discussed above, a federal district court lacks jurisdiction over section 806 complaints where

(1) The plaintiff failed to file a complaint with the DOL within ninety days of the alleged violation;
(2) The DOL issued a final decision within 180 days of the filing of the complaint;
(3) The plaintiff filed suit in federal district court less than 180 days after the filing of the DOL complaint; and
(4) The DOL failed to issue a decision within 180 days of filing as a consequence of the plaintiff's bad faith.[107]

The court held that, as long as the plaintiff complied with his obligation to file within the ninety-day period, his failure to file with the applicable OSHA area director and to hold the DOL's "feet to the irons" in a situation where his complaint to the secretary of Labor fell "through the proverbial cracks" did not demonstrate bad faith precluding a district court suit.[108]

If the parties have entered into an arbitration agreement that cov-

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federal court because no final decision had been issued within 180 days of the filing of the initial complaint).

104. 69 Fed. Reg. 52111 (2004).

105. *See* Stone v. Duke Energy Corp., No. 3:03-CV-56, 2004 WL 1834597, at *1–2 (W.D.N.C. June 10, 2003) (declining to stay administrative proceeding because there was no indication that the 180-day limit was reached because of the plaintiff's bad faith or delay and because, although the secretary had expended "some resources" in connection with the investigation and initial determination, it "has not issued a final order, and [did] not appear ready to do so anytime in the immediate future").

106. Murray v. TXU Corp., 279 F. Supp. 2d 799 (N.D. Tex. 2003).

107. *Id.* at 802.

108. *Id.* at 804–05. *See also Collins*, 334 F. Supp. 2d at 1372–74 (finding jurisdiction proper because OSHA failed to issue findings within 180 days and because there was no showing of bad faith).

ers employment-related disputes, the DOL or federal court may defer to arbitration.[109]

VII. When Is an Employer Potentially Subject to Criminal Liability?

In addition to the new civil claim available under section 806, in SOX, Congress expanded the scope of section 1107, making it a felony to intentionally retaliate against any person who provides "truthful information" concerning the actual or possible commission of "any Federal offense," including federal securities and antifraud laws, to a "law enforcement officer."[110] This provision differs from section 806 in several material respects:

- It only applies to complaints to a "law enforcement officer";
- The information reported must be "truthful";
- The information reported may relate to "*any* Federal offense";
- The provision applies to the conduct of *any* employer, not merely publicly registered companies; and
- The provision prohibits interference with the lawful employment or livelihood of any person.[111]

Individuals who violate this provision are subject to fines of up to $250,000 and/or imprisonment for up to ten years. Organizations that violate this provision are subject to fines of up to $500,000.[112]

VIII. How Do the Whistleblower Provisions of SOX Change the Law?

Under current law, an employee asserting a wrongful discharge claim must demonstrate that his discharge contravened a clear mandate of public policy. Typically, such mandates are found in constitutional rights or in statutes. Consistent with this requirement, several courts have held that internal complaints of wrongdoing cannot form the basis of a wrongful discharge claim. At least for publicly traded companies, SOX creates a clear mandate of public policy protecting internal complaints, as well as complaints to public officials. This is not, however, necessarily bad news for employers.

Wrongful discharge law provides that, if the statute establishing the clear mandate of public policy also contains a procedure for relief, the employee must rely on that procedure, including its provisions for

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109. *See* Boss v. Salomon Smith Barney, 2003 U.S. Dist. LEXIS 8340, at *1 (S.D.N.Y May 16, 2003) (staying whistleblower retaliation complaint and compelling arbitration before NASD pursuant to employer's arbitration policy and U-4 application).

110. 18 U.S.C. § 1513(e) (1994 & Supp. 2005).

111. *Id.*

112. *Id.*

damages, in lieu of a tort claim for wrongful discharge. SOX contains exactly this sort of provision. Moreover, SOX may preclude claims for punitive damages, because the Act expressly states that the remedies available are limited to the relief required to make whole the employee. Because punitive damages are not “make-whole” relief, but are designed to punish and deter, it would appear that such damages are not available.

"On the Road Again" (to Organizing): *Dana Corp.*, *Metaldyne Corp.*, and the Board's Attack on Voluntary Recognition Agreements

Alexia M. Kulwiec*

I. Introduction

When Congress passed the Wagner Act in 1935, it declared that the "policy of the United States" included "encouraging the practice and procedure of collective bargaining."[1] Central to the furtherance of that policy is the effectuation of the majority choice of employees concerning their bargaining representative. Section 9(a) of the Act states in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit.[2]

As the plain text of section 159 makes clear, employees' choice can be expressed through an election supervised by the National Labor Relations Board (NLRB or the Board), but that is not the exclusive method of registering the will of the majority.[3] In addition, the Board has always considered employers' voluntary recognition based on a showing of majority support an equally acceptable method of establishing a bargaining relationship.[4] As the Supreme Court has made clear, "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status."[5] Indeed, such recognition existed before the passage of the Act and the introduction of elections was only

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1. 29 U.S.C. § 151 (2000).
2. 29 U.S.C. § 159(a) (2000).
3. *Id.*
4. John Deklewa & Sons, 282 N.L.R.B. 1375, 1387 n. 53, 124 L.R.R.M. (BNA) 1185, 1196 (1987); Island Construction Co., 135 N.L.R.B. 13, 15–16, 49 L.R.R.M. 1417, 1418 (1962).
5. United Mine Workers v. Arkansas Flooring Co, 351 U.S. 62, 72 n.8, 37 L.R.R.M. (BNA) 2828 (1956).

intended to provide a remedy for employees whose employer would not voluntarily recognize their choice of representative.[6] Immediately after the passage of the Taft-Harltey Act, the Board reiterated, "Employers and unions do not require Board certifications as a prerequisite to collective bargaining if recognition of a majority representative suffices for their purposes."[7] A year earlier, two members observed, "There are thousands of employers who have voluntarily recognized and bargained with representatives of their employees."[8] In other words, for almost seventy years, the Board has accepted and enforced, with Court approval, voluntary recognition agreements, whereby employers recognize a labor organization as the representative of its employees upon proof of majority status.[9]

The Board also has long held that whether the majority's choice is registered in an election or through a card-check, it must be respected for a reasonable period of time to give the process of collective bargaining an opportunity to succeed.[10] The election and recognition bars both recognize the fact that collective bargaining, particularly for a first contract, takes time and requires both commitment and compromise; and that the bars ensure that the majority's desire for collective bargaining is respected for a period of time that gives the parties a reasonable opportunity to reach an agreement.[11] The election bar and recognition bar are two sides of the same coin, purchasing respect for the majority will. On June 7, 2004, the NLRB questioned the well-established recognition bar, and, in so doing, the propriety of voluntary recognition agreements.[12] In *Dana Corp.* and *Metaldyne Corp.*,[13] the 3-2 majority found that "the use of voluntary recognition has grown in recent years" and questioned whether entry into a voluntary recognition agreement prior to the acquisition of majority support somehow altered the appli-

6. 29 U.S.C. § 159(c)(1)(A)(i) (2000).

7. General Box Co., 82 N.L.R.B. 678, 683, 23 L.R.R.M. (BNA) 1589, 1591 (1949).

8. Monroe Co-operative Oil Co., 86 N.L.R.B. 95, 99, 24 L.R.R.M. (BNA) 1591, 1593 (1949) (Members Murdock and Gray dissenting).

9. *See, e.g.*, NLRB v. Lyon & Ryan Ford, Inc.; 647 F.2d 745, 750–751, 107 L.R.R.M. (BNA) 2345 (7th Cir. 1981); NLRB v. Broadmoor Lumber Co., 578 F.2d 238, 241, 98 L.R.R.M. (BNA) 3134 (9th Cir. 1978); NLRB v. Newspapers, Inc., 515 F.2d 334, 340–41, 89 L.R.R.M. (BNA) 2715 (5th Cir. 1975); Baseball Club of Seattle, LP d/b/a Seattle Mariners; 335 N.L.R.B. 563, 564–65, 168 L.R.R.M. (BNA) 1219, 1221–22 (2001); MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 329 N.L.R.B. 464, 465–66, 162 L.R.R.M. (BNA) 1202, 1204 (1999); Keller Plastics Eastern, Inc, 157 N.L.R.B. 583, 586, 61 L.R.R.M. (BNA) 1396, 1397 (1966).

10. *MGM*, 329 N.L.R.B. at 466, 162 L.R.R.M. (BNA) at 1204–05; *Keller Plastics*, 157 N.L.R.B. at 586, 61 L.R.R.M. (BNA) at 1397. The Board has applied the recognition bar in at least 18 separate cases over the past 29 years.

11. *Keller Plastics*, 157 N.L.R.B. at 587, 61 L.R.R.M. (BNA) at 1397–98.

12. Dana Corp. and Metaldyne Corp. (Int'l Union United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW)), Nos. 8-RD-1976, 6-RC-1518, 6-RD-1519, 341 NLRB No. 150, 2004 N.L.R.B. LEXIS 300, *1–*2, 174 L.R.R.M. (BNA) 1521, 1521 (June 7, 2004).

13. *Id.* at *2, *4, 174 L.R.R.M. (BNA) at 1521–22.

cability of the recognition bar. For these reasons, the majority held that reconsideration of the policy underlying the recognition bar was warranted.[14] Soon thereafter, on July 27, 2004, the General Counsel's Office directed the Regions to seek advice in handling any unfair labor practice charges or representation cases where a recognition agreement existed prior to the actual voluntary recognition.[15] In his November 17, 2004, "Report on Recent Case Developments," NLRB General Counsel Rosenfeld again commented on the use of recognition agreements. While he noted the dismissal of sections 8(b)(1)(A) and 8(a)(2) and (3) charges in a case where there was no evidence of coercion, he also reviewed several other cases in which he had authorized the issuance of complaints alleging that portions of the recognition agreements were unlawful.[16]

This paper examines the proper legal status of recognition agreements. As explained *infra*, the Act, congressional intent, and Board precedent all support continued adherence to the recognition bar.

II. Background to the *Dana Corp./Metaldyne Corp.* Decision

The overriding goal of the National Labor Relations Act (the Act) is industrial peace and the encouragement of voluntary arrangements between labor and management.[17] Indeed, the initial passage of the Wagner Act was intended to bring industrial peace between labor and management in the face of major industrial conflicts over employers' refusal to recognize their employees' desire to be represented.[18] Permitting voluntary recognition of a union's majority status and requiring the parties to bargain based on that recognition furthers both the Act's goals of ensuring industrial peace and protecting employees' choice of representatives.[19] To permit an immediate challenge to such recognition dishonors the majority's authorization of collective bargaining and

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14. *Id.* at *4–*5, 174 L.R.R.M. (BNA) at 1522.

15. Memorandum from Arthur Rosenfeld, General Counsel of NLRB, to all Division Heads, Regional Directors, Officers in Charge and Resident Offices, Memorandum No. 04–76 (July 29, 2004), *at* http://www.nlrb.gov/nlrb/shared_files/ommemo/ommemo/om04-76.pdf.

16. *See generally* Arthur Rosenfeld, NLRB Office of the General Counsel, *Report on Recent Case Developments*, R-2544 (Nov. 17, 2004), *at* http://www.nlrb.gov/nlrb/press/releases/R2544.pdf.

17. 29 U.S.C. § 151 (2000); *Dana Corp.*, 341 N.L.R.B. No. 150, 2004 NLRB LEXIS 300, at *8–*10, 174 L.R.R.M. (BNA) at 1522–23 (Members Liebman and Walsh, dissenting, 2004) (*citing MGM*, 329 N.L.R.B. at 466) (Board promotes voluntary recognition and bargaining to promote harmony and stability of labor-management relations).

18. S. Rep. No. 80-105, at 16, 80th Cong. (1st Sess. 1947); Hill v. Florida, 325 U.S. 538, 541, 16 L.R.R.M. (BNA) 734 (1945).

19. *Seattle Mariners*, 335 N.L.R.B. at 565, 168 L.R.R.M. (BNA) at 1222; *MGM*, 329 NLRB at 465–66, 162 L.R.R.M. (BNA) at 1204. *See also* Franks Bros. Co. v. NLRB, 321 U.S. 702, 705–706, 14 L.R.R.M. (BNA) 591 (1944) (bargaining relationship must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed).

complicates the employer's duty to bargain in good faith. Increasing regulation of labor-management relations as suggested by the Board in *Dana* is in direct contradiction to the purposes of the Act and can only be explained by the dissents' observation that American labor unions have had increasing success in winning voluntary recognition from employers.

A. The Election and Recognition Bar

The election bar prohibits filing of petitions affecting an NLRB-certified unit for a period of one year.[20] Thus, a union certified following a Board election is entitled to an unrebuttable presumption of majority support for up to one year.[21] Similarly, the recognition bar provides that the Board will not process any petitions for a reasonable period (typically six to twelve months) following an employer's recognition of the union based on a showing of majority support.[22] The rationale for both prohibitions is the same: the parties must be afforded a reasonable time to bargain and execute a contract resulting from such bargaining.[23] Without such protection, the bargaining relationship will be unstable and the parties may be continually faced with challenges to the established relationship distracting them from the legally required effort to reach a collective agreement in furtherance of the national policy seeking labor peace. For decades, the Board has acknowledged that Board elections and voluntary recognition are equally accepted methods for "designat[ing] or select[ing]" a representative and the Board has afforded similar protections to representatives selected through both methods.[24] Any change to the recognition bar will necessarily devalue voluntary arrangements as new parties to a bargaining relationship will no longer be afforded a reasonable period "in which it can be given a fair chance to succeed."[25] The *Dana* majority attempts to minimize the impact of its anticipated decision, claiming that it is not challenging recognition agreements *per se*, but only whether such agreements are of "bar quality."[26] Yet it is the bar, and the opportunity for meaningful bargaining uninterrupted by premature challenge, that effectuates the

20. 29 U.S.C. § 159(c)(3) (2000).

21. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 37, 125 L.R.R.M. (BNA) 2441 (1987).

22. *See, e.g.*, Sound Contractors Ass'n, 162 N.L.R.B. 364, 365, 64 L.R.R.M. (BNA) 1009, 1009 (1966); Lyon & Ryan Ford, 647 F.2d at 747–48, 107 L.R.R.M. (BNA) 2345 (enforcing Board finding that employer failed to bargain with union after recognition in violation of § 8(a)(5) of the Act); *Seattle Mariners*, 335 N.L.R.B. at 564, 168 L.R.R.M. (BNA) at 1221; *MGM*, 329 NLRB at 466, 162 L.R.R.M. (BNA) at 1204.

23. *Keller Plastics*, 157 N.L.R.B. at 587, 61 L.R.R.M. (BNA) at 1397.

24. *Id.; see also John Deklawa & Sons*, 282 N.L.R.B at 1387 n.53, 124 L.R.R.M. (BNA) at 1196; *Island Constr.*, 135 N.L.R.B. at 15, 49 L.R.R.M. (BNA) at 1418; 29 U.S.C. § 9(a).

25. *See Franks Bros.*, 321 U.S. at 705, 14 L.R.R.M. (BNA) 591.

26. *Dana* Corp., 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, at *2, 174 L.R.R.M. (BNA) at 1521.

purposes of the Act. To remove the protection of the bar would be to undermine the effectiveness of voluntary recognition agreements.

B. The Board's Historic Promotion of Voluntary Recognition[27]

The Board and the courts have long favored voluntary recognition agreements as a means by which employers acknowledge a union's majority support among employees in a given unit.[28] Indeed, it is clear that the electoral mechanism was created only as a remedy for recalcitrant employers who refused to recognize the clear choice of the majority of their employees.[29] The language "designated or selected" in section 9(a) of the Act is written in the disjunctive, implying that more than one method is acceptable, and no preference for elections is expressed.[30] The legislative history clearly indicates that Congress intended to permit nonelection recognition procedures.[31] Thus, the Board has held that voluntary recognition by an employer of a union serves to effectuate employees' free choice.[32] In fact, "it is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations."[33]

The Board does, of course, enforce stringent safeguards to ensure that any "voluntary recognition" is based on the uncoerced choice of a majority of employees. Specifically, the Board requires a "clear and unequivocal agreement by the employer to recognize the union on proof of majority status" and that "the union's majority status has been demonstrated."[34] Accordingly, card check recognition is not too "informal

27. Parties must bargain following Board certification, *Fall River Dying*, 482 U.S. at 37, 125 L.R.R.M. (BNA) 2441; upon issuance of a bargaining order, NLRB v. Gissell Packing Co., 395 U.S. 575, 612, 71 L.R.R.M. (BNA) 2481 (1969); or following the employer's grant of voluntary recognition to the employees' bargaining representative, *Keller Plastics Eastern, Inc.*, 157 N.L.R.B. at 587, 61 L.R.R.M. (BNA) at 1397; *MGM*, 329 N.L.R.B. at 466, 162 L.R.R.M. (BNA) at 1204.

28. *See, e.g.*, *Lyon & Ryan Ford, Inc.*, 647 F.2d at 750–51, 107 L.R.R.M. (BNA) 2345; *Broadmoor Lumber Co.*, 578 F.2d at 241, 98 L.R.R.M. (BNA) 3134; *Newspapers, Inc.*, 515 F.2d at 340, 89 L.R.R.M. (BNA) 2175; *Seattle Mariners*, 335 N.L.R.B. at 565, 168 L.R.R.M. (BNA) at 1222; *MGM*, 329 N.L.R.B. at 465-66, 162 L.R.R.M. (BNA) at 1204; Kroger Co. (Retail Clerks Int'l Assoc. Local No. 455), 219 N.L.R.B. 388, 389, 89 L.R.R.M. (BNA) 1641, 1642 (1975); *Keller Plastics*, 157 N.L.R.B. at 587, 61 L.R.R.M. (BNA) at 1397.

29. 29 U.S.C. § 9(c)(1)(A)(i) (2000) (authorizing the Board to investigate petitions filed by "employees . . . alleging that [they] . . . wish to be represented for collective bargaining and that their employer declines to recognize their representative . . .").

30. *Id.*

31. *Dana Corp. and Metaldyne Corp.*, 341 NLRB No. 150, 2004 N.L.R.B. LEXIS 300 at *3, *10 n.3, 174 L.R.R.M. (BNA) at 1523 (Members Liebman and Walsh dissenting) (citing Retail Clerks Local 455 v. NLRB, 510 F.2d 802, 807, 88 L.R.R.M. (BNA) 2592 (D.C. Cir. 1975)).

32. *Seattle Mariners*, 335 N.L.R.B. at 565, 168 L.R.R.M. (BNA) at 1222.

33. *MGM*, 329 N.L.R.B. at 466, 162 L.R.R.M. (BNA) at 1204.

34. Terracon and IUOE Local 150, Nos. 13-CA-39181, 13-CA-39271, 13-CA-39279 (2003), 339 N.L.R.B. No. 35, N.L.R.B. 2003 LEXIS 294 *11–12 (June 6, 2003), *aff'd*, IUOE v. NLRB, 361 F.3d 395, 397, 174 L.R.R.M. (BNA) 2551 (7th Cir. 2004); Nantucket Fish Co., 309 N.L.R.B. 794, 795, 143 L.R.R.M. (BNA) 1043, 1044 (1992).

and uncertain" to warrant the recognition bar.[35] Rather, the standards governing what qualifies as recognition adequately protect against enforcement of a bargaining relationship lacking majority support.

C. *What Is Not at Issue—Neutrality Agreements*

Perhaps encouraged by what appears to have been an extraordinary rush to judgment by the Board majority when it denied (by a 3-2 vote) routine motions for short extensions of time by its own General Counsel as well as the Union party and amicus AFL-CIO, many employer amici focused their briefs on the issue of neutrality agreements. However, the legal status of such agreements is *not* at issue in *Dana* or *Metaldyne.* There is no evidence in the record of these cases that the agreements at issue contained neutrality provisions or that such provisions were honored. Recognition agreements do not necessarily contain neutrality provisions and neutrality agreements can be reached prior to a Board election. Nothing in the grant of review or the invitation to file briefs alerted the parties or the broader labor-management community that the status of neutrality agreements was at issue in these cases. The Board could not reach the issue in these cases without raising serious due process issues.

A neutrality agreement typically provides that an employer will not engage in specified campaign tactics in opposition to a union organizing campaign.[36] The use of neutrality agreements permits employees to exercise their rights and to choose a bargaining representative free from coercive employer tactics. The use of such agreements often prevents unnecessary litigation before the Board and facilitates the development of a harmonious relationship after recognition.[37] Studies indicate that the use of neutrality agreements increases cooperation post-recognition and decreases unlawful tactics by employers opposing unionization. For example, one study of 118 organizing campaigns demonstrated an approximate 10 percent reduction in the use of unlawful tactics such as retaliatory termination.[38]

Through a neutrality agreement, the parties define voluntarily the rules governing an organizing drive. The parties also often agree upon a method of dispute resolution in the event either party allegedly violates the agreement, thus avoiding protracted litigation before the Board and the courts. These agreements, therefore, further the Act's goals of private ordering and industrial peace. Like the recognition bar,

35. *See* NLRB v. Montgomery Ward & Co., 399 F.2d 409, 412–13, 68 L.R.R.M. (BNA) 2933 (7th Cir. 1968).

36. Rosenfeld, *supra* note 16, at 2–3; Verizon Info. Sys., 335 N.L.R.B. 558, 559, 168 L.R.R.M. (BNA) 1136, 1137 (2001); Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 INDUS. & LAB. REL. REV. 42, 47 (2001).

37. *See* Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

38. Eaton, *supra*, note 36, at 49–50.

the Board for decades has upheld the use of neutrality agreements.[39] The use of a neutrality agreement is completely voluntary by both parties. Thus, an employer that desires to expend the resources strenuously to oppose a union campaign need not enter into such agreement. An employer that prefers to deal with the union strictly on the basis of its employees' choice, however, should likewise have the right to do so. An employer's decision not to engage in an expensive and divisive battle to defeat the union's quest for majority support does not render unlawful assistance to an organizing campaign. Indeed, what would be the remedy if the Board were to so hold—an order forcing such an employer to campaign? As recently as the General Counsel's November 17, 2004, "Report on Case Developments," the General Counsel recognized the legality of neutrality agreements when they do not proceed further and provide for terms and conditions of employment.[40]

As with voluntary recognition, the Board should continue to permit an employer to decide whether and how strongly to oppose a union campaign and to reach an agreement with the union about the limits of campaign conduct.

D. Attack by Right to Work Foundation

The role of the National Right to Work Foundation, Inc. (NRTW) in attempting to turn national labor policy on its head cannot be ignored in examining the context in which the Board is considering changes to the recognition bar doctrine. Lawyers employed by NRTW represent the charging parties in both *Dana* and *Metaldyne* as well as in a number of the cases discussed in the General Counsel's recent memorandum. National labor policy thus is being shaped by an ideologically driven organization that purports to represent employees but was founded and is funded largely by employers.[41] While we do not know how the charging parties in these particular cases came to file the charges, we do know that NRTW has publicly and actively solicited employees to file charges in other cases of voluntary recognition.[42]

Moreover, even a quick glance at the literature published by NRTW establishes that it exists not to protect employees' section 7 rights but to attack unions.[43] The NRTW criticizes "big labor," and challenges la-

39. *See, e.g., Verizon*, 335 N.L.R.B. at 559–60, 168 L.R.R.M. (BNA) at 1138–39; Briggs Indiana Corp., 63 N.L.R.B. 1270, 1272–73, 17 L.R.R.M. (BNA) 46, 47 (1945).

40. Rosenfeld, *supra* note 16, at 2–5.

41. Fine, Chanin, Gold, *Setting the Record Straight: A Report on the National Right to Work Committee and the National Right to Work Legal Defense and Education Foundation, Inc.* (1991).

42. *See* Advertisement, *Don't Let Union Bosses Take Away Your Freedom!*, GRAND RAPIDS PRESS AND LOWELL LODGER (June 2003) ("The Foundation will provide free legal assistance to employees." "Please call the National Right to Work Foundation at 800-336-3600.").

43. *See* National Right to Work Legal Defense Foundation, Inc., *at* http://www.nrtw.org.

bor's role in politics.[44] In fact, Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has held that the ideological bent of NRTW creates a conflict of interest that disqualifies its lawyers from representing a class of employees represented by a union.[45]

Tellingly, it is thus not necessarily employers, the management bar, or even employees challenging the Board's long established recognition bar doctrine. Indeed, both Dana Corp. and Metaldyne Corp. filed briefs in these cases supporting the continuation of the recognition bar doctrine, as did numerous corporate amicus curiae. Employer amicus briefs supporting the continuation of the recognition bar include submissions by the Kaiser Foundation Health Plan, Inc., Collins and Aikman Corp., General Motors, Daimler Chrysler Corp., Ford Motor Company, Levi Strauss, Liz Claiborne, Delphi Group, and Plastech Engineered Products, Inc. The Board's General Counsel recognized the value of voluntary recognition and the continued validity of the recognition bar, supporting only a limited exception to the bar.[46] Only the extreme, unrepresentative, anti-labor voice of NRTW is driving and supporting changes to the recognition bar. The Board should rely on well established precedent and policy rather than capitulate to NRTW's agenda to the detriment of employees, labor, and management.

Recognition agreements between labor and management make sense. If the parties agree voluntarily to the union's status as a representative, they need a reasonable period of time to negotiate an agreement without costly procedures they intended to avoid impeding their efforts.[47] Since prior to recognition, employees voluntarily indicated their preference for the union, all the purposes of the Act are effectuated.[48] Employees have the opportunity to exercise their section 7 rights and the parties are given a reasonable period of time to bargain as the employees directed.

III. The *Dana Corp./Metaldyne Corp.* Cases

A. *Brief Facts*

Both *Dana Corp.*, 8-RD-1976, and *Metaldyne Corp.*, 6-RD-1518 and 6-RD-1519, involve an employer and union entering into recognition agreements requiring a card check showing of majority support. In *Metaldyne*, the union and employer entered into the agreement in Septem-

44. *See* National Right to Work Legal Defense Foundation, Inc., *Big Labor's Massive Political Machine, available at* http://www.nrtw.org/d/political_spending.htm.

45. Gilpin v. AFSCME, 875 F.2d 1310, 1313, 131 L.R.R.M. (BNA) 2636 (7th Cir. 1989), *cert. denied*, 110 U.S. 278 (1989).

46. Amicus Brief of the General Counsel, at 2; Dana Corp. and Metaldyne Corp., 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521 (No. 8-RD-1976, 6-RD-1518, 6-RC-1519) (June 7, 2004).

47. *See Fall River Dyeing*, 482 U.S. at 37, 125 L.R.R.M. (BNA) 2441; *Keller Plastics*, 157 N.L.R.B at 587, 61 L.R.R.M. (BNA) at 1397.

48. *See Lyon & Ryan*, 647 F.2d at 751–53, 107 L.R.R.M. (BNA) 2345.

ber 2002. On November 26, 2003, the union notified the employer that it had a majority of cards and on December 1, 2003, the employer voluntarily recognized the union.[49] Prior to recognition, a Federal Mediation and Conciliation Service (FMCS) mediator verified the union's majority status. On December 23, 2003, petitioner filed a decertification petition.[50]

In *Dana Corp.*, the parties entered into the agreement on August 6, 2003. On November 26, 2003, the union informed the employer that it represented a majority of the bargaining unit employees. Again, a mediator from FMCS verified the union's majority status and on December 4, 2003, the employer voluntarily recognized the union.[51] On January 7, 2004, petitioner filed a decertification petition.[52]

In both cases, the respective Regional Director dismissed the decertification petitions based on the recognition bar doctrine. In both cases, petitioners, represented by the National Right to Work Foundation, filed a request for review.[53]

B. The Board Majority—Chairman Battista; Members Schaumber and Meisburg—Reconsiders the Historically Accepted Recognition Bar

With little discussion, the majority granted petitioners' request for review, stating that it would reconsider the extent to which voluntary recognition should be given "bar quality," i.e., that it would reconsider the recognition bar.[54] In so doing, the majority appeared to criticize the use of recognition agreements that precede the actual presentation of evidence of majority support as well as to question the increased use of voluntary recognition. The majority also posited that secret ballot elections were the best method of determining whether employees desire union representation.[55]

C. The Board Dissent—Members Liebman and Walsh—Supports Continued Promotion of Voluntary Agreements and Would Retain the Recognition Bar

The dissenting opinion hypothesized that the majority granted review because American labor unions have had increasing success in organizing employees through voluntary recognition, commenting "success, it seems, has prompted greater scrutiny."[56] The dissent reviewed the Act's goal of securing industrial peace, the well-established pro-

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49. *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at *1–*2, 174 L.R.R.M. (BNA) at 1521.
55. *Id.*
56. *Id.* at *2.

motion of voluntary recognition, and the well-settled nature of the voluntary recognition bar.[57] The dissent discussed parties' need for a reasonable period of time to reach agreement after both an election and voluntary recognition. The dissent cited to *Kroger Co.*, to illustrate the fact that the Board has long enforced agreements that require an employer to recognize a union once majority status is obtained.[58] The dissent also discussed the usefulness of the recognition bar in furthering the Act's policy of maintaining peace and stability in labor management relations and established that there is no compelling reason to review this well-established law.[59]

D. *The General Counsel Recommends Retention of the Recognition Bar with Limited Exception*

In his brief, the NLRB's General Counsel recognized that the Board has historically promoted voluntary recognition and bargaining in an effort to further harmony in labor-management relations.[60] The General Counsel likewise acknowledged that voluntary recognition is a favored element of national labor policy and effectuates employees' choice.[61] General Counsel Rosenfeld further recognized the needs of the parties to a bargaining relationship, whether established by an election or voluntary recognition, to have a reasonable period to bargain free of interruption and distraction to effectuate the choice of the majority of employees.[62] The General Counsel thus recommended that the recognition bar be maintained.[63] Since a valid majority of cards is required to obtain recognition, the General Counsel recommended that the recognition bar apply regardless of whether the parties entered into a prior agreement binding the employer to recognize such a showing.[64]

Starting from the premise that recognition based on a card check provides lesser safeguards than an election, the General Counsel recommended a limited exception to the recognition bar doctrine.[65] The General Counsel recommended that the Board process a RD Petition

57. *Id.* at *3–*4.

58. *Id.* (Members Liebman and Walsh dissenting) (citing to *Kroger Co.*, 219 N.L.R.B. at 388, 389) (enforcing after acquired store clauses requiring an employer to recognize union at later acquired facility upon proof of majority status). The majority appear to have responded to this argument by now also attacking the validity of after acquired store clauses. *See* Shaw's Supermarket & UFCW Local 791, No. 1-RM-1267, 343 NLRB No. 105, 2004 N.L.R.B. LEXIS 700, *3–*4, 176 L.R.R.M. (BNA) 1220, 1221 (December 8, 2004).

59. *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300 at *6.

60. *See* Amicus Brief of the General Counsel at 4, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, at *1–*2, 174 L.R.R.M. (BNA) at 1521 (2004).

61. *Id.* at 4–5.

62. *Id.*

63. *Id.* at 8–9.

64. *Id.* at 15.

65. *Id.* at 11.

supported by signature of 50 percent of unit employees within twenty one days of formal notice of voluntary recognition.[66] The General Counsel also recommended that to avoid the bar, such a decertification petition must be filed within thirty days of formal notice of recognition.[67]

IV. Analysis

The Board should retain the recognition bar and uphold the current legal status of voluntary recognition agreements. Doing so will further the national labor policy of ensuring industrial peace through voluntary dispute resolution and effectuate employee free choice.

A. Enforcing Recognition Agreements Furthers Federal Labor Policy

As discussed above, both the Board and federal courts have long enforced voluntary recognition agreements and the Board has held that they are favored by federal labor policy.[68] The use of voluntary arrangements to determine a union's status as bargaining representative avoids the contentiousness and delays associated with NLRB conducted elections.[69] Avoiding litigation and contention furthers the goal of stable labor relations while protecting employee choice through the requirements of a card check.[70] Federal labor policy also favors the private resolution of labor disputes.[71] Accordingly, the continued approval, if not promotion, of voluntary recognition furthers national labor policy. The elimination of the recognition bar would undermine voluntary recognition, for it would deprive the parties of the time necessary to fully establish their relationship through bargaining.[72] Hence, the Board must retain the recognition bar doctrine to protect the value of voluntary recognition agreements.

B. Enforcing Recognition Agreements Respects the Rights of All Parties

Current law fully protects the rights of both employers and employees in the context of voluntary recognition. Employers are fully

66. *Id.* at 12.
67. *Id.*
68. *Seattle Mariners*, 335 N.L.R.B. at 564–65, 168 L.R.R.M. (BNA) at 1221–22; *MGM*, 329 N.L.R.B. at 465–66, 162 L.R.R.M. (BNA) at 1204; *Keller Plastics*, 157 N.L.R.B. at 587, 61 L.R.R.M. (BNA) at 1397; *Verizon*, 335 N.L.R.B. at 558–59, 168 L.R.R.M. (BNA) at 1137–38 (neutrality agreements).
69. *See* Congressional Letter and Amicus Brief of Members of Congress at 5, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 174 L.R.R.M. (BNA) 1521 (Nos. 8-RD-1976, 6-RD-1519) (2004) (citing *Gissell Packing Co., Inc.*, 395 U.S. at 598–99. (On July 15, 2004, certain members of Congress, led by Senator Edward M. Kennedy, filed their brief in support of the long standing policy of the recognition bar, hereinafter referred to as Congressional Letter Brief.)
70. *Id.* at 6.
71. *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 174 L.R.R.M. (BNA) 1251 (Liebman and Walsh, dissenting).
72. *Keller Plastics*, 157 N.L.R.B. at 587, 61 L.R.R.M. (BNA) at 1397.

protected from any alleged unlawful or improper union tactics because employers remain free to reject voluntary recognition and demand an election as a precondition for any bargaining.[73] Moreover, the Board has developed a web of rules governing the solicitation of authorization cards that prevent any coercion by employers or unions as well as any misrepresentations. Finally, the strict requirements for valid recognition, a clear, prerecognition showing of majority support, also protects employee rights.[74] In fact, in several critical respects, the rules governing voluntary recognition are more protective of employee rights than those governing elections. For example, voluntary recognition must be based on an expression of support by an absolute majority of all employees in the unit while an election can be won by a majority of those voting. In addition, any employee can file an unfair labor practice charge challenging voluntary recognition, but only a union or employer can file objections to the conduct of an election.

The Supreme Court has held that the Board's rules controlling card solicitation, which include challenging alleged invalid cards through unfair labor practice proceedings, adequately protect against misrepresentation and coercion.[75] Indeed, the Supreme Court has held that employees should be bound by the clear language of what they sign unless deliberately canceled.[76] The *Dana* majority cites no reason why this is no longer true. Employees' rights are fully protected during the process of voluntary recognition. Continued application of the recognition bar will continue to encourage the parties to resolve their disputes voluntarily, consistent with all aspects of national labor policy.

C. No Circumstances Exist That Warrant Review of the Recognition Bar

The Board should only review well-established Board policies when there are compelling reasons to grant review.[77] The *Dana* majority states that the use of recognition agreements prior to proof of majority support, the increased use of voluntary recognition, the alleged superiority of elections, and employees' section 7 rights provide compelling reasons to review the recognition bar.[78] These factors do not, in fact, warrant review.

First, the use of agreements binding an employer to recognize a

73. Linden Lumber Div. Summer & Co. v. NLRB, 419 U.S. 301, 304–06, 87 L.R.R.M. (BNA) 3236 (1974).

74. *See Lyon & Ryan Ford*, 647 F.2d at 750–51, 107 L.R.R.M. (BNA) 2345; *Gissell*, 395 U.S. at 604, 71 L.R.R.M. (BNA) 2481.

75. *Gissell*, 395 U.S. at 572–73, 604, 71 L.R.R.M. (BNA) 2481.

76. *Id.* at 606.

77. NLRB Rules and Regulations, § 102.67(c).

78. *Dana Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, at *5, 174 L.R.R.M. (BNA) at 1521.

union based on a card check is nothing new, and has certainly been considered previously by the Board. The *Dana* majority states that in previous cases where it applied the recognition bar, no such prior agreement existed.[79] Yet in both *MGM* and *Seattle Mariners*, the parties entered into such agreements prior to the actual voluntary recognition.[80] While the Board did not specifically question the use of the prior agreements in those cases, the published facts indicate that the Board knew the parties had entered into such agreements, and it nevertheless applied the bar based on the fruits of those voluntary recognition agreements.[81] The majority does not explain why this should not be so, and there is no reason in law or logic why it should make a difference that the parties agreed in advance that the employer would recognize the union if it demonstrated majority support.

Next, since the Board has long favored voluntary recognition,[82] the increased resort to voluntary recognition, even if it actually exists, should not warrant a change in Board policy. Rather, the Board should embrace such recognition as furthering the industrial peace envisioned by the Act. The majority did not cite to any specific problem to be addressed by a change in Board policy. Neither the majority nor petitioners (represented by NRTW) cite to appellate court decisions challenging the recognition bar. Nor have they cited to empirical evidence that authorization cards are unreliable or that voluntary recognition agreements are being used where the union does not enjoy majority support, presumably because such authority does not exist.[83] In fact, the only "evidence" the petitioners and their amici can cite are isolated Board decisions finding misconduct by employers or unions, but fully remedying it under *existing* law. In contrast, the actual empirical evidence demonstrates that authorization cards are a reliable indicator of employee preference and a reliable predictor of employee support.[84] With no problem or even suggested problem arising out of voluntary recognition and the recognition bar, the Board should retain current policy.

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79. *Id.*

80. *MGM*, 329 N.L.R.B. at 464, 162 L.R.R.M. (BNA) at 1203; *Seattle Mariners*, 335 NLRB at 563–64, 168 L.R.R.M. (BNA) at 1220–21.

81. *MGM*, 329 N.L.R.B. at 464, 162 L.R.R.M. (BNA) at 1202–03; *Seattle Mariners*, 335 N.L.R.B. at 563–64, 168 L.R.R.M. (BNA) at 1220–21.

82. *See Lyon & Ryan Ford, Inc.*, 647 F.2d at 750, 107 L.R.R.M. (BNA) 2345.

83. The secondary authority cited by petitioners appears to be in support of their argument that the increasing use of recognition renders the Board's process irrelevant. Joint Petitioners' Brief on the Merits at 17–18, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 LEXIS 300, 174 L.R.R.M. (BNA) 1521 (June 7, 2004)

84. Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissell *Decision*, 79 Nw. U. L. Rev. 87, 102 (1984); Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, Union Representation Elections: Law and Reality 137 (Russell Sage Foundation 1976).

D. The Statutory Role of Elections Does Not Suggest Voluntary Recognition Should Be Devalued

As discussed above, in drafting the Wagner Act, Congress intended to continue to permit voluntary recognition based on evidence of majority support for a labor organization along with the newly created NLRB election process as alternative means of obtaining collective bargaining rights.[85] Prior to the passage of the Taft-Hartley Act in 1947, Congress debated amendments to the Act that would have provided protection to bargaining relationships established by election only, but ultimately enacted none.[86] The Board should confine its interpretation of the NLRA and Labor Management Relations Act (LMRA) to the legislative intent and not misunderstand the statutory role of NLRB elections—as a means of forcing recalcitrant employers to recognize employees' will—to suggest a lesser role for voluntary recognition. The Board should continue to recognize that Board elections and voluntary recognition are equally acceptable methods of registering majority support for a union as the exclusive bargaining representative.[87]

Elections, as conducted in the workplace under current Board rules, are hardly infallible instruments for determining employees' will. Lengthy election campaigns provide employers an opportunity through both lawful and unlawful means to exert undue influence on what is supposed to be employees' choice. Any fair evaluation of the election as used in this context must take into account the economic dependence of employees on their employer.[88] Indeed, Human Rights Watch recently found that unlawful termination for union activity is commonplace in the United States and that NLRB remedies are ineffectual.[89] The goal of NLRB elections—to permit employees to choose their bargaining representative, if any, in so-called laboratory conditions—is merely a goal and should not be mistaken for reality.[90] Empirical evidence demonstrates that as the number of elections increases, so does the volume of coercive employer tactics designed to influence employ-

85. *See* 29 U.S.C. §159(a); Congressional Letter Brief at 3–4, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, at *1–*2, 174 L.R.R.M. (BNA) at 1521 (citing H.R. CONG. REP. NO. 80–245, 80th Cong., 1st Sess. (1947)).

86. *Gissell*, 395 U.S. at 597–98, 71 L.R.R.M. (BNA) 2481 (citing H.R. CONF. REP. NO. 80–510, 80th Cong., 1st Sess. 41 (1947)).

87. Lincoln Park Zoological Soc. v. NLRB, 116 F.3d 216, 219, 155 L.R.R.M. (BNA) 2598 (7th Cir. 1997); Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243, 1246, 146 L.R.R.M. (BNA) 2833 (D.C. Cir. 1994); *John Deklawa & Sons*, 282 N.L.R.B. at 1387 n. 53, 124 L.R.R.M. (BNA) at 1196; *Lyon & Ryan Ford*, 647 F.2d at 750, 107 L.R.R.M. (BNA) 2345; *Island Constr.*, 135 N.L.R.B. at 15, 49 L.R.R.M. (BNA) at 1418.

88. *Gissell*, 395 U.S. at 602–04, 71 L.R.R.M. (BNA) 2481.

89. HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS STANDARDS (2000).

90. General Shoe Corp., 77 N.L.R.B. 124, 127, 21 L.R.R.M. (BNA) 1337, 1341 (1948).

ees' votes.[91] In contrast, empirical studies of organizing campaigns conclude that the use of voluntary recognition agreements decreases illegal tactics by management to avoid unionization, such as unlawful termination of union supporters.[92] Specifically, without the use of neutrality or recognition agreements, in 100 percent of organizing drives, employers are alleged to have engaged in some section 8(a) violation, including discharge of union supporters 24–32 percent of the time and coercive one-on-one supervisor meetings 79–92 percent of the time.[93] In contrast, when neutrality agreements alone are utilized, the percentage of cases in which there is an allegation of any violation drops to 90.5 percent, and of unlawful supervisory meetings to 61.1 percent.[94] In cases where the parties also entered into recognition agreements, violations are alleged 42.9 percent of the time, one-on-one meetings 21.7 percent, and unlawful discharge only 8.7 percent.[95] In fact, as Congress currently debates mandatory card check arrangements, many members of Congress have recognized employers' common use of heavy handed tactics to discourage workers from organizing, such as intimidating workers and illegally terminating union supporters. For instance, in introducing the Employee Free Choice Act (which at the close of the last session had 210 cosponsors in the House and 38 co-sponsors in the Senate), Senator Edward Kennedy cited to a survey finding that employers illegally fire employees in one quarter of all union organizing drives.[96] Similarly, representative Mark Udall of Colorado, co-sponsor of the House legislation, stated he is disturbed by reports citing "example after example of employers using heavy handed techniques to discourage workers from organizing . . . and . . . illegally firing workers."[97] In a legal environment that permits widespread employer efforts to bust unions, the legal status of card check recognition must be maintained to better protect employee rights.[98] Card check recognition minimizes coercive employer tactics. As such, it provides greater protection to employees than elections, contrary to the assumptions of the *Dana* majority.

In addition, contrary to the suggestion by petitioners and some of their amici, authorization cards are a reliable indication of employee preference and a union's support. Indeed, empirical studies have demonstrated that card signing is an accurate indication of employee choice

91. *See* Weiler, *supra*, note 37, at 1778–80 (from 1957 to 1965, elections up 50 percent while allegations over coercion up 200 percent, and trend continuing upward).

92. *See, e.g.*, Eaton & Kriesky note 36, *supra*, at 42–50.

93. *Id.* at 49.

94. *Id.*

95. *Id.*

96. 149 CONG. REC. S15805, 15805-06 (Nov. 24, 2003) (statement. of Sen. Kennedy).

97. 150 CONG. REC. E1087, 1087 (June 2004) (statement of Rep. Udall).

98. *Id.*

and a reasonably accurate predictor of an employee's vote.[99] Moreover, voluntary recognition avoids long, contentious proceedings to establish and effectuate the majority's will. It allows the parties to immediately progress to a bargaining relationship.[100] The NLRB election process, at a minimum, where an election is held by agreement, takes approximately forty two days plus at least one week for formal certification.[101] If the employer disputes the appropriate bargaining unit or if either party files challenges or objections, however, the process may take years—time that erodes support for the union.[102] Indeed, studies suggest that union victories drop 2.5 percent for each month between petition and election; or .29 percent drop per day of delay.[103] The Human Rights Watch found that NLRB elections too often involve intense, acrimony-filled campaigns marked by heated rhetoric and attacks by both management and labor.[104] Unlike card check recognition, which can combine the benefit of freedom of choice and a mutually respectful relationship, elections are adversarial and can take years to resolve.[105] Accordingly, elections provide neither the quick resolution nor uncoerced choice envisioned by the *Dana* majority.

Last, the *Dana* majority cited the Supreme Court decision in *Linden Lumber* as support for its view that secret ballot elections are the best method for determining whether employees desire representation.[106] The Supreme Court also acknowledged in *Linden Lumber*, however, that authorization cards "may adequately reflect employee sentiment."[107] The sole ruling in *Linden Lumber* was that absent unfair labor practices, if the employer refused to grant recognition, the union has the burden of petitioning the Board for an election to obtain representative status.[108] Thus, *Linden Lumber* fails to support the elimination of the recognition bar.

E. The Board's Elimination of the Recognition Bar Would Usurp the Legislative Role

While federal agencies vested with power to enforce a statute have broad authority to interpret the statute, they may not change the stat-

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99. *See* GETMAN, Goldberg & Herman *supra*, n. 84, at 137.

100. *See MGM*, 329 N.L.R.B. at 466, 162 L.R.R.M. (BNA) at 1204–05.

101. Memorandum of Arthur Rosenfeld, General Counsel of N.L.R.B. to all Division Heads, Regional Directors, Officers in Charge, and Resident Officers, NLRB Officer of the General counsel, Memorandum GC 04-02 (Apr. 22, 20004) (median time from petition to election is 42 days).

102. Weiler, *supra*, note 37, at 1778.

103. *Id.* (citations omitted).

104. HUMAN RIGHTS WATCH, *supra*, note 89.

105. *Id.*

106. *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521 (Liebman and Walsh dissenting) (citing *Linden Lumber*, 419 U.S. at 364, 87 L.R.R.M. (BNA) 3236).

107. *Linden Lumber*, 419 U.S. at 304, 87 L.R.R.M. (BNA) 3236 (citing *Gissell*, 395 U.S. at 603, 71 L.R.R.M. (BNA) 2481).

108. *Id.* at 310, 87 L.R.R.M. (BNA) 3236.

ute or construe it in a manner inconsistent with legislative intent. Accordingly, the Board may not usurp Congress' role and, through its interpretation, amend the NLRA.[109] Rather, agencies and courts must "give effect to the unambiguously expressed intent of Congress."[110]

Since Congress intended to afford voluntary recognition the same status and protection as elections, to eliminate the recognition bar and thereby devalue voluntary recognition would be to amend the NLRA. First, the Act itself contemplates bargaining based on both elections and voluntary recognition. The Act recognizes a labor "representative designated or selected for the purpose of collective bargaining by a majority" of employees as the exclusive representative,[111] thus contemplating more than one form of proof of majority support. Indeed, the Supreme Court stated in *Gissell*:

> Since § 9(a), in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support." Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means . . . by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.[112]

The legislative history further demonstrates that Congress intended to permit unions to obtain representative status through voluntary recognition.[113] Prior to the passage of the LMRA, Congress debated requiring an employer to bargain only with a union certified through election but rejected this proposal.[114] Instead, section 9(a) continued to permit selection of bargaining representation through election or recognition.[115] Since Congress intended voluntary recognition to be given the same status as elections, the Board's elimination of the recognition bar, and consequent demotion of voluntary recognition, would usurp

109. *See* Congressional Letter Brief at 3, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521 (citing H.R. REP. NO. 80–245, 80th Cong., 1st Sess. (1947); H.R. REP. NO. 80–3020, 80th Cong., 1st Sess. (1947)).

110. Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842–43 (1984). *See also*, Burlington Northern R.R. v. Surface Transp. Ed., 75 F.3d 685, 694 (D.C. Cir. 1996).

111. 29 U.S.C. § 159(a).

112. *Gissel*, 395 U.S. at 596–97, 71 L.R.R.M. (BNA) 2481.

113. *See* Congressional Letter Brief at 3, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521 (citing H.R. REP. NO. 80–245, 80th Cong., 1st Sess. (1947); H.R. REP. NO.80–3020, 80th Cong., 1st Sess. (1947)).

114. H.R. CONF. REP. NO. 80–510, 80th Cong., 1st Sess. (1947).

115. 29 U.S.C. § 159(a), (c) (2000).

the legislative role in creating federal labor policy. Accordingly, current members of Congress have cautioned the Board against writing voluntary recognition out of the statute by placing newly recognized unions under an immediate threat of decertification.[116]

F. NLRB Role Should Be in Supervising Voluntary Recognition

In a naked appeal to institutional self-interest, petitioners argue that the increasing role of voluntary recognition is decreasing the NLRB's role in labor relations.[117] As discussed above, however, the purpose of the Act was to promote *private* resolution of labor disputes. Indeed, the tradition of volunteerism has informed interpretation of the Act since its inception, and the Board's current activism and threatened disruption of voluntary agreements between labor and management that fully respect individual rights signals a dangerous departure from the tradition of deference to private ordering, for example, the general refusal to police the substantive terms of collective bargaining agreements.[118] If there is any legitimate concern regarding the private resolution of disputes, the Board can play a role that does not disrupt parties' agreements or the voluntary nature of the process.

Rather than attacking the use of voluntary recognition that is wholly consistent with the purpose and letter of the law, the Board should be taking action to encourage such recognition when it is based on an uncoerced showing of majority support. Thus, the proper role for the Board is to continue to process unfair labor practice charges alleging a lack of such support or employer or union coercion in the gathering of such support. Voluntary recognition has always been part of the process of organizing and collective bargaining that is supervised by the Board, both through its conduct of elections and through its adjudication of unfair labor practice charges.

This would be consistent with state law practice under which voluntary recognition is formally recognized and, indeed, expressly sanctioned by state labor boards. In the public sector, some states now compel employers to recognize a union that presents proof of its status as majority representative.[119] In Illinois, for example, the State Labor Relations Board confirms the union's majority status and certifies the union as exclusive representative.[120] While federal law does not yet permit the Board to certify a union based on a nonelectoral showing of

116. *See* Congressional Letter Brief at 8–9, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521.

117. Joint Petitioners Brief on the merits at 14–18, *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150, 2004 N.L.R.B. LEXIS 300, 174 L.R.R.M. (BNA) 1521 (2004).

118. *See* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 1937–1941, 62 MINN. L. REV. 265, 293–310 (1978).

119. *See, e.g.*, 5 ILL. COMP. STAT. 315/9(a-5) (2005) (Illinois State Labor Relations Board shall designate an exclusive representative based on showing of majority status); N.Y. C.L.S. Pub. A §1739 (2004).

120. 5 ILL. COMP. STAT. 315/9(9-5) (2005).

majority support, the Board should continue to ensure the existence of such support as a precondition for voluntary recognition through the unfair labor practice procedures.

G. Potential Impact in the Construction Industry

The discouragement and ultimate elimination of voluntary recognition would have a drastic impact on employee-union relationships in the construction industry. Unlike in any other industry, in construction, section 8(f) of the Act makes it lawful for an employer and a union to enter into a "pre-hire" agreement, whereby an employer can agree to hire union members and enter into an agreement governing the terms and conditions of employment.[121] Congress provided for such section 8(f) agreements because of the short length of employment in the construction industry, the need for contractors to estimate costs, and the need to have a ready supply of craftsmen available for quick referral.[122] Such arrangements benefit employers as it allows them to estimate costs and bid appropriately on construction projects, and assures them of a ready supply of skilled labor.[123]

Once a construction employer has hired a full complement of employees, the parties often "convert" the section 8(f) to a section 9(a) agreement, based on a showing of majority support among the employees.[124] This provides the same protection to the parties' contract and the union's status as representative as if they initially established a relationship pursuant to section 9(a) of the Act. This conversion most typically occurs through the use of voluntary recognition. Since the elimination of the recognition bar would be the first step toward eliminating voluntary recognition, the ordinary process of recognition would be lost throughout the construction industry. The prospect of such a result will likely cause parties to flood the Board with petitions in units where there are well-established relationships—where management, labor, and the employees have worked in harmony for years. Such a result, in the construction industry as well as others, will cause labor instability and potential unrest, in complete contradiction to the goals of the Act.

V. Conclusion

The Board majority has chosen to review well-established law that furthers the purposes of the Act in the absence of any compelling reason. It is apparent that its decision is, at least in part, a response to unions' success in utilizing voluntary recognition agreements and the

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121. 29 U.S.C. §158(f) (2000).

122. *John Deklawa & Sons*, 282 N.L.R.B. at 1380, 124 L.R.R.M. (BNA) at 1190 (citing S. Rep. 1 Leg. Hist. at 423).

123. *Id.*

124. *Id.* at 1378, 124 L.R.R.M. (BNA) at 1188.

influence of advocates outside the mainstream of labor-management relations with little or no practical experience in the field, in particular the National Right to Work Foundation. As the federal government moves to deregulate and lessen its involvement elsewhere, the Board is considering increasing the government's role in labor relations by placing a premium on adversarial proceedings rather than encouraging private resolution. Such a policy stands in stark contrast to more than half a century of preference for private agreement to foster industrial peace and a more harmonious relationship between labor and management.

In the Name of Security, Insecurity: The Trend to Diminish Federal Employees' Rights

Edward H. Passman and Bryan J. Schwartz*

I. Introduction

On March 3, 2005, the Department of Homeland Security (DHS) announced its new personnel regulations, to take effect no later than August 1, 2005.[1] These regulations drastically reduce approximately 110,000 employees' rights to appeal adverse conduct- or performance-based actions, to engage in labor-management collective bargaining, and to be assured of consistent pay increases. It is Capitol Hill's worst-kept secret that the new DHS regulations have the potential to reach far beyond DHS. The Bush administration has intimated that it hopes to expand personnel reforms like those at DHS to many, if not all, other federal agencies.[2] Most immediately, the Department of Defense's (DoD's) approximately 750,000 civilian employees are likely to see similar changes within a year.[3] The federal government's approximately 2.5 million civilian workers nationwide might all soon be impacted.

The new regulations stemmed from the Homeland Security Act of

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1. 70 Fed. Reg. 5,272 (Feb. 1, 2005) (to be codified at 5 C.F.R. pt. 9701). DHS forestalled implementation of the regulations until after August 15, 2005, in light of a motion by the federal employees' unions to enjoin the implementation of the regulations. The motion was heard by the U.S. District Court for the District of Columbia, Judge Rosemary Collyer, and decided August 12, 2005. NTEU v. Chertoff, No. CIV.A. 05-201, 2005 WL 1941398, at *1, 177 L.R.R.M. (BNA) 3089 (D.D.C. Aug. 12, 2005). Following this decision, several sections of the regulations are being implemented as planned by DHS. *Id.* at *1. However, significantly, Judge Collyer enjoined implementation of several sections of the regulations, as discussed below. *Id.*

2. *See, e.g.*, Tim Kauffman and Eileen Sullivan, *Future of Civil Service: Reforms Empower Managers, Set Course for Government* FED. TIMES (Jan.31, 2005) (quoting Clay Johnson, Office of Management and Budget (OMB), Deputy Director for Management). Mr. Johnson commented on the DHS reforms, saying, "We think that the same opportunity to better other agencies exists in the rest of the federal departments." *Id.*

3. Legislation has mandated a new human resources system, the National Security Personnel System (NSPS), for the Department of Defense, as authorized by the National Defense Authorization Act, Pub. L. No. 108–136, § 1101, 117 Stat. 1392 (2003). The proposed NSPS regulations were issued but are not yet final as of the date of this article. *See* 70 Fed. Reg. 7,552 (Feb. 14, 2005) (to be codified at 5 C.F.R. pt. 9901).

2002 (November 25, 2002) (the Act),[4] which created DHS effective March 1, 2003, combining 20 existing federal agencies and functions. Some say the creation of DHS to streamline the fight against terrorism represented the most significant reorganization of federal agencies in the executive branch in more than 50 years. The Act gave the DHS secretary and the director of the Office of Personnel Management (OPM) the authority to establish a "contemporary" and "flexible" new human resources management system for DHS,[5] abandoning many of the existing requirements of Title 5 of the U.S. Code.

Between November 2002 and February 2004, debate raged regarding the new personnel policies, leaving DHS employees with a sense of foreboding as to the policies that would govern their employment at the new agency. Finally, on February 20, 2004, DHS and OPM issued the proposed personnel policies for DHS[6]—which many employees felt confirmed their worst fears, by endeavoring to strip away many of their most basic employment rights. The DHS secretary and OPM director were required to accept comments from the public. On March 22, 2004, the major federal employees' unions (including the American Federation of Government Employees (AFGE), AFL-CIO, and the National Treasury Employees Union (NTEU)), directly representing more than one-quarter of DHS employees, submitted a ninety-one-page joint commentary.[7] The unions objected to the DHS system "in its entirety and strongly recommend[ed] that it not be implemented until the many serious defects . . . have been corrected."[8]

On May 19, 2004, Senator Joseph I. Lieberman, D-Conn., the former chairman of the Senate Governmental Affairs Committee and, as of the date of this writing, its ranking member, sent a letter to then-DHS Secretary Thomas Ridge and OPM Director Kay Coles James, responding to the proposed DHS personnel regulations.[9] The senator explained: "DHS and OPM assert that the purpose of the regulations is to enable the Department to carry out its mission, but I fear the actual effect of these sweeping changes would be the opposite: to undermine the employee safeguards that prevent arbitrary and abusive workplace practices and that sustain the employee morale and performance on which the Department's mission depends."[10] Senator Lieber-

4. Pub. L. No. 107–296, 116 Stat. 2135 (2002).

5. *See* 5 U.S.C. § 9701(b)(1) and (2).

6. 69 Fed. Reg. 8,030 (Feb. 20, 2004) (to be codified at 5 C.F.R. pt. 9701).

7. Joint Comments and Recommendations Submitted by the National Presidents of the NTEU and AFGE *inter alia*, Re: DHS Human Resources Management System (Mar. 22, 2004), pp. 1–2. The AFGE and NTEU are the largest of the unions dedicated to representing federal civilian employees—of whom as many as 60 percent are covered by collective bargaining units. *Id.*

8. *Id.*

9. Press Release, Senate Committee on Homeland Security and Governmental Affairs (May 19, 2004), *available at* http://hsgac.senate.gov (last visited Dec. 6, 2004).

10. *Id.*

man carried special credibility on homeland security issues because it was he who originally conceived and promoted legislation to create the new DHS. His vociferous opposition to the proposed personnel regulations—and that of such a large, organized contingent of the DHS workforce—could not be taken lightly.

The regulations finally enacted on March 3, 2005, did contain variations from the original proposed regulations—for example, providing greater detail on the new mandatory removal offenses (MROs), giving some arbitration opportunities to employees with non-MROs, eliminating the notion of "Performance Review Boards," and maintaining the status quo burden of proof for an agency in a non-MRO misconduct action, i.e., that to sustain an action against a nonprobationary employee, an agency must prove by a preponderance of the evidence that an employee engaged in misconduct.[11] However, most of the originally proposed DHS changes were adopted in the final regulations, including, for example: (1) eliminating the General Schedule, and substituting a new "pay-banding" system that gives management more discretion to grant or prevent pay increases; (2) curtailing union rights across the board and establishing a Homeland Security Labor Relations Board (HSLRB); and (3) drastically reducing the scope and changing the nature of possible employee appeals of performance- and conduct-based adverse actions.[12]

This article will focus on one of the three major areas of change—the impact on federal civilian employee appeals. This article begins by profiling over a century of growth in federal employees' rights under both Democratic and Republican presidents, and then explores how the new DHS regulations dramatically reverse this pattern.

II. History of Federal Employees' Rights

In 1881, after an applicant for federal employment was rejected for political reasons, he assassinated President James A. Garfield. Congress responded by passing the Pendleton Act, which brought about the creation of a classified Civil Service in 1883.[13] The Pendleton Act only prohibited "removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service."[14] In 1897, Republican President William McKinley expanded federal employees' protections, promulgating Civil Service Rule II, which provided that "removal from the competitive classified service should not be

11. *See* 70 Fed. Reg. 5,272.

12. *Id.* Again, it is worth noting that the implementation of the final regulations, and, in particular, one portion of the regulations that is the focus of this essay, regarding employee appeals invoking mitigation of penalties, is currently enjoined by the U.S. District Court, per the terms of Judge Collyer's decision. *See* NTEU v. Chertoff, 2005 WL 1941398, at *30.

13. Civil Service Act (Pendleton Act), ch. 27, 22 Stat. 403 (1883).

14. *Id.*

made except for just cause and for reasons given in writing."[15] While job tenure was protected, there were no administrative appeal rights, and the courts refused to enforce the rule judicially. In 1912, Republican President William Howard Taft signed into law the Lloyd-LaFollette Act, as one section of the Post Office Department appropriations bill.[16] It substantially enlarged upon Civil Service Rule II, stating:

> No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses not (sic) any trial or hearing shall be required except in the discretion of the official making the removal.[17]

The Lloyd-LaFollette Act provided limited statutory protections for federal employees for over 30 years.

There was no requirement for an administrative hearing until the Veterans Preference Act of 1944 gave certain veterans procedural and appeal protections for adverse personnel actions, which included removal, suspension of more than fourteen days, reduction in grade or pay, and furlough of thirty days or less.[18] Under the Veterans Preference Act, veterans could appeal their cases to the Civil Service Commission (CSC), which was the predecessor of today's OPM.[19]

On January 17, 1962, Democratic President John F. Kennedy signed Executive Order (EO) 10,987,[20] which extended adverse action appeal rights to nonveterans.[21] President Kennedy followed the guidance of the Report of the President's Task Force on Employee-Management Relations in the Federal Service, which recommended that "[a] more uniform system of appeals of adverse actions should be established by Government agencies. Veterans and non-veterans should have identical rights to appeal adverse actions to the Civil Service Commission [CSC]."[22] EO 10,987 left it up to the CSC and the departments and agencies to issue regulations and develop an appeals system with a hearing in most cases, "except when the holding of a hearing is im-

15. Fifteenth Report of the Civil Service Commission 70 (1897–1898). *See also* Arnett v. Kennedy, 416 U.S. 134, 149 n.19 (1974) (citing Civil Service Rule II).

16. *Id.* at 150.

17. *Id.* at 150 n.20 (quoting Act of Aug. 24, 1912, c. 389, § 6, 37 Stat. 555).

18. Veterans Preference Act of 1944, Pub. L. No. 78–359, §§ 12 and 14 (codified as 5 U.S.C. § 2108).

19. *Id.*

20. Exec. Order No. 10,987, 27 Fed. Reg. 550. Exec. Order No. 10,987 *revoked by* Exec. Order No. 11,787, 39 Fed. Reg. 20,675 (June 11, 1974).

21. Exec. Order No. 10,987, 27 Fed. Reg. 550.

22. Report of the President's Task Force on Employee-Management Relations in the Federal Service, ¶ J, "Appeals" (Nov. 30, 1961).

practicable by reason of unusual local or other extraordinary circumstance."[23] Employees had only a single level of appeal.[24] EO 10,987, section 4 also provided for advisory arbitration in the agency appeals system, as recommended by the President's Task Force.[25] This provision allowed unions to negotiate with agencies to allow for advisory decisions by neutral arbitrators, instead of CSC hearing examiners.[26] Under EO 10,987, a number of agencies retained employees in a duty status until receipt of the decision in the agency hearing.[27] The latter was a substantial benefit to federal employees who received removal actions, inasmuch as dismissed employees are usually under severe financial pressure, making it difficult for them to retain counsel.[28] The CSC also had the significant authority to mitigate agencies' unreasonable penalties in misconduct actions.[29]

On October 29, 1969, Republican President Richard M. Nixon issued EO 11,491, extending appeal rights identical to veterans' rights to the vast majority of federal employees.[30] The CSC continued to provide hearing examiners and an appeals process, and its final decisions were binding upon agencies. In 1974, in EO 11,787, President Nixon eliminated agency predecision hearings and provided for hearings by the Federal Employee Appeals Authority (FEAA) and appellate review by the Appeals Review Board (ARB).[31] These new bodies were theoretically separate from other CSC functions and reported directly to the CSC members (the Commissioners). EO 11,787 also eliminated the op-

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23. Exec. Order No. 10,987, 27 Fed. Reg. 550.
24. *Id.*
25. *Id.*
26. *Id.*
27. *See* Edward H. Passman, *Federal Employees' Statutory Appeals Procedure—Status Quo or Change*, J. COLLECTIVE NEGOTIATIONS (1976), at 299. The Supreme Court held in *Arnett* that there was no Constitutional requirement to retain employees in a duty status pending the hearing outcome. *Arnett*, 416 U.S. at 151.

28. While this provision was not carried over into the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7701 *et seq.* (CSRA), it was included in some of the stronger collective bargaining agreements. However, recently, the Federal Service Impasses Panel ordered a long-standing stay provision deleted from the collective bargaining agreement between Local 12, American Federation of Government Employees, AFL-CIO and the Department of Labor, Washington, DC. *See* In the Matter of Local 12, American Federation of Government Employees, 4 Fed. Serv. Imp. Pan. Rels. 111 at § 8 (Dep't. of Labor 2005).

29. LaChance v. Devall, 178 F.3d 1246, 1256 (Fed. Cir. 1999). *See also* Douglas v. Veterans Administration, 5 M.S.P.R. 280, 290 (1981) ("It cannot be doubted, and no one disputes, that the Civil Service Commission was vested with and exercised authority to mitigate penalties imposed by employing agencies.").

30. Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969). Appeals rights were extended to the "competitive civil service," which includes most federal employees other than certain certified professionals, such as lawyers and doctors. *Id.* In 1990, the Civil Service Due Process Amendments, 5 U.S.C. §7611(a)(1), extended adverse action appeal rights to nonveterans in the "excepted service." *Id.* Unlike their counterparts in the competitive service who have a one-year probationary period, excepted service attorneys, physicians, and others have to serve two years in a federal position before they are entitled to adverse action appeal rights. *Id.*

31. Exec. Order No. 11,787, 39 Fed. Reg. 20,675 (June 11, 1974).

tion of advisory arbitration, although appellants had enjoyed greater success with this procedure.

There were a number of problematic areas in EO 11,787's revised appellate system. For example, the system did not give the FEAA or the ARB authority to substitute a less severe penalty in adverse action cases, except where an agency violated its own table of penalties.[32] Even where the FEAA or the ARB canceled an adverse action for being unduly harsh and severe, the agency was allowed to employ a form of "double jeopardy"[33]—to re-charge the offense with a less severe penalty in a new personnel action. The CSC regulations failed to specify that the agency had the burden of proof in adverse action cases. Agencies were not required to produce witnesses in their employ or documentary evidence in their control, though such were relevant to the case.[34] The revised appellate system also lacked published concurring or dissenting opinions by the ARB panel members.

Democratic President James E. Carter's Civil Service Reform Act of 1978 (CSRA)[35] streamlined appellate procedures and added greater procedural fairness. For example, the CSRA eliminated agency hearings and appeals for reduction in rank and created the independent Merit Systems Protection Board (MSPB or Board) to replace the FEAA and the ARB.[36] The three members of the independent MSPB, including one member from the minority party, are appointed by the president and confirmed by the Senate.[37] The MSPB regulations expedite the hearing process for adverse actions and other statutory appeals, strongly encouraging MSPB administrative judges (AJs) to issue initial decisions within 120 days—though, in practice, second-level appeals to the Board often progress slowly.[38] The CSRA gives employees the oppor-

32. *Id.*

33. This term is not intended in the literal sense, which applies only to criminal proceedings, but to invoke an argument for fairness embodied in the principle barring double jeopardy.

34. *See* Passman, *supra* note 27, at 298.

35. Pub.L. No. 95–454, codified in 5 U.S.C. § 7101, *et seq.*

36. The CSRA incorporated many changes first executed by Reorganization Plans 1 and 2 of 1978, even as the CSRA superseded these Plans. *See* Pub. L. No. 95–454, § 905. The MSPB swallowed the former functions of the FEAA and ARB as part of these incorporated changes. *See* Reorg. Plan No. 2 of 1978, pt. II, § 203.

37. 5 U.S.C. §1201.

38. The MSPB clarified the 120-day standard, and its underpinnings, in Milner v. Dep't of Justice, stating, "The 120-day deadline for adjudicating cases is a yardstick that the Board relies upon to evaluate its AJs and its success rate in expeditiously processing appeals." Milner v. Dep't of Justice, 87 MSPR 660, 665 (2001).

The Board continued:

> The Board's policy of deciding appeals within 120 days is based on the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (CSRA), which reflects Congressional intent that appeals be decided expeditiously. For example, 5 U.S.C. § 7701(i)(4) provides that it "shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that pro-

tunity to pursue appeals of actions they allege are based upon whistleblower retaliation and/or discrimination[39] and requires agencies to prove misconduct charges against employees by a preponderance of the evidence[40]–or see such charges permanently dismissed.[41] In addition, there are ample opportunities for the parties to conduct discovery,[42] and AJs have authority to issue subpoenas that are enforceable in U.S. district courts.[43]

Under the CSRA, as amended, as previously under the CSC, MSPB AJs can mitigate unreasonable penalties that agencies have proposed against employees.[44] The Board applies a twelve-factor test for mitigation first outlined in *Douglas v. Veterans Administration.*[45] Also, under the CSRA, unions may negotiate coverage of statutory appeals under the

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ceeding." *See also* 5 U.S.C. § 7702(a)(1) (requiring the Board to decide within 120 days appeals in which discrimination prohibited by section 2302(b)(1) is alleged). Section 7701(i)(1) provides, however, that when the Board announces dates by which it expects to complete action on appeals, these dates are to be "consistent with the interests of fairness and other priorities of the Board." In *Thomas v. Department of Veterans Affairs*, 51 M.S.P.R. 218, 220 (1991), the Board explained that the policy underlying this CSRA statutory requirement that the Board expeditiously process appeals was to benefit appellants by preventing delays that adversely affected appellants who might be unemployed while their appeals were pending. A similar expeditious processing policy applies to individual right of action appeals. *See* 5 U.S.C. § 1221(f) (the Board must issue a final order or decision "as soon as practicable" after the proceeding is initiated).

Average case processing times for Petitions for Review have hovered around 150 days. *See* MSPB PERFORMANCE PLAN FOR FY2005 (REVISED FINAL), Feb. 7, 2005, at 2 *available at* http://www.mspb.gov/foia/forms-pubs/03annrpt/FY2003AnnualReport.html. However, the average processing time for cases where the MSPB issues a substantive, written decision is much longer, since this 150-day figure includes many rapidly processed cases in which the Petition for Review is summarily rejected. *See also infra* notes 60 and 61.

39. 5 U.S.C. § 2302.

40. 5 U.S.C. at § 7701(e)(1).

41. 5 U.S.C. § 7701(c)(1)(B); *see generally* Byers v. Dep't of Veterans Affairs, 89 MSPR 655 (2001).

42. 5 C.F.R. § 1201.72; *see also, e.g.*, Delalat v. Dep't of Navy, 86 M.S.P.R. 455, 460–61 (2000) (requiring discovery opportunities).

43. 5 U.S.C. §§ 1204(b)(2)(A), 1204(c).

44. *See* 5 U.S.C. § 7701(b)(3) (1994). Congress amended the CSRA to incorporate Board case law (especially Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), and its progeny), allowing for the mitigation of unreasonable agency-imposed penalties, and to extend this right of mitigation to senior Executive Service employees. *Devall*, 178 F.3d at 1256 (citing 137 CONG. REC. H9630-02 (daily ed. Nov. 12, 1991). The Board noted in *Douglas*, 5 M.S.P.R. at 292, and argued to the Federal Circuit in *Devall*, 178 F.3d at 1252, that its mitigation authority remained after the CSRA as it was under the CSC, based upon section 202 of Reorganization Plan 2 of 1978. *See also* Lisiecki v. Merit Systems Protection Board, 769 F.2d 1558, 1566 (Fed. Cir. 1985). In *Devall*, the Federal Circuit explained that mitigation authority arose from the original CSRA, 5 U.S.C. § 7513, as interpreted by the Board and courts, because the standard requiring that adverse actions promote the "efficiency of the service" requires recognition of the need for mitigation of unreasonable penalties. *Devall*, 178 F.3d at 1256.

45. 5 M.S.P.R. 280 (1981). *See infra* for additional discussion regarding mitigation.

negotiated grievance and arbitration procedures of their contracts.[46] The Supreme Court has held that arbitrators are required to follow the same substantive provisions of law as determined by the MSPB.[47] With the passage of the Federal Courts Improvement Act of 1982,[48] all judicial appeals of final MSPB decisions have been consolidated in the U.S. Court of Appeals for the Federal Circuit.[49] This has led to a more uniform body of law for all federal employees, although agencies have been successful in the overwhelming majority of cases decided by the Federal Circuit.[50]

III. Unchanged or Expanded Rights: Few and Far Between[51]

While much has changed about the personnel regulations that will govern the daily work-lives of DHS employees—as we discuss below—a few basic constructs related to employee appeals will remain intact. Apart from the MROs, discussed *infra*, there is no change regarding the actions that are considered "adverse actions" appealable to the MSPB—i.e., a furlough for thirty days or less, a suspension of fifteen days or more, a demotion, a reduction in pay, or a removal.[52] As under the personnel regulations affecting other agencies, the DHS regula-

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46. 5 U.S.C. § 7111.

47. Cornelius v. Nutt, 472 U.S. 648, 119 L.R.R.M. (BNA) 2905 (1985).

48. Pub. L. No. 97–164, 96 Stat. 25 (1982).

49. *Id.*

50. The Federal Circuit affirmed the Board over 90% of the time (ranging from 93–96%) during Fiscal Years 2001–2004. *See* MSPB PERFORMANCE PLAN FOR FY2005, *supra* note 38, at 3. The Board, in turn, has affirmed agencies in 70–80% of appeals adjudicated on the merits—to say nothing of the 50%+ of appeals that are dismissed prior to adjudication. *See, e.g.*, MSPB ANNUAL REPORT: FY 2002, at 22–23, *available at* http://www.mspb.gov/foia/forms-pubs/02annrpt/FY2002AnnualReport.html; MSPB ANNUAL REPORT: FY 2003, at 18–20, *available at* http://www.mspb.gov/foia/forms-pubs/03annrpt/FY2003AnnualReport.html. For example, of 6,601 appeals decided in FY 2003, the Board only mitigated, modified, or reversed agencies' decisions in 260 cases (less than 4% of appeals decided). *Id.* at 22–23. The Board only granted Petitions for Review (PFRs) or reopened cases 13–15% of the time on receiving PFRs of Intial Decisions regarding appeals. *Id.* at 24; MSPB ANNUAL REPORT: FY 2002 at 28. To its credit, the Board reversed, mitigated, or remanded 69–74% of those cases where PFRs were granted or cases were reopened. *Id.* at 29; MSPB ANNUAL REPORT: FY 2003 at 25.

51. Of the 180,000 DHS employees, approximately 110,000 will be covered by the new regulations. Fact Sheet: DHS and OPM Final Human Resource Regulations (Jan. 26, 2005) *available at* http://www.dhs.gov/dhspublic/display?content=4313. The DHS website's "Fact Sheet: DHS and OPM Final Human Resource Regulations" explains that the employees of the Inspector General, Transportation Security Administration, and Emergency Preparedness & Response Stafford Act are not included in any elements of the new system. *Id.* The website explains, "Secret Service is excluded from labor relations, and the Uniformed Division is not included in pay and classification elements of the System. Wage Grade employees are not included in pay and classification in initial implementation. In addition, the Senior Executives (SES) will be covered by a government-wide pay-for-performance system." *Id.* The website goes on to state, ominously, "It is important to note that employees not included in the Human Resource Management System right now may be included at a future date." *Id.*

52. 5 C.F.R. § 9701.706(a).

tions allow employees to petition for review by the full MSPB within thirty days of a decision by an MSPB AJ, and allow the director of OPM to appeal to the Board only if the "decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive."[53] The DHS personnel regulations will not affect the appeals rights of federal employees who are whistleblowers and/or victims of discrimination (e.g., mixed-case complaints under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, and complaints under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act).[54]

The agency must still prove the charge that is the basis of its adverse action decision by a preponderance of the evidence—a significant change to the regulations from those originally proposed by DHS and OPM.[55] Interestingly, one development in the DHS personnel regulations seems to liberalize the prior state of the law to favor employees. Under the regulations currently governing agencies other than DHS, management can remove, demote, or reassign an employee for poor performance under 5 U.S.C. § 4303 based upon a showing of substantial evidence—a considerably easier standard to meet than the preponderance of the evidence standard applicable to conduct-based actions.[56] However, under the new DHS regulations, no distinction is made between performance- and conduct-based actions.[57]

IV. Diminished Rights

The chief spokesman for the new DHS personnel regulations, Dr. Ronald P. Sanders, testified before the U.S. Senate about the new adverse action appeals system shortly before the regulations went into effect.[58] Dr. Sanders said that because the DHS mission requires a "high level of workplace accountability," Congress authorized DHS and OPM to waive the provisions of Title 5 of the U.S. Code dealing with

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53. 5 C.F.R. § 9701.706(f).

54. 5 U.S.C. § 9701(b)(3).

55. 5 C.F.R. § 9701.706(d). DHS and OPM initially proposed a reduced appellate burden of proof for the agency, but they were overcome in the "meet-and-confer process" by a united coalition of employees' groups and legislators. Dr. Ronald P. Sanders discussed this change in his Statement to the U.S. Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia Committee on Homeland Security and Government Affairs on February 10, 2005. *Unlocking the Potential within Homeland Security: The New Human Resources System Hearing befor Sen. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia*, 112th Cong. 6 (2005) [hereinafter Sanders Statement] (Statement of Dr. Ronald P. Sanders, Associate Director for Strategic Human Resources Policy, Office of Personnel Management). Sanders is one of the architects of the new DHS personnel regulations. *Id.* at 9.

56. 5 U.S.C. § 7701(c)(1)(A).

57. 5 C.F.R. § 7701(c)(1)(A). *See also* Sanders Statement, *supra* note 55, at 9.

58. Sanders Statement, *supra* note 55, at 9.

adverse actions and appeals, while assuring DHS employees "that they would continue to be afforded the protections of due process."[59] While the new DHS personnel regulations will certainly accomplish the former, by holding employees accountable for offenses they did or did not commit, employees' Due Process rights in many instances will be more rhetorical than real. We discuss below several of the key restrictions on employees' rights featured in the new DHS system, including a curtailed MSPB adjudication process; restricted vehicles for settlement; the creation of new mandatory removal offenses and a new mandatory removal bureaucracy; and the end of *Douglas* and its opportunity for penalty mitigation—though the latter provision is currently enjoined by the U.S. district court.[60]

A. *Curtailed MSPB Adjudication Process*

The new adjudication process that will govern DHS employees' appeals drastically curtails discovery possibilities. DHS will rush the appeals process so much that no real opportunity to develop a factual record is guaranteed. The new DHS regulations allow summary judgment to eliminate employees' long-held appeal rights.

1. Rocket Docket

The MSPB process (prior to any appeal to the full Board) is already vastly accelerated, in comparison with other federal administrative and judicial processes. Currently, AJs are pushed to complete case processing within 120 days, with one 30-day suspension of proceedings possible.[61] As a matter of course, in some cases, AJs grant brief additional stays of proceedings to allow for settlement negotiations, resolution of basic jurisdiction/timeliness questions, or extraordinary extenuating circumstances affecting one or both of the parties. Nonetheless, MSPB cases frequently take less than 180 days from the date of the appeal to the date of an initial decision by an AJ, even after a suspension and extensions.[62] Compare this to the EEOC, where it is not uncommon

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59. *Id.* at 6.

60. Judge Collyer's decision in *Chertoff* emphasizes 5 U.S.C. § 9701(f)(2)(C), which provides that the new regulations must modify the personnel procedures only insofar as such modifications are designed to "further the fair, efficient, and expeditious resolution of matters involving employees of the DHS." 2005 WL 1941398, at *26. Judge Collyer explained, "The Chapter to which Congress was speaking when it addressed appeals of adverse actions and authorized changes that meet certain requirements was Chapter 77. The 'sense of Congress' was that DHS employees 'are entitled to fair treatment in any appeals that they bring in decisions relating to their employment.' 5 U.S.C. § 9701(f)(1)(A) . . . Clearly, Congress anticipated that any changes affecting employee appeals of adverse actions would occur within the context of Chapter 77—and that the statutory requirements of fairness, expedition, and efficiency would apply to such changes." *Id.*

61. 5 C.F.R. §§ 1201.22(b), 1201.28(b).

62. MSPB PERFORMANCE PLAN FOR FY 2005, *supra* note 38, at 4. The average case processing time, from appeal filing to an AJ's Initial Decision, hovers around 90 days currently—but this includes many cases that are dismissed without complete adjudication. *Id.* at 4.

that a federal employee and agency will lack even an assigned AJ (by an Acknowledgment and Order) for 180 days from the date of a hearing request—and the hearing process and time to receive a decision can easily stretch for years. Even cases before Department of Labor administrative law judges (ALJs), while accelerated like MSPB cases, might still take eight months from a hearing request to the conclusion of hearing—not counting the time it takes to receive an ALJ's decision, which can easily take years longer. Federal district court cases not on the "rocket docket" can take a year or more just to begin discovery after the suit has been filed, by the time the parties have finished litigating and obtaining rulings on all of their preliminary motions.

Under the new DHS standards, employees' time to vindicate their rights is drastically constrained compared to even the MSPB's currently expedited processing time. Now, before an employee realizes what is happening to him or her and has a chance to hire a representative and respond, he or she will be unemployed—despite possibly decades of dedication to the civil service and regardless of the merits or lack of merits of the agency's charges.

Employees are deeply disadvantaged at the outset by the shortened timeframes under the new DHS personnel regulations. Whereas the agency already has seasoned attorneys and personnel accustomed to and prepared for prosecuting adverse actions, the employee will likely be experiencing the process for the first time. Employees will not be likely to engage experienced representation quickly unless the employees have a premonition of their impending doom and schedule appointments before any actions are proposed.

Even if an employee does manage to meet timely with a prospective representative, the chosen attorney or union representative will not be able to study the case history and develop a sound legal strategy before he/she faces major deadlines. Given representatives' inevitable scheduling conflicts, the net result will be that attorneys or unions will be willing to undertake representation in fewer cases—further stacking the proverbial deck against employees' rights. Moreover, current MSPB Chairman Neil A. G. McPhie, a George W. Bush appointee, not known for being anti-agency, implied in his testimony before Congress that the Board currently does not have the resources to arrive at carefully reasoned decisions within the new regulations' timeframes.[63] In sum, Due Process suffers greatly under the new deadlines.The hurried processing under the new DHS personnel regulations begins with the pre-appeal process, in which employees will only be given fifteen days' notice before an adverse action can be taken, with a ten-day window (included in the

63. *The Countdown to Completion: Implementing the New Homeland Security Personnel System Hearing before the House Subcomm. on the Federal Workforce and Agency Organization*, 112th Cong. 6–7 (2005) (statement of Neil A.G. McPhie, MSPB Chairman) [hereinafter McPhie Statement].

total of fifteen days) to respond to a proposed adverse action.[64] Currently, agencies must give thirty days' notice before an adverse action, with a seven-day window to respond.[65] In practice, both the notice and response timeframes are routinely extended under the present regime, whenever an employee or employee's representative requests an extension of time to reply and requests documentation and information to include in the reply.

Employees' time for filing an MSPB appeal is shortened from thirty to twenty days.[66] Filing such an appeal is often difficult for an unrepresented party who is not accustomed to completing legal forms. Moreover, unrepresented employees may omit crucial bases of appeal and affirmative defenses because of the pressured filing time. Employees' representatives, even if they are hired timely, will scarcely have a chance to review a case before the statutory filing deadline has passed. Employees alleging constructive removals—for example, in instances of involuntary retirement due to an adverse reassignment, or forced resignation after unbearable harassment following whistleblower disclosures—will be more prone to filing late appeals, with the shorter deadlines. This will only foster more resource-consuming litigation before the Board as to whether employees are entitled to a waiver for filing untimely appeals due to mitigating circumstances.

Moreover, the new twenty-day deadline counts from the effective date of service,[67] unlike the present thirty-day clock, which starts ticking when the employee actually receives notice of the effective date of the adverse action.[68] Certified mail often takes five or more days to arrive, thereby effectively shortening an employee's filing deadline under the new DHS personnel regulations to approximately two weeks or less. In a procedure designed to guarantee an employee's right to Due Process, there can be no justification for beginning to count against an employee's filing deadline before he/she even knows of an adverse action decision—unless the process is really only designed to create the illusion of Due Process.

Additionally, the new DHS personnel regulations require that the entire MSPB process—from the appeal through the issuance of an initial decision by an MSPB AJ—be crammed into ninety days from date of filing,[69] cutting at least 25 percent from the present, already-

64. 5 C.F.R. §§ 9701.609(a), 9701.610(a).
65. 5 U.S.C. §§ 3502(e)(3), 4303(b)(1)(A), 4303(b)(2).
66. 5 C.F.R. §§ 9701.706(k)(1), 1201.22(b).
67. 5 C.F.R. § 9701.706(k)(1)).
68. 5 C.F.R. § 1201.22(b).
69. 5 C.F.R. § 9701.706(k)(7) (1995). Again, counting from the filing date, as opposed to the date of receipt of an appeal (as under the prior standards), this deadline represents another means of shortening the real time for the employees to obtain Due Process through the MSPB. *Id.*

abbreviated processing time.[70] The new DHS personnel regulations effectuate the goal of reduced processing time in part by making it more difficult for any party in contentious litigation to suspend case proceedings—where, currently, one thirty-day suspension is allowed at the AJ's discretion.[71] With the new regulations, all requests for suspension in DHS cases must be joint requests—the AJ is robbed of any discretion.[72] MSPB Chairman McPhie explained the unfairness of this change, noting, "[r]equiring that [case suspension] requests be jointly submitted effectively gives the non-moving party the authority to block a request that is based on a legitimate reason, such as illness of a party or representative."[73]

2. Hamstrung Discovery[74]

The biggest change effectuated to ensure rapid case processing is a set of drastic limitations on the MSPB discovery process. Apparently, the MSPB will be rushed to judgment—and with only partial information—under the new DHS personnel regulations. The current MSPB discovery

70. 5 C.F.R. §§ 9701.706(k)(7), 1201.22(b). In cases involving MROs, the case processing time is narrowed to 30 or 45 days. 5 C.F.R. § 9701.707(c)(2). Chairman McPhie noted—in the most understated possible manner—"It is not clear that this revision provides adequate time to conduct a thorough review." McPhie Statement, *supra* note 63, at 3. Likewise, the MSPB will be required to decide upon Petitions for Review (PFR) within 90 days of the close of the record. 5 C.F.R. § 9701.706(k)(7). As Chairman McPhie noted in his statement to Congress, currently there is no specific limit to the MSPB's time to consider PFRs, and the average time is 141 days. McPhie Statement, *supra* note 63, at 3. This rushed processing simply means that the Board will have to docket PFRs regarding DHS cases above other agencies' cases, regardless of the urgency of any particular matter. *Id.*

71. 5 C.F.R. §§ 9701.706(k)(4), 1201.28(b).

72. 5 C.F.R. § 9701.706(k)(4).

73. McPhie Statement, *supra* note 63, at 5.

74. The employees' unions challenged the reduced discovery opportunities, along with the new summary judgment provision, but Judge Collyer did not enjoin them. Judge Collyer's decision asked the question, "[D]id Congress authorize the Agencies to modify the internal regulations of MSPB, an independent agency?" She answered the question, holding: "Strange as it may sound, the Court concludes that the Agencies' interpreation of the [Act] to that effect is entitled to *Chevron* deference." *Chertoff*, 2005 WL 1941398, at *28. "Chevron deference" is explained elsewhere in Judge Collyer's opinion, as follows:

> The Court reviews the Agencies' interpretation of the [Act] under the now-familiar *Chevron* framework. Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But, if the statute is silent or ambiguous with respect to the issue at hand, then the Court must defer to the Agencies so long as their "answer is based on a permissible construction of the statute." *Id.* at 843. At *Chevron* step two, "a 'reasonable' explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a 'permissible' construction is made; an explanation that is 'arbitrary, capricious, or manifestly contrary to the statute,' however, is not."

Id. at *10. (Citations omitted)

process, while quicker than in other forums, is notable for its openness. Parties conduct discovery largely without AJ intervention, making as many follow-up requests for documents as necessary within the strict timeframes allotted. The new DHS policies will limit parties to one set of discovery requests and, most egregiously, to two depositions.[75]

Though DHS can (and agencies usually do) adequately conduct discovery in this manner—deposing the employee and maybe one favorable witness, and setting forth a broad cross-section of blanket interrogatories and document requests—there are few cases that an employee can adequately develop with two depositions and one set of discovery requests. After deposing the proposing and deciding officials, an employee will have no depositions left to question any agency managers, human resources personnel, or other employees. The latter witnesses might not speak to the employee's attorney voluntarily, but might provide favorable testimony contradicting that of the instigators of the adverse action. The employee will not be able to conduct any follow-up written discovery after learning in an agency official's deposition about types of exculpatory documents of which the employee had no notice at the time of the initial discovery request.

Although an employee will be allowed to file a motion requesting additional discovery, such discovery may be granted only upon a heightened showing of "necessity and good cause."[76] AJs will no longer have discretion to consider the circumstances of each individual case in making discovery rulings. It will instead be based upon this objective requirement.[77]

To assess how the "necessity and good cause" standard will be applied, we look to similar standards in other contexts. For example, a similar standard is employed when judging whether a party should be able to depose opposing counsel during discovery or call him/her as a witness during trial. In this instance, the burden is on the party seeking testimony from opposing counsel to demonstrate propriety and need.[78] The Eighth Circuit Court of Appeals set forth the often-cited standard that discovery of opposing trial counsel is appropriate only when "(1) [n]o other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case."[79] The *Shelton* court noted that courts have long discouraged "the practice of forcing trial counsel to testify as a witness."[80] Several policy reasons for imposing this necessity and good cause inquiry include the "potential

75. 5 C.F.R. § 9701.706(k)(3)(iii).
76. 5 C.F.R. § 9701.706(k)(3)(iii).
77. *Id.*
78. Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).
79. *Id.*
80. *Id.* (citing Hickman v. Taylor, 329 U.S. 495, 513, 67 S. Ct. 385, 394 (1947)).

for disruption to the adversarial system, an increase in the time and costs of litigation, lowered standards of the legal profession, detraction from the quality of legal representation, and a chilling effect on attorney-client communications."[81] "Additional reasons to limit discovery of opposing counsel include its potential for harassment and disqualification of counsel."[82]

While there are apparently ample reasons for limiting deposition of or calling as a witness opposing counsel, such that the practice should be limited by "necessity and good cause," there are no similar reasons for limiting discovery in an MSPB adverse action appeal. While there is a long history of restricting the right to question opposing counsel, thorough discovery is generally encouraged in the federal courts and administrative legal system. Ample discovery often promotes a better understanding of the merits of a case before hearing and helps parties define disputed issues clearly, without burdening the judiciary or, in this case, the MSPB. Undoubtedly, the high rate of settlements at the MSPB[83] has been attributable, in large part, to the flexible discovery procedures that preexisted the new DHS system. The constriction of discovery under the new DHS personnel regulations is unwarranted and ill-advised.

3. Compromised Due Process

After narrowing the employee's opportunity for discovery and rushing the employee through the adverse action appeals process—which has always existed for his or her protection—the new DHS personnel regulations impose a major new limitation upon Due Process rights: employees' appeals will be subject to summary judgment.[84] After decades of civil servants having a right to a hearing in their adverse action appeals, the new DHS regulations eliminate this right. Indeed, as Chairman McPhie pointed out in his statement to Congress, AJs will be required—not merely allowed—to grant summary judgment where there are no material facts in dispute.[85] Because there has never been a case decided on summary judgment in an employee adverse action appeal, we can only imagine the facts that employees must allege to create a dispute, in order to reach hearing. It is likely, however, that without adequate discovery opportunities, many employees will have difficulty surviving summary judgment. The parties will reach fewer

81. Doubleday v. Ruh, 149 F.R.D. 601, 614 (E.D. Cal. 1993) (citing *Shelton*, 805 F.2d at 1327).

82. *Id.*

83. Every year from FY2001–2004, more than half of the cases settled, of the cases that were slated for adjudication (i.e., the cases that were not dismissed). MSPB Performance Plan for FY2005, *supra* note 38, at 6. *See infra* for additional discussion regarding the impact of the new DHS personnel regulations upon the settlement process.

84. 5 C.F.R. § 9701.706(k)(5). *See supra* note 74 and accompanying text.

85. McPhie Statement, *supra* note 63, at 4.

mutually agreeable settlements because more employees' appeals will be dismissed prematurely, resulting in more petitions for review and appeals to the Federal Circuit. The net result will likely be to clog the MSPB's and Federal Circuit's dockets even further, rather than to expedite processing.

B. *The End of Douglas*

One of the most striking differences between the regime before the enactment of the new DHS personnel system and the regime after this event would have been the virtual elimination of federal employees' ability to mitigate an unreasonable proposed penalty—a right that has existed since the 1960s.[86] Currently, the enforcement of the portion of the new regulations eliminating mitigation has been enjoined by U.S. District Court Judge Rosemary Collyer.[87] Nonetheless, the proposed and nearly executed scheme merits some discussion because DHS may seek to overturn Judge Collyer's decision.

Since 1981, literally thousands of decisions, from the U.S. Supreme Court to the MSPB and arbitrators (and in virtually every court in between), have invoked the *Douglas* factors, analyzing to what degree, if any, an employee's penalty for misconduct should be reduced by the twelve-factor test. For decades, federal employees from every agency have invoked *Douglas* in their oral and written replies to proposed disciplinary or removal actions, compelling management to give real weight to the seriousness of given offenses, whether penalties are being applied consistently, an employee's personal circumstances, and other considerations. Under *Douglas*, management is forced to consider a diversity of individualized, factual scenarios: the fact that twelve others who committed the same offense received a one-day suspension while removal is now being proposed; the fact that the employee's spouse died the day before the incident; or the fact that the incident was a one-time lapse in an unblemished thirty-five-year career.[88] Considering all of these factors, agencies have only been entitled to impose penalties within the "range of reasonableness," up to the maximum reasonable penalty.[89]

For DHS employees, the *Douglas* analysis would have been turned on its head. Under the DHS's regulations, "an arbitrator, adjudicating official or MSPB may not modify the penalty imposed by [DHS] unless such penalty is so disproportionate to the basis for the action as to be wholly without justification . . . When a penalty is mitigated, the max-

86. *See supra* part IV.
87. *Chertoff*, 2005 WL 1941398, at *25–27, 30.
88. These illustrate hypothetical, stark examples of common mitigating factors under *Douglas*.
89. *See Devall*, 178 F.3d at 1260 (explaining the "maximum reasonable penalty" standard).

imum justifiable penalty must be applied."[90] DHS might as well have sought to eliminate mitigation altogether.[91] Indeed, employees might be better off if mitigation were outright eliminated, rather than DHS's proposed scheme, because at least employees would not waste their limited resources trying to reach the impossible new standard of proof, in which even the agency's unreasonable penalty will be sustained if the agency states any rationale for it.

The "wholly without justification" standard is wholly without precedent in the labor and employment context. The standard recalls that applied under Rule 38 of the Federal Rules of Appellate Procedure, which allows a court of appeals to sanction an appellant if the court determines that the appeal is frivolous or wholly without merit.[92] Thus, it seems that employees must show that management's proposal is so obviously wrong as to be sanctionable—essentially a showing of bad faith—to have any mitigation considered in their cases. Yet, there is no precedent by which employees will be able to prove that the agency's decision is obviously wrong, because AJs, the Board, and arbitrators

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90. 5 C.F.R. § 9701.706(k)(6).

91. Dr. Sanders, the chief exponent of the new DHS personnel regulations, argues that this possibility for mitigation actually greatly expands employees' rights in performance cases, where they currently have no possibility of mitigation under *Lisiecki. See* Sanders Statement, *supra* note 55, at 9. However, the "wholly without justification" standard leaves so slim a chance of mitigation for employees that, we predict, this small concession to employees is nothing more than illusory. *Id.*

92. Fed. R. App. P. 38. For cases applying this standard, *see, e.g.*, Newhouse v. McCormick & Co., Inc., 130 F.3d 302, 305 (8th Cir. 1997) (appellant sanctioned where his persistence in continuing to litigate the question of whether or not he was entitled to an enhanced contingency fee, in the face of controlling precedents that removed every colorable basis in law for his position, made appeal both frivolous and "wholly without merit"); Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656–657 (9th Cir. 1984) (insurance claim based upon false statements, with negative statutory language and case law directly on point, is "wholly without merit," such that appeal of denied claim is "frivolous" and the "result is obvious"); Williams v. U.S. Postal Serv., 873 F.2d 1069, 1075 (7th Cir. 1989) (appeal was wholly without merit where it was frivolous and "unwarranted" and result was obvious in light of unequivocal district court order—a "forgone conclusion"; "wholly without merit" standard met where appellate counsel failed to cite any relevant cases, or make any arguments addressing district court's accurate exposition of the law, demonstrating "insistence on litigating a question in the face of controlling precedents which removed every colorable basis in law for the litigant's position."); In re Prop. Movers, L.L.C., 31 Fed. Appx. 81, slip op., 2002 WL 225836, *2 (4th Cir. 2002) (unpublished opinion) (finding appeal wholly without merit or frivolous where an appellant cites no relevant cases in response to a lower court's accurate exposition of the law, and where an appellant's arguments are irrelevant to the issues in dispute); Communications Workers of Am. v. Forward Telecasting, 1983 WL 2038, *5 (W.D. Wis.) (citing Amoco Oil Co. v. Oil, Chem. and Atomic Workers Int'l Union, 548 F.2d 1288, 1296 (7th Cir. 1977), *cert. denied*, 431 U.S. 905, 97 S. Ct. 1697, 52 L. Ed. 2d 389 (1977)). *See also, e.g.*, Dixon v. Coburg Dairy, Inc., 369 F.3d 811 (4th Cir. 2004) (First Amendment claim against private employer was so attenuated and insubstantial as to be "wholly devoid of merit"); Tolbert v. Branche, 1986 WL 1844, *3 (N.D. Ill.) (punishment "wholly without justification" may be cruel and unusual punishment under the Eighth Amendment); Erie R.R. Co. v. Solomon, 237 U.S. 427, 431, 35 S. Ct. 648, 59 L. Ed. 1033 (1915) (case "wanting in substance," "unsubstantial and frivolous" is "wholly devoid of merit").

have been applying reasonableness-based mitigation standards for more than twenty-five years.[93]

There is no guarantee under the new standards that the Board would allow mitigation in any circumstance, even for an employee (hypothetically) with decades of service, without disciplinary incident, who was fired for his first instance of being five minutes tardy. Short of this extreme example, the "wholly without justification" standard provides virtually no hope of achieving any penalty mitigation.

Judge Collyer's decision enjoining the regulations' provision all but foreclosing mitigation eloquently explains the court's rationale:

> The Court finds that the desire of the Agencies to restrict MSPB review results in a system that is not fair. First, the Court seriously doubts that by insisting on fairness, the Congress meant that DHS could discipline or discharge employees without effective recourse. Second, rather than afford a right of appeal that is impartial or disinterested, the Regulations put the thumbs of the Agencies down hard on the scales of justice in their favor. Under current law, MSPB reviews the reasonableness of agency adverse actions and will mitigate a penalty only when it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. This is, in fact, a generous standard in an agency's favor. Under the Regulations at DHS, however, MSPB would have to find that the penalty was "so disproportionate" as to be "wholly without justification." 70 Fed.Reg. at 5281. This would render an MSPB review almost a nullity and, since it is the MSPB decision that goes to the Federal Circuit and not the employing agency decision, see 5 U.S.C. § 1204(a), *Douglas, supra at* 284, it could effectively insulate DHS adverse actions from review. Such a procedure fails to measure up to the sense of Congress that "employees of the Department are entitled to fair treatment in any appeals," 5 U.S.C. § 9701(f)(1)(A), or Congress's express requirement that any modified procedures "further the fair . . . resolution of matters involving the employees of the Department." 5 U.S.C. § 9701(f)(2)(C). The Court concludes that the Agencies failed to apply the plain meaning of the statute in this regard and so are not entitled to *Chevron* deference.[94]

C. Constricted Settlement Opportunities

While alternative dispute resolution (ADR) is rising throughout the American legal system and judges at all levels are increasingly required to encourage parties to settle,[95] the new DHS regulations take

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93. Chairman McPhie acknowledged as much to Congress, arguing that the new regulations misapprise the current state of the law. McPhie Statement, *supra* note 63, at 3–4. Chairman McPhie observed that the Board does not routinely or willy-nilly second-guess managers' chosen penalties, contrary to the statements of those advocating the new regulations—but only mitigates penalties that clearly exceed the maximum reasonable penalty. *Id.*

94. *Chertoff*, 2005 WL 194138, at *27.

95. For example, the Dispute Resolution Act of 1998 § 4, 28 U.S.C. § 652, requires all federal district courts to adopt an ADR program for civil actions. *Id.* President William J. Clinton's May 1, 1998, Memorandum for Heads of Executive Departments and Agen-

the unjustified and bizarre step of closing off avenues of settlement between the agency and appealing employees. The regulations provide, "MSPB or an adjudicating official may not require settlement discussions in connection with any appealed action under this section."[96]

Until now, and still in non-DHS cases, MSPB AJs have typically issued Acknowledgment Orders to the parties when the AJs are first assigned to cases, which frequently include language such as the following:

> I DIRECT the agency to contact the appellant within 35 calendar days of the date of this Order to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. The agency must discuss concrete, specific settlement proposals with the appellant unless either party concludes in good faith that no compromise of any kind is possible. The agency must also be prepared to discuss with me the status of its settlement discussions.[97]

Thus, as a practical matter, agencies are never forced to settle, as long as they decline resolution in good faith. Yet, settlement provisions in Acknowledgment Orders do have the effect of preventing wasteful litigation, by requiring the parties at least to discuss the possibility of finding a middle ground—which parties accomplish more than 50 percent of the time.[98] The current system promoting settlement sometimes overcomes an agency's instincts toward obstreperousness, which will be rewarded under the new DHS policies.

In its explanation for limiting the MSPB's authority over settlement negotiations, DHS asserts that "we believe strongly that settlement should be a completely voluntary decision made by the parties on their own, based on their individual interests."[99] This rationale is disingenuous because agencies are never required presently to settle cases

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cies strongly encouraged the use of ADR by federal agencies and set up the Alternative Dispute Resolution Working Group to be convened by the attorney general. Memorandum from President William J. Clinton to the Heads of Executive Departments and Agencies (May 1, 1998). Likewise, nearly every state court, from Alabama to Wyoming, has adopted ADR requirements at both the trial and appellate levels. *See* Cornell University Law School, Legal Information Institute, *State Statutes Dealing with Alternative Dispute Resolution*, at www.law.cornell.edu/topics/state_statutes.html#alternative_dispute_resolution. *See also* Lawrence D. Connor, *The Proposed New Court Rules—Modern Dispute Resolution for Michigan*, MICH. B. J., (May 2000) (citing Vol. 79, FLA. R. CIV. P. 1.700 (1997); IND. R. P., Burns Ind. ADR 2.1 (1997); MASS. SUP. CT. R. 1:18 (1998); TENN. SUP. CT. R. 31).

96. 5 C.F.R. § 9701.706(i)(1). This is despite 5 C.F.R. § 9701.705 of the new regulations, giving lip service to the development of ADR methods to address employee-employer disputes arising in the workplace, including those that may involve disciplinary actions, and providing that ADR will be subject to collective bargaining.

97. Such orders are issued under the authority of 5 C.F.R. §1201.41(c), which allows an AJ to "initiate" settlement discussions "at any time." *Id.*

98. *See* MSPB PERFORMANCE PLAN FOR FY2005, *supra* note 38, at 6.

99. 70 Fed. Reg. 5,271, at 93.

involuntarily, and since the curtailed MSPB adjudication process already tilts the playing field more in favor of the agency.

The DHS regulations take the additional step of precluding the most likely official to encourage settlement—the MSPB AJ charged with the case—from engaging in any settlement discussions with the parties, requiring that all settlement talks be with "an official specifically designated by MSPB for that sole purpose."[100] There is nothing *per se* unreasonable about providing designated settlement judges to assist parties in negotiating cases, without prejudicing the judge assigned to a given case. Yet, foreclosing the involvement of the AJ assigned to the case is exceedingly rigid, inasmuch as how frequently the parties agree that an AJ's involvement in encouraging settlement is constructive. As a practical matter, the MSPB is not currently staffed to allow for a separate settlement judge in every case—or even nearly so.[101]

Preventing the AJ assigned to a case from encouraging resolution has a disproportionate impact upon the employee, who is often unrepresented and disempowered in MSPB proceedings. Many employees are prevented by escalating costs from pursuing an appeal through hearing with representation. The reduced likelihood of a successful outcome (because of the crippled discovery process, *inter alia*) will also mean a smaller chance of recovering attorney fees, only further diminishing the opportunity for employees to obtain legal representation. For such employees, early resolution is often their only opportunity to resolve satisfactorily an adverse action.

D. Mandatory Removal Offenses (MROs) and the New Mandatory Removal Bureaucracy[102]

The new DHS personnel regulations regarding MROs provide that the Secretary in his/her sole, exclusive, and unreviewable discretion will identify offenses that have an alleged direct and substantial impact on DHS's ability to protect homeland security.[103] The secretary has not completely identified the MROs to date but claims he "intends to consult with the Department of Justice in preparing the list of offenses."[104]

100. 5 C.F.R. § 9701.706(i)(2).

101. *See* McPhie Statement, *supra* note 63, at 4.

102. Judge Collyer did not alter the MRO process embodied in the new DHS personnel regulations, holding that the agencies' interpretation of the legislative intent, while "extraordinary," was entitled to *Chevron* deference. *Chertoff*, 2005 WL 1941398, at *29.

103. 5 C.F.R. § 9701.606.

104. 70 Fed. Reg. 5,272 at 88 (DHS commentary on new personnel regulations) (citing Department of Homeland Security Human Resources Management System—Adverse Actions, 5 C.F.R. § 9701.607).

A preliminary list of potential MROs includes:

- Intentionally or willfully aiding or abetting an act, or potential act, of terrorism.
- Intentionally or willfully allowing the improper transportation or importation of illegal weapons (including, but not limited to, weapons of mass destruction) or materials to be used for the purpose of committing or contributing to a terrorist act.
- Intentionally or willfully allowing the improper entry of an individual into the United States who could compromise, or potentially compromise, homeland security.
- Soliciting or intentionally accepting a bribe or other personal benefit that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise.
- Intentionally or willfully misusing and/or divulging law enforcement sensitive or confidential information (including, but not limited to, classified material) to unauthorized recipients that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise, subject to applicable whistleblower and free speech protections.
- Intentionally or willfully engaging in activities that compromise, or could compromise, the information, economic, or financial infrastructure of the Federal Government, when the employee knew or reasonably should have known of the compromise or potential compromise.[105]

While no one doubts the gravity of such offenses, DHS employees and their advocates have taken issue with the process for enforcing the MRO policy. While in the criminal law context, the most serious crimes, the death penalty offenses, have more—not fewer—Due Process rights associated with them, DHS reverses this notion in the employment context. The economic "death penalty"—an MRO finding, which will not only end an employee's federal career, but likely his entire career—will be meted out more hastily and with fewer guarantees of fairness.

The MRO procedure is as follows: employees will have a brief fifteen-day period of advance written notice of a proposed adverse action, with a concurrent ten-day reply period.[106] An employee found to have committed an MRO will be removed following an expedited ap-

105. Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5,272, at 26–27 (Feb. 1, 2005) (to be codified as C.F.R. pt. 9701).

106. 5 C.F.R. §§ 9701.609(a), 9701.610(a). Under 5 C.F.R. §9701.609(a), a shorter five-day notice and reply period is provided, patterned after 5 U.S.C. § 7513, when there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed.

peals process.[107] This process culminates in an appeal before an "independent" DHS panel, the Mandatory Removal Panel (MRP), consisting of three members appointed by the secretary.[108]

One of DHS's few concessions to labor organizations participating in the meet-and-confer process is a requirement that "every proposed notice of mandatory removal be approved by a Departmental official before being issued to the employee."[109] According to DHS, "[t]his requirement, combined with the secretary's authority to mitigate the removal penalty" is sufficient to guard against "the potential for such abuse and assures consistency of application."[110]

Meanwhile, the secretary's appointed MRP is charged with holding a hearing after establishing "procedures for the fair, impartial, and expeditious assignment and disposition of cases . . ."[111] The MRP can only sustain or overturn a mandatory removal and does not have authority to mitigate the penalty, a right reserved to the secretary (like a governor issuing a pardon)—whose designee authorized the MRO charge in the first place.[112] The DHS decision can only be overturned if the employee proves harmful procedural error, a prohibited personnel practice, or a decision not in accordance with law.[113]

Thereafter, an employee has only a fifteen-day window of time to appeal the MRP's decision to the MSPB—and must show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"; caused by procedural error; or "[u]nsupported by substantial evidence."[114] These standards of review are significantly higher than the Board's normal "preponderance of the evidence" review in other DHS cases. In other words, appealing the economic "death penalty" is much more difficult, and must be done more quickly, than appealing any other adverse action. Finally, the Board must decide the appeal within a mere thirty to forty-five days of receiving the parties' submissions—or the MRP's decision is considered affirmed, and an employee's only recourse is a Federal Circuit appeal.[115]

MSPB Chairman McPhie highlighted faults of the MRO appeals system in his testimony before Congress:

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107. 70 Fed. Reg. 5,272 at 88 (Feb. 1, 2005).

108. 5 C.F.R. §§ 9701.707(a), 9701.708(a).

109. 70 Fed. Reg. 5,272, at 27. *See Id.* at 88–89.

110. *Id.*

111. 5 C.F.R. §9701.707(b)(1). At the MRP hearing, the vote of the chair will be dispositive of any split between the other members. 5 C.F.R. §9701.707(b)(2).

112. 5 C.F.R. § 9701.707(b)(4).

113. 5 C.F.R. § 9701.707(b)(5).

114. 5 C.F.R. § 9701.707(c)(1). In addition, a member of the DHS secretary's MRP will substitute for a member of the MSPB if there is a "mixed case," involving an MRO adverse action and an affirmative defense of discrimination. 70 Fed. Reg. 5,272, at 95 (Feb. 1, 2005) (to be codified as 5 C.F.R. pt. 9701).

115. 5 C.F.R. § 9701.707(c)(2)–(4).

> [Subsection] 9701.707(c)(4) . . . provides that "If MSPB does not issue a final decision within the mandatory time limit [30 to 45 days], MSPB will be considered to have denied the request for review of the Mandatory Review Panel's (MRP) decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. § 7703." This provision is not consistent with the law. The Homeland Security Act of 2002 does not authorize DHS to confer jurisdiction on the U.S. Court of Appeals for the Federal Circuit over appeals from DHS decisions. When the MSPB fails to act on a petition for review of an MRP decision within a stated time, that MRP decision does not constitute the decision of the MSPB. It is unlikely that the Federal Circuit would take jurisdiction over an appeal when there has not been a final MSPB decision, although that determination is for the court to make. *See* 5 U.S.C. § 7703(a) ("[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision") (emphasis supplied).[116]

MSPB Chairman McPhie also noted that the MRO procedures reinstate an almost draconian, "double jeopardy" adverse action prosecution, which was replaced decades ago with the CSRA and fundamental fairness. Chairman McPhie testified:

> [S]ubsection 9701.707(d) provides that if a mandatory removal offense is not sustained, DHS may bring a second, non-MRO action against the employee based on the same conduct and on evidence that was not a part of the initial record. The possibility that an employee would be subject to multiple actions based on the same underlying conduct raises a substantial question of fundamental fairness. *Cf.* Byers v. Dep't of Veterans Affairs, 89 M.S.P.R. 655, ¶ 19 (2001) (an employee may not be disciplined more than once for the same conduct).[117]

Clearly, the MRO appeals system is designed to ensure close control—and unfettered ability to act—by the DHS secretary throughout, to the point that the Secretary oversteps his or her authority. Chairman McPhie commented that the MRP and the agency are so closely tied that the Board, exercising fundamental fairness, might not be able to give binding, precedential effect to the MRP's decisions.[118] Chairman McPhie's deep lack of faith in the objectivity of the new MRP is illustrative. He testified, "If the MRP is not deemed to be sufficiently independent of DHS for collateral estoppel purposes,[119] neither party would be precluded from relitigating (in a second action) all of the issues that were decided by the MRP."[120] Such repetitive litigation would lead to a profound waste of resources and inefficiency.

116. McPhie Statement, *supra* note 63, at 6.
117. *Id.*
118. *Id.*
119. *See* Wright v. Dep't of Transp., 89 M.S.P.R. 571 (2001).
120. McPhie Statement, *supra* note 63, at 6.

In sum, apart from political considerations, there appears to be no demonstrated need for MROs or the new MRP bureaucracy. Most, if not all, of the potential MROs would probably constitute criminal offenses for which the employee could be indefinitely suspended while being prosecuted. It is hard to believe that such offenses, if proven, would not result in the sustaining of a penalty of removal by the MSPB or an arbitrator under a collective bargaining agreement. It is also hard to discern how this paternalistic MRO appeals system protects employees' Due Process rights, especially in comparison to the present, independent adjudicatory system. The MRP will be beholden to the same secretary whose office brought the MRO, economic "death penalty" charges, and has a reduced burden of proof on appeal to the Board and Federal Circuit.

V. Conclusion

Across the generations, many talented Americans have joined the civil service with a desire to help build their country, although their compensation has never competed with that available in the private sector. These civil servants have labored for decades, in many cases, because they have known that they could count on stability in their jobs, unaffected by the whims of politicians or the latest trends. Now, the new DHS personnel system threatens to undermine federal employees' appeals rights that have developed over more than a century—thus inspiring insecurity in the same employees whom we count on now more than ever to protect our security. If the DHS personnel system becomes the norm across the government, many of America's best and brightest will look for employment elsewhere.[121] Without a real chance for merit-driven appeals, the appellate process will lose credibility, employees will lose hope, and all Americans will lose the protection of an impartial government, run by employees for the public benefit, not to please politicians or to protect their paychecks.

121. A major study by the Partnership for Public Service and the Institute for the Study of Public Policy Implementation, which was conducted in December 2004, after the new DHS personnel regulations were proposed, found that DHS employees gave their employer among the lowest ratings given by any group of federal agency employees—29th out 30 federal agencies surveyed. *See Best Places to Work in the Federal Government*, *available at* www.bestplacestowork.org/.

Union's Gamble Pays Off: In *San Manuel Indian Bingo & Casino*, the NLRB Breaks the Nation's Promise and Reverses Decades-Old Precedent to Assert Jurisdiction over Tribal Enterprises on Indian Reservations

Anna Wermuth*

"Great nations, like great men, should keep their word."
Federal Power Commission v. Tuscarora,
362 U.S. 99, 142 (1960) (Black, J., dissenting).

I. Early Rulings on Tribal Sovereignty

To American Indians, the notion of tribal sovereignty is more than an abstraction existing only in the vacuum of legal parlance. It is an inherent attribute of their precolonial political and territorial status, derived not by some grant of authority from another government, but from the members of the tribes themselves.[1] That perspective is not surprising; tribal nations predate the existence of the federal and state governments in the United States. Indeed, the U.S. Constitution recognizes that Indian tribes, along with foreign nations and the several states, are distinct governments.[2] The competing perspective is an exceedingly limited theory of tribal sovereignty; that is, that tribes have only those attributes of sovereignty that Congress gives them.

The more accurate depiction of tribal sovereignty vis-à-vis the federal government, however, falls somewhere in between those competing theories. Through a series of early Supreme Court decisions, Indian

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1. *See, e.g.*, American Indian Policy Center, *Framework of Tribal Sovereignty*, *available at* http://www.airpi.org/projects/marge/.html (last visited Nov. 3, 2004).

2. U.S. Const. art. I, § 8, cl. 3.

tribes came to be characterized as "domestic dependent nations" *retaining* the inherent attributes of sovereignty, subject to defeasance by Congress.[3] Regarding Congress's power to abrogate attributes of tribal sovereignty, the U.S. Supreme Court announced that "General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[4] Over time, the inherent attributes of sovereignty that directly affect the tribes' right to self-governance have been identified by the courts as including, among others, the right to regulate economic matters within their territory.[5]

Since those early decisions, all three branches of the federal government have repeatedly affirmed the principles of *retained* tribal sovereignty, while vacillating between promoting self-governance and forcing integration. Although the 1800s were dominated by treaty making between tribes and the federal government whereby Indian nations were recognized as sovereigns within their reservations, this reservation system resulted in the "removal" of Indians to lands in the Western United States in exchange for their eastern territories.[6] From the late 1800s through the early 1900s, the policy tended toward heavy-handed attempts to "civilize" the tribes. This period was marked by an expansion of the federal government's power over tribes through legislation that sought to make Indians subject to the same laws as the general population.[7] Between the 1920s and the 1950s, however, the pendulum swung back toward encouraging self-governance and the preservation of Indian culture.[8]

Subsequently, the federal government adopted a policy of "termination," which reached its pinnacle in the 1950s.[9] While this policy purportedly sought to eliminate federal services to and terminate treaties with Indians under the auspices of freedom from "dependence" on the federal government, it heralded an era of forced assimilation and deprivation of basic social services, such as education, health and child welfare.[10] During that period, the U.S. Supreme Court issued an aberrant decision, retreating from the principle that sovereign rights were subject to defeasance only by *explicit* acts of Congress. In that decision, *Federal Power Commission v. Tuscarora*,[11] the Supreme Court considered whether the Federal Power Act (FPA), which specifically protected

3. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). *See also* Johnson v. McIntosh, 21 U.S. 543, 574 (1823); Worcester v. Georgia, 31 U.S. 515, 559 (1832).

4. Elk v. Wilkins, 112 U.S. 94, 100 (1884).

5. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); NLRB v. Pueblo of San Juan, 280 F.3d 1278, 1284 (10th Cir. 2000), *aff'd on reh'g en banc*, 276 F.3d 1186, 169 L.R.R.M. (BNA) 2129 (10th Cir. 2002).

6. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 62-107 (Michie 1982).

7. *Id.* at 127-44.

8. *Id.* at 144-52.

9. *Id.* at 152-80.

10. *Id.*

11. *See generally* Fed. Power Comm'n v. Tuscarora, 362 U.S. 99 (1960).

certain types of "tribal lands" from the use of eminent domain nevertheless authorized the federal government to "take" lands owned by the Tuscarora tribe.[12] Notably, the FPA "specifically defines and treats with lands occupied by Indians . . . [and therefore] gives every indication that, within its comprehensive plan, Congress intended to include lands owned or occupied by any person or persons, including Indians."[13] Even though the FPA expressly excluded certain tribal lands, the Court stated that "a general statute in terms applying to all persons includes Indians and their property interests."[14] As support for this broad dictum, the Court relied on cases involving individual income tax statutes that literally subjected "every individual" to tax on income "from any source whatsoever," or did not except "any . . . persons" from their scope.[15] In spite of announcing this variation on principles of statutory construction where tribal rights are implicated, the Court did not overrule its holding in *Elk v. Wilkins* that general acts of Congress do not apply to Indians unless the statute contains a clear expression to the contrary. To be sure, since *Tuscarora*, the Supreme Court has reaffirmed the holding in *Elk v. Wilkins.*[16] Ultimately, the Court concluded that the Tuscarora lands did not meet the statutory definition of "reservation," and therefore authorized the taking of the lands for use by the federal government.[17] In his poignant dissent, Justice Black expressed regret "that this Court is to be the governmental agency that breaks faith with [the Indian] people."[18]

Beginning in the late 1960s, Congress developed comprehensive legislation promoting tribal self-determination, a policy that theoretically remains in effect today.[19] Shortly thereafter, the National Labor Relations Board (the Board) reasonably concluded that, based on notions of tribal sovereignty and congressional deference to those notions, the National Labor Relations Act (the NLRA or the Act) implicitly exempted tribal-owned and operated commercial enterprises on reservations from the Act's jurisdiction.[20] Just last year, however, in *San*

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12. *Id.* at 102.
13. *Id.* at 118.
14. *Id.* at 116.
15. *See id.* at 116-17 (quoting Superintendent of Five Civilized Tribes v. Comm'n of Internal Revenue, 295 U.S. 418, 419-20 (1935); Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 607 (1943)).
16. *See* San Manuel Indian Bingo & Casino, 341 N.L.R.B. No. 138, slip op. at 18-19, 174 L.R.R.M. (BNA) 1489 (2004) (Member Schaumber, dissenting) (citing cases).
17. *Id.* at 14-15.
18. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142 (S. Ct. 1960) (Black, J., dissenting).
19. The recent spate of federal court cases extending certain employment-related statutes to Indians and their tribal governments suggests, unfortunately, that the tide may be turning again. *See* COHEN, *supra* note 5, at 180-206.
20. *See* Fort Apache Timber Co., 226 N.L.R.B. 503, 506 93 L.R.R.M. (BNA) 1296 (1976).

Manuel Indian Bingo & Casino,[21] the Board inappropriately invoked the so-called "*Tuscarora* rule" thereby causing this "great nation" to break its word to the Indian Nations once again.

Announcing that the Act is a "statute of general application," the Board retreated from its long-standing precedent and asserted unwarranted jurisdiction over commercial enterprises wholly owned and operated by tribal governments on Indian reservations.[22] In light of the Board's historically expansive reading of the several enumerated exemptions to its statutory jurisdiction, its attempt now to characterize the NLRA as a statute of general applicability is somewhat disingenuous. In any event, the Board's decision is unsound as a matter of public policy, and will create conflicts with the well-developed tribal-state compacting mechanisms put into place by federal legislation, which already regulate labor relations in tribal gaming operations. For these reasons, *San Manuel's* longevity is questionable.

II. The Board's Long-Standing Precedent of Exempting Tribal-Owned and Operated Commercial Enterprises on Indian Reservations from Its Jurisdiction

For nearly 30 years, the Board advanced a reasonable and well-supported interpretation of the term "employer," as used in the Act, as implicitly excluding Indian enterprises operating on tribal lands.[23] It is not surprising that the Board was first confronted with the issue in 1976, some handful of years after the federal government announced a new policy of tribal self-determination. This change in policy was accompanied by legislation that authorized tribes to qualify for economic development loans and grants, which engendered a significant expansion in tribal-owned and operated commercial enterprises.[24] Unions began taking note of tribal-owned commercial enterprises as they began to seriously compete with non-Indian businesses, which were undoubtedly subject to the Act.

Against that backdrop, *Fort Apache* found its way to the Board. In *Fort Apache*, the White Mountain Apache Tribe, through its governing Tribal Council, owned and operated a lumber mill, among other commercial enterprises, within the confines of its reservation.[25] All of the

21. San Manuel Indian Bingo & Casino, 341 N.L.R.B. 138, 174 L.R.R.M. (BNA) 1489 (2004).

22. *Id.* at 8.

23. *See* Fort Apache Timber Co., 226 N.L.R.B. at 506, 93 L.R.R.M. (BNA) 1296 (1976). Prior to the *Fort Apache* case, the Board had only addressed the question of whether *non-Indian*-owned commercial enterprises operating on Indian lands were covered by the Act. *See* Texas-Zinc Minerals Corp., 126 N.L.R.B. 603, 605 45 L.R.R.M. (BNA) 1356 (1960), *enf'd sub nom.* Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir. 1961). In that case, the Board held that the Act did not exempt such employers. *Id.*

24. *See* COHEN, *supra* note 5, at 189-90, 200-02.

25. *Fort Apache Timber Co.*, 226 N.L.R.B. at 503.

mill workers were employed and paid by the Central Tribe, which set wages and working conditions for all of the employees at the various businesses on the reservation, including the lumber mill.[26] Doing business under the name Fort Apache Timber Company, the Tribe sold and shipped goods valued in excess of $50,000 directly to customers located outside the reservation and outside the State of Arizona.[27]

The Teamsters sought to organize some of the employees, and the Regional Director issued an order directing an election.[28] Fort Apache sought review of the order, arguing that the Board lacked statutory jurisdiction over the mill.[29] Noting initially that it was "not treating with Indians who have either left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government," the Board specifically framed the issue thusly: "whether an Indian tribal governing council qua government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation, could be an employer within the meaning of the Act."[30] The Act is silent as to its application to Indians, and section 2(2) defines employer as excluding

> the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.[31]

Relying on Supreme Court precedent, while noticeably ignoring the *Tuscarora* case that had been decided almost two decades earlier, the Board noted that "individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, *unless Congress has specifically provided to the contrary*."[32] In other words, consistent with relevant Supreme Court jurisprudence, the Board began with the presumption that federal statutes do not apply to Indians unless the statute expressly provides otherwise.[33] Noting further that tribal governments have been likened to states, territories, and other types of distinct political entities, the Board conclusively determined that it was "clear beyond peradventure that a tribal council . . . is a government both in

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26. *Id.* at 504. It is unclear from the opinion how many of the employees, other than the private individual with whom the tribe contracted for management services, were non-Indian. *Id.*

27. *Id.* at 503.

28. *Id.*

29. *Id.*

30. *Id.* at 504. (internal citations omitted).

31. 29 U.S.C. § 152(2).

32. Fort Apache Timber Co., 226 N.L.R.B. 506, 93 L.R.R.M. (BNA) 1296 (1976) (emphasis added).

33. *Id.*

the usual meaning of the word, and as interpreted and applied by Congress, the Executive and the Courts."[34] From there, the Board had no problem reading the statutory employer exemption to implicitly exclude tribal governments, specifically holding that as a "government," the Tribal Council and its self-directed enterprise on the reservation were "implicitly exempt as employers within the meaning of the Act."[35]

Just three years after *Fort Apache*, the Board confronted a related case. In *Devil's Lake Sioux Mfg. Corp.*, the employer was a manufacturing plant located on the reservation of the Sioux Indian Tribe.[36] The plant was jointly owned by the Tribal Council and the non-Indian Brunswick Corporation, with the tribe holding 51 percent of the stock to Brunswick's 49 percent.[37] In spite of that ownership structure, Brunswick controlled the management of the enterprise, including its labor relations policies, with Brunswick officials sitting in more than half of the board of director seats and holding seven of the eight department head positions.[38]

There, the Board focused not on the ownership of the enterprise, nor on the employee membership in the tribe, but instead on the entity that controlled and directed the enterprise.[39] Distinguishing the facts from those presented in *Fort Apache*, the Board concluded that Brunswick, not the Tribal Council, controlled the operations and labor policies.[40] In so deciding, the Board was influenced by the fact that unlike the *Fort Apache* case, the employees in *Devil's Lake* were not employed nor paid by the tribe.[41] Accordingly, the Board concluded that because the employer was controlled by Brunswick, a private entity, the Board had statutory jurisdiction regardless of the tribal status of the employees.[42]

In *Southern Indian Health Council, Inc.*, the Board again faced the issue of whether a tribal-owned enterprise on an Indian reservation satisfied the definition of "employer."[43] The employer in that case was a health care clinic organized to provide health services for Indians and operated by a consortium of seven Indian tribes.[44] The clinic was governed by a board of directors comprised solely of tribal members, but its day-to-day operations were run by a program director who did not

34. *Id.*
35. *Id.*
36. Devil's Lake Sioux Mfg. Corp., 243 N.L.R.B. 163, 163 101 L.R.R.M. (BNA) 1380 (1979).
37. *Id.*
38. *Id.*
39. *Id.* at 164.
40. *Id.*
41. *Id.* at 163.
42. *Id.* at 164.
43. S. Indian Health Council, Inc., 290 N.L.R.B. 436, 436, 129 L.R.R.M. (BNA) 1013 (1988).
44. *Id.*

belong to any of the seven member tribes.[45] While the professional staff apparently was predominantly non-Indian, the majority of the nonprofessional staff were Indian.[46]

In its jurisdictional analysis, the Board once again focused on determining which entity controlled the enterprise, rather than the tribal status of the clinic's employees.[47] Finding that the board of directors established and controlled significant employment policies, had the authority to approve hiring and firing decisions, set wages and was the ultimate arbiter of employee grievances, the Board easily concluded that the clinic was tribally controlled.[48] Accordingly, the Board applied its *Fort Apache* rationale and held that the employer was implicitly exempt from the Act's reach as a "governmental entity."[49]

Then, in *Sac and Fox Industries, Ltd.*, the Board asserted jurisdiction over a tribal enterprise, based primarily on the fact that it was not located within the confines of the reservation.[50] In spite of the fact that *Tuscarora* had been decided more than 30 years prior, the Board in that case for the first time made reference to the principle espoused in *Tuscarora* that "a general statute in terms applying to all persons includes Indians and their property interests."[51] In its discussion of the *Tuscarora* case, however, the Board completely glossed over the fact that the Federal Power Act, the statute at issue in *Tuscarora*, did in fact contain an express exemption for "tribal lands," thereby leaving the uninformed reader with the erroneous impression that the Federal Power Act, like the NLRA, was silent on the topic.[52]

Although noting the disagreement among the federal courts about the applicability of the *Tuscarora* rule to property interests in reservation lands, the Board proceeded with little discussion to apply it to the NLRA, noting that the Act contains "only a few specified exemptions."[53] Arriving at the conclusion that the NLRA is a statute of general applicability, the Board then analyzed the facts presented to determine whether the NLRA fell within any of the exceptions to the *Tuscarora* rule as set forth by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm.*[54] In that case, the Ninth Circuit held that a federal statute of general application would not apply to Indian tribes if: (1) the activity governed by the statute involves "exclusive rights of self-

45. *Id.*
46. *Id.*
47. *Id.* at 437.
48. *Id.*
49. *Id.*
50. Sac and Fox Indus. Ltd., 307 N.L.R.B. 241, 243 140 L.R.R.M. (BNA) 1054 (1992).
51. *Id.* at 243 (quoting *Tuscarora*, 362 U.S. at 116).
52. *Id.* at 244.
53. *Id.* at 243.
54. *See generally* Donovan v. Coeur d' Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).

governance in purely intramural matters"; (2) the application of the statute would abrogate treaty rights;[55] or (3) there is proof by legislative history or some other means that Congress intended that the law would not apply to Indians.[56]

Despite applying the *Tuscarora-Coeur d'Alene* analysis, the Board did not overrule its *Fort Apache* decision that the definition of employer in the Act implicitly excluded Indian governments. Instead, the Board held, in essence, that the implicit exemption for tribal governments did not apply to tribal-owned enterprises operating outside of the confines of the reservation.[57] The rationale advanced by the Board was that off-reservation activities do not "touch on" purely intramural matters.[58] Specifically, in its discussion of the first *Coeur d'Alene* exception the Board determined that the application of the NLRA to Sac and Fox's *off-reservation* enterprise would not interfere with the tribe's rights of self-governance in purely *intramural* matters.[59] Under that same rationale, the Board then easily concluded that Congress could not have intended to restrict the application of the Act to exclude commercial enterprises that operated outside of tribal lands.[60] Accordingly, the Board slightly narrowed its *Fort Apache* precedent, holding that tribal-owned enterprises that are operated off the tribe's own lands do not fall within the governmental exemption from the Act's coverage.[61]

III. The Board's *San Manuel Indian Bingo & Casino* Decision

Several principles were established in this line of Board authority. First, section 2(2) of the Act implicitly recognizes tribal governments as exempt governmental entities.[62] Second, whether the enterprise is controlled by the tribe, as opposed to whether tribal members are employed by or consume the enterprise's services, is determinative of whether the exemption applies to a tribal enterprise.[63] Third, if the enterprise is tribally operated and located on the reservation, it is engaging in purely intramural matters of a sovereign nature and should be free from federal interference.[64] Setting aside nearly 30 years of

55. The Board easily disposed of the second exception because the tribe had not identified any treaty rights it had vis-à-vis the federal government. *Id.* at 1117.
56. *Id.* at 1116.
57. Sac and Fox Indus. Ltd., 307 N.L.R.B. at 243.
58. *Id.* at 244.
59. *Id.*
60. *Id.* at 245.
61. *Id.* at 243. *See also* Yukon Kuskokwim Health Corp., 328 N.L.R.B. 761, 762 (1999).
62. National Labor Relations Act, 29 U.S.C. § 152(2) (2000). *See Fort Apache Timber Co.*, 226 N.L.R.B. at 506.
63. *Devil's Lake Sioux Mfg. Corp.*, 243 N.L.R.B. at 164.
64. *Fort Apache Timber Co.*, 226 N.L.R.B. at 506.

rulings, the Board last year completely rejected those principles and reversed its long-standing precedent of declining jurisdiction over Indian tribal employers operating commercial enterprises on reservations.[65] The Board's analysis and subsequent approach in *San Manuel Indian Bingo & Casino* was a clear departure from its recognized stance on what had previously been a relatively routine jurisdictional issue.[66]

A. *The Majority's Ill-Advised Opinion: Unwarranted Interference with Tribal Sovereignty*

In 1988, Congress passed the federal Indian Gaming and Regulatory Act (IGRA).[67] Pursuant to this statute, tribal gaming enterprises are required to enter into regulatory contracts, known as compacts, with the state within which they operate.[68] In California, this compacting process had a protracted and contentious history. For nearly 10 years, the State of California and Indian tribes operating gaming enterprises engaged in a series of legal battles over the scope of permissible tribal gaming activities, with Nevada gaming interests and organized labor weighing in. It was against that backdrop of unsettled turmoil that the *San Manuel* case arrived at the Board.[69]

The San Manuel Band of Serrano Mission Indians is a tribe governed by a general council consisting of all tribal members.[70] The San Manuel Bingo and Casino is a tribal governmental economic development project that is wholly owned and operated by the tribe on its reservation.[71] Members of the tribe hold key management positions and all aspects of the project, including employment policies, are controlled and operated by the tribe.[72]

Through a compact with the State of California, the tribe regulates its gaming activities in accordance with state requirements, and has adopted the Tribal Labor Relations Ordinance (TLRO) promulgated by the State of California.[73] The TLRO in existence at the time of the dispute contained protections of employee rights identical to those set forth in section 7 of the Act, and rendered interference with those rights unfair labor practices as does section 8 of the Act.[74] In addition, that TLRO contained rights and protections for labor unions and their mem-

65. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 1.
66. *Id.*
67. Indian Gaming and Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*
68. *Id.*
69. Ultimately, the first tribal-state compact between California and an Indian tribe was signed in 1998, 10 years after the passage of IGRA.
70. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 2.
71. *Id.*
72. *Id.* at 18 (Member Schaumber, dissenting).
73. California Tribal Labor Relations Ordinance (Sept. 14, 1999).
74. *Id.* at §§ 4, 5, 7.

bers at Indian casinos that exceeded the protections afforded under the Act.[75]

Turning first to the statutory definition of "employer," the Board marked its first departure from *Fort Apache* by relying on traditional canons of statutory construction, rather than those properly applied where tribal interests are implicated.[76] Declaring, pursuant to those traditional principles, that statutory exemptions are to be narrowly construed, the Board then reasoned that because the legislative history was silent on the issue of the Act's application to Indian tribes and because other employment-related statutes enacted some 30 to 60 years later did expressly exclude Indian tribes from coverage, the "inescapable conclusion [is] that Congress purposely chose not to exclude Indian tribes from the Act's jurisdiction."[77] In so concluding, the Board summarily extinguished its prior reliance on the location of the tribal enterprise as a determinative factor in the jurisdictional analysis.[78]

In another more alarming departure from *Fort Apache*, the Board rejected the well-established principle that Indian tribal governments, at least on reservation lands, are not subject to state or federal intervention unless "Congress has specifically provided to the contrary."[79] Instead, according to the Board, statutes of "general application" apply to the conduct of Indian tribes.[80] In relying on *Tuscarora*, the Board notably mischaracterized the facts of that case. Specifically, the Board noted that the statute at issue in *Tuscarora*, the Federal Power Act, "provided no express exemption for Indians."[81] While that is true, what the Board failed to point out is that the statute did in fact expressly exempt certain "tribal lands" from its reach.[82] In support of its newfound reliance on *Tuscarora*, the Board then referenced a line of federal court cases applying the *Tuscarora* rule to other employment-related statutes, which, unlike the Act, do not exempt the panoply of governmental units from their scope.[83]

To further support its changed position, the Board referenced *Sac and Fox*, stating that its decision in that case adopted the *Tuscarora-Coeur d'Alene* analysis for off-reservation cases.[84] Although it is true that the Board did invoke and apply that analysis in *Sac and Fox*, the Board in *San Manuel* overstated *Sac and Fox's* holding. The *Sac and*

75. *See infra*, Section B, for further discussion of the TLRO adopted by the San Manuel Board.

76. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 6.

77. *Id.*

78. *Id.* at 5.

79. *Id.* at 7 (quoting *Fort Apache*, 226 N.L.R.B. at 506).

80. *Id.* (citing Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)).

81. *Id.* at 7.

82. *Tuscarora*, 362 U.S. at 111.

83. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 8.

84. *Id.* at 4.

Fox decision did not overrule *Fort Apache*'s holding that tribal governments were implicitly exempt from the definition of employer—it simply said that when tribal governments operated commercial enterprises off tribal lands, they were not acting in a self-governing capacity and therefore did not qualify for the implicit exemption from the Act.[85] Because *San Manuel* did not involve off-reservation operations, the Board's reliance on *Sac and Fox* in reversing course was entirely misplaced.

In any event, because the Board found no "impediment" to statutory jurisdiction, the Board focused on the first *Coeur d'Alene* exception to determine whether there existed any policy considerations disfavoring the Board's assertion of jurisdiction.[86] First addressing the issue of whether the Tribe's gaming operations "touch[ed] exclusive rights of self-governance in purely intramural matters," the Board ignored Supreme Court precedent and federal policy pronouncing the right to regulate internal economic matters as an inherent sovereign attribute.[87] According to the majority, when tribes operate commercial enterprises where they employ a substantial number of non-Indian employees and serve a substantial number of non-Indian patrons, such enterprises do not touch on purely "intramural" affairs, and therefore are undeserving of deference to tribal sovereignty.[88] This focus on the tribal status of the consumer and the employees marked an entirely new analysis for the Board.

Finally, turning briefly to "policy considerations," the Board only superficially analyzed the purpose of tribal gaming operations and ignored the fact that the Tribe was already subject to a comprehensive labor relations scheme. With respect to the first issue, the Board was swayed by the fact that many of the casino employees were non-Indian and that it catered to a predominantly non-Indian clientele.[89] In so doing, the Board placed no import on the fact that, unlike the non-Indian casinos with which it competes, the casino was a tribal governmental *economic development project* controlled by a Tribal Council and developed for the primary purpose of funding government programs and services.[90]

With respect to the second issue, that the casino was subject to a

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85. Sac and Fox Indus Ltd., 307 N.L.R.B. at 244.

86. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 9. Because the San Manuel Band has no treaty rights, the second exception was easily disposed of by the Board. *Id.* at 15. Similarly, the Board glossed over the third exception, declaring that there was no evidence of congressional intent to exclude Indians from the Act. *Id.*

87. *Id.* at 8. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982); NLRB v. Pueblo of San Juan, 280 F.3d 1278, 1284 (10th Cir. 2000), *aff'd on reh'g en banc*, 276 F.3d 1118 (10th Cir. 2002).

88. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 11.

89. *Id.* at 15.

90. *Id.* at 2.

detailed labor relations scheme adopted pursuant to a compacting process mandated by the IGRA, the Board once again told only part of the story. Noting that the IGRA was enacted to establish regulatory authority for Indian gaming, the Board noticeably failed to mention the other enumerated statutory purpose of the IGRA; that is, "provid[ing] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[91] Pursuant to the IGRA, the Tribe, like 58 other California Indian Tribes, entered into a compact with the State of California that required adoption of the TLRO. By adopting this ordinance the San Manuel Board committed itself to uniform measures relating to unionization, and provided rights to employees and unions that were equivalent to, and in some respects better than, the rights available to employees subject to the NLRA. The TLRO also implemented established principles of tribal sovereignty by guaranteeing the primacy of "tribal law, ordinances, personnel policies or the tribe's customs and traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention."[92] Erroneously stating that the IGRA only regulates gaming operations and not labor relations, the Board concluded that its exercise of jurisdiction would not interfere with application of the IGRA.[93] Based on these facts, the Board ultimately determined that no compelling reasons to overcome the Board's assertion of jurisdiction had been presented.[94]

B. Member Schaumber's Well-Reasoned Dissent: Leave It to Congress

In dissenting, Member Schaumber's principal objection with the majority's ruling was that the Board improperly intruded on the province of Congress, which ought to be responsible for "rebalancing of competing policy interests involving Indian sovereignty."[95] Referencing "well-established principles of Federal Indian law and statutory construction," Member Schaumber devoted much of his opinion to a rejection of the *Tuscarora-Coeur d'Alene* analysis.[96]

Beginning with a summary of controlling federal authority on the

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91. *See* 25 U.S.C. § 2702.

92. CALIFORNIA TLRO §§ 4, 5, 7.

93. San Manuel Indian Bingo & Casino, slip op. at 15.

94. *Id.* at 16. The Board, however, did recognize that where the tribal enterprise undertook activities touching on exclusive rights of self-governance, the Board could, in its discretion, decline jurisdiction. *Id.* at 13. In the companion case issued by the Board the same day, the Board did precisely that. In *Yukon Kuskokwim Health Corp.*, the Board exercised its discretion to decline jurisdiction because the respondent clinic was fulfilling the "unique governmental function" of providing free health care to Indians. Yukon Kuskokwim Health Corp., 341 N.L.R.B. No. 139 at 3, 174 L.R.R.M. (BNA) 1510 (2004).

95. San Manuel Indian Bingo & Casino, slip op. at 17 (Member Schaumber, dissenting).

96. *Id.*

unique status of Indian tribes and the deference afforded to their internal sovereignty, Member Schaumber correctly noted that special canons of statutory construction apply when determining the applicability of federal statutes to Indian tribes.[97] Rejecting the *Tuscarora* analysis as nonbinding dictum, if not implicitly overruled, Member Schaumber advanced the analysis, supported by Supreme Court precedent, that ambiguities regarding application of statutes to Indians, including ambiguities created by statutory silence, must be construed in favor of giving deference to notions of tribal self-determination.[98] Based on that reasoning, Member Schaumber argued, the assertion of Board jurisdiction in this case was an improper infringement on the Tribe's sovereign rights in that (1) "it would negate the Tribe's retained sovereign right to enact laws regulating commerce and the activities of persons employed by the Tribe on its reservation"; (2) it would impair Indian sovereignty in the same way the Board's jurisdiction over a state's employment relationships would, including the ability to accord tribal preferences in hiring; (3) it would subject the Tribe to awards for back pay damages and unpaid benefits, "thereby depleting resources necessary to carry out government functions and to improve the economic status of the tribe's members"; and (4) it would interfere with the Tribe's sovereign right to exclude non-Indians, including Board officials and union organizers, from tribal lands.[99]

From a policy perspective, Member Schaumber argued, even if a *Coeur d'Alene* analysis were appropriately applicable, the Board's distinction between the commercial and the governmental nature of the casino was artificial.[100] Citing Supreme Court precedent and the repeatedly expressed congressional objective of encouraging tribal self-sufficiency and economic development, Member Schaumber correctly noted that this objective could only be achieved through commercial activity.[101] As such, there is no bright line between the commercial and the governmental nature of the tribal gaming operations.[102] Ultimately, Member Schaumber providently called for congressional action in the absence of any evidence of Congress's intent to abrogate Indian sovereign rights.[103]

IV. Where the Board Went Wrong

Although Member Schaumber's dissent thoroughly and persuasively highlights the fatal deficiencies in the majority's decision, other

97. *Id.* at 18-19.
98. *See id.* at 19 (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982)).
99. *Id.* at 20-21.
100. *Id.* at 29.
101. *Id.*
102. *Id.*
103. *Id.*

compelling arguments against the *San Manuel* approach exist. First, for reasons other than those identified by Member Schaumber, the *Tuscarora* analysis is wholly inapplicable. For decades, the Board has consistently expanded the exemptions from coverage of the Act by analogy. Its recent retreat from those decisions does not magically turn the Act into a "statute of general applicability." Even if it did, the Board has routinely refused to assert jurisdiction over industries that are uniquely local. Much like the horse racing industry, over which the Board has declined jurisdiction, tribal gaming operations and their labor relations are locally governed and regulated by tribal-state compacts.[104] For reasons similar to those relating to jurisdiction over the race track industry, the Board should decline jurisdiction over tribal gaming operations.

A. *The* Tuscarora-Coeur d'Alene *Analysis is Inapplicable*

1. The NLRA is Not a Statute of "General Applicability"

In the *San Manuel* decision, the majority and Member Schaumber take two diametrically opposing stances on the validity, and therefore applicability, of the so-called *Tuscarora* "principle." On the one hand, the majority pronounces that the NLRA is a statute of "general application," and therefore holds that the *Tuscarora* "principle" is clearly controlling.[105] Rather than contest the majority's characterization of the NLRA, Member Schaumber instead characterizes the *Tuscarora* Court's assertion that statutes of general applicability are presumed to apply to Indian tribes as dictum and therefore questions the vitality of that principle in light of subsequent Supreme Court decisions.[106]

Member Schaumber's approach is not totally surprising; the Board in *Sac and Fox* had already so characterized the NLRA.[107] Nevertheless, it is no easy task to convincingly argue that a rule pronounced by the Supreme Court, which has not been expressly overruled, has simply lost its force and effect. By taking this approach to get around the *Tuscarora* rule, Member Schaumber ignored the more obvious and more convincing argument; that is, that throughout its history, the Board has not treated the NLRA as a statute of general application. While the Board in *Sac and Fox* summarily announced that the NLRA is a statute of "general application," its conclusion was based on a most rudimentary analysis, noting primarily that the NLRA's definition of employer "contain[s] only a few specified exemptions."[108] In reality, the

104. 25 U.S.C. § 2710(d)(1)(D).

105. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 14.

106. *Id.* at 26 (Member Schaumber, dissenting). Such characterization is not so farfetched. *Id.* To be sure, the Board previously acknowledged that the *Tuscarora* principle was appropriately characterized as dictum, given that the statute involved in the *Tuscarora* decision did in fact specifically deal with Indians and their lands. *See* Sac and Fox, 307 N.L.R.B. at 243, n.19.

107. *See id.*

108. *Id.* at 243.

exemptions to the Act are not so "few,"[109] and the Board's own historical approach in refusing to exercise jurisdiction over certain types of employers and employees without any explicit statutory exemption are legion.

Turning first to the express statutory exemptions contained in the definition of "employer," the Act excludes the following types of employers from its jurisdiction:

> the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.[110]

While certain private sector employers are listed as exempt, the primary purpose of the definition of "employer" is to exclude any governmental entities from the Act's reach. Indeed, it is axiomatic that the NLRA's applicability is limited to the *private* sector.[111] The rationale behind this tenet of federal labor policy is well known. The depletion of governmental resources occasioned by back pay awards and lengthy strikes would undoubtedly compromise the government's ability to satisfy its basic governmental functions.

The breadth of this public sector exemption is borne out by the Board's own historical approach of refusing to assert jurisdiction over certain "governmental" employers that are not expressly enumerated in the Act's definition of employer.[112] For example, in *Herbert Harvey,*

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109. *See* THE DEVELOPING LABOR LAW (BNA 2002) at 2070 ("[B]y defining in Section 2 the terms 'employers,' 'employees' and 'labor organizations,' the Act narrows the Board's jurisdiction *significantly.*") (emphasis added).

110. 29 U.S.C. § 152(2). The Postal Reorganization Act brought the U.S. Postal Service and its employees under the jurisdiction of the Board, thereby removing that public sector employer from the exemption. *See* 39 U.S.C. § 1209(a).

111. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) ("In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively . . . [b]ut congressional attention focused on employment in private industry and on industrial recovery.") (citing 79 CONG. REC. 7573 (1035) (remarks of Sen. Wagner), 2 National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935, at 2341-43 (1949)). *Cf.* Admiral Merchants Motor Freight Inc., 264 N.L.R.B. 54, 58 (1982) (comparing Railway Labor Act and NLRA and stating "the [RLA] seeks to accomplish the same objective in the railway and airline industries, labor peace, as the NLRA does *elsewhere in the private sector.*" (emphasis added)).

112. The definition of "employee" explicitly excludes agricultural laborers, domestic servants, any individual employed by a parent or spouse, supervisors, employees subject to the Railway Labor Act and other individuals employed by persons who are not "employers." *See* 29 U.S.C. § 152(3). Unlike the individual tax laws discussed in *Tuscarora*, which expressly applied "any person," the enumerated exemptions in this definition alone dispute any contention that the Act is one of "general application." *Id.* Furthermore, over time the Board has by analogy extended this exemption to other individuals who are not specifically excluded from the definition. *See, e.g.*, Brown University, 342 N.L.R.B. No. 42 (2004) (teaching assistants, graduate assistants and research assistants); Cedars-Sinai Med. Ctr. 223 N.L.R.B. 251 (1976) (medical interns and residents), *overruled by* Boston

Inc., the Board decided whether the World Bank, "an intergovernmental institution, corporate in form, with all of its capital stock being owned by its member governments," fell outside of section 2(2)'s definition of employer.[113] Relying on principles of governmental comity and the *absence* of Congress's intent to include such operations within the ambit of the Board's jurisdiction, the Board held that the World Bank was exempt from its jurisdiction.[114]

Similarly, the definition of "employer" contains no explicit exemption for governmental contractors. Nevertheless, for many years the Board routinely declined to assert jurisdiction over private sector employers that provided services to exempt governmental entities. Under this line of authority, the Board had regularly held that where the services of a private entity were "intimately connected" to governmental functions, or where the governmental employer controlled the employment conditions of the private employer with whom it contracted, then the private employer shared the section 2(2) public sector exemption.[115] At least one inference that can be drawn from the Board's treatment of governmental contractors is that the Board understood that Congress had intended to exempt any entity that acted under the cloak of governmental authority, regardless of whether such entities were specifically enumerated among the other statutory exemptions. Although the Board has recently retreated from its position that government contractors are statutorily exempt from its jurisdiction,[116] this line of cases

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Med. Ctr., 330 N.L.R.B. No. 30 (1999) (managers); *see, e.g.* Citywide Corp. Transp., Inc., 338 N.L.R.B. 444 (2002) (individuals employed by in-laws); T.K. Harvin & Sons, 316 N.L.R.B. 510 (1995); Luce & Sons, 313 N.L.R.B. 1355 (1994); M.C. Decorating, Inc., 306 N.L.R.B. 816 (1992) (siblings); NLRB v. Bell Aerospace Co. Div. of Textron Inc., 419 U.S. 267, 276-77 (1974) (citing Board cases) (shareholders).

113. Herbert Harvey, Inc., 171 N.L.R.B. 238, 238-39, 68 L.R.R.M. (BNA) 1053 (1968).

114. *Id. See also* Nat'l Detective Agencies, Inc., 237 N.L.R.B. 451, 454 n.1, 99 L.R.R.M. (BNA) 1007 (1978) (holding that International Monetary Fund and American Development Bank, two international organizations operating in Washington, D.C., for the purpose of assisting member nations in achieving economic growth and development were exempt governmental entities).

115. *See, e.g.*, Rural Fire Protection Co., 216 N.L.R.B. 584, 88 L.R.R.M. (BNA) 1305 (1975) (articulating "intimate connection" test); Nat'l Transp. Serv. Inc., 240 N.L.R.B. 565, 100 L.R.R.M. (BNA) 1263 (1979) (articulating "sufficient control of employment conditions" test); Res-Care, Inc., 280 N.L.R.B. 670, 122 L.R.R.M. (BNA) 1265 (1986) (refining National Transportation "control" test to include examination of the scope and degree of control exercised by the exempt entity over the economic terms of employment). While some of the cases decided under this line of authority have described the various governmental contractor tests as a standard for determining discretionary jurisdictional issues, there is no question that many of these cases were decided based upon the construction and application of section 2(2). *See, e.g.*, Teledyne Econ. Dev. Co., 223 N.L.R.B 1040, 92 L.R.R.M. (BNA) 1012 (1976); Ohio Inns Inc., 205 N.L.R.B. 528, 84 L.R.R.M. (BNA) 1005 (1973); Servomation Mathias, Pa., Inc., 200 N.L.R.B. 1063, 82 L.R.R.M. (BNA) 1030 (1972).

116. *See* Mgmt. Training Corp., 317 N.L.R.B. 1355, 1359 149 L.R.R.M. (BNA) 1313 (1995).

illustrates that the Board has historically treated the Act as a statute of more limited application.

While it is true that the Board has yet to encounter a case involving the applicability of the Act to a governmental employer in a U.S. Territory, also not enumerated among the excluded employers listed in the Act, federal courts faced with the issue have uniformly refused to extend the Act's jurisdiction to cover those governmental employers.[117] It is unlikely that the Board would rule differently if confronted with the issue. For example, in *Saipan Hotel Corp.*, the Board at least suggested that if the commonwealth government of the Mariana Islands did actually operate the respondent hotel, as the hotel unpersuasively argued, jurisdiction would have been lacking.[118]

Also weighing in, the Supreme Court has refused to read the Act so broadly, limiting the Board's jurisdiction even in the absence of a clear expression of congressional intent. For example, in *NLRB v. Catholic Bishop of Chicago*, the Court looked beyond the four corners of the statute and held that the Act did not apply to church-operated institutions.[119] Even though the Act itself and its legislative history "indicate[d] that Congress simply gave no consideration to church-operated schools," it was precisely that lack of "affirmative intent" that influenced the Court's conclusion that "Congress did not contemplate that the Board would [assert jurisdiction over] church-operated schools."[120] Similarly, in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, the Court held that before it would sanction the Board's exercise of jurisdiction over foreign seamen in vessels in U.S. waters, "there must be present the affirmative intention of Congress clearly expressed."[121]

What is apparent from the plain language of the Act's definitional exemptions and the Board's willingness to further limit its own jurisdiction by expanding those exemptions beyond their literal scope is that

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117. *See, e.g.*, Chaparro-Febus v. Int'l Longshoremen Ass'n Local 1575, 983 F.2d 325, 142 L.R.R.M. (BNA) 2182 (1992) (1st Cir. 1992); Puerto Rico Marine Mgt. Inc. v. Int'l Longshoremen's Ass'n, 540 F.2d 24, 93 L.R.R.M. (BNA) 2046 (1976) (1st Cir. 1976); Virgin Islands Port Auth. v. SIU de Puerto Rico, 354 F. Supp. 312, 82 L.R.R.M. (BNA) 2885 (1973) (D.V.I. 1973), *aff'd*, 494 F.2d 452, 85 L.R.R.M. (BNA) 2899 (1974) (3d Cir. 1974).

118. Saipan Hotel Corp., 320 N.L.R.B. 192, 152 L.R.R.M. (BNA) 1144 (1995), *aff'd*, Saipan Hotel Corp. v. NLRB, 114 F.3d 994, 997-98 (9th Cir. 1997) (affirming Board's assertion of jurisdiction over hotel in Mariana Islands where hotel was not operated by, did not have contracts with and did not receive substantial funding from the commonwealth government). *Cf.* Howard Univ. 224 N.L.R.B. 385, 387 n.9, 92 L.R.R.M. (BNA) 1249 (1976) ("the Board has assumed plenary jurisdiction over *private sector* labor relations in the District of Columbia[.]") (emphasis added); Conrado Forestier,111 N.L.R.B. 848, 35 L.R.R.M. (BNA) 1596 (1955) ("[I]n the present case and in future cases the Board's entire [commerce] jurisdictional standards will be uniformly applied in territories as in the several States.").

119. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979).

120. *Id.* at 506.

121. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963).

that Act was certainly not the sort of statute at issue or discussed by the Supreme Court in *Tuscarora*. As discussed *supra*, these federal statutes either expressly referenced Indians or generally applied to "all persons." Since the NLRA does not apply to "every person" or even to "every employer" but instead has numerous explicit and implicit exceptions relating specifically to governmental entities, the NLRA's application to Indian tribes at a minimum is ambiguous, so as to preclude a finding that it falls under *Tuscarora's* definition of a statute of general applicability.

Under Supreme Court precedent, appeals to "plain language" must give way to canons of statutory constructions peculiar to Indian law. The Act is not "plainly" one of general application, nor has it been treated by the Board or the Supreme Court as such. Because the Act's silence on the matter of Indians constitutes an intrinsic ambiguity, the Board should have instead applied special rules of statutory construction requiring deference to notions of tribal sovereignty.[122]

2. The Better Approach: Seventh Circuit's *Great Lakes* Analysis

As duly noted by the Board in *San Manuel*, some federal circuit courts have applied the *Tuscarora* rule to cases involving other employment-related statutes.[123] Many others, however, have refused to succumb to that trend, instead abiding by the presumption that Congress's intent toward tribes is deferential and therefore refusing to construe ambiguous statutes as applicable to the tribes.[124] *Tuscarora* ap-

122. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. . . . The Court has applied similar canons of construction in nontreaty matters."); *Merrion*, 455 U.S. at 152 ("[I]f there is ambiguity . . . the doubt would benefit the tribe, for 'ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'").

123. *See* San Manuel Indian Bingo & Casino, slip op. at 5, n.14. Many of these employment-related statutes do not contain the sort of exemptions for public employers that the NLRA does. *See* Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (including "State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency" in the definition of employer); Occupational Safety and Health Administration, 29 U.S.C. §§ 652(5), 667(c)(6), 668 (requiring federal agencies to maintain occupational safety and health programs consistent with OSHA standards); Americans with Disabilities Act, 42 U.S.C. § 11121 (exempting Indian tribes and the U.S. government but expressly covering state and local government employers). *But see* 29 U.S.C. § 1321(b)(2); 26 U.S.C. § 6058 (*partially* exempting "governmental plans" from ERISA coverage).

124. Member Schaumber thoroughly discussed other federal court decisions characterizing the *Tuscarora* rule as dictum and/or as not controlling authority. *See* San Manuel Indian Bingo & Casino, slip op. at 17, 18 n.61, 64 (citing NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 177 (2d Cir. 1996); EEOC v. Cherokee Nation, 871 F.2d 937, 938 n.3 (10th Cir. 1989); Donovan

plies only when the statute in question, based on its plain language, clearly purports to apply generally to all individuals. The NLRA is not so plainly "general." Moreover, there can be no doubt that it was designed to regulate labor relations between employees and only private sector employers. As such, the Act is "extrinsically ambiguous" in that it explicitly exempts all public sector employers within the U.S., except tribal governments. This ambiguity must be resolved in favor of deference to the tribes and their interests in self-government.

One analogous case ignored by both the majority and dissenting opinions in *San Manuel* merits particular attention. *Reich v. Great Lakes Indian Fish & Wildlife Commission* involved the applicability of the Fair Labor Standards Act (FLSA), a statute enacted near in time to the NLRA and with a similar post-Depression purpose of protecting employee rights.[125] Specifically, in *Great Lakes* the Seventh Circuit addressed the applicability of the FLSA's overtime requirements to Indian police responsible for enforcing treaty rights on nontribal land.[126] In spite of the fact that the FLSA's statutory language and history made no reference to Indians and/or tribal sovereignty, the Seventh Circuit nevertheless held that the FLSA's overtime requirements did not apply to the Indian officers because they qualified for the FLSA's exemption for law enforcement officers of "public agencies."[127]

The employer in *Great Lakes* was a consortium of thirteen Chippewa Indian tribes created to enforce certain usufructuary rights the Chippewas had retained pursuant to a series of nineteenth-century treaties with the United States.[128] Under these treaties, the Chippewa surrendered occupational rights to certain lands, but retained the right to use some of the land for fishing, hunting and gathering.[129] The Commission was created to supervise these activities and employed an armed police force to ensure that Indians complied with the Commission's regulations, and to protect Indians from interference by Anglo hunters, fishers and gatherers.[130] Notably the work performed by these police officers was identical in nature to that of law enforcement officers generally, apart from the fact that it was seasonal.[131]

The Department of Labor (DOL) petitioned the federal district

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v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982); Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131, 1135-36 (N.D. Okla. 2001)).

125. Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 491 (7th Cir. 1993).

126. *Id.* at 493.

127. *Id.* at 495. *See* 29 U.S.C. § 207(k).

128. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 492.

129. *Id.* Not surprisingly, these treaties made no mention of a system for enforcing the rights retained therein, let alone made reference to the terms of employment of those hired to enforce it. *Id.* at 493.

130. *Id.* at 492.

131. *Id.*

court to enforce a subpoena it had issued to the Commission seeking evidence that the Commission was violating the FLSA by failing to pay overtime compensation to this police force.[132] The Commission refused to honor the subpoena on the basis that it was not subject to the FLSA's overtime requirements, and the district court agreed.[133] The DOL appealed, on the basis that the term "public agency" as defined under the FLSA, makes no explicit reference to Indians, and instead lists only the federal government, its agencies, state governments and political subdivisions thereof and any governmental interstate agency as exempt public agencies.[134]

Citing the presumption against a construction that would result in the abrogation of Indian rights, the Seventh Circuit initially noted that when the FLSA was enacted in 1938, "Indian problems were not at the forefront of the national policy agenda. Nothing in the legislative history suggests that Congress thought about the possible impact of the Act on Indian rights, customs, or practices."[135] Dismissing the failure to mention Indians in the FLSA as a congressional "oversight," the Seventh Circuit rejected the application of the "plain meaning" principle of statutory construction based on its conclusion that the statute was "extrinsically" ambiguous.[136] In part, the Seventh Circuit relied upon the "senseless distinction between Indian police and all other public police" necessarily created by a literal reading of the statute.[137]

Likening tribal governments to other governmental entities exempted by the FLSA, the Seventh Circuit held that "Indian tribes, like states, are quasi-sovereigns entitled to comity."[138] Characterizing as dictum its own statement in an earlier case, relied upon by the majority of the Board in *San Manuel*, that "federalism uniquely concerns States; there simply is no Tribe counterpart,"[139] the Seventh Circuit stated that such dictum went "too far."[140] Significantly, the Seventh Circuit noted that "it would be a breach of comity to accuse [Indian governments] . . . of not being guided by a sincere concern for the best interests of [individual Indians]. We must bear in mind also that the principal beneficiaries of the activities of the [Commission] are not the Commission's

132. *Id.* at 491.
133. *Id.*
134. *Id.* at 491. *See also* 29 U.S.C. § 230(x) (defining "public agency").
135. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 493-94.
136. *Id.* at 494. *See also* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 487 (1999) (concluding that tribes should be treated like states because the Price Anderson Act's silence as to tribal court preemption was attributable to congressional inadvertence).
137. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 494.
138. *Id.* at 495. *See also* N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002) (concluding that tribes, like states, have the authority to pass "right-to-work laws" under section 14(b) of the NLRA).
139. Smart v. State Farm Ins. Co., 868 F.2d 929, 936 (7th Cir. 1989).
140. *Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 494.

employees; they are the Indian fishermen, hunters, and gatherers whom the Commission serves and protects."[141] Ultimately refusing to apply the FLSA's overtime requirements to the Commission's police officers, the Seventh Circuit explained that it was "rectifying an oversight . . . actuated by the same purpose of making federal law bear as lightly on Indian tribal prerogatives as the leeways of statutory interpretation allow."[142]

The *Great Lakes* decision is compelling for its treatment of the *Tuscarora* rule. Unlike the NLRA, which from its inception exempts many types of employers and employees from its coverage, the FLSA is truly a statute of general application. It is presumed that the FLSA applies to all employees unless the employer can affirmatively prove that the employee qualifies for an exemption.[143] Moreover, unlike the NLRA, Congress amended the FLSA in 1974 to extend its reach to all state and local employees, except elected officials and their staff.[144] In spite of its general applicability, the Seventh Circuit made no mention of the *Tuscarora* rule.[145] Because the exemption provision was ambiguous, the Seventh Circuit obviously determined that the application of that rule was unnecessary. Similarly here, it cannot be seriously argued that in 1935 Congress considered the impact of the rights and obligations created by the NRLA on tribal governments as opposed to other governmental entities. As noted by the Seventh Circuit and the Supreme Court, Indian issues were not at the forefront of national policy at the time, and may simply have been overlooked.[146]

Recognizing that striking public sector employees and back pay awards could cripple critical government services, Congress specifically excluded governmental entities from coverage of the NLRA.[147] That tribal governments alone would be excluded from the governmental exemption to the definition of "employer," results in precisely the sort of "senseless distinction" noted by the Seventh Circuit.[148] To be sure,

141. *Id.*

142. *Id.* at 496.

143. *See* Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

144. *See* Christensen v. Harris County, 529 U.S. 576, 579 (2000).

145. Except for Judge Coffey's dissent. *See Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d at 499 (Coffey, J. dissenting).

146. *Id.* at 493.

147. 29 U.S.C. § 152.

148. Member Schaumber and the majority engage in a lively debate about whether the San Manuel Council was acting in its role as a "tribal government" by operating the casino. *See generally* San Manuel Indian Bingo & Casino, 341 N.L.R.B. No. 138, slip op., 174 L.R.R.M. (BNA) 1489 (2004). Without repeating those arguments here, it is important to note that all three branches of the federal government have affirmatively stated that Indian gambling is in fact an indispensable tool of self-governance for the majority of Indian tribes. Initially, in 1987 the U.S. Supreme Court issued its opinion in *California v. Cabazon Band of Mission Indians*, a case noticeably absent from both the majority and dissent in *San Manuel*. *See generally* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). That case was brought by an Indian tribe in California that, like many

tribal members are equally dependent on the services provided by their own governing bodies, and therefore the rationale for exempting governmental employers applies with equal force to tribal governments.

B. Even If the NLRA Were Applicable to Tribal Governments, the Board Should Have Exercised Its Discretion to Decline Jurisdiction Based on "Extensive Regulation" over the Indian Gaming Industry

Even assuming the Board adopted the correct analysis, in light of the comprehensive tribal-state agreement governing employee relations at the San Manuel Casino, this was not the appropriate case for the Board to announce a new approach to jurisdictional questions involving tribal commercial enterprises. In *San Manuel*, the Board con-

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Indian tribes after the proliferation of state-run lotteries, began operating bingo games catering to non-Indians with prizes larger than permitted by state law. *Id.* at 205. When the State of California sought to regulate those gaming operations, the Tribe sued in federal court seeking a declaratory judgment that the county had no authority to apply its local laws inside the reservations. *Id.* at 206. Ultimately, the Court held that if a state itself operated gaming activities, it could not regulate the same sort of enterprises on Indian reservations, stating that such regulation would "impermissibly infringe on *tribal government.*" *Id.* at 222. Noting the "congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," the Court went on to affirmatively state that tribal governments could not achieve these goals without gaming operations that generate revenue for the operations of tribal governments and the provision of tribal services. *Id.* at 216-19. The Court took pains to distinguish the gaming operations from purely commercial enterprises such as "importing [tobacco] product onto the reservations for immediate resale to non-Indians." *Id.* at 219. Likening the gaming operations instead to the hunting and fishing recreational services operated by other tribes, the Court noted that the Cabazon tribes were generating value on the reservations, thereby fulfilling their governmental goals of self-sufficiency and economic development. *Id.* at 220.

Congress responded to the *Cabazon* decision by passing the IGRA so as to permit the states with legalized gaming operations to regulate Indian gaming. *See* 25 U.S.C. §§ 2701 *et seq.* In passing the IGRA, Congress specifically stated its primary purpose was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *See* 25 U.S.C. § 2702. That purpose is effectuated, in part, by the provision in the IGRA that requires that revenue generated by Indian gaming operations be used to fund tribal operations and programs, provide for the general welfare of the tribe and its members or promote tribal economic development. *See* 25 U.S.C. § 2710(b)(2)(B). In addition, Congress created the National Indian Gaming Commission, with a chairman appointed by the president, to monitor and enforce compliance with the statute. *See* 25 U.S.C. §§ 2704, 2706. Recently, an attorney from the NIGC's Office of the General Counsel remarked, "At its core, Indian gaming is a function of sovereignty exercised by tribal governments; as tribes, consistent with IGRA, play a front-line role in the regulation of Indian gaming." *See* Sandra J. Ashton, *The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545 (2003). *See also* U.S. NATIONAL GAMBLING IMPACT STUDY COMMISSION FINAL REPORT, Chapter 6 Native American Tribal Gambling, Pages 6-7 (1999) ("[T]here was no evidence presented to the commission suggesting any viable approach to economic development across the broad spectrum on Indian country, in the absence of gambling."). *See also* Exec. Order No. 13175 § 2-3, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (directing all executive departments and agencies of the federal government to "operate within a *government-to-government* relationship with federally recognized Indian tribes.") (emphasis added).

cluded that because tribal casinos are proliferating and employ and cater to non-Indians, their operations have a significant impact on interstate commerce and are therefore in need of federal labor regulation.[149] What this conclusion fails to appreciate is that a detailed statutory scheme requiring tribal-state regulation of all aspects of gaming operations is already in place. This regulatory scheme, at least in California, already fills the labor relations void created by this burgeoning industry. For that reason, it simply would not effectuate the purposes of the Act for the Board to exercise jurisdiction where employee rights are protected, to a degree even greater than that provided by the NLRA, through the tribal-state compacting process.

Under section 14(c) of the Act, the Board may, in its discretion, decline to assert jurisdiction over labor disputes where doing so would not effectuate the purposes of the Act, even if the industry affects interstate commerce.[150] The Board has consistently done precisely that with the horse and dog racing industries, based in part on the peculiarly local regulation of those industries.[151] Noting that the states derive substantial revenue from these industries, as evidenced by local regulations relating to the licensing of race track employees, the Board has determined that the states have a continuing interest in supervising race track operations.[152] Despite recognizing that these industries do have a substantial impact on interstate commerce, the Board has nevertheless concluded that because these industries are "peculiarly related to, and regulated by, local governments," the Board's exercise of jurisdiction would not substantially engender stability in labor relations.[153]

Similar localized regulation is at play in Indian gaming operations. Generally, the Indian Gaming Regulations Act of 1988 established federal jurisdiction over Indian gaming, giving the states authority for joint regulation over all aspects of any type of gaming operations other than traditional Indian social games.[154] This joint regulatory authority is accomplished through a negotiation process between Indian tribes and the respective states within which they operate commonly referred to as "compacting."[155] These formal agreements or "compacts" may cover any topic directly related to gaming, including labor issues.[156] The tribal-state compact negotiated by the parties in *San Manuel* (the Davis

149. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 13.

150. *See* 29 U.S.C. § 164(c)(1); N.L.R.B. v. Denver Bldg. & Constr. Trade Council, 341 U.S. 675, 684 (1951).

151. NLRB Rules & Regulations, 38 Fed. Reg. 9507 (Apr. 17, 1973).

152. *Id.*

153. *Id. See also* Centennial Turf Club, Inc., 192 N.L.R.B. 698, 698, 77 L.R.R.M. (BNA) 1894 (1971); Walter A. Kelly, 139 N.L.R.B. 744, 747, 51 L.R.R.M. (BNA) 1375 (1962); Meadow Stud, Inc., 130 N.L.R.B. 1202, 1204, 47 L.R.R.M. (BNA) 1467 (1961); Los Angeles Turf Club, Inc., 90 N.L.R.B. 20, 22, 26 L.R.R.M. (BNA) 1154 (1950).

154. 25 U.S.C. §§ 2701 *et seq.*

155. *See* 25 U.S.C. § 2710.

156. *See* 25 U.S.C. § 2710(d)(3)(C)(vii).

Compact) provided for the same sort of "peculiarly local" regulatory oversight by the State of California as states do in the horse and dog racing industries.[157] For example, the Davis Compact regulated the licensing of employees by the State Gaming Agency and the Tribal Gaming Agency, required the tribe to submit to on-site regulation and investigation by the state, and required the Tribe to provide for the physical health and safety of patrons and employees and to prevent illegal activity.[158] In addition, as in the horse and dog racing industries, the Davis Compact required that certain percentages of revenues be provided to the state's "Special Distribution Fund" to be used, in part, to defray the administrative costs associated with implementing and administering the Compact and for state-funded gambling addiction programs.[159]

Even more notable, Indian gaming under the Davis Compact was conditional upon the tribe's agreement to participate in a statewide unionization mechanism, making tribes subject to a uniform Tribal Labor Relations Ordinance (TLRO).[160] The TLRO in existence at the time of the dispute in *San Manuel* contained the same protections of employee rights as those set forth in section 7 of the NLRA, namely the right to support unions, to bargain collectively, to strike or to refrain from those activities, and renders interference with those rights unfair labor practices as does section 8 of the Act.[161] Like the NLRA, the TLRO also identified rendering assistance to a union as an unfair labor practice, the very allegation involved in the *San Manuel* case.[162]

In addition, that TLRO contained advantages to labor unions and their members at Indian casinos that exceeded the protections afforded under the NLRA. Those advantages included (1) the right of unions to enter casino property at any time to talk to employees and post notices in order to facilitate organization of the employees;[163] (2) the right of unions to engage in a secondary boycott after negotiations have reached impasse;[164] and (3) permission for unions to insist on nego-

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157. *See* TRIBAL STATE GAMING COMPACT (Sept. 10 1999).

158. *See id.* at §§ 6.0, 7.0, 8.0, 10.0.

159. *See id.* at § 5.0. In 2003 alone, Indian gaming generated approximately $7.6 billion in revenue for federal, state, and local governments. *Amendments to IGRA*: *Before the Senate Comm. on Indian Affairs on S. 1529*, 108th Cong. (2004) (testimony of Ernest L. Stevens Jr., Chairman of the Nat'l Indian Gaming Assn.). In California in 2004, tribal gaming operations paid approximately $130 million into two state funds developed to assist tribes without gaming operations. *See Indian Gaming in California, University of California's Institute of Governmental Studies* (Nov. 2004), at http://www.igs.berkeley.edu/library/htIndianGaming.htm.

160. *See* Davis Compact, *supra* note 156, at § 10.7 ("this Compact shall be null and void if . . . the Tribe has not provided an agreement or other procedure acceptable to the state for addressing organizational and representational rights . . . of employees[.]").

161. *See* CALIFORNIA, TRIBAL LABOR RELATIONS ORDINANCE §§ 4, 5, 7 (1999).

162. *See id.* at § 5(2).

163. *See id.* at § 8(a), (e).

164. *See id.* at §§ 6(2), 11.

tiating subjects other than "wages, hours and other terms and conditions of employment."

Much like the race track industry, Indian gaming is subject to extensive local control. Therefore, the same policy reasons for declining jurisdiction over those industries apply to Indian gaming operations. Like the race track industry, "practically every individual working at the [tribal casinos] . . . must be licensed by state regulatory authorities."[165] In addition, much like the race track industry, "because of the important revenue derived from [tribal gaming], state governments have a strong interest in insuring uninterrupted operations[.]"[166] To be sure, that interest is so strong that the State of California required tribes to agree to adopt a scheme for recognizing employees' organizational and representational rights. For that reason alone, the Board should have declined jurisdiction over the casino in *San Manuel.*

Apart from the fact that there was no labor relations void, other related public policy reasons militate against the Board's exercise of jurisdiction over tribal casinos. In the aftermath of *San Manuel*, the IGRA and NLRA both purportedly regulate labor issues pertaining to casinos on Indian reservations. While the Board heralds its new approach to determining whether to assert jurisdiction over Indian commercial enterprises as a better balance between competing interests, a more in-depth treatment of the serious potential conflicts between the IGRA and NLRA reveals otherwise. The doctrine of federal preemption does not dictate which of two conflicting federal statutes controls, and therefore courts will be called upon to accommodate the competing interests advanced by the two Acts. That will be no easy task. General principles of statutory construction dictate that a more specific statute controls over a more general one, and therefore weigh in favor of the NLRA. Yet, well-established public policy considerations favor deference to a construction promoting Indian sovereignty, and therefore arguably weigh in favor of the IGRA.

In its *San Manuel* decision, the Board acknowledged "an obligation to accommodate other Federal statutory schemes where a conflict exists," yet, by rejecting the argument that its decision could create conflicts with the tribe's obligations under the IGRA, the Board failed to fulfill that obligation.[167] The Board's cursory analysis of the potential conflict relied almost entirely on the title, rather than the substantive provisions, of the IGRA. Noting only that the IGRA pertains to gaming, while the NLRA affects labor, the Board summarily dismissed the argument that the two federal statutes conflict.[168] In that regard, the Board stated that the general purpose of the IGRA is "to provide a

165. Walter A. Kelly, 139 N.L.R.B. 744, 747, 51 L.R.R.M. (BNA) 1375 (1962).
166. *Id.*
167. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 15.
168. *Id.*

statutory basis for Indian gaming, to provide Federal standards for the regulation of Indian gaming, and to establish a Federal regulatory authority for Indian gaming."[169] Section 2702 of the IGRA, however, sets forth another purpose ignored by the Board; that is, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[170] As such, the IGRA expressly relates to more than gaming activities per se. Indeed, the IGRA requires tribes to negotiate with the states over regulation of their gaming operations, including regulation of labor relations. The potential conflict between the two statutes is patent.

That conflict is highlighted further by the content of the labor relations ordinances passed by California pursuant to the IGRA. The most obvious conflict between the California TLRO and the NLRA relates to the ability to engage in secondary boycotts. While the NLRA has rendered this powerful economic weapon unlawful,[171] the California TLRO permits unions to use this leverage to gain bargaining demands.[172] Another potential conflict between the IGRA and the NLRA involves discrimination against bargaining unit members. Section 9 of the California TLRO provides:

> Nothing herein shall preclude the tribe from giving Indian preference in employment, promotion, seniority, lay-offs or retention to members of any federally recognized Indian tribe or shall in any way affect the tribe's right to follow tribal law, ordinances, personnel policies or the tribe's customs or traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention.[173]

Pursuant to the NLRA, unions must fairly represent all members.[174] In practice, the exercise of Indian preferences will undoubtedly trigger a flood of unfair labor practice charges.

In sum, the *San Manuel* decision is an unworkable precedent rife with pitfalls. *San Manuel* leaves tribes and unions with conflicting obligations, and no guidance on how to proceed. Tribes and unions may violate one regulatory scheme while adhering to the other. Moreover, as one scheme may be more favorable to a tribe, and the other more favorable to a union, clashes over which statute controls will likely be prevalent. Until these conflicting obligations are litigated, affected parties are left to stake out contentious positions as to which federal stat-

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169. *Id.*
170. 25 U.S.C. § 2702.
171. 29 U.S.C. § 158 (b)(4), (e).
172. *See* TLRO, §§ 6(2), 11.
173. *See* TLRO, § 9.
174. *See* Olympic Steamship Co., Inc., 233 N.L.R.B. 1178, 1188, 97 L.R.R.M. (BNA) 1276 (1977). *See also* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944).

ute controls, hardly fostering the industrial peace envisioned by the drafters of the Act.

V. Conclusion

In *Fort Apache*, the Board held that tribal-directed enterprises located on Indian reservations were implicitly exempt from coverage of the Act as governmental entities.[175] Relying heavily on federal policy toward Indians, which has long favored the notion that Indian tribes on reservations retain powers of internal sovereignty, the Board went a step further and held that even when the tribal government acted through a commercial enterprise it still retained its governmental character.[176] The only real change in the landscape between the *Fort Apache* and *San Manuel* decisions was the rise of large-scale gaming sponsored by tribal governments. While there is no dispute that these casinos are commercial enterprises, that does not detract from the governmental nature of the operations. That a tribe's major source of revenue comes from gaming operations, as opposed to buffalo herding or timber farming—more traditional forms of economic subsistence among Indians—is immaterial. The proceeds from gaming are used for government services, cultural preservation and to replenish impoverished communities.

Just as in the *Fort Apache* case, the San Manuel casino is operated by tribal members who are directly accountable to the governing Tribal Council, which in turn is accountable to the members of the tribe.[177] Indeed, the revenue from the gaming operations must be used to finance tribal programs and services, and can even be distributed in per capita payments to individual tribe members.[178] In that regard, the casino does not have the trappings typically associated with a purely commercial employer; the bottom line is important only insofar as it is generated to promote tribal self-sufficiency and economic independence. "Indian gaming has been a major catalyst for community growth and economic development, generating revenues for tribes like no federal stimulus effort ever has before."[179] In this context, tensions between management (the government) and labor are substantially diminished. This is particularly true in light of the fact that the casino does in fact employ tribal members—the very individuals who also benefit from the operation's commercial success. That the operations cater to a predominantly non-Indian clientele or that some employees are

175. *Fort Apache*, 226 N.L.R.B. at 506.
176. *Id.*
177. San Manuel Indian Bingo & Casino, 341 N.L.R.B. slip op. at 2.
178. *Id.* at 18.
179. *See* National Indian Gaming Association, *History of Tribal Gaming*, *available at* http://www.indiangaming.org/info/pr/presskit/history.html (last visited Dec. 20, 2004).

non-Indian simply does not alter the purpose of the activities: to promote tribal sovereignty.

So why did the Board break the nation's promise? In *San Manuel* the Board simply says, "we were wrong." As legal justification for its retraction of *Fort Apache*, the Board relies on Supreme Court jurisprudence that existed at the time that case was decided, and analogizes the NLRA to other employment-related statutes that are much broader in their jurisdictional scope. The result is an unworkable opinion that evidences a willingness to be swayed by the current tide, as opposed to evidencing allegiance to well-supported and long-standing legal principles.

If in fact the Board was wrong in *Fort Apache*, presumably Congress would have stepped in to correct the error. That is precisely what Congress did with the Taft-Hartley Act in 1947. Prior to the passage of the Taft-Hartley amendments, the Board routinely extended coverage of the Act to private hospitals.[180] Congress brought that exercise of jurisdiction to a halt by affirmatively exempting nonprofit hospitals from the definition of employer in 1947.[181] Congress has had nearly 30 years to take similar action with respect to the Board's initial refusal to assert jurisdiction over commercial enterprises wholly owned by tribal governments and operated on tribal reservations, but did not do so. Such inaction can only be construed as Congress's tacit acceptance of the Board's position. By taking a newfound position on the jurisdiction over tribally-owned and operated enterprises on Indian reservations, the Board has overstepped its bounds and has created a confusing overlay of competing obligations for such employers. Such action, if at all warranted, should have been left to Congress. Congress should be urged to step in now and correct this aberrant decision by amending section 2(2) of the Act to expressly exempt tribal governments from its coverage.

180. *See, e.g.*, Cent. Dispensary & Emergency Hosp., 44 N.L.R.B. 533, 11 L.R.R.M. (BNA) 120 (1942).

181. 61 Stat. 136 (1947); 120 CONG. REC 12,941 (1974). With the passage of the health care amendments in 1974, Congress expressly extended the Board's jurisdiction to all health care institutions. *See* 29 U.S.C. § 152(14).