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Comments

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COMMENTS

Civil Procedure—A FEDERAL EMPLOYEE HAS THE RIGHT TO A JURY TRIAL IN AN ACTION AGAINST THE FEDERAL GOVERNMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT—*Nakshian v. Claytor,* 628 F.2d 59 (D.C. Cir. 1980).*

In enacting the Age Discrimination in Employment Act of 1967 (ADEA),[1] Congress failed to say whether a plaintiff bringing suit under the ADEA was entitled to a jury trial. The courts of appeals interpreting the ADEA[2] differed in their views as to whether Congress intended to grant the right to a jury trial under section 626 of the ADEA,[3] authorizing suits against private employers. The Supreme Court of the United States was consequently forced to speak and, in *Lorillard v. Pons,*[4] announced that Congress did intend plaintiffs to enjoy the right to a jury trial in ADEA suits against private employers.[5]

Unfortunately, the problem in *Lorillard* has been resurrected. In 1974[6] Congress enacted section 633a,[7] which extended ADEA coverage to actions by federal employees against the federal government[8] but again failed to authorize expressly the right to a jury trial. The language of section 633a is identical to that of section 626[9] in establishing the manner of enforcement, but does not specify whether a jury right exists under the amendment. The question of the right to a jury trial under section 633a arose in *Nakshian v. Claytor.*[10] In a two to one decision,[11] the United States Court of Appeals for the District of Columbia Circuit held that federal employees have the right to a jury trial in federal ADEA actions.[12]

Alice Nakshian was a 62-year-old employee of the United States Navy. After working for the Navy for over thirty years, Mrs. Nakshian sued her employer under the ADEA, alleging that she had been the victim of age discrimination.[13] When Mrs. Nakshian requested a jury trial the Government

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* *Cert. granted,* Hidalgo v. Nakshian, 49 U.S.L.W. 3409 (Dec. 2, 1980).

1 29 U.S.C. §§ 621-34 (1976 & Supp. II 1978).

2 *Compare* Morelock v. NCR Corp., 546 F. 2d 682 (6th Cir. 1976) (no jury right), *vacated and remanded,* 434 U.S. 911 (1978), *with* Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) (jury right), *aff'd,* 434 U.S. 575 (1978), *and* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834 (3d Cir. 1977) (jury right), *cert. denied,* 434 U.S. 1022 (1978).

3 29 U.S.C. § 626 (c) (1976) provides in relevant part: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."

4 434 U.S. 575 (1978).

5 *Id.* at 585. ADEA actions against private employers will henceforth be referred to as private ADEA actions.

6 *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (amending 29 U.S.C. § 206 (1970)).

7 *Id.* § 28 (b) (2) (codified at 29 U.S.C. § 633a (1976)). Section 633a(c) authorizes federal suits to enforce the ADEA and provides: "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter."

8 ADEA actions against federal employers will henceforth be referred to as federal ADEA actions.

9 *See* notes 3 and 7 *supra.*

10 628 F.2d 59 (D.C. Cir. 1980).

11 Chief Judge Wright, joined by Judge Bazelon, wrote for the majority. Judge Tamm dissented.

12 Only two other courts have considered the right to a jury trial in a federal ADEA action. Both federal district courts denied the jury right. *See* Edmondson v. Simon, No. 76-4591 (N.D. Ill., Aug. 26, 1980); Huber v. Marshall, No. 78-1104 (D.D.C., Feb. 22, 1979).

13 628 F.2d at 60.

moved to strike the request, contending that Congress, in waiving sovereign immunity, had to authorize expressly the right to a jury trial before such a right could exist.[14]

In denying the Government's motion and granting the jury request,[15] the District Court for the District of Columbia suggested that its decision was merely an extension of the Supreme Court's recent decision in *Lorillard.*[16] The district court noted that the "exact same" language was used to authorize federal ADEA actions in section 633a(c) as had been used in section 626(c) to authorize private ADEA actions.[17] The court concluded that the language identical to both sections—particularly the term "legal or equitable relief"[18]—was intended by Congress to mean the same thing in both sections.[19] The court stated that it was unwilling "to deprive plaintiffs who sue government entities instead of private employers of their right to a jury trial without Congress' explicit refusal to grant such a right."[20] The court then certified the issue for interlocutory appeal.

The District of Columbia Circuit faced two issues on appeal: (1) whether Congress must expressly provide for the right to a jury trial when it waives the federal government's sovereign immunity to unconsented suits,[21] and (2) assuming that the right to a jury trial need not be explicit, whether the language and legislative history of the ADEA indicated a congressional intent to grant the right to a jury trial in federal ADEA actions.[22] Writing for the court, Chief Judge Wright affirmed the plaintiff's right to a jury trial.[23] He agreed with both parties that Congress, in waiving sovereign immunity and consenting to suit, "can specify the procedures to be followed, including whether the case is to be tried to a jury or to the court."[24] Nevertheless, the Chief Judge declared that no "automatic presumption" arises against jury trials when Congress waives sovereign immunity without specifying the procedures to be followed in the ensuing suits.[25] The contrary view that a jury right cannot be implied, he stated, results from a misunderstanding of the doctrine of sovereign immunity.[26] When Congress consents to suit it completely removes all sovereign immunity. Proper trial procedures must therefore be found in the statute and the "available indicia of legislative intent . . . ."[27]

The majority opinion found sufficient evidence indicating a congressional

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14 *Id.*

15 *See* Nakshian v. Claytor, 481 F. Supp. 159 (D.D.C. 1979). Judge Oberdorfer wrote the memorandum opinion.

16 434 U.S. 575 (1978). In the district court opinion in *Nakshian v. Claytor,* Judge Oberdorfer wrote that an "application of the *Lorillard* Court's reasoning suggests that a jury trial right exists for suits against the government." 481 F. Supp. at 160.

17 481 F. Supp. at 160. *See* notes 3 and 7 *supra.*

18 "Legal or equitable relief" will henceforth be referred to as "legal. . . relief."

19 481 F. Supp. at 161.

20 *Id.*

21 628 F.2d at 62.

22 *Id.* at 63.

23 *Id.* at 65.

24 *Id.* at 62-63.

25 *Id.* at 63.

26 Chief Judge Wright focused on the Government's argument that there is a traditional sovereign immunity from jury trials which can only be waived expressly. *Id.* at 61.

27 *Id.* at 63 n.4. Regarding *how* Congress could authorize trial procedures, see 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2314 (1971) ("there is a right to a jury trial only if a statute, expressly or by fair implication so provides") (footnote omitted).

intent to allow jury trials in federal ADEA actions. The court noted that "the very fact that Congress gave jurisdiction over ADEA suits against the federal government to the [d]istrict [c]ourts rather than the Court of Claims supports the inference that there is a right to jury trial in such cases."[28] The court cited *United States v. Pfitsch,*[29] in which the Supreme Court noted that an intent to provide for jury trials can be inferred when Congress confers jurisdiction in the district courts over actions against the federal government.[30] The court further noted that Congress must have known that the term "legal" relief, which it used in sections 626(c) and 633a(c) of the ADEA,[31] had consistently been held to grant the right to a jury trial where the seventh amendment is applicable.[32] The court declared that even though the seventh amendment[33] was inapplicable in *Nakshian,*[34] Congress had the power to place federal ADEA actions within the class of suits to which the seventh amendment applied.[35]

Finally, the court stated that in amending section 626(c) to provide expressly for the right to a jury trial,[36] Congress was "merely acting to reaffirm its intention to provide for jury trial whenever the issue was in doubt."[37] In merely squelching doubt, Congress did not intend to distinguish between private and federal ADEA actions.[38] The court therefore dismissed the absence of a parallel amendment to section 633a(c) on the ground that no such amendment was necessary.

The dissenting opinion of Judge Tamm rejected the majority's finding of congressional intent to grant a jury right in federal ADEA actions. Reviewing the 1974 amendments extending FLSA and ADEA protection to federal employees,[39] the dissent observed that even though the amendments granted federal employees the same protection against age discrimination as private

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28 *Id.* at 1238. *See* 5 MOORE'S FEDERAL PRACTICE ¶ 38.31[2] (2d ed. rev. 1979); WRIGHT & MILLER, *supra* note 27, at § 2314 n.43 (1971).

29 256 U.S. 547 (1921). *See also* Law v. United States, 266 U.S. 494 (1925).

30 256 U.S. at 549, 552 (dictum). *See* notes 47-48 *infra* and accompanying text.

31 *See* notes 3 and 7 *supra.*

32 *See* Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442 (1977); Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Ross v. Bernhard, 396 U.S. 531 (1970).

See also Lorillard v. Pons, 434 U.S. 575, 583 (1978). In *Lorillard* Justice Marshall, writing for the unanimous Court, declared that Congress is presumed to know the meaning of the term "legal" and to have incorporated that meaning absent an obvious intent to give the term a different meaning. The Court saw no such intent in the ADEA. *See also* Standard Oil v. United States, 221 U.S. 1, 59 (1911) ("where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary").

33 U.S. CONST. amend VII provides in relevant part: "In Suits at common law . . . the right of trial by jury shall be preserved . . . ."

34 The seventh amendment has been held not to apply to suits against the sovereign because such suits were not recognized at common law at the time the seventh amendment was enacted. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Galloway v. United States, 319 U.S. 372 (1943); McElrath v. United States, 102 U.S. 426 (1880); Mathes v. Commission of Internal Revenue, 576 F.2d 70 (5th Cir. 1978).

35 628 F.2d at 64. The plaintiff also argued that the *Lorillard* Court found the term "legal . . . relief" significant for private ADEA actions. Even though *Lorillard* was a private action in which the seventh amendment was applicable, *Lorillard* was decided upon statutory rather than seventh amendment grounds. *See* Brief for Appellee at 12-13.

36 *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 96-267, § 4(a), 92 Stat. 189 (amending 29 U.S.C. § 626(c) (1976)).

29 U.S.C. § 626(c)(2) (Supp. II 1978) provides in part: "In [a private ADEA action] . . . a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter regardless of whether equitable relief is sought by any party in such action."

37 628 F.2d at 64.

38 *Id.*

39 *See* note 6 *supra.*

employees had been receiving under the Acts, it did not necessarily follow that the same procedures were intended in federal actions as in private actions.[40] The dissent supported its distinction between protection and procedure on two grounds. First, the dissent construed Congress' failure to mention the right to a jury trial in the 1974 FLSA Amendments as indicating an intent to deny federal employees any jury right.[41] Second, the dissent observed that the 1974 amendments established a separate legislative scheme for federal employees under the ADEA[42] rather than amending the employee definition as was done in the FLSA.[43] The dissent argued that this divergence "indicates that Congress contemplated different procedures for the two programs."[44]

In the wake of *Lorillard,* Congress amended only private ADEA actions to grant a jury right. The dissent considered Congress' failure to enact a parallel amendment for federal ADEA actions[45] to be a clear indication that Congress intended to authorize the right to a jury trial only in private ADEA actions.[46]

Finally, the dissent criticized the majority's reliance on what it termed "dictum" in *United States v. Pfitsch.*[47] The dissent contended that the exclusive jurisdiction granted district courts in federal ADEA actions should not imply the right to a jury trial, if based solely on the authority of *Pfitsch.*[48]

The Government's argument that there exists a sovereign immunity from jury trials waivable only by an express provision granting a jury right[49] may or may not have been accepted by Judge Tamm.[50] It does, however, state an apparently new concept of sovereign immunity that is without support.

The Government's position was derived primarily from *Galloway v. United States,*[51] a Supreme Court case confirming an implied jury right in an action against the federal government under the War Risk Insurance Act.[52] The Court in *Galloway* stated that because the seventh amendment was not applicable "of its own force" to the case, "whatever force the Amendment has . . . is derived because Congress, in the legislation cited, has made it ap-

40 628 F.2d at 67.

41 It should be noted, however, that if Congress intended a jury right before 1974, any silence on a jury right in the 1974 FLSA Amendments could indicate the continuation of that jury right.

42 *See* note 76 *infra.*

43 *See* note 75 *infra.*

44 628 F.2d at 68 n.6.

45 *Compare* 29 U.S.C. § 626 (c) (1976) (explicit jury right) *with* 29 U.S.C. § 633a(c) (1976 & Supp. II 1978) (no explicit jury right).

46 628 F.2d at 69.

47 256 U.S. 547 (1921). *Pfitsch* involved an action against the federal government under the Lever Act, ch. 53, § 10, 40 Stat. 276 (1917), a wartime act allowing seizure of civilian supplies to aid the war effort. The Court held that since the statute granted exclusive jurisdiction to district courts, an appeal would not be taken by the Court directly but would go to the Court of Appeals. Thus, the appeal was dismissed for want of jurisdiction. The Court in dictum mentioned that exclusive jurisdiction in the district courts would "incidentally" include the right to a jury trial. 256 U.S. at 552.

48 628 F.2d at 70. Judge Tamm emphasized that:

> *Pfitsch* supplies the sole support for the assertions made in 9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2314, and 5 Moore's Federal Practice ¶ 38.31[2], that jurisdiction in the United States District Court against the federal government carries with it the right to jury trial.

Id. at 70 n.12.

49 *See* note 26 *supra.*

50 In seemingly contradictory fashion, Judge Tamm stated that a "fair implication" must be found, 628 F.2d at 66, but also referred to the "government's immunity from jury trial," 628 F.2d at 70. If the Government's argument were to be followed, a sovereign immunity from jury trials would require an express waiver before any jury right could exist. *See* note 26 *supra.*

51 319 U.S. 372 (1943).

52 38 U.S.C. § 784 (1976).

plicable."[53] The Government argued that the Court by these statements made it clear that an express legislative waiver of sovereign immunity is required to create a jury right in an action against the United States.[54]

Although the Court in *Galloway* stated that Congress made the seventh amendment applicable to suits against the government, it does not necessarily follow that the Court was also describing whether Congress could apply the seventh amendment expressly or impliedly. The Government assumed that Congress had to grant expressly a jury right and cited *Galloway* as support. But *Galloway* did not mention whether Congress must apply a seventh amendment jury right expressly or impliedly. Instead, *Galloway* cited with approval *Law v. United States,*[55] which held that plaintiffs in suits brought under the War Risk Insurance Act have a right to a jury trial even though Congress did not explicitly provide for jury trials under the Act.[56] If there is, as the Government contended in *Nakshian,* a "settled rule . . . that Congress must unequivocally express a waiver of sovereign immunity in order to allow a right of jury trial in an action against the sovereign,"[57] that rule is refuted rather than supported by *Galloway.*

The traditional role of congressional waiver of sovereign immunity has been to grant jurisdiction in suits brought against the federal government. Thus, in *United States v. King,*[58] the Supreme Court declared that "jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit . . . ."[59] Similarly, in *United States v. Sherwood,*[60] the Supreme Court held[61] that district courts lacked jurisdiction to hear suits brought against the federal government under the Tucker Act of 1887.[62] Concerning the limits marked by the government's waiver of sovereign immunity, however, the Court stated that "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."[63] The Court warned that the issue of jurisdictional waiver of sovereign immunity was not to be confused with procedural issues.[64] Thus, a waiver of sovereign immunity determines whether a certain action against the federal government can be heard by a certain court; rules of procedure are a separate consideration.

The majority's rejection of the Government's position on sovereign immunity in *Nakshian* receives further support in a recent Ninth Circuit decision, *Franquez v. United States.*[65] The statute at issue in *Franquez* governed claims against the United States respecting government-acquired land in Guam.[66] Although the statute was silent on the right to a jury trial, the district court found that such a right existed. On appeal the Government argued (as in

53 319 U.S. at 388-89.
54 *See* Reply Brief for Appellant at 2.
55 266 U.S. 494 (1925).
56 *See* 319 U.S. at 389 n.18.
57 Reply Brief for Appellant at 4.
58 395 U.S. 1 (1969) (holding that the Court of Claims may not issue declaratory judgments).
59 *Id.* at 4.
60 312 U.S. 584 (1941).
61 *Id.* U.S. at 591.
62 Ch. 359, § 24(20), 24 Stat. 505 (1887) (current version at 28 U.S.C. §§ 1346, 2401-02 (1976)).
63 *Id.* at 586 (emphasis added).
64 *See id.* at 591 ("the matter [of whether district courts could hear Tucker Act suits] is not one of procedure of jurisdiction whose limits are marked by the Government's consent to be sued").
65 604 F.2d 1239 (9th Cir. 1979).
66 *See* Omnibus Territories Act of 1977, 48 U.S.C. § 1424(c) (Supp. II 1978).

Nakshian) that no jury right existed because the statute waiving sovereign immunity did not expressly authorize it.[67] The Ninth Circuit cited *Sherwood* as establishing that while "the terms of the sovereign's legislative consent to be sued define the court's jurisdiction to entertain the suit," those terms do not define the rules of procedure that the court must follow.[68] The *Franquez* court concluded that the trial court had authority to grant a jury trial on the issue of just compensation since it could be fairly implied from the statute that Congress intended to authorize jury trials.

Franquez, King, Galloway, and *Sherwood* all stand for the proposition that a right to a jury trial may be implied when Congress waives its sovereign immunity from unconsented suits, since express authorization is required only for jurisdiction to entertain the suit. No case requires specific authorization for the particular judicial procedures to be used after jurisdiction has been granted. The Government's position that there exists a "traditional sovereign immunity against jury trials" is therefore without support and misconstrues the doctrine of sovereign immunity.

Unfortunately the specific congressional intent underlying the ADEA is less clear. First, the ADEA was enacted in 1967 for the express purposes of promoting older persons' employment based on their ability, and of prohibiting all arbitrary age discrimination in employment.[69] Congress thus appears to have had as its specific goal the eradication of age discrimination in all employment, without regard to whether the employer and employee were in the public or private sector.[70] Second, although the original ADEA did not include federal employers within its scope,[71] this exclusion was later characterized as inadvertent.[72] When the ADEA was amended in 1974 to include federal employees, the House Report described the amendment as a "logical extension of the Committee [on Education and Labor's] decision to extend FLSA coverage to Federal, State and local government employees."[73] Finally, Congress' use of the same language in both the federal and private enforcement sections seems to reveal an intent that both sections be applied in the same manner. Thus, a cogent argument may be made that the 1974 FLSA Amendments furthered the congressional purpose of offering an ADEA remedy to all employees, regardless of their private or public status.

A persuasive argument of the plaintiff, set forth in the *Nakshian* majority's opinion, concerned the link between the ADEA and the FLSA. Neither Act applied to actions against the federal government until 1974,[74] when Congress

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67 604 F.2d at 1243 n.13.

68 *Id.* at 1243. The *Franquez* court stated: "[w]e disagree with the government's reading of Sherwood and find no support for the conclusion that specific terms must define the court's procedure." *Id.* at 1243 n.13.

69 *See* 29 U.S.C. § 621(b).

70 *See id.* at § 621. The congressional statement of findings and purpose does not distinguish between private and government employers. Congress may well have been concerned with age discrimination in general in drafting the ADEA.

71 *See* ADEA, Pub. L. No. 90-202, § 11, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 630(b) (1976)).

72 *See* note 74 *infra.*

73 H.R. REP. No. 913, 93d Cong., 2d Sess. 55 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2849.

74 *See* Fair Labor Standards Amendments of 1974 (1974 FLSA Amendments), Pub. L. No. 93-259, § 6(a) (1), (6), 88 Stat. 55 (1974) (amending 29 U.S.C. § 203 (1970)); *id.*, § 28(b) (2) (codified at 29 U.S.C. §

amended the FLSA definition of employer to include all units of government[75] and added to the ADEA a section authorizing actions against the federal government.[76] The plaintiff argued that because Congress did not alter FLSA procedures in amending the FLSA employer definition, it intended the same procedures to apply to both federal and private FLSA actions.[77] The plaintiff noted that the ADEA provided for enforcement according to the "powers, remedies, and procedures" of the FLSA,[78] under which a right to a jury trial clearly exists in suits against private employers.[79] The congressional intent to authorize a jury right in federal FLSA actions, therefore, applied equally to federal ADEA actions.[80] The plaintiff's argument found further support in Congress' terming the ADEA amendment a "logical extension of the . . . decision to extend FLSA coverage to Federal . . . employees."[81]

The ADEA was further amended in 1978, in the wake of the *Lorillard* decision, to provide expressly for the right to a jury trial in private ADEA actions.[82] As the *Nakshian* dissent observed, no parallel amendment of section 633a was offered.[83] However, the remarks of Senator Edward M. Kennedy, the amendment's floor sponsor, illustrate the "general" nature of the amendment.[84] Senator Kennedy deemed it "wise to insure that particular protection [extends] to those who are subject to age discrimination."[85] Nowhere in the amendment itself nor in Senator Kennedy's remarks is any distinction made between types of employers.[86]

Nevertheless, since there was no parallel amendment to section 633a, the

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633a (1976)). Committee reports on the 1974 FLSA Amendments illustrate that the omission of federal employees from original ADEA coverage was inadvertent:

> The Committee recognizes that the omission . . . did not represent a conscious decision by the Congress to limit the ADEA to employment in the private sector. It reflects the fact, that in 1967, when ADEA was enacted, most government employees were outside the scope of the FLSA . . . .

S. REP. No. 690, 93d Cong., 2d Sess. 55 (1974).

75 *See* note 74 *supra,* § 6(a) (1), (6) (amending 29 U.S.C. § 203 (1970)).

76 *Id.,* § 28(b) (2) (codified at 29 U.S.C. § 633a (1976)). It is not clear why Congress added a new section to the ADEA rather than amending the employer definition, found at 29 U.S.C. § 630 (b) (1976). In 1972, Senator Lloyd Bentsen introduced a bill to amend the ADEA definition of employer to include all governmental units, but the bill was not acted upon. *See* S. 3318, 92d Cong., 2d Sess., 118 CONG. REC. 7745 (1972). Later that term, however, Senator Bentsen introduced an amendment to include in the proposed FLSA Amendments of 1972 a new ADEA section extending coverage to employees of all governmental units. *See* S. 1861, 92d Cong., 2d Sess., 118 CONG. REC. 23952 (1972). That version of the FLSA Amendments finally passed the Congress and was signed by the President in 1974. *See* 1974 FLSA Amendments, Pub. L. No. 93-259, 88 Stat. 55 (1974). Why Senator Bentsen changed the form of his amendment is unknown and cannot be deduced from the legislative history of the FLSA Amendments.

77 628 F.2d at 61.

78 29 U.S.C. § 626(b) (1976).

79 The FLSA jury right extends to actions for back pay, which are "analogous to actions at law." Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965). *See also* Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950); Note, *The Right to Jury Trial Under the Age Discrimination in Employment and Fair Labor Standards Acts,* 44 U. CHI. L. REV. 365 (1977); Note, *Fair Labor Standards Act and Trial by Jury,* 65 COLUM. L. REV. 514 (1965).

In Lorillard v. Pons, 434 U.S. 575, 580-83 (1978), the Supreme Court stated that Congress had reason to know the interpretation given to a statute when incorporating it into another, and such an interpretation would apply as well to the later statute.

80 One court has implied that federal employees in an FLSA action have the right to a jury trial. *See* Carter v. Marshall, 26 Fed. R. Serv. 2d 610 (D.D.C. 1978).

81 *See* note 73 *supra.*

82 *See* note 36 *supra.*

83 628 F.2d at 68.

84 *See* 123 CONG. REC. S17,296 (daily ed. Oct. 19, 1977) (remarks of Sen. Kennedy).

85 *Id.* at S17,297.

86 Senator Kennedy emphasized: "It does seem to me that when a particular plaintiff in an age discrimination case feels aggrieved, if he desires to be able to utilize the procedures which are in the FLSA, which do provide for a jury trial, that it would be important not to deny him that opportunity." *Id.*

dissent insisted that Congress must have intended to authorize jury trials only for private ADEA actions under section 626.[87] The majority countered by describing the 1978 amendment as a congressional attempt to "reiterat[e] its belief in the appropriateness of jury trials in ADEA actions and . . . confirm the right whenever doubt appeared . . . ."[88] Indeed, Senator Kennedy referred to his amendment as an attempt to "clarify"[89] a situation that was the subject of conflict in the courts of appeals.[90] Furthermore, since the amendment was offered before *Lorillard* was decided, the amendment was not merely a codification of *Lorillard*.[91]

The stated purpose of the 1978 ADEA Amendments was "to provide for jury trials in actions brought under the ADEA of 1967."[92] The absence of a private-federal distinction in the amendment is understandable, since at the time the amendment was enacted the right to a jury trial in a federal ADEA action had not yet been litigated.[93] That circumstance adds to the reasonableness of the *Nakshian* majority's conclusion that Congress acted only to correct errors in the existing ADEA framework. Nevertheless, if Congress had actually meant to protect all potential plaintiffs, it would have taken little extra effort to amend section 633a as well as section 626. Congress' failure to expend that effort indicates that it did not foresee litigation in the federal sector and overlooked the issue. Thus, the 1978 ADEA Amendments present weak support at best for both the majority and dissenting opinions.

United States v. Pfitsch[94] provides equally weak support for either opinion. The dissent in *Nakshian* correctly pointed out that *Pfitsch*'s references to a jury right arising from exclusive district court jurisdiction were dicta.[95] Reliance on *Pfitsch* is yet another example of the need for courts to resort to weak indicia of legislative intent.[96] The majority and dissenting opinions both rely on uncertain indicia as to what Congress may have been thinking when it dealt with the ADEA. A more logical and honest approach is to assume that Congress thought nothing about jury trials in the federal sector, and thus left no indications as to whether it intended to grant a jury right.

Due to the silence of Congress, courts addressing federal employees' right to a jury trial under the ADEA have been forced to resort to their own opinions as to what Congress would have intended had it dealt with the issue. In such a

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87 628 F.2d at 69 ("the failure to adopt a parallel amendment indicates that Congress did not extend its waiver of sovereign immunity to permit jury trials for federal employees"). One lower federal court has found the *Nakshian* dissent's argument persuasive. *See* Edmondson v. Simon, No. 76-4591 (N.D. Ill., Aug. 26, 1980).

88 628 F.2d at 65.

89 123 CONG. REC. at S17,296 ("this particular amendment is to clarify section [626(c)] of the ADEA, which applies to lawsuits brought by aggrieved individuals on their own behalf"). Note Sen. Kennedy's use of the word "individuals" rather than "private employees."

90 *See* note 2 *supra*.

91 Sen. Kennedy presented the clarifying amendment to the Senate floor on October 19, 1977. *Lorillard* was decided by the Supreme Court on February 22, 1978.

92 123 CONG. REC. at S17,296.

93 *See* 628 F.2d at 65.

94 256 U.S. 547 (1921).

95 *See* note 47 *supra*. The fact that noted authorities have argued the same principle in reliance on *Pfitsch*, however, indicates that the principle is somewhat settled despite the absence of strong case support. *See* note 28 *supra*. *But see* note 48 *supra*.

96 *See generally* Dickerson, *Statutory Interpretation: A Peek into the Mind and Will of a Legislature*, 50 IND. L. J. 206 (1975) (the most common approach to statutory interpretation is to fall back on extrinsic sources which vary in reliability and accessibility, in an effort to grasp a fictitious subjective intent).

divining process, a court's interpretation of a fictitious congressional intent[97] will ultimately be controlled by the court's own policy judgments.[98] The *Nakshian* majority concluded its discussion of congressional intent with Congressman Claude Pepper's remark that federal policy favors granting federal employees a jury right when they bring suit under the ADEA.[99] The dissent ended on a policy note as well, arguing that jury trials are a "favor [that] does not extend to suits against the Government" [100] and that the courts should not grant jury trials in federal ADEA actions where Congress has foregone an opportunity to so provide.[101]

The majority and dissenting opinions in *Nakshian* are both reasonable opinions revealing judicial "legislating" made necessary by congressional silence. It is unfortunate that the silence occurred in the area of the right to a jury trial, an area which has often evoked strong reactions from segments of the judicial system.[102] Knowing that the ADEA had caused jury issue problems prior to *Lorillard* and that such problems could arise in the federal sector, Congress should have amended section 633a as well as section 626. By not amending section 633a, and by not explicitly stating that a jury right exists in all ADEA actions, Congress invited the judiciary to legislate the issue for itself.[103] Congress should act soon to codify its policy before the Supreme Court is again forced to search for congressional intent regarding jury trials under the ADEA.

Ralph E. DeJong

Labor Law—HOSPITAL HOUSE STAFF—NLRB DID NOT EXCEED ITS STATUTORY AUTHORITY IN HOLDING THAT HOUSE STAFF ARE NOT EMPLOYEES WITHIN THE MEANING OF THE NLRA—*Physicians National House Staff Association v. Fanning*,—F.2d—(D.C. Cir. 1980)*

Prior to 1974, the National Labor Relations Act (the Act)[1] exempted from its coverage private non-profit hospitals. The 1974 Health Care Amendments (the Amendments) brought such hospitals within the purview of the Act for the

97 *See* Lehman, *How to Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 500 ("the intent of the legislature is a phantom because the will of the legislature is a metaphor"); Dickerson, *supra* note 96; Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

98 *See* Lehman, *supra* note 97. Prof. Lehman points out the distinction between the positivist (one who looks to the act of the legislature as law) and the realist (the law is what a judge says it is). While courts engaging in statutory interpretation attempt to be positivists examining what the legislature did or intended to do, they in fact are realists swayed by their own notions of what the law ought to be.

99 628 F.2d at 65, *quoting* 125 CONG. REC. E 4258 (daily ed. Sept. 5, 1979) (remarks of Cong. Pepper). Cong. Pepper emphasized his policy position as follows:

> Those who participated in the House and Senate debates would be surprised to learn that legislative efforts to confirm the right to a jury trial have been construed as a denial of that right. It would be indefensible to deny Federal employees the right to a jury trial. Under any legislative enactment in the field of civil rights, the Federal Government should be the leader not a grudging participant.

Id.

100 628 F.2d at 70.

101 *Id.*

102 *See, e.g.*, Ross v. Bernhard, 396 U.S. 531, 551 (1970) (Stewart, J., dissenting) ("the Court's decision today can perhaps be explained as a reflection of an articulated but apparently overpowering bias in favor of jury trials in civil actions").

103 *Cf. Nakshian with* Edmondson v. Simon, No. 76-4591 (N.D. Ill., Aug. 26, 1980) *and* Huber v. Marshall, No. 78-1104 (D.D.C., Feb. 22, 1979).

* No 78-1209 (D.C. Cir. July 11, 1980).

1 29 U.S.C. §§ 151-69 (1976).

first time.[2] Immediately thereafter a strong movement to organize health care employees began.[3] Included in this movement were private hospital house staffs, which consist of interns, residents, and clinical fellows.[4] At several hospitals the house staffs formed associations for the purpose of bargaining collectively, pursuant to section 9(c) of the Act.[5] Accordingly, these associations petitioned the National Labor Relations Board (the Board) to order the holding of elections to certify them as the lawful bargaining agents of the hospital's house staff.[6] These petitions provided the factual basis upon which *Physicians National House Staff Association v. Fanning*[7] arose.

Petitions by house staff associations were sent to the regional offices of the Board in 1974 and 1975,[8] and hearings were then held on the house staff petitions.[9] The Board found the petitions of house staff to be important, and selected a representative case for oral argument. That case, *Cedars-Sinai Medical Center,*[10] involved the petition of the Cedars-Sinai Housestaff Association. Oral argument was heard by the Board on September 8, 1975. The Board dismissed the petition, holding the petitioner was not a labor organization.[11] More specifically, the Board ruled house staff were not within the definition of employees provided in section 2(3)[12] of the Act. Instead, the Board determined house staff were more properly characterized as "primarily students."[13]

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2 29 U.S.C. § 152(2) (1976) (defines employer); 29 U.S.C. § 152(3) (1976) (defines employee); 29 U.S.C. § 152(14) (1976) (defines health care institution).

3 *See* Speech by Stephen P. Pepe at National Institute on Hospitals and Health Care Facilities (April 28-29, 1977), *reprinted in* LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 7-8 (A. Knapp ed. 1977) [hereinafter referred to as Speech by Pepe]. The effective date of the Amendments was August 25, 1974, Brief for Appellant at 4, Physicians Nat'l House Staff Ass'n v. Fanning, No. 78-1209 (D.C. Cir. July 11, 1980), and on Monday, August 26, 1974, the regional offices of the Board were inundated with health care petitions. Speech by Pepe at 8.

4 *Id.* at 8 n.27: "An intern is a medical school graduate who is serving a one-year internship to qualify for the examination to practice medicine. A resident is a physician who has completed his internship and serves a period of 1-5 years for more advanced training. A clinical fellow is a physician who has completed his internship and residency and is engaged in further study and training to become certified in a subspecialty. These individuals are collectively referred to as 'house staff.' " *See* Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 255-57 (1976) (Fanning, dissenting); H.R. REP. No. 504, 96th Cong., 1st Sess. 3-4 (1979).

5 29 U.S.C. § 159(c) (1976). *See* Cedars-Sinai Medical Center, 223 N.L.R.B. at 251; Speech by Pepe, *supra* note 3, at 7-9.

6 Physicians Nat'l House Staff Ass'n v. Fanning, No. 78-1209, slip op. at 3 (D.C. Cir. July 11, 1980). *See* Cedars-Sinai Medical Center, 223 N.L.R.B. at 251; Speech by Pepe, *supra* note 3, at 7-9.

7 No. 78-1209 (D.C. Cir. July 11, 1980).

8 Brief for Appellant at 4-5, Physicians Nat'l House Staff Ass'n v. Fanning, No. 78-1209 (D.C. Cir. July 11, 1980).

9 *See* Speech by Pepe, *supra* note 3, at 8.

10 223 N.L.R.B. at 251.

11 *Id.* The decision was vigorously criticized by a number of commentators. *See* Note, *Student-Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital House Staff,* 38 U. PITT. L. REV. 762 (1977); Speech by Joel A. D'Alba at National Institute on Hospitals and Health Care Facilities (April 28-29, 1977), *reprinted in* LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 19-23 (A. Knapp ed. 1977) [hereinafter referred to as Speech by D'Alba]; Speech by Murray A. Gordon at National Institute on Hospitals and Health Care Facilities (April 28-29, 1977), *reprinted in* LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 94-98 (A. Knapp ed. 1977); Speech by Representative Frank Thompson, Jr. at National Institute on Hospitals and Health Care Facilities (April 28-29, 1977), *reprinted in* LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 141-142 (A. Knapp ed. 1977). *Cf.* Speech by G. Roger King at National Institute on Hospitals and Health Care Facilities (April 28-29, 1977), *reprinted in* LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 173-174 (A. Knapp ed. 1977); Speech by Peter D. Walther at National Institute on Hospitals and Health Care Facilities (April 28-29, 1977), *reprinted in* LABOR RELATIONS LAW PROBLEMS IN HOSPITALS AND THE HEALTH CARE INDUSTRY 66-68 (A. Knapp ed. 1977).

12 29 U.S.C. § 152(3) (1976).

13 223 N.L.R.B. at 251.

Subsequent decisions by the Board have followed this ruling,[14] and these Board decisions have been held to preempt state labor relations boards from asserting jurisdiction over house staff.[15] As a result, house staff are unable to collectively bargain under federal or state law.[16]

Physicians National House Staff Association,[17] the house staff associations of three private non-profit hospitals,[18] and a union of house staff personnel[19] (hereinafter referred to as the house staff associations) then filed suit in Federal District Court for the District of Columbia.[20] They petitioned the district court to vacate the dismissal of their representation petitions by the Board, to declare that house staff were employees within the meaning of the Act and to order the Board to assume jurisdiction of their certification petitions.[21] The district court decided it did not have jurisdiction to hear the case, finding that the absence of a "clear statutory mandate"[22] precluded judicial review.[23]

This decision was appealed to a three judge panel[24] of the Court of Appeals for the District of Columbia. In a two to one decision, handed down on April 2, 1979, the panel reversed and remanded the district court decision.[25]

On June 5, 1979, the court of appeals granted the petition for a rehearing *en banc.*[26] The *en banc* court of appeals vacated the panel's decision, and affirmed the ruling of the district court by a five to four decision.[27]

Judicial review of Board decisions concerning certification proceedings is allowed in limited circumstances.[28] Section 9(d)[29] of the Act provides for judicial review of certification proceedings only in connection with judicial review of unfair labor practice (ULP) orders of the Board[30] under section 10(f).[31] There were no ULP orders issued by the Board in *Fanning.*

The house staff associations argued that the district court nonetheless had

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14 St. Christopher's Hosp. for Children, 223 N.L.R.B. 166 (1976); St. Clare's Hosp. and Health Center, 223 N.L.R.B. 1002 (1976); University of Chicago Hosps. and Clinics, 223 N.L.R.B. 1032 (1976); Buffalo Gen. Hosp., 224 N.L.R.B., 76 (1976); Kansas City Gen. Hosp., 225 N.L.R.B. 108 (1976); Wayne State Univ., 226 N.L.R.B. 1062 (1976).

15 NLRB v. Committee of Interns & Residents, 566 F.2d 810 (2d. Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

16 No. 78-1209, slip op. at 3-4 n.2 (majority), 25 n.62 (dissent).

17 About 40,000 of the nation's 60,000 interns and residents belonged to the Physicians National House Staff Association in 1976. No. 78-1209, slip op. at 1 n.1 (dissent).

18 The three were Cedars-Sinai Medical Center (Los Angeles), St. Christopher's Hospital (Philadelphia), and the University of Chicago Hospitals.

19 The union was the Committee of Interns and Residents located in New York City.

20 Physicians Nat'l House Staff Ass'n v. Murphy, 443 F. Supp. 806 (D. D.C. 1978).

21 *Id.* at 808.

22 No. 78-1209, slip op. at 19 (dissent).

23 443 F. Supp. at 810, 811. *See* text accompanying notes 34-39 *infra.*

24 The panel consisted of Chief Judge Wright, Circuit Judge Robb, and District Judge Richey, sitting by designation persuant to 28 U.S.C. 292(a) (1976).

25 Physicians Nat'l House Staff Ass'n v. Murphy, No. 78-1209, slip op. at 3 (D.C. Cir. April 2, 1979).

26 Supplemental Brief for Appellants at iii, Physicians Nat'l House Staff Ass'n v. Fanning, No. 78-1209 (D.C. Cir. July 11, 1980).

27 No. 78-1209, slip op. at 4.

28 *See, e.g.,* Boire v. Greyhound Corp., 376 U.S. 473, 476-79 (1964); Leedom v. Kyne, 358 U.S. 184, 187 (1958); A.F.L. v. NLRB, 308 U.S. 401, 409-12 (1940); Comment, *Judicial Review of Preliminary Orders of National Labor Administrative Agencies After Leedom v. Kyne,* 8 BUFFALO L. REV. 372, 376-77 (1959) [hereinafter referred to as Comment, *Judicial Review*]; Comment, *Labor Law-Collective Bargaining—Jurisdiction of District Court to Vacate An Unlawful Order of the NLRB,* 57 MICH. L. REV. 910, 911 (1959) [hereinafter referred to as Comment, *Labor Law*].

29 29 U.S.C. § 159(d) (1976).

30 *See* note 28 *supra.*

31 29 U.S.C. § 160(f) (1976).

jurisdiction,[32] based on the exception of *Leedom v. Kyne.*[33] In that 1958 decision, the United States Supreme Court held that a district court has jurisdiction to invalidate non-ULP orders of the Board "made in excess of the Board's delegated powers and contrary to a specific prohibition in the Act."[34] The Supreme Court made it clear this was not a review of the Board's decision, at least not in the sense review was used in the Act. Instead, it involved nullifying a Board order made in excess of the Board's statutory authority.[35]

In *Kyne,* a group of 233 professional employees and 9 nonprofessional employees had been certified as a bargaining unit by the Board. Kyne was the president of the local Westinghouse Engineers Association, Engineers and Scientists of America, organized to collectively bargain for non-supervisory professional employees, at the Westinghouse plant in Cheektowaga, New York. Kyne brought suit to invalidate the Board certification action, based on the deprivation of the professional employees' right to vote for the inclusion of the nonprofessional employees in the bargaining unit pursuant to section 9(b)(1) of the Act.[36] The Supreme Court found section 9(b)(1) to be "clear and mandatory"[37] and determined that in such extraordinary circumstances the district court had jurisdiction to "strike down an order of the Board."[38]

The *en banc* majority in *Fanning* did not find a clear statutory mandate in the Act's wording or its legislative history that house staff were employees under the Act.[39] As a result, the *en banc* majority held the Board's decision is unreviewable by a district court,[40] supporting the district court's decision that it lacked jurisdiction.[41] The *en banc* majority's decision is directly contrary to the three judge panel's conclusion that the "congressional instructions" were clear and mandatory that house staff were employees under the Act.[42]

The *en banc* majority first dealt with the argument of the house staff associations that the clear statutory mandate that house staff were employees was found in section 2(3) of the Act, which defines "employees."[43] The *en banc* majority pointed out that the question of who was an employee under section

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32 No. 78-1209, slip op. at 2 (dissent).
33 358 U.S. 184 (1958).
34 *Id.* at 188. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 346-48 (1965) (discussion of district court jurisdiction under *Kyne* and the presumption of judicial review).
35 358 U.S. at 188. It has been contended this method of determining jurisdiction is the equivalent of putting the cart before the horse, in that a court must examine the case on its merits to determine if it has jurisdiction. Comment, *Judicial Review, supra* note 28, at 383 n.74. *See Physicians Nat'l House Staff Assn,* No. 78-1209, slip op. at 8 n.21 (dissent).
36 358 U.S. at 185-89. 29 U.S.C. § 159(b)(1) (1976).
37 358 U.S. at 188. Based on the legislative history, the Board had interpreted section 9(b)(1) to allow the Board to skip the vote where the professional employees had a large majority. *See, e.g.,* Westinghouse Elec. Corp., 80 N.L.R.B. 591, 595 n.11 (1948); Continental Motors Corp., 77 N.L.R.B. 345, 347-48 (1948). The applicable legislative history is contained in S. REP. No. 105, 80TH CONG., 1ST SESS. 11 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. 47 (1947). *See* Comment, *Judical Review, supra* note 28, at 388 n.93; Comment, *Equitable Jurisdiction to Review N.L.R.B. Certification Orders,* 11 STAN. L. REV. 760, 762 n.12, 768 n.37 (1959) [hereinafter referred to as Comment, *Equitable Jurisdiction*].
38 358 U.S. at 158. The jurisdictional grant is found in 28 U.S.C. § 1337 (1976). The 1978 amendment did not affect this jurisdictional grant. 28 U.S.C.A. § 1337 (1978).
39 No. 78-1209, slip op. at 8-15.
40 *Id.* at 15.
41 443 F. Supp. at 811.
42 No. 78-1209, slip op. at 24 (panel decision).
43 No. 78-1209, slip op. at 8. *See* 29 U.S.C. § 152(3) (1976).

2(3) was a factual determination left to the Board's discretion.[44] Here, the Board decided that house staff were not employees.[45]

The house staff associations then argued that the Board's finding that house staff possessed "employee characteristics"[46] required the Board to classify house staff as employees. The *en banc* majority disagreed,[47] citing *NLRB v. Bell Aerospace Corp.*[48] *Bell Aerospace* involved a Board determination that managerial employees were not excluded under the Act. The employer refused to bargain and a ULP order was issued by the Board.[49] The case eventually went before the Supreme Court, which held that, although not specifically excluded from section 2(3), managerial employees were not covered by the Act.[50] The *en banc* majority interpreted *Bell Aerospace* to mean "persons who are literally 'employees' may be excluded from coverage under the act" for policy reasons.[51] The *en banc* majority concluded house staff could be excluded, therefore, even though they possessed employee characteristics.

The *en banc* majority also rejected the argument that specific statutory authority for classifying house staff as employees was found in the definition of "professional employee" under section 2(12) of the Act.[52] Section 2(12) was interpreted by the *en banc* majority as classifying only those people already found to be employees.[53] They concluded the section was inapplicable, therefore, since house staff could not be *professional* employees until they had first been found to be employees.[54]

The house staff associations also argued that the legislative history of the Amendments provided a clear statutory mandate that house staff be classified as employees. The *en banc* majority concluded no congressional directive existed that required house staff to be classified as employees.[55] The *en banc* majority ascertained from an examination of the reports of the congressional committees that the committees expected the Board to follow its normal procedures in determining whether employees were supervisors. As a result, it was reasonable to conclude that the committees expected the Board to follow its normal procedures in determining whether people were employees.[56]

44 No. 78-1209 at 8. *See, e.g.,* Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 304 n.14 (1977); NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403-04 (1947); NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944).

45 223 N.L.R.B. at 251.

46 *Id.*

47 No. 78-1209, slip op. at 9.

48 416 U.S. 267 (1974). For a critique of the use of *Bell Aerospace* by the majority, see the text accompanying notes 112-23 *infra.* The majority also cited Allied Chem. Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 168 (1971) for support. For a good discussion of *Allied* see *Physicians Nat'l House Staff Ass'n,* No. 78-1209, slip op. at 20-21 n.55 (dissent).

49 416 U.S. at 270-72.

50 *Id.* at 275.

51 No. 78-1209, slip op. at 9-10.

52 *Id.* 29 U.S.C. § 152(12) (1976):

> (12) The term "professional employee" means—
> (a) any employee engaged in work . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital . . .; or
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional employee as defined in paragraph (a).

53 No. 78-1209, slip op. at 10. *Cf.* Polner, *Representation Rights of Professional and Technical Employees,* 10 LAB. L. J. 405, 407 (1959) (passed to provide a specific definition of the modern professional employee).

54 No. 78-1209, slip op. at 10.

55 *Id.* at 10-13.

56 *Id.* at 11. The majority relied on H.R. REP. NO. 1051, 93d CONG., 2d SESS. 7 (1974) AND S. REP. NO. 766, 93d CONG., 2d SESS. 6 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 3951.

The *en banc* majority admitted that the committees' discussion of the supervisor issue,[57] and the remarks made on the floor by Senator Cranston,[58] a floor manager of the Amendments, and Senator Dominick,[59] an opponent of the Amendments, indicated a belief on the part of Congress that the Board would find house staff were employees under the Act.[60] The *en banc* majority nonetheless decided that was insufficient to invoke jurisdiction under the *Kyne* exception.[61] The *en banc* majority implied the legislative history would have had to have contained a specific statement declaring house staff to be employees, before they would have upheld district court jurisdiction based on the *Kyne* exception.[62]

To further support this conclusion, the *en banc* majority looked to House Bill 2222,[63] which was introduced in 1979 and provided for an amendment of the Act to include house staff.[64] The recent failure of the bill in the House of Representatives[65] was interpreted by the *en banc* majority as indicative of the congressional intent that the Board retain discretion to decide whether house staff were employees under the Act.[66]

Finally, the *en banc* majority addressed the house staff associations' equitable plea that without a finding of jurisdiction the house staff decisions would never be subject to judicial review. The *en banc* majority dismissed this argument, finding that Congress clearly intended to deny judicial review in an attempt to expedite the collective bargaining process.[67]

Judge Wright led a strong dissent that concluded the district court had jurisdiction based on the *Kyne* exception.[68] The dissenting judges' conclusion was based on an analysis of four factors they felt were relevant in a *Kyne* exception analysis. The four factors were: (1) Whether a question of statutory inter-

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57 No. 78-1209, slip op. at 11 n. 6. The explicit reference in both reports (see note 56) to "health care professionals such as registered nurses, interns, residents, fellows and salaried physicians," prompted this concession by the majority.

58 No. 78-1209, slip op. at 12. 120 CONG. REC. 12937 (1974).

59 No. 78-1209, slip op. at 12. 120 CONG. REC. 12971, 22580 (1974).

60 No. 78-1209, slip op. at 11-12. For a good discussion of the weight to be given statements by opponents and managers of a bill, see Duncan v. Louisiana, 391 U.S. 145, 164-65 (1968) (Black, J., concurring).

61 No. 78-1209, slip op. at 11-12.

62 *Id.* at 11-12 (majority), 18-19 (dissent).

63 H.R. 2222, 96th Cong., 1st Sess. (1979).

64 *Id. See* H.R. REP. No. 504, 96th Cong., 1st Sess. 1-9 (majority views), 10-19 (minority and individual views) (1979), *reprinted in* 125 CONG. REC. H11295-11304 (daily ed. Nov. 28, 1979). H.R. 15842 and H.R. 2222, introduced in the 94th and 95th Congress' respectively, were similar to H.R. 2222 (1979). Neither was brought to a vote.

65 The bill was defeated on November 28, 1979 (227 against, 167 for). 125 CONG. REC. H11304 (daily ed. Nov. 28, 1979).

66 No. 78-1209, slip op. at 12-13.

67 *Id.* at 13-14. H.R. REP. No. 245, 80th Cong., 1st Sess. 43 (1947) contained a provision which would have allowed immediate judicial review of Board certification decisions. This provision was eliminated in conference. H.R. REP. No. 510, 80th Cong., 1st Sess. 56-57 (1947), *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1163. Senator Taft in explanation said: "In receding on their insistence on this portion, the House yielded to the view of the Senate conferees that such provision would permit dilatory tactics in representation proceedings." 93 CONG. REC. 6444 (1947). *See* Boire v. Greyhound Corp., 376 U.S. at 476-79; Leedom v. Kyne, 358 U.S. at 197 (Brennan, J., dissenting). *See also* Public Resolution 44, 48 Stat. 1183 (1934), which allowed judicial review of certification proceedings. The following year it was replaced, because of its use as a stalling device. Pub. L. No. 74-198, 49 Stat. 449, 455 (1935)(judicial review of ULP orders only); S. REP. No. 573, 74th Cong., 1st Sess. 5, 14 (1935); H.R. REP. No. 1147, 74th Cong., 1st Sess. 6, 23 (1935); H.R. REP. No. 972, 74th Cong., 1st Sess. 5, 20-21 (1935); Comment, *Judicial Review, supra* note 28, at 377; Comment, *Labor Law—National Labor Relations Board—Judicial Review of Representation Proceedings,* 50 IOWA L. REV. 931, 933-34 (1965). *See also* Comment, *Labor Law, supra* note 28, at 911.

68 No. 78-1209, slip op. at 2, 30 (dissent).

pretation or a question of fact was involved; (2) "whether the statutory provision [was] 'clear and mandatory' in creating rights for those subject to the [Act]"; (3) whether any "realistic hope" of judicial review, in conjunction with a ULP order, existed for the party challenging the Board action; and (4) whether the purpose of the Act would be thwarted if jurisdiction were granted in this case.[69]

Addressing the first factor, whether a question of statutory interpretation or a question of fact was involved, Judge Wright concluded the question was a statutory one.[70] Noting the wide sweep of section 2(3)[71] of the Act and the absence of house staff among its exclusions, he pointed out how the section was held to have a broad application.[72]

Judge Wright next dealt with the majority's conclusion that the section 2(12) definition of professional employee only applied to persons classified as employees.[73] He conceded the classification applied only after a person had been determined to be an employee under section 2(3) of the Act, but explained that section 2(12) mirrored the congressional intent as to who falls within the employee definition.[74] This observation was reinforced by the statement in the House Conference Report on Section 2(12) at the time of its enactment: "This definition in general covers such persons as legal, engineering, scientific and *medical personnel together with their junior professional assistants.*"[75]

Examining the legislative history of the Amendments, Judge Wright concluded Congress intended house staffs to be covered by the Act.[76] He cited in support of his conclusion statements in the hearings held by the Subcommittee on Labor,[77] the House and Senate reports,[78] and the statements made on the floor by the co-manager[79] and by the leading opponent of the Amendments.[80]

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69 *Id.* at 8 (dissent).

70 *Id.* at 15 (dissent).

71 29 U.S.C. § 152(3) (1976).

72 No. 78-1209, slip op. at 10 (dissent). NLRB v. Hearst Publications, Inc., 322 U.S. at 129 (applicability to be determined broadly).

73 29 U.S.C. § 152(12) (1976).

74 No. 78-1209, slip op. at 11 (dissent). *See also Bell Aerospace,* 416 U.S. at 297-98 (White, J. dissenting); Polner, *supra* note 53, at 407.

75 No. 78-1209, slip op. at 11-12 (dissent). H.R. REP. No. 510, 80th Cong., 1st Sess. 36 (1947), *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1141. NLRB Chairman Fanning, in *Cedars-Sinai,* see text accompanying notes 11-13 *supra,* in his dissent stated: "[T]he definition fits, *precisely,* housestaff officers." 223 N.L.R.B. at 258 (Fanning, dissent).

76 No. 78-1209, slip op. at 12-15 (dissent). Based on the Amendment's legislative history, the Second Circuit concluded Congress "considered housestaffs within the scope of the Health Care Amendments." 566 F.2d at 815.

77 *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973: Hearing Before the Sub-comm. on Labor of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 1st Sess. 291-423 (August 1, 1973). Spokesmen for house staff associations urged the committee to include a provision in the Amendments specifically stating house staff were not "supervisory employees." *Id.* at 292-345, 354. Reference was also made in these hearings to states where house staff had been bargaining collectively and the success they had in those states in regard to patient care. *Id.*

78 H.R. REP. No. 1051, 93d Cong., 2d Sess. 7 (1974) and S. REP. No. 766, 93d Cong., 2d Sess. 6 (1974). It is important to note Judge Wright interpreted these reports to contain an underlying assumption that house staff were employees. The majority read them as saying if the procedure was going to remain the same for determining if a person was a supervisory employee, then it was going to remain the same for determining if a person was an employee. No. 78-1209, slip op. at 11 (majority), 13 (dissent).

79 *See* note 58 *supra.* The co-manager of the Amendments was Senator Cranston. Judge Wright felt house staff would not have been cited by Cranston had Cranston not thought house staff were covered by the legislation. No. 78-1209, slip op. at 14 (dissent).

80 *See* note 59 *supra.* The leading opponent of the Amendments was Senator Dominick. Judge Wright emphasized Dominick's continued reference to house staff as employees under the Act. No. 78-1209, slip op. at 14 (dissent).

The second factor Judge Wright dealt with was whether the statutory provision was clear and mandatory in creating rights for those subject to the Act. He concluded there was a clear statutory mandate that house staff were employees under the Act. Judge Wright based this conclusion primarily on his examination of the Act and its legislative history, made simultaneously with his inquiry into whether a statutory or factual issue was involved. He did not believe the Act or the legislative history had to contain a specific statement that house staff were employees. From the Act and the legislative history combined, Judge Wright found the requisite clear statutory mandate.[81]

In further support of this conclusion, Judge Wright advanced the argument that in Congress' consideration of the Amendments they had obviously assumed house staff were employees.[82] Recognition of house staff as employees under state labor law[83] and the absence of any controversy over the issue during the congressional hearings were emphasized as the basis for the congressional assumption.[84]

In his discussion of whether there was a clear statutory mandate, Judge Wright expressed dissatisfaction with the majority's view. He questioned[85] the majority's interpretation of *Bell Aerospace* that "for policy reasons persons who are literally 'employees' may nonetheless be excluded from coverage under the [A]ct."[86] Judge Wright interpreted that case to mean managerial employees were excluded from coverage under the Act, because that was the congressional intent.[87] Judge Wright also relied on *Bell Aerospace* as support for his stance that a specific congressional directive to the Board to find house staff to be employees was not necessary. He pointed out how his examination of the legislative history paralleled that of the Supreme Court. He also showed how the Supreme Court found Congress meant to exclude managerial employees, even absent specific language in the Act and its legislative history to that effect.[88]

Judge Wright rebutted the *en banc* majority argument that the recent failure of HR 2222,[89] which provided for an amendment of the Act to include house staff, was strong and relevant evidence of congressional intent that house staff should not be covered under the Act. According to Judge Wright, the relevant congressional intent is that of the Congress which enacted the legislation being examined.[90] Judge Wright concluded that the inaction of one house of Congress was not indicative of an earlier congressional intent.[91]

81 No. 78-1209, slip. op. at 15-16, 18-19 (dissent).

82 *Id.* at 23-24 (dissent).

83 *See* Regents v. Michigan Employment Relations Comm'n, 389 Mich. 96, 204 N.W.2d 218 (1973); Brooklyn Eye & Ear Hosp., 64 LRRM 1344 (New York 1966); H.R. REP. No. 504, 96th Cong., 1st Sess. 4 (1979); *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973:*, *supra* note 77, at 292-96, 354. *See* H.R. REP. No. 1051, 93d Cong. 2d Sess. 15 (1974) (Minnesota experience).

84 No. 78-1209, slip op. at 23-24 (dissent).

85 *Id.* at 20 (dissent).

86 *Id.* at 9-10.

87 *Id.* at 19-20 (dissent). After an examination of the legislative history, the Supreme Court in *Bell Aerospace* stated: "We think the inference is plain that 'managerial employees' were paramount among this impliedly excluded group." 416 U.S. at 282-84.

88 No. 78-1209, slip op. at 19-20 (dissent). *See Bell Aerospace,* 416 U.S. at 283-84.

89 *See* notes 63-66 *supra* and accompanying text.

90 No. 78-1209, slip op. at 21-23. *See, e.g.,* United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 n.7 (1977); United States v. Price, 361 U.S. 304, 310-12 (1960); Fogarty v. United States, 340 U.S. 8, 13-14 (1950); United States v. United Mine Workers, 330 U.S. 258, 281-82 (1947).

91 No. 78-1209, slip op. at 22 (dissent).

The third factor considered in the dissent was whether any realistic hope of judicial review, in conjunction with a ULP order, was present for the party challenging the Board action. The *en banc* majority admitted house staff had no other recourse to judicial review.[92] Judge Wright emphasized this lack of judicial review, noting that the only other means available to attain judicial review could very possibly subject house staff to a law suit.[93] Because of the finality of the Board ruling, Judge Wright decided the refusal to certify should have been deemed a final order subject to judicial review.[94] Judge Wright focused on the conclusion of the Court in *Kyne,* that the employees had "no other means within their control"[95] to protect their rights.[96] Judge Wright combined this with his interpretation of *Boire* v. *Greyhound Corp.*,[97] that the availability of judicial review was an important consideration in a *Kyne* exception analysis,[98] to justify his conclusion.[99]

The fourth and final factor Judge Wright considered was whether the purpose of the Act would be thwarted if jurisdiction was granted in *Fanning.* Judge Wright found the Act was designed to eliminate recognition strikes and lead to collective bargaining; he reasoned certification of the house staff associations would accomplish, not thwart, these objectives.[100]

Essentially, the dispute between the *en banc* majority and the dissent was over what approach and what standard was to be applied in a *Kyne* exception analysis, especially where an examination of the legislative history was called for. The decision in *Fanning* emphasized the *Kyne* exception requirement of a Board violation of a clear statutory mandate.[101] More importantly, two elements of the majority's treatment of the *Kyne* exception requirement helped maintain the exception's narrow scope. First, the *en banc* majority examined and weighed each provision of the Act and its legislative history separately in determining whether there was a clear statutory mandate, disregarding the cumulative effect of the provisions and legislative history.[102] Secondly, the *en*

92 *Id.* at 13.

93 The group could picket for recognition and very possibly subject itself to a section 8(b)(4)(c) (29 U.S.C. § 158(b)(4)(c) (1976)) ULP charge. Upon issuance of a cease and desist order of the Board, the certification could be challenged in the court of appeals, pursuant to § 9(d) (29 U.S.C. § 159(d) (1976)). However, under 303(a)(3) (29 U.S.C. § 187(a) (1976)) of the Labor-Management Relations Act a union which pickets for recognition is subject to a damage suit by the employer. *See* Comment, *Judicial Review of Certification Proceedings,* 73 HARV. L. REV. 217, 220 (1959) [hereinafter referred to as Comment, *Certification Proceedings];* Comment, *Labor Law—Judicial Review—District Court Has No Jurisdiction to Review Certification Proceedings Where Question Is Essentially One of Fact,* 43 TEX. L. REV. 251, 253 n.23 (1964) [hereinafter referred to as Comment, *District Court Has No Jurisdiction*].

94 No. 78-1209, slip op. at 28 (dissent).

95 358 U.S. at 190.

96 No. 78-1209, slip op. at 26-27 (dissent).

97 376 U.S. 473 (1964).

98 No. 78-1209, slip op. at 27 (dissent).

99 *Id.* at 26-28 (dissent). *Boire* involved a determination that a bus company was a joint employer of maintenance employees within the meaning of section 2(3). The bus company brought suit in district court, based on the *Kyne* exception, to enjoin the Board from conducting a representation election. The case eventually came before the Supreme Court, which ruled that the question was primarily one of fact and therefore unreviewable under the *Kyne* exception. The Court in *Boire* pointed out the *Kyne* decision involved a question of statutory construction, whereas *Boire* involved the factual finding of the Board that Greyhound was an employer. The Supreme Court declined to extend the *Kyne* exception to cases involving factual decisions of the Board. 376 U.S. at 475-81.

100 No. 78-1209, slip op. at 28-29 (dissent). The purposes of the Act are set forth in 29 U.S.C. § 151 (1976).

101 No. 78-1209, slip op. at 7-8 (majority), 7 (dissent).

102 *Id.* at 8-14 (majority). Compare this with the dissent's cumulative approach. *Id.* at 9-15, 15 n.41, 19 (dissent).

banc majority implicitly required that the legislative history, to be a clear statutory mandate, must contain specific language on the issue involved.[103] For this criterion to have been met in *Fanning,* it appears the court would have required the legislative history to provide, in effect, that: "House staff are employees under section 2(3) of the Act."

The cumulative effect approach of Judge Wright's dissent provided for a more liberal basis on which a clear statutory mandate could be found. Judge Wright's approach, however, would appear to restrict the use of the *Kyne* exception to unions and employees.[104]

Fanning appears to be the first case in a *Kyne* exception situation in which an extensive examination was made of the legislative history.[105] By conducting more than a facial survey of the Act, the majority and dissent may have unnecessarily expanded the scope of a *Kyne* exception analysis. This is particularly relevant in light of the congressional intent against judicial review of certification proceedings,[106] the questionable basis on which *Kyne* was decided,[107] and the stance of the courts that the *Kyne* exception remain a narrow one.[108]

A general rule of statutory construction provides that consideration of the legislative history of a statute is not permissible where the statute is unambiguous.[109] Yet, if recourse to legislative history is necessary in a *Kyne* exception analysis, because the statutory section is ambiguous, it appears to be contradictory to say that such a statutory section can be a clear statutory

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103 *Id.* at 12 (majority), 18 (dissent).

104 *See* notes 127 & 135 *infra.*

105 An examination of the case law in this area revealed that apparently no court has undertaken a detailed analysis of the legislative history of the Act in determining whether a clear statutory mandate existed. For the list of cases examined see No. 78-1209, slip op. at 7-8 (majority), 7 n.16, n.17, 9 n.24, 16 n.43 (dissent). *Cf.* Internat'l Ass'n of Tool Craftsmen v. Leedom, 276 F.2d 514, 516 (D.C. Cir.), *cert. denied,* 364 U.S. 815 (1960) (legislative history sufficient to support Board position; no detailed analysis).

106 *See* note 67 *supra.*

107 The criticism of the *Kyne* decision by commentators has generally revolved around its questionable use of case law and its ignoring of the legislative history. *E.g.,* Leedom v. Kyne 358 U.S. at 191-201 (Brennan, J., dissenting); Polner, *supra* note 53, at 411; Comment, *Judicial Review, supra* note 28, at 382-83; Comment, *Certification Proceedings, supra* note 93, at 221; Comment, *Labor Law-Jurisdiction of Federal District Court-Wrongful Certification of Professionals and Nonprofessionals in One Bargaining Unit—"Obliteration of Right" Theory,* 28 J. B. A. ST. KAN. 211, 213 (1959); Comment, *Equitable Jurisdiction, supra* note 37, at 763, 767-69; Comment, *Labor Law—Labor Management Relations Act—Jurisdiction of Federal District Court to Set Aside Improper Certification Order,* 12 VAND. L. REV. 1404, 1407-08 (1959). *Cf.* Comment, *Labor Law—Jurisdiction—Judicial Review of NLRB Certification Proceedings,* 42 MINN. L. REV. 938, 939-42 (1958); Comment, *Labor Law—Representation Proceedings—Jurisdiction of Federal District Court Over Suit to Set Aside NLRB Certification Order Made In Violation of Statutory Authority,* 27 GEO. WASH. L. REV. 600, 602-04 (1959). Some commentators felt the Supreme Court had adopted the "presumption of judicial review" rationale advocated by the leading commentator, Jaffe, *supra* note 34, at that time. *E.g.,* Comment, *Judicial Review, supra* note 28, at 388; Comment, *Certification Proceedings, supra* note 93, at 221. For a comprehensive explanation of this "presumption," written about the time of the decision, see Jaffe, *The Right to Judicial Review* (pts. 1 & 2), 71 HARV. L. REV. 401, 769 (1958).

108 *See, e.g.,* Boire v. Greyhound Corp., 376 U.S. at 481; Chicago Truck Drivers v. NLRB, 599 F.2d 816, 819 (7th Cir. 1979); IUERMW v. McCulloch, 345 F.2d 90, 95 (D.C. Cir. 1965); McCulloch v. Libbey-Owens-Ford Glass Co., 403, F.2d 916, 917 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1016 (1969). For an exhaustive list of the cases on this point see No. 78-1209, slip op. at 7-8 (majority), 7 nn.16 & 17 (dissent). *Cf.* Cox, The Major Labor Decisions of the Supreme Court October Term 1958, ABA Section of Labor Relations Law, 1959 Proceedings, *reprinted in* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 441, 443 (4th ed. 1960)(thought *Kyne* would cause all Board certification decisions to be reviewable).

109 *See, e.g.,* Wilbur v. United States, 284 U.S. 231, 237 (1931); F.J. MCCAFFREY, STATUTORY CONSTRUCTION §§ 32, 36 & 37, at 62-63, 75-77 (1953); J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION 54-55 (4th ed. C. Sands ed. 1973). *Cf. id.* at 182, 415 ("ambiguity is not uniformly insisted upon as a prerequisite to the use of aids to construction;" in determining whether a provision is mandatory or directory "all of the pertinent intrinsic and extrinsic aids to construction are applicable").

mandate.[110] Perhaps the majority's requiring an express statement in the legislative history addressing the issue involved provides a reasonable compromise between these positions.

If such an approach is accepted, it will result in requiring that the Board examine the legislative history of the Act when making its *factual* determination of whether members of a certain group are employees under the Act. If the Board does not consider the legislative history, the Board will be taking the chance that a court will find a clear statutory mandate. If such were found, the Board decision would be subject to invalidation, based on the *Kyne* exception. Inherent in this discussion is the question of whether the Board should have to look to the legislative history when making this type of factual determination.[111]

The majority's and dissent's use of *Bell Aerospace* in *Fanning* is questionable.[112] The Supreme Court's specific holding in *Bell Aerospace* was that managerial employees were not covered by the Act, based on the legislative history, on the early Board decisions, on the Board's construction of the Act for twenty years, and on the court of appeals decisions.[113]

Reliance on the strict *Bell Aerospace* holding would then seem to dictate that the majority show house staff were meant to be excluded, pursuant to the legislative history and case law.[114] The legislative history, as admitted by the majority, contains a congressional assumption that house staff would be found to be employees within the meaning of the Act.[115] In *Bell Aerospace* there had been other Board rulings and court of appeals decisions on the status of managerial employees prior to the Board's controversial ruling that managerial employees were employees under the Act.[116] With respect to house staffs, however, the Board decided house staff were not employees,[117] and it has never deviated from that ruling.[118] The Second Circuit, on the other hand, concluded Congress meant to include house staff under the provisions of the Act.[119] Moreover, the Board ruled house staff were "primarily students"[120] and Board decisions exist which deal with the question of who is an employee in student contexts.[121] When the Board decisions in the student-employee cases are applied to the house staff situation, the inclination appears to be towards inclu-

110 *See* Squillacote v. Int'l Broth. of Teamsters, 561 F.2d. 31, 36 (7th Cir. 1977)(violation of statutory authority if Board disregards specific and *unambiguous* statutory directive).

111 Fanning, in his dissent in *Cedars-Sinai,* criticized the majority for not considering the legislative history. 223 N.L.R.B. at 257-59.

112 No. 78-1209, slip op. at 9-10 (majority), 20 (dissent).

113 416 U.S. at 289. The dispute between the majority and the dissent on this point could very well hinge on what the majority means by "policy reasons." No explanation is given by the majority.

In defense of the dissent, a heavy emphasis was placed on the legislative history by the Supreme Court in *Bell Aerospace,* and from language in the case it appears the Supreme Court would have made the same decision based only on the legislative history. *See* 416 U.S. at 283-84; Comment, *Exclusion of Managerial Employees from the NLRA,* 88 HARV. L. REV. 258, 260-61 (1974); *Supra* note 87.

114 *See* No. 78-1209, slip op. at 20 (dissent); *supra* note 113 and accompanying text.

115 No. 78-1209, slip op. at 11 n.6.

116 416 U.S. at 285-89.

117 223 N.L.R.B. at 251.

118 *See* note 14 *supra.*

119 566 F.2d at 815.

120 223 N.L.R.B. at 251.

121 *See* note 83 *supra.* Several Board decisions have held student-employees to come under the Act. *E.g.,* Beecher Ancillary Servs., Inc., 225 N.L.R.B. 642 (1976); New England Tel. & Tel. Co., 179 N.L.R.B. 531 (1969); Miller Elec. Co., 101 N.L.R.B. 1014 (1952).

sion of house staff under the Act.[122] A *Bell Aerospace* approach appears then to lead to the conclusion that house staff should not have been excluded.

Even though a court could find, under *Bell Aerospace,* that house staff are covered under the Act, *Bell Aerospace* did not involve an application of the *Kyne* exception, but consisted of judicial review pursuant to sections 9(d) and 10 (f).[123] In these circumstances, therefore, the *Bell Aerospace* approach would not apply.

This does not mean that since the Board found house staff to have employee characteristics the Board must classify them as employees. The factual determination of who is an employee under section 2(3) is left to the Board's discretion.[124] A logical argument could be made that since the entire factual determination is discretionary with the Board, whether or not enough employee traits are exhibited to qualify a group for inclusion under section 2(3) is a decision within that discretion. The Board could then consistently find that a group had certain employee characteristics and yet were not employees under the Act.

Judge Wright's reliance on *Boire* to support the relevancy of his third factor, whether there was any realistic hope of judicial review for the party challenging the Board action, also appears questionable. The Court in *Boire* discussed the review process in certification proceedings, but only as a prelude to their discussion of what was required to sustain district court jurisdiction pursuant to the *Kyne* exception.[125] A focus on the "deprivation of an effective remedy"[126] in *Boire* would have led to the conclusion that the employer had a viable alternative remedy.[127] As a result, *Boire*'s use in this case is minimized.

Possible support for a "deprivation of an effective remedy" factor can be found, however, in Congress' intent to restrict judicial review in certification proceedings.[128] The rationale behind this position was to prevent stall tactics and promote collective bargaining.[129] But this rationale would not appear applicable to cases where the Board refuses to certify a union, as was the case in *Fanning.* Collective bargaining cannot be delayed, because it is never allowed to begin.[130]

Judge Wright also felt that since the refusal to certify a union is essentially nonreviewable, it should be considered a final order subject to challenge in the

122 *See* Speech by D'Alba, *supra* note 11 at 20-22. *Cf.* The Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974). *See* Cedars-Sinai Medical Center, 223 N.L.R.B. at 255 n.14 (Fanning, dissent) (effective discussion distinguishing *Leland*).

123 *See* notes 28-31 and accompanying text. In *Bell Aerospace,* the company refused to bargain and a ULP order was issued. The company was ordered to bargain and then petitioned for review of that order. 416 U.S. at 269-72.

124 *See* note 44 *supra.*

125 376 U.S. at 476-79.

126 358 U.S. at 190.

127 By refusing to bargain with the certified union, the bus company could have illicited a ULP order. Incidental to review of this order, the bus company could have received judicial review of the certification proceeding and it would have exhausted its administrative remedies. By ruling on the bus company's claim on its merits, the Supreme Court implied the *Kyne* exception was available to employers. 376 U.S. at 477; Comment, *District Court Has No Jurisdiction, supra* note 93, at 253. *Cf.* Comment, *Judicial Review, supra* note 28, at 383 (judicial review is never within the control of the parties).

128 The congressional intent was clearly to restrict judicial review in certification proceedings. *Supra* note 67.

129 *Id.* An amendment proposed by the house argued for judicial review on grounds similar to those used by Judge Wright. H. R. REP. No. 245, 80th Cong., 1st Sess. 56-57 (1947).

130 No. 78-1209, slip op. at 29 (dissent).

courts.[131] It appears that Judge Wright sees no difference between the certification decision in this case and final orders entered by other federal agencies. Although final agency orders are normally reviewable, judicial review can be denied by the courts when there is a clear congressional intent to do so.[132] Since the congressional intent is clear here that judicial review is to be denied,[133] the substance of this line of reasoning is dissipated.

Finally, Judge Wright's reasoning, that certification of house staff associations would accomplish, rather than thwart, the Act's objectives, is simplistic.[134] If followed it would prevent the Board from ever denying certification without opening itself to the argument it is thwarting the purposes of the Act.[135] A Board decision not to certify a union would always be contrary to the objectives of the Act, because a refusal by the Board to certify a union eliminates collective bargaining for that union and could lead to a disruptive recognition strike.

The *Kyne* exception, at this point in its development, is sorely in need of clarification. The Supreme Court has not dealt with the *Kyne* exception since 1964.[136] Serious, unanswered questions have developed since then as to the proper method, scope, and factors to be considered in a *Kyne* exception analysis. These questions are susceptible to more than one answer and the lower federal courts have adopted an unsatisfactory piecemeal approach in analyzing *Kyne* exception questions.[137] The five to four decision of the court of appeals in *Fanning* is indicative of the disagreement caused by the lack of any clear guidance by the Supreme Court in this area. *Fanning* provides the Supreme Court with the ideal vehicle with which it can clarify the approach to be taken in *Kyne* exception cases.

Jon D. Ehlinger

Antitrust—First Amendment—Political Boycotts are Beyond the Scope of the Sherman Act and Privileged Under the First Amendment—*Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980)*

In *United States v. Topco Associates, Inc.*,[1] the Supreme Court of the United

131 *Id.* at 28 (dissent).
132 Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Abbott Laboratories v. Gardner, 387 U.S. 136, 139-41 (1967); 5 U.S.C. § 704 (1976).
133 *See* note 28 *supra.*
134 No. 78-1209, slip op. at 29 (dissent).
135 An employer suit at this stage would also delay collective bargaining. A heavy emphasis on this factor would then, in effect, prohibit an employer from invoking district court jurisdiction in certification proceedings, based on the *Kyne* exception. This result would be contrary to the Supreme Court's position in *Boire* of allowing employer suits, provided the Board has acted outside its statutory authority. 376 U.S. 473.
136 *Id.*
137 In *Fanning,* the majority and dissent developed different approaches. *See* text accompanying notes 101-04 *supra. See also* Chicago Truck Drivers v. NLRB, 599 F.2d 816, 819 (7th Cir. 1979) (examination of whether the Board violated a specific statutory directive "should be made with relatively lax scrutiny"); McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916, 917 (D.C. Cir. 1968); Miami Newspaper Printing Pressmen's Union v. McCulloch, 322 F.2d 933 (D.C. Cir. 1963) (applies to positive commands as well as negative prohibitions); National Maritime Union v. NLRB, 375 F. Supp. 421, 429-30 (E.D. Pa.), *aff'd mem.,* 506 F.2d 1052 (3d Cir. 1974), *cert denied,* 421 U.S. 963 (1975).

* *Cert. denied,* 49 U.S.L.W. 3216 (U.S. Oct. 14, 1980) (No. 79-2037).
1 405 U.S. 596 (1972).

States labeled the Sherman Act[2] the Magna Carta of our economic system. It is, the Court stated, "as important to . . . free-enterprise . . . as the Bill of Rights is to the protection of our fundamental personal freedoms."[3] Thus, it is clear that the Supreme Court attaches great importance to the economic freedoms promoted by the Sherman Act. When enforcement of the Act infringes upon first amendment rights, however, this clarity quickly fades.

In *Missouri v. National Organization for Women, Inc. (NOW),*[4] economic freedom and the first amendment right to petition the government collide. The dispute resulted from a campaign conducted by the National Organization for Women (NOW) discouraging groups from holding conferences and conventions in states that had not yet ratified the proposed Equal Rights Amendment.[5] Missouri's convention trade suffered economic harm as a result of the NOW boycott.[6] Missouri brought suit against NOW charging that its boycott violated section 1 of the Sherman Act,[7] violated Missouri antitrust law,[8] and constituted tortious infliction of economic harm.[9] The district court ruled in favor of NOW on all issues.[10] The United States Court of Appeals for the Eighth Circuit affirmed, holding that the NOW boycott was a political activity outside the scope of antitrust legislation and protected under the first amendment right to petition.[11]

In reaching its decision, the Eighth Circuit first examined the legislative history of the Sherman Act.[12] Although it discovered no affirmative statement of intent, the court concluded that the legislative history indicated an intent to regulate the activities of competitors in commerce rather than the activities of "noncompetitors motivated socially or politically in connection with legislation."[13]

Turning to the case law,[14] the Eighth Circuit sought additional guidance from the Supreme Court decision of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[15] In

2 15 U.S.C. §§ 1-7 (1976).

3 405 U.S. at 610.

4 620 F.2d 1301 (8th Cir.), *cert. denied,* 49 U.S.L.W. 3216 (U.S. Oct. 14, 1980) (No. 79-2037).

5 The proposed twenty-seventh amendment to the United States Constitution reads as follows:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

6 The Supreme Court has defined boycott as "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541 (1978). *See also* BLACK'S LAW DICTIONARY 169 (5th ed. 1979).

7 15 U.S.C. § 1 (1976) provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

8 MO. REV. STAT. § 416.031.1 (1969).

9 *See* RESTATEMENT (SECOND) OF TORTS §§ 766B, 767 (1977).

10 Missouri v. National Organization for Women, Inc., 467 F. Supp. 289 (W.D. Mo. 1979).

11 620 F.2d at 1319; U.S. CONST. amend. I.

12 620 F.2d at 1304-09, *quoting* 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978).

13 620 F.2d at 1309.

14 The Eighth Circuit considered *NOW* a case of first impression. *But see* Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920). In that case, the Council of Defense organized a boycott of a publishing company to protest the political views of stockholder William Randolph Hearst. The Eighth Circuit held the boycott to be within the proscriptions of the Sherman Act. The *NOW* court distinguished this case by pointing out: 1) the *Council of Defense* boycott was intended to punish the publisher for his past actions while the NOW boycott was intended to apply economic pressure to achieve future action; and 2) *Council of Defense* did not involve the right to petition. 620 F.2d at 1304 n.4. The dissent found these distinctions to be without merit. 620 F.2d at 1324 n.17.

15 359 U.S. 207 (1959).

Klor's, an appliance retailer charged that a competitor had conspired with several manufacturers to limit the availability of their appliances to the plaintiff. Ruling for the plaintiff, the Supreme Court indicated that group boycotts were within the class of restraints condemned as per se violations[16] of the Sherman Act. The Eighth Circuit distinguished *Klor's* from *NOW* by pointing out that *Klor's* involved a commercial boycott among competitors while the NOW boycott was a politically motivated attempt to influence legislation. The Supreme Court's language in *Klor's* supports this political-commercial distinction by recognizing that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."[17]

The Eighth Circuit found more direct support for its decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. (Noerr).*[18] In *Noerr,* a group of railroads coordinated a publicity campaign designed to encourage legislation harmful to the trucking industry. The campaign was conducted using a "third party" technique, whereby the anti-trucking propaganda appeared to originate from civic groups with no commercial interest in the proposed legislation. Despite the railroads' anticompetitive purpose and deceptive tactics, the Supreme Court declared that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[19] The Supreme Court rested its decision on three factors: 1) the "essential dissimilarity" between the railroads' attempts to influence legislation and agreements traditionally condemned by the Sherman Act; 2) the government's need to be informed; and 3) the important constitutional questions which would be raised by construing the Sherman Act as regulating a political activity.[20] In a subsequent case, *California Motor Transport Co. v. Trucking Unlimited,*[21] the Supreme Court indicated that the *Noerr* exclusion from antitrust regulation was primarily based upon the first amendment right to petition.

Applying *Noerr* to *NOW,* the Eighth Circuit found that "the crux of the issue is that NOW was politically motivated to use a boycott to influence ratification of the ERA."[22] The political motivation of the NOW boycott brought it within the overriding policy implications of *Noerr.* As the Supreme Court stated in *Noerr:*

16 *Id.* at 211-12. Per se violations of the Sherman Act "are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1976) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)). For an examination of the per se rule as applied to boycotts, see Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination,* 79 COLUM. L. REV. 685 (1979); Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?* 27 RUTGERS L. REV. 773 (1974). *See also* note 38 *infra.*

17 359 U.S. at 213 n.7 (dictum).

18 365 U.S. 127 (1961). For a general discussion of *Noerr* and its progeny, see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctine,* 45 U. CHI. L. REV. 80 (1977); Holzer, *An Analysis for Reconciling the Antitrust Laws with the Right to Petition:* Noerr-Pennington *in Light of* Cantor v. Detroit Edison, 27 EMORY L.J. 673 (1978).

19 365 U.S. at 135.

20 *Id.* at 136-38. Subsequent Supreme Court cases have expanded the *Noerr* exemption from antitrust regulation to include attempts to influence administrative agencies, UMW v. Pennington, 381 U.S. 657 (1965), and the courts, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

21 404 U.S. 508 (1972).

22 620 F.2d at 1314.

> The proscriptions of the [Sherman] Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.[23]

From its examination of the legislative history and the case law, the Eighth Circuit concluded that the Sherman Act was inapplicable and that the first amendment right to use political activities to petition the government shielded the NOW boycott from liability for antitrust violations or common law trade restraints.[24]

The foundation of the Eighth Circuit's opinion in *NOW* is the district court's finding that "[t]he goal and sole purpose of NOW's economic boycott campaign is the ratification of the ERA."[25] The district court correctly distinguished between the intent and the purpose of the boycott.[26] Although the intent of the boycott may have been to inflict economic injury on Missouri's convention trade,[27] its underlying purpose was ratification of the ERA.[28] The intended anticompetitive effects of the boycott were, therefore, incidental to the primary political purpose of the boycott. The Supreme Court made a similar distinction in *Noerr,* stating:

> [T]he findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships . . . with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action . . . .[29]

Although *Noerr* and *NOW* are factually dissimilar, in both cases the injury inflicted can be viewed as an ancillary effect of a political act.

In dissent, Chief Judge Gibson criticized the majority's treatment of *Noerr.* Citing Supreme Court decisions which emphasize the expansive interpretation given the Sherman Act[30] and the presumption against implied exemptions from the Act,[31] the dissent contended that *Noerr* must be narrowly construed.[32]

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23 356 U.S. at 141.

24 620 F.2d at 1319. In Henry v. First Nat'l Bank, 595 F.2d 291 (5th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980), the Fifth Circuit considered the first amendment implications of political boycotts. The court in *Henry* restrained enforcement of a state court injunction prohibiting picketing associated with civil rights boycotts, noting:

> There is no suggestion that the . . . defendants were in competition with the white businesses . . . . On the contrary, the boycott grew out of a racial dispute with the white merchants and the city government . . . . This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

Id. at 303. Due to the procedural posture of the case, the Fifth Circuit did not propose a scheme for reconciling a state's interest in regulating economic activity with first amendment rights. Nonetheless, the court's deference to the first amendment in this context is noteworthy.

25 620 F.2d at 1302 (paraphrase of district court findings, 467 F. Supp. at 295).

26 *See* Coons, *Non-Commercial Purpose as a Sherman Act Defense,* 56 Nw. U.L. Rev. 705 (1962).

27 *Id.* at 1303 (paraphrase of district court findings, 467 F. Supp. at 295).

28 *Id.* at 1302.

29 365 U.S. at 143.

30 City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398 (1978); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

31 City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

32 620 F.2d at 1319-21 (Gibson, C.J., dissenting).

The dissent highlighted the factual variations, asserting that "[t]he *Noerr* case was a combination to get legislation harmful to others. The *NOW* case is a combination to harm others to get legislation."[33] Viewing this distinction as fundamental, Chief Judge Gibson found the majority's reliance on *Noerr* unwarranted.

The dissent's arguments are not without merit. Although *Noerr* supports the majority's position, it is not controlling. In contrast with *NOW, Noerr* involved no boycott. The railroads in *Noerr* lobbied in favor of legislation which would have improved their competitive position vis-a-vis the trucking industry. The Supreme Court found the form of the railroads' activities (regardless of their purpose) rendered the Sherman Act inapplicable.[34] In *NOW,* the Eighth Circuit found that the political purpose of the ERA boycott immunized the boycott from antitrust liability.[35] While admitting that *Noerr* was not dispositive,[36] the majority failed to clearly state that the *NOW* decision was not simply an extension of *Noerr. NOW* should be read not as expanding the *Noerr* doctrine,[37] but rather as establishing an independent doctrine which accords noncompetitive, political boycotts antitrust immunity when the boycotts' sole purpose is to influence governmental action. Under this approach, *NOW* stands on its own merits and cannot be dismissed as an unwarranted extension of another case.

The central objection of the dissent in *NOW* concerned not the relevance of *Noerr* but the failure of the majority to do the "requisite" first amendment analysis.[38] The dissent did not propose that the NOW boycott be summarily condemned as a per se violation of the Sherman Act.[39] Rather, it criticized the majority's failure to undertake a more comprehensive balancing of the government's interest in regulating interstate commerce and the public's interest in using political boycotts to influence legislation.[40] Support for this balancing of first amendment rights against governmental interests can be found in *Buckley*

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33 *Id.* at 1323 (Gibson, C.J., dissenting) (quoting brief for appellant at 31).

34 365 U.S. at 136-40. In a subsequent case expanding *Noerr,* Justice White stated, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials *regardless* of intent or purpose . . . ." UMW v. Pennington, 381 U.S. 657, 670 (1965) (emphasis added).

35 *See* notes 22 and 25 *supra* and accompanying text.

36 620 F.2d at 1315.

37 Two recent commentators have interpreted *NOW* as an attempt by the Eighth Circuit to extend the *Noerr* doctrine. *See* Cockerill, *Application of Noerr-Pennington and the First Amendment to Politically Motivated Economic Boycotts: Missouri v. NOW,* 13 LOY. L.A.L. REV. 85 (1979); Comment, *Protest Boycotts Under the Sherman Act,* 128 U. PA. L. REV. 1131 (1980).

38 620 F.2d 1319. *See* Note, *Political Boycott Activity and the First Amendment,* 91 HARV. L. REV. 659 (1978).

39 The Supreme Court's language in Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), however, indicates that group boycotts fall within the per se rule. *See* note 16 *supra.* Reasoning from this basis, one commentator has contended that all boycotts should be treated as per se violations of the Sherman Act regardless of their motivation. *See* Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal,* 1970 DUKE L.J. 247. However, the Supreme Court's holdings in boycott cases have been narrow enough to permit several courts to avoid application of the per se rule under appropriate circumstances. *See, e.g.,* Smith v. Pro Football, Inc., 593 F.2d 1173, 1177-91 (D.C. Cir. 1978); Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 546-47 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1979); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 127-30 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-80 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). Some commentators have concluded that group boycotts in a noncommercial context may not merit per se treatment. *See* Bauer, *supra* note 16; McCormick, *Group Boycott—Per Se or Not Per Se, That Is the Question,* 7 SETON HALL L. REV. 685 (1979); Comment, *supra* note 37.

40 620 F.2d at 1324-25 (Gibson, C.J., dissenting). It should be noted that the dissent fails to articulate any particular scheme of analysis, but argues instead for remanding the case to the district court with instructions to apply a balancing test to the first amendment issue.

v. Valeo,[41] *United States v. O'Brien,*[42] and other Supreme Court decisions.[43] The dissent concluded that a balancing analysis was required "to assure consistent evaluation of similar claims . . . ."[44]

Although the *NOW* majority failed to address the issue, the wisdom of employing a balancing test in this situation is questionable. A court faced with the task of applying such a test would have to weigh the potential competitive harms of the boycott against the political benefits which the boycotters are seeking to attain. Economic effects are susceptible to reasoned analysis, but the standard by which the importance of political goals is measured is at best subjective. Courts attempting this balancing act would have little to guide them apart from the dominant social and political mores of the day and their individual prejudices. The balancing test suggested by the dissent would be difficult to apply to political boycotts and would inevitably lead to divergent results in similar cases, thereby creating the impression of judicial arbitrariness.[45]

A recent commentator on the *NOW* decision[46] contends that the Sherman Act is applicable to social and political boycotts, and that all such "protest boycotts"[47] should be analyzed under the rule of reason. First enunciated in *Standard Oil Co. v. United States,*[48] the rule of reason does little more than instruct the court to examine all relevant circumstances surrounding a particular restraint in order to determine whether in fact the restraint is "unreasonably restrictive of competitive conditions."[49] Under the rule of reason the purpose for which an economic restraint is imposed can be considered only as evidence of the restraint's probable effect on competition.[50] The commentator asserts that, due to their lack of anticompetitive purpose, most protest boycotts should enjoy a presumption of reasonableness.[51]

Rule of reason analysis appears to eliminate the inconsistencies inherent

41 424 U.S. 1 (1976).

42 391 U.S. 367 (1968).

43 Brown v. Glines, 444 U.S. 348 (1980); NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960).

44 620 F.2d at 1324.

45 *See* Bird, *supra* note 39, at 277-82. Bird argues that the difficulties inherent in applying a balancing test militate in favor of per se treatment of political boycotts.

46 Comment, *supra* note 37.

47 *See* Comment, *supra* note 37, at 1133. This commentator defines protest boycott as a "concerted refusal to deal motivated by a political, social, religious, or other noncommercial purpose. . . . [T]he participants in a protest boycott lack . . . [a] commercial objective to achieve an effect traditionally held violative of the Sherman Act, . . . [and] lack a significant business interest that might be advanced by the boycotting activity."

48 221 U.S. 1 (1911).

49 *Id.* at 58. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). Justice Brandeis in *Chicago Board of Trade* articulated the rule of reason as follows:

> Every agreement concerning trade, every regulation of trade, restrains . . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238.

50 National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

51 Comment, *supra* note 37 at 1157.

in a subjective balancing test by allowing the boycott's purpose to be assessed only as evidence of its potential anticompetitive effect. It is clear upon closer examination, however, that the inconsistencies are not eliminated. Due to the amorphous nature of the rule of reason,[52] courts applying it may fail to distinguish between a boycott's intent, which is anticompetitive, and its purpose, which may be unrelated to any economic restraint.[53] Such a failure would lend uncertainty to any evaluation of a political boycott based upon the rule of reason. In addition, whether or not political boycotts are afforded a presumption of reasonableness, the courts retain a great deal of discretion in determining when a restraint shall be deemed "unreasonably restrictive"[54] and therefore violative of the antitrust laws. In practice, application of the rule of reason to political boycotts would result in ad hoc judicial determinations plagued both by the complexities, inherent in antitrust litigation and the subjective nature of the values underpinning any political goal.

An additional problem with applying the rule of reason or any balancing test is that the success of a political boycott will be a major factor in determining its legality. A well-organized boycott will naturally have a greater economic impact than a mismanaged one, a fact which may tip the balance against the boycott's legality. Under this analysis, political boycotts could well be acceptable only if unsuccessful. It seems anomalous to allow boycotts to be used in the political arena with the sole proviso that they be ineffective.

The majority's position in *NOW* avoids the inconsistencies inherent in a balancing test by focusing on the purpose underlying the boycott. The trial court assumes responsibility for determining the purpose behind the refusal to deal. When the purpose is found to be solely political, the boycott is shielded from antitrust liability. This approach preserves the right to use political boycotts to influence legislation.

In practical terms, the structure of our government does not afford ordinary citizens a wide variety of means to influence effectively the political system. Boycotts are among the few non-violent methods by which less powerful members of society can effectuate constructive change. By eliminating the right to use boycotts in a political context, the courts would enhance the sense of impotence widely felt by middle-class Americans. The alternative—allowing political boycotts only if they are incapable of having a significant impact—is hardly an acceptable compromise.

The Eighth Circuit held in *NOW* that political boycotts designed to influence legislation are beyond the scope of the antitrust laws and protected by the first amendment right to petition.[55] Although the court may have relied too extensively on *Noerr,* its conclusions merit support. By focusing on the purpose of the boycott, a trial court can determine the applicability of antitrust regulations. This approach avoids the subjective balancing of governmental interests with private political interests and preserves the right to use political boycotts to influence governmental policy.

Robert G. Homchick

52 *See* note 49 *supra* and accompanying text.
53 *See* notes 26-28 *supra* and accompanying text.
54 Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).
55 620 F.2d at 1319.

Civil Procedure—FEDERAL RULE OF CIVIL PROCEDURE 55(E) IS TO BE STRICTLY APPLIED IN DISABILITY BENEFIT APPEALS DESPITE THE COURT'S POWER TO COMPEL GOVERNMENT COMPLIANCE WITH COURT ORDERS—*Alameda v. Secretary of Health, Education and Welfare,* 622 F.2d 1044 (1st Cir. 1980).

If a defendant fails to answer a complaint in timely fashion, the district court can find the defendant in default and enter a default judgment. In cases involving the federal government, however, Federal Rule of Civil Procedure 55(e)[1] requires the district court to look to the merits of the dispute before entering a default judgment.[2]

Although the courts have consistently favored the government in cases challenging the rule,[3] the United States District Court for the District of Puerto Rico entered a default judgment against the Secretary of Health, Education and Welfare[4] (the Secretary; HEW) for refusing to file requested memoranda thereby delaying review of denial of disability benefits. The district court entered the default judgment without passing on the evidence in the administrative transcript.

On appeal, the United States Court of Appeals for the First Circuit considered whether the district court had the authority to strike the denials in the Secretary's untimely answer, find the claimants entitled to benefits, and remand the cases back to the Secretary for computation of benefits. The First Circuit held that the district court order amounted to a default judgment under rule 55(e), and that as such, the order could not be entered without examining the merits of the case using the accepted standard of review.[5] Although supported by the case law,[6] the accepted standard of review found in section 405(g) of the Social Security Act,[7] and rule 55(e), the decision allows the Secretary to

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1 FED. R. CIV. P. 55(e) states that "[n]o judgment by default shall be entered against the United States or an officer or agent thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

2 The district court must satisfy itself that the claimant has established "his claim or right to relief by evidence satisfactory to the court." FED. R. CIV. P. 55(e).

3 Williams v. Califano, 593 F.2d 282 (7th Cir. 1979); Poe v. Mathews, 572 F.2d 137 (6th Cir. 1978); Carroll v. Secretary of Health, Educ. & Welfare, 470 F.2d 252 (5th Cir. 1972); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962).

4 Santiago v. Secretary of Health, Educ. & Welfare, 463 F. Supp. 759, *aff'd on rehearing,* 82 F.R.D. 164 (D.P.R. 1979). The agency is no longer designated Health, Education and Welfare, and has been renamed the Department of Health and Human Services as prescribed by § 601 of Pub. L. 96-88, tit. VI, 93 Stat. 696 (October 17, 1979).

5 Alameda v. Secretary of Health, Educ. & Welfare, 622 F.2d 1044, 1047 (1st Cir. 1980). The standard of review is found in the Social Security Act, 42 U.S.C. §§ 405(g) and (h) (1976), which provides in pertinent part:

> (g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision . . . . Such action shall be brought in the district court of the United States for the judicial district in which plaintiff resides . . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based. The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . .
>
> (h) No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

6 *See* note 3 *supra.*

7 *See* note 5 *supra.*

use a procedural rule to circumvent the broad social policies behind the Social Security Act[8] and evades discussion of several relevant issues.

Alameda involved seven cases consolidated at the district court level for purposes of appeal. The facts in each case were similar. The claimants had filed for disability benefits and were denied the benefits at the local level. After exhausting their administrative appeals,[9] the claimants requested a review of the decision by the United States District Court for the District of Puerto Rico under section 405(g).[10]

The chronology of events in *Santiago v. Secretary of Health, Education and Welfare*[11] typifies the situations in the cases ultimately consolidated by the district court for appeal. In July of 1978, the district court established a timetable for submitting pleadings and supporting memoranda. The timetable gave the Secretary sixty days to answer and ninety days to file memoranda to aid the court in reviewing the administrative transcript. The Secretary missed the deadline for filing both the answer (September) and the ordered supporting memoranda (October). The district court then, *sua sponte,* granted the Secretary ten more days to respond. One week after the new deadline, the Secretary filed an answer. By December, the court had not received the memoranda ordered to be filed by October.[12] The district court again gave the Secretary another ten days in which to file the requested memoranda. Thirty days later, in January of 1979, the district court issued a four part order requiring that (1) the allegations in each of the complaints be taken as established; (2) the denials in the Secretary's answer be stricken; (3) the clerk enter judgment granting the relief prayed for by the claimants; and (4) the cases be remanded to the Secretary for computation of benefits.[13]

One week later, unaware the default judgment had even been entered, the Secretary requested a fifteen day extension to file the memoranda. The district court denied the motion for additional time because of the previous default judgment. The Secretary finally filed the memoranda in February. Similar situations existed in the other cases before the district court.[14]

The Secretary moved under rule 60(b) to vacate the judgments,[15] arguing

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8 42 U.S.C. §§ 301-1396 (1976).

9 Santiago v. Secretary of Health, Educ. & Welfare, 82 F.R.D. at 164.

10 *See* note 5 *supra.*

11 82 F.R.D. at 165-66.

12 [The Secretary's] sole approach to the court lay in repetitive boilerplate requests:

> "1. Defendant would like to file memorandum of law prior to the adjudication of this case by the Court, in support of the allegations contained in his answer to the complaint.
>
> "2. Due to the enormous litigation of Social Security cases defendant needs some time to prepare his brief."
>
> Whereupon defendant usually sought sixty more days.

Alameda v. Secretary of Health, Educ. & Welfare, 622 F.2d 1044, 1046 (1st Cir. 1980).

13 Santiago v. Secretary of Health, Educ. & Welfare, 463 F. Supp. at 759.

14 The district court randomly surveyed nine other Social Security appeals and found four, five and six month delays before an answer was filed, and a similar time elapsing before any legal memoranda were filed. Santiago v. Secretary of Health, Educ. & Welfare, 82 F.R.D. at 164.

15 FED. R. CIV. P. 60 reads in pertinent part:

> Relief From Judgment or Order
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the

that the order amounted to a default judgment under rule 55(e). According to the Secretary, the district court had no authority to enter the judgment without first reviewing the merits of the claimant's case. In addition, the Secretary contended the order contravened the section 405(g) standard of review. Finally, the Secretary boldly asserted she was under no duty to file the requested memoranda.[16]

The district court took the position that the Secretary had simply disregarded lawful court orders with neither explanation nor excuse.[17] In the court's opinion, the Secretary unnecessarily protracted the proceedings to the disadvantage of the claimants awaiting review.[18] The court refused to tolerate "contumacious disregard of its orders by any litigant."[19] Looking to the remedial nature of the Social Security Act, the court contended it had the inherent power to deal with the Secretary's inaction by imposing the severe sanction of a default judgment.[20] Although it understood the mandates of rule 55(e) and section 405(g),[21] the court felt the interests of justice would not be served by their application.

The district court classified its order as a sanction rather than a default judgment.[22] The court conceded, however, that for all practical purposes the order was a default judgment.[23] As authority for its action the court cited Local Rule 29 of the District Court of Puerto Rico.[24] Local Rule 29 pertains ex-

judgment has been satisfied, released, or discharged . . . ; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

16 To establish disability and maintain the right to benefits under the Social Security Act, the wage earner must adduce medical proof of the disability. 42 U.S.C. § 423(d) (1976). When a claimant applies for benefits, the initial determination of eligibility is made at the local Social Security Office. If the claim is denied at that level, the claimant may then request a *de novo* hearing before the appropriate state agency to reconsider the adverse decision at the local level. This request is decided on evidence presented in affidavits and supporting briefs. If the claim is again denied, the claimant is entitled to a hearing before an administrative law judge of the Social Security Bureau of Hearings and Appeals. 42 U.S.C. § 405(b) 1976. This requires a personal appearance and a full evidentiary hearing. (It is the administrative transcript compiled at this hearing which the district court in *Alameda* failed to review.) If the claimant is unsuccessful in this hearing he may request a reconsideration at the administrative level, and finally judicial review. 42 U.S.C. § 405(g) (1976); *See* Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); *See also* J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL, M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 127 (1978) [hereinafter cited as J. MASHAW]. The process is tedious and time consuming. J. MASHAW, *id.* at 1-4. Should the review process reach the stage of judicial review, legal costs become significant.

Judicial review is limited by 42 U.S.C. §§ 405(g) and (h) (1976). The district court may not hold a *de novo* evidentiary hearing, but is bound by the evidence in the transcript. Bush v. Celebrezze, 239 F. Supp. 688 (D. Or. 1965); Holland v. Celebrezze, 223 F. Supp. 347 (E. D. Tenn. 1963); Julian v. Folsom, 160 F. Supp. 747 (S.D.N.Y. 1958). The burden of proof is on the claimant to establish that the Secretary's findings of fact are not supported by "substantial evidence." 42 U.S.C. § 423(d)(5) (1976); Reyes Robles v. Finch, 409 F.2d 84 (1st Cir. 1969). If this burden is not met, the Secretary's findings of fact are deemed conclusive. 42 U.S.C. § 405(g) (1976).

17 Santiago v. Secretary of Health, Educ. & Welfare, 463 F. Supp. 759, 760 (D.P.R. 1979).

18 *Id.*

19 *Id.*

20 *Id.*, 82 F.R.D. at 166.

21 *See* note 5 *supra.*

22 Santiago v. Secretary of Health, Educ. & Welfare, 82 F.R.D. 164, 166 (D.P.R. 1979).

23 *Id.*

24 Local Rule 29 of the United States District Court for the District of Puerto Rico, provides in pertinent part:

B) The defendant (the Secretary of Health, Education, and Welfare) shall have sixty (60) days to answer the complaint and to file the administrative transcripts of the administrative proceedings. Defendant will not be granted any extension to answer the complaint in excess of thirty (30) days.

C) The time within which defendant has to file his memorandum shall be ninety (90) days from the date of the filing of the answer to the complaint.

clusively to Social Security cases and allows the imposition of sanctions if the Secretary fails to meet established deadlines. Although Local Rule 29 is silent as to the evidentiary review required before a default judgment may be entered against the Secretary, the court concluded the exercise of such power was necessary because the Secretary had violated policies behind the Social Security Act.[25] The Secretary's motion to vacate the default judgment was denied, and the Secretary appealed to the First Circuit.

Although recognizing the inherent remedial powers of the court, the First Circuit considered itself bound by the strictures of rule 55(e), sections 405(g) and (h), and prior case law.[26] The First Circuit did agree, however, that the Secretary's inaction was frustrating[27] and that the district court had the authority to require memoranda to be submitted to aid in reviewing the administrative transcripts.[28] Nevertheless, the court found that the district court order amounted to a default judgment under rule 55(e), and therefore, the district court was required to review the administrative transcript before entering any judgment against the Secretary.[29]

The First Circuit did make one concession to the district court. Since the Secretary had defaulted under rule 55(a)[30] for "failure to otherwise defend," the court noted that upon remand the amount and quality of the evidence that the district court would need to review would be less than would have been required had no default occurred.[31] The court then remanded the case to have the district court examine the claimants' memoranda to determine whether the findings of fact in the administrative transcript were supported by substantial evidence.[32]

The First Circuit felt its decision struck an equitable balance between the four competing interests involved: (1) the social and statutory aim of processing claims with reasonable expedition; (2) the social security claimant's burden; (3) the court's interest in guaranteeing that the adversary process functions; and

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D) No extension beyond ninety (90) days will be granted to the defendant to comply with the provisions of (C) above.

Failure of any party to comply with the terms herein established may subject the offending party to appropriate sanctions including dismissal of the complaint, remand of the case for computation and payment of benefits pending final outcome of the proceedings, disciplinary action against attorneys and such other measures as justice may require.

Out of the 94 judicial districts, only Puerto Rico has a rule as extensive as this. Puerto Rico's heavy disability review case load is the reason. Between 1969 and 1973, the Puerto Rico district handled six percent of the nation's social security cases. *See* J. MASHAW, *supra* note 16, at 127.

25 Santiago v. Secretary of Health, Educ. & Welfare, 463 F. Supp. 759, 760 (D.P.R. 1979).

26 Williams v. Califano, 593 F.2d 282 (7th Cir. 1979); Poe v. Mathews, 572 F.2d 137 (6th Cir. 1978); Carroll v. Secretary of Health, Educ. & Welfare, 470 F.2d 252 (5th Cir. 1972).

27 Alameda v. Secretary of Health, Educ. & Welfare, 622 F.2d 1044, 1046 (1st Cir. 1980).

28 *Id.* at 1047.

29 *Id.*

30 FED. R. CIV. P. 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." The entry of default is similar to a finding of liability, but is not a final judgment. The final judgment is the entering of a default judgment upon request of the responsive party. *See* MOORE'S FEDERAL PRACTICE, §§ 55.02(3), 55.03(1) (1976).

31 Alameda v. Secretary of Health, Educ. & Welfare, 622 F.2d 1044, 1048 (1st Cir. 1980). A two step process is involved. First, a default is entered against the unresponsive party. Second, a default judgment is entered, either by the court or the clerk.

32 If the findings of fact in the administrative transcript are unsupported by substantial evidence, a reversal or modification of the Secretary's decision will stand.

(4) the taxpayer's interest in minimizing payment of unsubstantiated claims due to the government's default.[33]

The First Circuit saw no inconsistency between the requirements of rule 55(e) and Local Rule 29 if an evidentiary examination is undertaken.[34] Since the local rule is silent on the matter of weighing evidence before entering a default judgment against the Secretary, the appellate court considered the rule consistent with both the Social Security Act and rules of procedure provided the district court evaluates the evidence in accordance with the guidelines established by the appellate court's opinion.

The *Alameda* decision has two important ramifications. First, the decision allows the Secretary to invoke a procedural rule to avoid compliance with lawful court orders, knowing the administrative transcript will be reviewed before a final decision is rendered. A denial of benefits case will thus be decided on its merits regardless of the Secretary's conduct, and claimants will encounter unnecessary delays. Such a result circumvents the policies behind the Social Security Act. Second, the court's opinion avoids several relevant issues because the appellate court viewed the case as simply presenting a rule 55(e) question. A broader approach might have led the court to affirm the district court's action. The question presented in *Alameda* required more than a mere categorization of the order as a default judgment. Four factors justify a judicially recognized exception to the requirements of rule 55(e).

First, the issue in *Alameda* is more meaningful when examined in the context of the Social Security Act's legislative intent.[35] The Act was signed into law on August 14, 1935.[36] Over the past 45 years, the Act has been amended repeatedly. In 1956 the disability section was added under Title II.[37] The benefits granted under this section are financed by revenue derived from employer and employee payroll taxes.[38]

In 1935 the Act's Congressional intent was to provide a measure of security to Americans in cases of old age or disability.[39] The underlying policy objec-

33 Alameda v. Secretary of Health, Educ. & Welfare, 622 F.2d 1044, 1047 (1st Cir. 1980).

34 *Id.* at 1049.

35 Although the legislative intent is not binding on the court, it provides a useful starting point for purposes of analysis.

36 At that time the Act consisted of four titles. Title I dealt with grants to the states for the needy aged; title II involved old age social insurance benefits; title III involved unemployment compensation to be financed by the states; and title IV involved state grants for aid to dependent children and others. For a brief historical overview, *see* R. CAMPBELL, SOCIAL SECURITY: PROMISE AND REALITY, 3-6 (1977).

37 70 Stat. 815, 42 U.S.C. § 423. Eighty to ninety percent of all social security actions commenced in the district courts are disability actions. J. MASHAW, *supra* note 16, at 126.

38 26 U.S.C. §§ 3101(a), 3111(a) (1976), 42 U.S.C. § 401(b) (1976). The program provides monthly benefits to disabled persons who have worked long enough to have an insured status, and who have had substantial work experience in a specified interval directly preceding the onset of disability. 42 U.S.C. §§ 423(c)(1)(A), (B) (1976). The claimants under title II, on the whole, tend to be from the lower socioeconomic groups. J. MASHAW, *supra* note 16, at 29.

39 *See* remarks of Rep. Ellenbogen, May 20, 1935: "Social Security legislation is designed to take the fear out of life. It is designed to remove the fear of insecurity arising from old age. It is designed to remove the fear arising from unemployment. It is designed to remove the fear arising from illness." 79 CONG. REC. 7839 (1935); *see also* 79 CONG. REC. 8223 (remarks of Sen. Thomas), 12,607 (remarks of Sen. George), 13,675-79 (remarks of Rep. Ellenbogen), 13,881 (remarks of Rep. Randolph), 14,138 (remarks of Rep. Focht).

The Committee on Economic Security gave this summary in 1935:

> The Social Security Act, as approved August 14, 1935, represents a major advance in the attainment of economic security for the individual and for his family. The President outlined the entire program . . . [and] he stated that, "Among our objectives, I place the security of the men, women, and children of the Nation first." He further said that security for the individual and for

tives of the Act have not changed since. In 1975, the bipartisan Ad Hoc Advisory Committee on Social Security[40] responded to attacks on the Social Security system in a paper entitled "Social Security: A Sound and Durable Institution of Great Value."[41] In its paper the Committee echoed Congress' aspirations and objectives of 1935.[42] The policy objectives of the disability program have been similarly reaffirmed in a separate Congressional report.[43]

Congress has repeatedly condemned delays in the Social Security process, labeling them a "national disgrace."[44] According to Congress, delays are "unnecessary, unfounded; and in addition, . . . a real hardship on those people who are unemployed due to disability . . . ."[45] Also, the courts have recognized that long delays "detract seriously from the effectiveness of the program."[46]

Given its broad social objectives, the Act should not be circumvented by statutory or procedural technicalities. The poverty of disability claimants compounds the importance of the social objectives behind the Act since the poor are less able to absorb the hardship resulting from the lack of benefits.[47]

Second, rule 55(e) is intended to protect the taxpayer. To insure that the public treasury is not subject to depletion without an affirmative showing that the claimant is entitled to relief, a claimant must establish his right to relief by "evidence satisfactory to the court."[48] The public must be assured that the federal government will only pay judgments when a bona fide claim exists.[49]

However, default judgments are intended to protect the diligent litigant's rights. The court must be free to fashion appropriate relief when the judicial

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his family concerns itself with three factors . . . (3) safeguards against the major misfortunes in life. The Social Security Act . . . "safeguards against the misfortunes which cannot be wholly eliminated in this man-made world of ours." 79 CONG. REC. 14,760 (1935).

40 The Committee is composed of five former Secretaries of H.E.W. and three surviving Social Security Commissioners.

41 121 CONG. REC. 3822 (1975).

42 "Congress has made clear beyond question its pledge to the American people that the social security commitment will be honored. The social security system is, in effect, a compact between the people of the United States and their Government." *Id.*

43 The Senate Finance Committee minority report, supporting H.R. 7225, 84th Cong., 2d Sess. (1956) (which Congress ultimately passed to create the disability insurance program), stated:

> Under a sound social insurance program, Americans should be protected against the fundamental hazards which would otherwise destroy their earning power and reduce them to beggary. Granted that some form of income is necessary to provide for those who are unable to provide for themselves, it is far preferable that these persons should remain proud, self-sufficient Americans rather than become in-hand pleaders for public charity.

[1956] U.S. CODE CONG. & AD. NEWS 3942.

The intent of the 74th Congress has never been questioned. A survey of every Congress from the 76th Congress, 1st Session, in 1939 through to the 96th Congress, 2d Session (June 13, 1980), shows that the legislative intent of the 74th Congress has been reaffirmed. In every Congress since then, numerous bills have been introduced regarding extension or liberalization of benefits, and expedition of claims and benefit checks. Also, in 36 of the 42 years between 1939 and 1980, there have been numerous statements of various Congressmen reaffirming the original policy justifications of the Act.

44 121 CONG. REC. 33,468 (1975) (remarks of Rep. Hefner). *See also* 121 CONG. REC. 41,877 (remarks of Rep. Hechler) (delays not in the true American Spirit).

45 121 CONG. REC. 33,468 (remarks of Rep. Hefner).

46 Caswell v. Califano, 583 F.2d 9, 18 (1st Cir. 1978); White v. Mathews, 559 F.2d 852 (2d Cir. 1977). The Act is intended as a remedial statute and should be liberally construed, interpreted and administered so it may accomplish the beneficent result intended. *See* Carroll v. Secretary of Health, Educ. & Welfare, 470 F.2d 252 (5th Cir. 1972); Rodriguez v. Celebrezze, 349 F.2d 494 (1st Cir. 1965). Judicial interpretation is to be done in the spirit of the legislation. Reyes Robles v. Gardner, 287 F. Supp. 200 (D.P.R. 1968), *rev'd on other grounds,* 409 F.2d 84 (1969).

47 J. MASHAW, *supra* note 16, at 1-4; Caswell v. Califano, 583 F.2d 9,18 n.16 (1st Cir. 1978).

48 Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert denied,* 371 U.S. 975 (1963); *see* MOORE'S FEDERAL PRACTICE, *supra* note 30.

49 Rank v. United States, 142 F. Supp. 1 (S.D. Cal. 1956); MOORE'S FEDERAL PRACTICE, *supra* note 30.

process has been halted by an unresponsive party, regardless of that party's identity. The default judgment provides a necessary sanction against unresponsive litigants and constitutes a significant tool for enforcing compliance with rules of procedure, as well as for disciplining the adversary who willfully ignores the orders of the court.[50] The diligent party has the right to be protected from interminable delay.[51]

The Supreme Court has stated that although the default judgment is the most severe sanction, it "must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but [also] to deter those who might be tempted to such conduct in the absence of such a deterrent."[52] The policies underlying the default judgment are: judicial efficiency; the integrity of judicial orders; protection of the rights of responsible litigants; and the smooth functioning of the adversary process.

Although the mandate of rule 55(e) is explicit there are situations in which a default judgment or its practical equivalent may be entered against the government without requiring the claimant to establish his right to relief. These situations arise under Federal Rule of Civil Procedure 37(b).[53] When discovery orders are either disobeyed or ignored, rule 37(b) allows the court to deem as established designated facts.[54] Courts have approved rule 37(b) sanctions even when the practical result is entry of a default judgement against the government.[55]

The government's obligation to participate in judicial proceedings can be enforced by sanctions.[56] Regardless of rule 55(e), the same logic should apply to the government's refusal to follow valid court orders in situations such as those found in *Alameda.*

The equity of the statute theory provides that a court may reason by analogy, as at common law, from one statute to another.[57] Given Congress's

50 *In re* Uranium Antitrust Litigation, 473 F. Supp. 382 (N.D. Ill. 1979); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2693 at 307-08, 315 (1973).

51 H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689 (D.C. Cir. 1970).

52 National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam).

53 FED. R. CIV. P. 37(b) sets forth various sanctions available to the court to impose when a discovery order is disobeyed. They are orders (A) that given facts be taken as established; (B) refusing to allow the disobedient party to oppose designated claims; and (C) striking pleadings or portions thereof. The rule also allows the imposition of reasonable attorney's fees and reasonable expenses incurred by the responsive litigant due to the failure to obey discovery orders.

54 *In re* Attorney General of the United States, 596 F.2d 58, 66 n.15 (2d Cir. 1979); Reynolds v. United States, 192 F.2d 987 (3d Cir. 1951), *rev'd on other grounds,* 345 U.S. 1 (1953); MOORE'S FEDERAL PRACTICE, *supra* note 30, at 322-23; *Cf.* Campbell v. Eastland, 307 F.2d 478, 491-92 (5th Cir. 1962) (Rule 55(b) prohibits relieving plaintiff of burden to prove claim against the government where disobeyed discovery order went to collateral matter). *Contra,* United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969); Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139 (E.D.N.Y. 1957). If these crucial facts are taken as established, the sanction order is, in effect, a default judgment since entry of summary judgment in favor of the claimant is a matter of course. *See* International Ass'n of Machine and Aerospace Workers v. National Mediation Board, 314 F. Supp. 229 (D.D.C. 1969), *rev'd on other grounds,* 425 F.2d 527 (D.C. Cir. 1970).

55 *Id.*

56 National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Societe Internationale v. Rogers, 357 U.S. 197 (1958). The willfulness of the failure to comply is, of course, important. If the failure is due to inability, it violates due process to impose a sanction on any party. United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980).

57 Haeger Potteries, Inc. v. Gilner Potteries, 123 F. Supp. 261, 267 (S.D. Cal. 1954); *See* United States v. Freeman, 44 U.S. 556, 565 (1845); Thorne, *The Equity of a Statute,* 31 ILL. L. REV. 202, 214-15, 217 (1936); Pound, *Common Law and Legislation,* 21 HARV. L. REV. 386 (1908).

strong legislative mandate in passing the Social Security Act,[58] it is unlikely that rule 55(e) was intended to circumvent the remedial policies behind the Social Security Act. The equity of the statute theory would allow a judicial exception to rule 55(e).[59] Under the theory a trial court can recognize exceptions to a statute when it is either inadequate or erroneous as applied to the facts before the court. Thus, the trial court can create exceptions to the literal requirements of a statute to correct a defect that the legislators themselves would correct were they present.[60]

The legislative intent behind the Act suggests a correction is in order given the facts and context of *Alameda.* The costs of delay to claimants in disability benefits cases are high. Often, retroactive benefit payments are insufficient to correct the damage caused by delay.[61] For this reason, the *Alameda* district court felt justified in having the government and, ultimately, the taxpayer absorb the unilaterally determined cost of a default judgment. The court believed the imposition of such harsh sanctions upon the Secretary would deter future irresponsibility. Also, future claimants would not incur damages like those endured by the claimants in *Alameda.*[62]

Although the taxpayers' interests are involved, it should be remembered that claimants are themselves taxpayers.[63] The social security system's primary purpose is to allocate to all taxpayers the cost of protecting those who can no longer provide for themselves. By allowing the district court to set and enforce reasonable deadlines, the high costs endured by the claimants will be greatly reduced.[64]

Preferably, any case should be decided upon its merits and not by a

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The theory gained recognition in the United States in 1891 in Baker v. Jacobs, 64 Vt. 197, 23 A. 588 (1891). The case stated that a specific statute may be extended or retracted to fit a given case not anticipated by the legislature. This should be especially true when the two statutes are a part of one common scheme. An argument may be made that the inaction of the Secretary was not anticipated by the drafters of rule 55(e).

58 *See* text accompanying notes 47-49 *supra.*

59 *See* Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945), *aff'd sub nom.* Markham v. Cabell, 326 U.S. 404 (1945); Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

Judge Learned Hand stated:

> There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards that overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.

Central Hanover Bank & Trust Co. v. Commissioner, 159 F.2d 167, 169 (2d Cir. 1947).

60 Guiseppi v. Walling, 144 F.2d 608, 616 n.15a (2d Cir. 1944); *See* Cox, *Judge Learned Hand and the Interpretation of Statutes,* 60 HARV. L. REV. 370 (1947); *But see* Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407 (1950) (courts should decide cases in line with the wording of statutes and let the legislature correct inconsistencies if it so desires).

61 White v. Mathews, 559 F.2d 852, 860 (2d Cir. 1977).

62 *See* J. MASHAW, *supra* note 16, at 79; Caswell v. Califano, 583 F.2d 9, 18 n.16 (1st Cir. 1978).

63 *See* note 38 *supra.* In 1977, four out of five people in the 21 to 64 age group had protection under social security against loss of income due to disability. [1977] U.S. CODE CONG. & AD. NEWS 4158. Therefore, 80% of the same taxpayers that are paying this default judgment may well reap the benefits of expedited claim review in the future.

64 In light of the high percentage of denials ultimately reversed on appeal, reducing unnecessary delays is an important consideration. During the period of 1970 to 1975, 54% of appealed cases were affirmed, 11% were reversed, and 34% remanded. Of those remanded, 65% ultimately resulted in grants. Thus, about one-third of all disability cases during that period were reversed. This significantly exceeds the court of appeals reversal rate (19%) of administrative actions generally. J. MASHAW, *supra* note 16, at 125-28.

default judgment. This preference, however, is counterbalanced by considerations of justice, social goals, and expediency.[65] The taxpayers may have to pay an occasional default judgment to insure that the Secretary obeys lawful court orders directed toward expediting disability reviews. Strict enforcement of rule 55(e) may result in an unresponsive bureaucracy impeding the adversary process and circumventing the policies behind the Act. The question is not whether there will be costs. The question is who will bear those costs.[66] The Federal Rules of Civil Procedure should not be used to weaken the Social Security Act.

Third, although the language of rule 55(e) is clear, authority exists elsewhere in the rules to uphold the district court's action in *Alameda.* Federal Rule of Civil Procedure 1 states that the federal rules "shall be construed to secure the just, speedy and inexpensive determination of every action."[67] Rule 1 provides a context in which rule 55(e) should be read in analyzing the district court's order in *Alameda.* Further, the government should be treated like a private litigant in remedial reviews to preserve a sense of personal responsibility in governmental agencies.[68]

Personal responsibility was likely a factor in the formulation of the review provisions of the Act. Appeals from HEW proceedings are "unique" for two reasons: (1) HEW reviews are made to federal district courts[69] rather than to courts of appeal as is usual in statutory reviews,[70] and (2) the action is brought directly against the Secretary.[71] Federal suits requesting review are usually brought against the particular federal agency or the United States.[72] The fact that the initial appeal is made to the district court is also significant because it creates an extra step in the review process. This extra step increases the already lengthy time claimants must wait for adjudication of their claims. Any extra delay due to bureaucratic irresponsibility should not be tolerated.

The Supreme Court has recognized that blind compliance with procedural rules is undesirable. In *Califano v. Yamasaki,*[73] the Court held that recoupment of erroneous overpayments of social security benefits should be waived by the Secretary should such an adjustment defeat the purpose of the Act or contravene equity and good conscience. Lower courts have stated that the Social

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65 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE: RULES EDITION, § 1217, at 89. The Secretary's dilatory tactics also contravene the A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY (1969). *See* Edestein, *Symposium: Quality Advocacy and the Code of Professional Responsibility,* 44 FORDHAM L. REV. 1069 (1976). Of the 87 published Local Rules of the United States District Courts, over one-half specifically mention the A.B.A. Code as being in force in that district.

66 *See, e.g.,* White v. Mathews, 559 F.2d 852, 859 (2d Cir. 1977).

67 FED. R. CIV. P. 1.

68 *See* Bank Line v. United States, 163 F.2d 133 (2d Cir. 1947).

69 42 U.S.C. § 405(g) (1976).

70 B. SCHWARTZ, ADMINISTRATIVE LAW 430-32 (1976). At least twenty federal statutes provide for judicial review of agency decisions in the court of appeals in the form of an action against the agency. The prototype is generally agreed to be § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(c) (1970). B. SCHWARTZ, *id.* at 431; K. DAVIS, ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS 442 (1965).

71 42 U.S.C. § 405(g) (1976).

72 Even under the so-called Urgent Deficiencies Act, which established procedures applicable to review of orders of the Interstate Commerce Commission, and which provided for such review in a three judge federal district court, the United States rather than the individual officer was the named defendant. The anomaly has now been repealed. 28 U.S.C. § 2321 (1976). The Hobbs Act which, as amended, prescribes the procedures for review of orders of six agencies in the courts of appeal, nevertheless states: "The action shall be against the United States." 28 U.S.C. § 2344 (1976).

73 442 U.S. 682 (1979).

Security Act's beneficent purposes are not to be circumvented by narrow, restrictive, or overly technical readings of the Act.[74] The principle should be equally applicable to interpretations of the Federal Rules of Civil Procedure in connection with social security actions.

The fourth consideration involves evaluation of a court's inherent powers and the manner in which those powers are used to discharge the duties owed the litigants and society. There are many benefits of judicial review of social security cases. Judicial review (1) contributes added accuracy to the claims adjudication process; (2) legitimizes the process in the eyes of the interested public; (3) provides the Secretary with a steady feedback for the agency's self-improvement; and (4) serves a public information function by providing a public exposure to an otherwise secretive process.[75] By uncovering problems arising in the system judicial review also forces continuing congressional evaluation.[76]

A court's inherent power to order briefs from litigants to assist in the efficient administration of justice, and dismiss actions *sua sponte* for a party's failure to respond to court orders, is well recognized.[77] Regardless of other strictures, courts have the inherent power to exercise remedial powers if the Secretary violates the provisions of the Social Security Act.[78] Courts also have a duty to protect litigants from abuse, harassment, or exploitation.[79] As one court noted, the statutorily created right of judicial review was not meant to be uncritical "rubber stamping" of administrative action.[80] Courts must maintain current dockets to allow for expeditious review of all claims. Neither litigant should be allowed to interfere with the expeditious review of benefit claims by protracting the proceedings unnecessarily. In one recent social security case, in refusing to set aside a default judgment entered against the claimant, the court stated:

> If the instant motions [to set aside the default judgments entered] were granted, the unacceptable practices which have led to the current situations would be encouraged. In denying the motions, the Court is of the view that the prejudice to the [claimants], although real and regrettable, is outweighed by the benefits which redound to other litigants when the court is able to prevent the propagation of unacceptable practices and inefficiencies and, thus, able to maintain a current docket.[81]

This reasoning should apply equally to the government should it default. The

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74 *See* Barnes v. Richardson, 342 F. Supp. 435 (S.D.N.Y. 1972): Pasquale v. Cohen, 296 F. Supp. 1088 (D.R.I. 1969), *appeal dismissed* 418 F.2d 627 (1969); Taylor v. Ribicoff, 196 F. Supp. 774 (W.D.S.C. 1961); *See also* Comment, 55 NOTRE DAME LAW. 396, 405 (1980) (non-technical reading of the Equal Employment Opportunity Act of 1972 is appropriate since it is a remedial statute).

75 J. MASHAW, *supra* note 16, at 136-37.

76 *Id.*

77 Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962); Fisher v. Pace, 336 U.S. 155 (1949); Michaelson v. United States, 266 U.S. 42 (1924); Ownby v. Morgan, 256 U.S. 94 (1921); Luis C. Forteza e Hijos, Inc. v. Mills, 534 F.2d 415, 419 (1st Cir. 1976); 5 MOORE'S FEDERAL PRACTICE, *supra* note 30, at 1041. Although the cases cited do not involve the government as a litigant, the powers are still recognized.

78 White v. Mathews, 559 F.2d 852, 860 (2d Cir. 1977).

79 Chatmon v. Churchill Trucking Co., 467 F. Supp. 79 (W.D. Mo. 1979).

80 Flack v. Cohen, 413 F.2d 278 (4th Cir. 1969).

81 Kostenbauder v. Secretary of Health, Educ. & Welfare, 71 F.R.D. 449, 453 (M.D. Pa. 1976).

federal courts have thus recognized that society as a whole must bear the price of governmental misconduct.[82]

While the First Circuit sympathized with the predicament of both the district court and the claimants in *Alameda,* it considered itself bound to follow the strictures of rule 55(e), section 405(g), and prior case law. Although the First Circuit's action represented a fair interpretation of the law, the district court's order should have been upheld. The important social policies behind the Act; the policy objectives behind the Federal Rules; the equity of the statute theory; and the inherent powers and duties of the court, all suggest that a judicial exception to rule 55(e) is appropriate in disability benefit proceedings.[83]

Thomas James Salerno

82 For an illustration of this principle in the criminal sphere, see the Supreme Court's discussion in Mapp v. Ohio, 367 U.S. 643, 659 (1961), invoking this principle to justify applying the exclusionary rule to the states.

83 As of this writing, the United States District Court for the District of Puerto Rico has reversed the Secretary's decision in the *Santiago* case. The district court complied with the evidentiary standard mandated by the First Circuit in reaching its decision.