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ADMINISTRATIVE LAW

D.E. V. DEPARTMENT OF THE NAVY: A REFUSAL TO RECOGNIZE A PRESUMPTION THAT EGREGIOUS OFF-DUTY MISCONDUCT ADVERSELY AFFECTS THE EFFICIENCY OF A GOVERNMENT AGENCY

A. INTRODUCTION

In *D.E. v. Department of the Navy*,[1] the Ninth Circuit refused to recognize a presumption that the off-duty misconduct of a civilian government employee adversely affected a government agency's performance.[2] The court held that egregious off-duty misconduct does not constitute grounds for dismissal without a showing that the conduct had an adverse effect on the agency. The court declared that federal law requires the agency to demonstrate, prior to dismissal of an employee, that an adverse effect on the efficiency of the service emanated from the employee's misconduct.[3]

Facts of the Case

On April 18, 1980, D. E.,[4] a mechanic employed at the Navy Facility in Ferndale, California, was removed from his job for off-duty conduct which allegedly adversely affected the employee/employer relationship.[5] The removal was based on the employee's plea of *nolo contendere*[6] to a child molestation

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1. 721 F.2d 1164 (9th Cir. 1983) (per Boochever, J.; the other panel members were Wright and Canby, JJ.).

2. With the holding in *D. E.*, the Ninth Circuit joined the Fifth Circuit as the only two circuits to expressly reject the rule that a presumption of adverse effect may arise from certain egregious off-duty misconduct.

3. 721 F.2d at 1169.

4. The court elected to use the defendant's initials to protect the privacy rights of those concerned. *Id.* at 1165.

5. *Id.* at 1166.

6. A plea of "nolo contendre" is an admission of every element of the offense and is tantamount to an admission of guilt, but is only a confession and does not dispose of the case or constitute a conviction or determination of guilt. Lott v. United States, 361 U.S. 421 (1961).

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charge involving his seven year old daughter.[7]

D.E. appealed the removal decision to the Merit Systems Protection Board (Board).[8] The Board reversed his removal, finding no evidence that D.E.'s misconduct affected his work.[9] However, the Board subsequently granted the Navy's petition to review the decision in light of the Board's recent decision in *Merritt v. Department of Justice*.[10] In *Merritt*, the Board held that a presumption[11] of nexus between the off-duty misconduct of an employee and the efficiency of the service may arise when the misconduct is egregious.[12] Relying on *Merritt*,[13] the Board reversed its previous decision, and held that a presumption of nexus between D.E.'s off-duty misconduct and the efficiency of the service was proper because of the egregiousness of the off-duty misconduct.[14] D.E. petitioned the Ninth Circuit for review of the Board's decision.[15]

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7. 721 F.2d at 1166. This was the Navy's second attempt to remove D.E. from his position because of the child molestation charge. The Navy first attempted to remove D.E. for conduct unbecoming a federal employee. That action failed because of procedural error.

8. *Id.* at n.2. The Merit Systems Protection Board is empowered to review the dismissal of a civilian employee by a government agency. Pub. L. No. 95-454, 91 Stat. 1138 (1978) (codified at 5 U.S.C. § 7701 (Supp. IV 1980)).

9. 721 F.2d at 1166.

10. 6 MSPB 493 (1981).

11. The court in *D.E.* acknowledged that the presumption at issue was a rebuttable presumption. 721 F.2d at 1168. A "rebuttable presumption" is a rule of evidence which shifts the burden of proof. Heiner v. Donnan, 285 U.S. 312 (1932).

12. 721 F.2d at 1168.

13. 6 MSPB at 509. On the same date that the Board decided *Merritt*, it also decided Doe v. National Security Agency, 6 MSPB 467 (1981). In both cases, the Board recognized a presumption of nexus between a civilian employee's off-duty misconduct and the efficiency of the service.

14. 721 F.2d at 1166.

15. The circuit court's jurisdiction to review D.E.'s petition is based on 5 U.S.C. § 7703 (Supp. IV 1980), which provides in part:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision. . . .(b)(1) [A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. . . .(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be — (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having

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B. Background

Removal of a Civilian Employee for Cause

Congress enacted the Civil Service Reform Act of 1978 (Act)[16] in an effort to make the federal civil service more efficient, more businesslike, less political and to ensure that government employees are hired and fired solely on the basis of their ability.[17] Under the Act, a government agency may remove a civilian employee "only for such cause as will promote the efficiency of the service."[18] The Act provides no standard for deter-

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> been followed; or (3) unsupported by substantial evidence. . . .

16. Pub. L. No. 95-454 91 Stat. 1111 (codified in scattered sections of 5 U.S.C.).

17. The Senate Report on Pub. L. No. 95-454 reads in pertinent part as follows:

> Throughout this country's history—and especially since 1883—there has been a tension between protections established to insure that employees are hired and fired solely on the basis of their ability, and the need of managers and policymakers to have flexibility to perform their jobs. Frequently, this tension is characterized as the "rights of employees" versus the "need for management flexibility." Although it has recognized this tension, the [Senate] Committee has viewed civil service reform from the standpoint of the public, rather than the more limited perspective of either the employee or manager. The "rights of employee's" to be selected and removed only on the basis of their competence are concomitant with the public's need to have its business conducted competently. Similarly, the need for Federal executives to manage their personnel responsibilities effectively can only be justified by the benefit derived by the public from such management flexibility. The employee has no right to be incompetent; a manager has no right to hire political bed fellows. The public has a right to an efficient and effective Government, which is responsive to their needs as perceived by elected officials. At the same time, the public has a right to a Government which is impartially administered. One of the central tasks of the civil service reform bill is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons. This balanced bill should help to accomplish that objective. It is an important step toward making the government more efficient and more accountable to the American people.

S. Rep. No. 969, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2726.

18. 5 U.S.C. § 7513(a) (Supp. IV 1980). That statute provides in pertinent part: "(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service."
This same standard governed the removal of civilian employees before the Civil Service Reform Act of 1978. *See* 5 U.S.C. § 7501(a) (1976).

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mining the required "cause" for removal. However, regulations implementing the Act[19] provide that "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct" are among the reasons that constitute the required cause.[20] There is no definition of these terms in the regulations, and the regulations do not elaborate further upon the statutory requirement. The Act also prohibits discrimination against any employee "on the basis of conduct which does not adversely affect the performance of others . . . ."[21]

In *Sherman v. Alexander*,[22] the Seventh Circuit established a standard for determining cause for removal of a civilian employee. The court declared that before removing a civilian employee for off-duty misconduct, the government agency must make two determinations. First, the agency must determine that the employee actually committed the conduct.[23] Second, the agency must conclude that the employee's removal will promote the efficiency of the service.[24] The second determination, the focus of the Ninth Circuit inquiry in *D.E.*,[25] requires the showing of a nexus between the employee's misconduct and some identifiable detriment to the efficiency of the service.[26]

In *Doe v. Hampton*,[27] the District of Columbia Circuit elaborated on the nexus requirement. That court declared that there must be a clear and direct relationship demonstrated between the grounds for disciplinary action and either the employee's ability to perform his or her duties or some other legitimate government interest.[28] Absent the showing of a nexus, the removal action will be dismissed as arbitrary and capricious. Several circuits, in adopting *Hampton*, require a showing of a nexus be-

19. 5 C.F.R. §§ 731.201-.401 (1968).

20. *Id.* at § 731.201(b).

21. 5 U.S.C. § 2302(b) (10) (Supp. IV 1980).

22. 684 F.2d 464 (7th Cir. 1982), *cert. denied* ___ U.S. ___, 103 S. Ct. 752, 74 L.Ed. 2d 970 (1983).

23. *Id.* at 468.

24. *Id.*

25. Because the defendant in *D.E.* did not dispute the child molestation charges, the first requirement—that the employee actually committed the misconduct—was not at issue. 721 F.2d at 1166.

26. 684 F.2d at 468.

27. 566 F.2d 265 (D.C. Cir. 1977).

28. *Id.* at 272.

tween off-duty misconduct and the efficiency of the service.[29]

The decisions are generally divided into those in which the employee's off-duty misconduct is directly related to the employee's on-duty responsibilities[30] and those in which the off-duty misconduct is not directly related to the employee's on-duty responsibilities.[31]

Giles v. United States[32] is an example of the former. There, the Court of Claims[33] upheld the dismissal of an Internal Revenue Service agent, whose duties included the securing of payments and filings of returns from delinquent taxpayers, for failure to file timely tax returns. The court found that the employee's misconduct undercut the service's efforts to encourage voluntary compliance with its rules and regulations. The court explained that condoning such conduct could impair the credibility of the service with its officers and with the public generally.[34]

Where the misconduct occurred off-duty, courts refuse to sustain removal where no nexus between the employee's misconduct and the performance of the employee or the service exists.[35] For example, when a product inspector employed by the Army was convicted of felony possession of controlled substances,[36] or when a budget analyst for the National Aeronautics and Space Administration was accused of homosexuality,[37] or when an Army intelligence operations officer was accused of sexual mis-

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29. *See* Young v. Hampton, 568 F.2d 1253 (7th Cir. 1977); Giles v. United States, 553 F.2d 647 (Ct. Cl. 1977); Bonet v. United States Postal Service, 661 F.2d 1071 (5th Cir. 1981); Embry v. Hampton, 470 F.2d 146 (4th Cir. 1972) and Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

30. *See, e.g.*, Wroblaski v. Hampton, 528 F.2d 852 (7th Cir. 1976); *Giles*, 553 F.2d at 647 and *Embry*, 470 F.2d at 146.

31. *See, e.g.*, Young 568 F.2d at 1253; *Norton*, 417 F.2d at 1161; *Bonet*, 661 F.2d at 1071 and Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978).

32. 553 F.2d 647 (Ct. Cl. 1977). Similarly, the Seventh Circuit in *Wroblaski*, 528 F.2d at 852, upheld the dismissal of an Immigration and Naturalization Service officer for having nonimmigrant aliens in her home performing domestic services.

33. Pub. L. 97-164 § 144(1), 96 Stat. 45, amended 5 U.S.C. § 7703(b)(1) (Supp. IV 1980) by substituting "United States Court of Appeals for the Federal Circuit" for "Court of Claims or a United States court of appeals."

34. 553 F.2d at 650.

35. *See supra* note 31.

36. *Young*, 568 F.2d at 1253.

37. *Norton*, 417 F.2d at 1161.

conduct,[38] failure by the agency to show the necessary nexus between the off-duty misconduct and the performance of the employee or the agency has resulted in reversal of the employee's dismissal.

Prior to *D.E.*, the Ninth Circuit, like the majority of circuits, required the showing of a nexus between off-duty misconduct and the efficiency of the service. In *Singer v. United States Civil Service Commission*,[39] the Ninth Circuit's leading decision dealing with removal of a civilian employee for off-duty misconduct,[40] the court reversed the dismissal of an employee of the Equal Employment Opportunity Commission accused of homosexual conduct. The Ninth Circuit, adopting the reasoning of the District of Columbia Circuit in *Norton v. Macy*,[41] held that the court at least must be able to discern a reasonably foreseeable connection between an employee's potentially embarrassing conduct and the efficiency of the service.[42]

Presumption of Nexus

Neither the Act[43] nor its implementing regulations[44] expressly permit an agency to presume a nexus between an employee's off-duty conduct and the efficiency of the service.

Congress expressly placed the burden of going forward and the burden of proof in removal actions involving civilian employees on the agency.[45] The Act revised the standards governing appeals from actions dismissing civilian employees to provide addi-

38. Hoska v. United States Department of the Navy, 677 F.2d 131 (D.C. Cir. 1982).

39. 530 F.2d 247 (9th Cir. 1976).

40. *See also*, Mindel v. United States Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970) and Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973).

41. *See supra* note 37.

42. 530 F.2d at 253.

43. *See supra* note 16.

44. *See supra* note 19.

45. The original version of the bill placed the burden of proof on the employee. The Senate version of the bill, which ultimately was adopted, rejected the proposed shifting of the burden. With regard to that burden, the Senate Report states "[a]s under current law, the agency would continue to have the burden of going forward with its case first, and the burden of convincing the decision maker in the end that its action was lawful." S. Rep. No. 969, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2777.

tional protection to employees dismissed for misconduct.[46] The new standard makes it less difficult for an employee to appeal an agency's adverse action.[47] The prior standard provided that the agency's action would be sustained if it was supported by a preponderance of the evidence.[48] Congress modified the standard so that the agency's action will not be sustained if there was (1) a procedural error which substantially impaired the employee's rights; (2) prohibited discrimination; or (3) a decision not supported by substantial evidence.[49]

While the Act provides that an agency may consider any conviction of an employee in determining the employee's suitability or fitness for employment,[50] conviction of a crime does not *per se* disqualify an individual from employment.[51]

Despite the Act and a substantial number of cases requiring a nexus between the employee's misconduct and the efficiency of the service,[52] the Board, and a minority of the courts[53] have recognized a presumption of nexus.

The Board first recognized the presumption in *Merritt*. In that decision, the Board relying on *dicta* in *Young v. Hamp-*

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46. *Id.* at 2776.

47. *Id.* The Act also changed the standard governing appeals from actions based on unacceptable performance. Congress revised the standard to make it more difficult for an employee to appeal an agency's adverse action. Congress wanted to avoid unnecessary reversals of agency actions involving unacceptable performance because of procedural error or because the judgment of the agency was not given sufficient weight. *Id.*

48. *Id.*

49. *Id.*

50. *See supra* note 21. That provision, which prohibits discrimination against any employee provides that "nothing . . . shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee . . . for any crime. . . ."

51. The House version of the antidiscriminatory provision of the bill was modified so that conviction of a crime may be taken into consideration when determining fitness or suitability of an individual for employment. Joint Explanatory Statement of the Committee on Conference, H. Conf. Rep. No. 1717, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2864. The Report specifically states, however, that "[t]his provision is not meant as an encouragement to take conviction of a crime into account when determining suitability. . . . Nor is it to be inferred that conviction of a crime is meant to disqualify an employee. . . ." *Id.*

52. *See Norton*, 417 F.2d at 1161; *Young*, 568 F.2d at 1253 and *Phillips*, 586 F.2d at 1007.

53. *Merritt, supra* note 10; Doe v. National Security Agency, *supra* note 13; Gueory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974); and Cooper v. United States, 630 F.2d 727 (Ct. Cl. 1980).

ton,[54] permitted a presumption of nexus to arise as a result of the off-duty possession and use of marijuana by a correctional officer employed by the Bureau of Prisons.[55]

In *Gueory v. Hampton*,[56] the District of Columbia Circuit held that conviction of a postal employee for manslaughter demonstrated the requisite nexus without a showing of an explicit deleterious effect on the efficiency of the service.[57] However, the court expressly stated that all crimes do not provide the nexus, and left the difficult task of drawing a line of demarcation for a future time.[58]

In *Cooper v. United States*,[59] the United States Court of Claims reviewed the removal of an electronics engineer from a naval training equipment center for off-duty acts of sexual misconduct.[60] While not directly discussing the nexus requirement, the court stated that it had no quarrel with the government's finding that sexual misconduct adversely affected the employer-employee relationship.[61] The court remanded the case for a determination of whether the misconduct actually occurred.[62]

Prior to the decisions in *Gueory* and *Cooper*, the Fifth Circuit in *Norton v. Macy*[63] observed that a presumption of "immorality" tends to discourage careful analysis because it unavoidably connotes a violation of divine, Olympian, or otherwise universal standards of rectitude.[64] In *Bonet v. United States Postal Service*,[65] the Fifth Circuit went a step further and expressly rejected the idea that a presumption of nexus arises in

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54. 568 F.2d at 1253. The court in *Young* stated "in certain egregious circumstances, where the adverse effect of retention on the efficiency of the service could, in light of the nature of the conduct, reasonably be deemed substantial . . . the nature of the misconduct may 'speak for itself.' " *Id.* at 1257.
55. 6 MSPB at 509.
56. 510 F.2d at 1222.
57. *Id.* at 1226.
58. *Id.*
59. 639 F.2d at 727.
60. *Id.* at 728. The employee in that case had been charged with indecent conduct and sexual battery involving a five year old child.
61. 639 F.2d at 730.
62. *Id.*
63. *See supra* note 37.
64. *Id.* at 1165.
65. 661 F.2d 1071 (5th Cir. 1981).

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certain egregious circumstances.[66] In *Bonet*, the court reversed the removal of a postal manager indicted, but not convicted, for indecency with a child.[67] The Board had affirmed the employee's removal, finding that the misconduct constituted a violation of the code of ethical conduct for employees, which prohibited any employee from engaging in criminal, dishonest, notoriously disgraceful or immoral conduct.[68]

The *Bonet* court observed that the agency's reliance on internal regulations proscribing certain types of conduct amounted to a presumed or *per se* nexus.[69] The court held that the burden of showing the required nexus between the misconduct and the efficiency of the service lay with the agency and may not be shifted to the employee by presumption or application of a *per se* rule.[70] The court reasoned that the Act precluded the characterization of certain off-duty conduct as so obnoxious as to create, *per se*, the required nexus.[71] Thus, the *Bonet* court refused to relieve the agency of its statutory duty to show a connection between the employee misconduct and the efficiency of the service.[72]

Prior to the decision in *D.E.*, the Ninth Circuit had not addressed the specific issue of whether a presumption of nexus between an employee's off-duty misconduct and the efficiency of the service may be raised.

C. THE NINTH CIRCUIT DECISION

In *D.E.*, the Ninth Circuit considered two issues, whether the egregiousness of off-duty misconduct can give rise to a presumption of nexus between the misconduct and the agency's performance, and whether in the absence of such a presumption, the evidence showed that the employee's misconduct adversely affected the efficiency of the service.

The Ninth Circuit, in rejecting the Board's decision that a

66. *Id.* at 1077.
67. *Id.* at 1073.
68. *Id.* at 1076.
69. *Id.* at 1077.
70. *Id.* at 1078.
71. *Id.* at 1077.
72. *Id.*

presumption of nexus was raised by the egregiousness of D.E.'s misconduct, held that such a presumption permits a government agency to remove an employee without offering evidence of actual adverse impact on the service.[73] The court declared that such a presumption arbitrarily shifts to the employee the burden of showing that the employee's continued employment has no adverse effect on the efficiency of the service.[74] The court concluded that Congress, in enacting the Civil Service Reform Act of 1978, intended to require the agency to prove that removal based on off-duty conduct would promote the efficiency of the service.[75]

The Court, acknowledging that some circuits have recognized a presumption of nexus based on egregious conduct, summarily disagreed with the decisions by those circuits.[76] The court declared that the Board's reliance in *Merritt* on the *dictum* in *Young v. Hampton*,[77] which permitted a presumption of nexus to arise in certain circumstances, was not conclusive.[78] In distinguishing *Young* from the present case, the court hypothesized that a conviction of off-duty misconduct directly related to the employee's on-duty responsibilities could reasonably be regarded as having a substantial adverse effect on the efficiency of the service.[79] However, the court reasoned that where the misconduct is totally unrelated to the employee's duties, as was the case in *D.E.*, no basis for a conclusion of nexus under the reasoning in *Young* existed.[80] The court noted that even before the Act, courts generally were unwilling to presume that a discharge will promote the efficiency of the service.[81]

The court further held that without the presumption of nexus, the Board had failed to produce substantial evidence showing a nexus between the defendant's misconduct and the agency's performance.[82] The court observed that the agency had

73. 721 F.2d at 1168.
74. *Id.*
75. *Id.* at 1169.
76. *Id.*
77. *See supra* note 36.
78. 721 F.2d at 1168.
79. *Id.*
80. *Id.*
81. *Id.* at 1169.
82. *Id.*

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failed to show either fault with D.E.'s job performance or that his off-duty conduct had been a source of "notoriety, embarrassment or discomfiture" to the agency. The court noted that the purely conclusory statements of his superiors that they no longer had any "trust or confidence" in him fell short of the substantial evidence required by the Act for removal.[83]

D. Analysis

Unfortunately, the Ninth Circuit's decision in *D.E.* fails to establish a standard for determining the required nexus in cases involving the dismissal of an employee for off-duty misconduct.[84] Moreover, it is unlikely that the Ninth Circuit will develop this standard since actions involving the discharge of civilian employees reach federal courts only upon appeal by the discharged employee. No judicial review is available to employing agencies when the Board reverses the agency's removal action for failure to prove the required nexus.[85] Consequently, no opportunity exists for federal courts to inform the Board whether it erred in reversing an agency's removal of an employee. Judicial review exists only when the Board erred in sustaining a removal. As a result, the judicial decisions only provide outer limits for determining when removal of an employee fails to promote the efficiency of the service. They provide no such limits for determining when the removal of an employee promotes the efficiency of the service.

The Ninth Circuit appropriately refused to relieve the agency of its burden to establish the required nexus. As the court observed, a presumption of nexus would shift the burden of proof from the agency to the employee.[86] Proving the required nexus places no onerous burden on the agency. It merely requires the agency to comply with a standard of reasonableness and nonarbitrariness. Conversely, the adverse effect of shifting the burden to the employee would be substantial. It would require every government employee charged with serious off-duty misconduct to prove that his or her continued employment had

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83. *Id.*

84. The Ninth Circuit specifically left unanswered the issue of whether "certain egregious circumstances" could ever be found to be deemed to have a substantial effect on an employee's job performance. 721 F.2d at 1168.

85. *See supra* note 15.

86. 721 F.2d at 1168.

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no adverse effect on the efficiency of the service, which would be a difficult burden to meet.

Furthermore, Courts which recognize a presumption of nexus have failed to establish criteria for determining under what circumstances an employee's off-duty misconduct could be considered so "egregious" as to give rise to a presumption of nexus. Without principled standards, a presumption of nexus tacitly permits and even encourages arbitrary and discriminatory actions by an agency. That is, a presumption of nexus essentially enables government agencies to purge themselves of persons whose conduct may be frowned upon by their superiors under the pretense of promoting the efficiency of the service. Government agencies thereby would be able to require nonconformists to comport themselves according to approved or appropriate lifestyles. Hence, the Ninth Circuit's rejection of a presumption of a nexus between egregious off-duty misconduct and the agency's performance represents a positive step toward preventing abuses of executive discretion in agency personnel actions.

It is the judiciary, not a government agency, that is empowered to punish the criminal conduct of civilians.[87] An agency should not be allowed to dismiss a civilian employee as a penalty for criminal behavior beyond that prescribed by law when there is no showing that the misconduct had any adverse effect on the agency.

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87. *Embry*, 470 F.2d at 147.

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TODD SHIPYARDS: THE NINTH CIRCUIT CLEARS THE AIR FOR OCCUPATIONAL DISEASE VICTIMS

A. INTRODUCTION

In *Todd Shipyards Corporation v. Black*,[1] the Ninth Circuit found an employer covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[2] fully liable for an employee's occupational disability even though a subsequent non-covered employer contributed to the disability. The court further held that the benefits would be based on the employee's income at the time the disability became known, rather than at the time of exposure to the substance which caused the disease.

Plaintiff, Gerald L. Black, worked for Todd Shipyards from 1942 through 1945, and for Boeing Aircraft Corporation from 1951 until he was forced to quit for health reasons in 1977.[3] His condition was diagnosed as asbestosis, a severe lung disease caused by inhalation of asbestos particles.[4] Black had been exposed to asbestos during his employment at both companies.[5]

Black filed a claim under the LHWCA against Todd and its insurer, Fireman's Fund Insurance Company.[6] The administrative law judge (ALJ)[7] found Todd liable and determined that

1. 717 F.2d 1280 (9th Cir. 1983) (per Reinhardt, J.; the other panel members were Browning, J., and Tuttle, J., sitting by designation).

2. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976).

3. 717 F.2d at 1282-83. Black's nose bled and he coughed up blood. On May 27, 1977, the upper right lobe of Black's lung was removed because of squamous cell carcinoma. Black died of this condition on April 2, 1981, before litigation was completed. His widow pursued the action as provided by the LHWCA. *Id.*

4. 717 F.2d at 1283. Asbestosis has been shown to be a cause of cancer, especially of the bronchial tubes and lining of the lungs. 1 SCHMIDT'S, ATTORNEY'S DICTIONARY OF MEDICINE A-308.

5. 717 F.2d at 1282-83. At Todd Shipyards, the asbestos material was thrown about "like snowballs." At Boeing, asbestos was used in gloves and fireproof curtains. *Id.*

6. *Id.*

7. *Id.* Claims under the LHWCA are filed with the deputy commissioner's office. If the parties dispute the facts, the matter is heard by an ALJ. The ALJ's decision may be appealed to the Benefits Review Board (BRB), a three-member panel. Appeals from the BRB are taken to the Federal Circuit Court of Appeals having jurisdiction over the area where the injury occurred. 33 U.S.C. §§ 919, 921 (1976). The BRB is an administrative body, its interpretations are not entitled to any deference from the courts. Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 278 n.18 (1980).

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Black's benefits would be based on 1977 wages.[8] The Benefit Review Board (BRB) upheld the decision.[9] On appeal to the Ninth Circuit, Todd contended that Black's subsequent exposure at Boeing relieved it of liability; secondly, even if Todd were liable, liability should be apportioned between itself and Boeing; and finally, benefits should be based on Black's wages at the time of exposure to the asbestos rather than the time of manifestation of the disease.[10]

B. Background

Statutory Framework

Prior to the enactment of the LHWCA in 1927, certain classes of maritime workers, such as loaders, unloaders, repairers, and builders of ships[11] were not covered by either maritime or state workers' compensation laws.[12] In enacting the LHWCA, Congress intended to compensate these workers for wages lost due to disability or death suffered as a result of injuries sustained while employed "on the navigable waters"[13] of the United States.[14] The LHWCA is the worker's exclusive remedy against the employer,[15] and the employee is not required to establish the employer's fault.[16] The injured[17] employee must file a claim within one year from the time the employee is aware or reasonably should be aware of the injury.[18] When an injured employee

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8. 717 F.2d at 1283. Black's wages in 1945 were $92.00 per week. His 1977 wages were $293.86 per week. *Id.* at 1287.

9. *Id.* at 1283. The BRB was sharply divided. Two members ruled Todd fully liable, a dissenting member said Boeing should be liable. Of the two who held Todd liable, one thought Black's benefits should be based on 1945 wages, the other thought 1977 wages should be used. The dissenting member refused to rule on the benefits issue. A *per curiam* decision was issued allowing the ALJ's decision to stand. Black v. Todd Shipyards Corp., 13 Ben. Rev. Bd. Serv. (MB) 682 (June 12, 1981).

10. 717 F.2d at 1282.

11. *See* 33 U.S.C. § 903 (1976).

12. Stocker, *An Overview of the LHWCA*, 12 Forum 674, 675 (1977).

13. "Navigable waters" include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 902(4) (1976).

14. *Stocker, supra* note 12 at 675.

15. The employee may not bring a suit against the employer for negligence. 33 U.S.C. § 905(a) (1976).

16. 33 U.S.C. § 904 (1976).

17. "Injury" includes "such occupational disease or infection as arises naturally out of such employment . . . " 33 U.S.C. § 902(2) (1976).

18. 33 U.S.C. § 913(a) (1976).

establishes the employer's liability,[19] that employee is entitled to compensation based on his or her wages "at the time of injury."[20]

Assessment of Liability

The LHWCA contains no provisions addressing the issue of liability among multiple culpable employers. The Second Circuit in *Travelers Insurance Co. v. Cardillo*,[21] established the "last employer rule," which operates to assess full liability for an injured worker's benefits to the last employer that contributed to the worker's injuries.[22] In rejecting an apportionment of liability, the *Cardillo* court reasoned that the last employer approach was the most equitable to employers and injured employees.[23] The court observed that a last employer rule was within the intent of the LHWCA for the reason that Congress had rejected suggestions to apportion liability during the creation of the LHWCA.[24] Five other circuits have recognized the *Cardillo* rule without deviation.[25]

The Ninth Circuit in *Cordero v. Triple A Machine Shop*,[26]

19. The employer is liable if the injury arises from the employment regardless of the employer's fault. 33 U.S.C. §§ 903, 904 (1976).

20. 33 U.S.C. § 910 (1976). Congress amended the LHWCA in 1972 to increase benefits in an attempt to counterbalance the effects of inflation. Amendments to the Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 92-576, 86 Stat. 1251 (1972). In providing adequate benefits Congress intended not only to meet the financial needs of disabled employees, but also to motivate employers to provide the fullest measure of on-the-job safety by having employers bear the cost of unsafe conditions. H.R. Rep. No. 1441, 92d Cong., 2d Sess. 2, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698, 4699.

21. 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The court joined several cases with similar facts concerning employees losing their hearing due to exposure to occupational noise. In each situation all employers were covered by the LHWCA. *Id.* at 139-142.

22. *Id.* at 145.

23. *Id.* at 144-45. The administration of the LHWCA would be facilitated by eliminating the delays caused by determining multiple liability. *Id.* at 145.

24. *Id.* at 145.

25. Hon v. Director, Office of Workers' Compensation Programs, 699 F.2d 441, 443 (8th Cir. 1983); Newport News Shipbuilding & Drydock Co. v. Fishel, 694 F.2d 327, 329 (4th Cir. 1982); Smith v. Aerojet-General Shipyards, Inc., 647 F.2d 518, 523 (5th Cir. 1981); General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 212 (2d Cir. 1977); Cordero v. Triple A Machine Shop, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

26. 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

adopted the *Cardillo* rule and articulated its rationale for applying the rule: the ultimate fairness of the rule lies in the fact that each maritime employer will be the last employer a proportionate share of the time.[27]

Effect of Subsequent Non-Covered Employment

In *Fulks v. Avondale Shipyards, Inc.*,[28] the Fifth Circuit ruled that exposure to harmful substances during subsequent noncovered activity did not relieve an employer of liability under the LHWCA.[29] Rejecting the contention that the LHWCA was not applicable because the last exposure did not occur on navigable waters, the *Fulks* court reasoned that the *Cardillo* rule was designed to simplify liability assessment among multiple employers and was not meant to allow an otherwise responsible employer to escape liability.[30] The *Fulks* court assessed liability for LHWCA benefit to Avondale despite the marginal amount of exposure which occurred during LHWCA-covered employment.[31]

In *Green v. Newport News Shipbuilding & Drydock Co.*,[32] the BRB determined that subsequent exposure by a noncovered employer did not exempt a previous LHWCA-covered employer from liability.[33] Noting that the *Cardillo* rule applies only to LHWCA-covered employers, the BRB found it unnecessary to resolve the issue of the subsequent employer's liability.[34] Relying on the *Fulks* reasoning that the *Cardillo* rule was designed to assess liability, not to make claimants ineligible for LHWCA benefits, the BRB held Newport News liable for Green's injuries.[35]

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27. *Id.* at 1336. No court has apportioned liability under the LHWCA. *See* Fitzhugh, *Disheartening Prospects: The Stress of Occupational Disease Cases on the Longshoremen's and Harbor Workers' Compensation Act*, 22 S. Tex. L.J. 471, 479 (1982).

28. 637 F.2d 1008 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981).

29. 637 F.2d at 1010. Fulks worked as a sandblaster for sixteen years, but only two months of that time was on navigable waters. Fulks developed silicosis from inhaling sand particles. *Id.*

30. *Id.* at 1011-1012.

31. *Id.*

32. 13 Ben. Rev. Bd. Serv. (MB) 562 (June 12, 1981).

33. *Id.* at 563. The claimant had been exposed to asbestos while working for Newport News and may have been further exposed during subsequent employment. *Id.*

34. *Id.* at 566.

35. *Id.* at 565. In an unpublished opinion, Green v. Newport News Shipbuilding &

Time of Injury

Although no definition of "time of injury" appears in the LHWCA, in *Urie v. Thompson*,[36] the Supreme Court determined that under the Federal Employers' Liability Act (FELA),[37] "time of injury" is the time of manifestation for statute of limitations purposes.[38] In *Urie*, the claimant brought suit under the FELA after the three-year statute of limitations had run, claiming that he could not know of his injuries until the symptoms manifested themselves years after the exposure.[39] Reasoning that the worker's ignorance of his condition should not result in a denial of a remedy, the Court held that the statute of limitations did not commence until the injury manifested itself.[40] Five circuit courts subsequently have applied *Urie* reasoning in determining the LHWCA statute of limitations.[41]

Circuit courts have not defined "time of injury" for the purpose of calculating benefits, and the BRB has been inconsistent in arriving at benefits in cases involving occupational diseases with long latency periods. In the most recent decision on this issue, *Dunn v. Todd Shipyards*,[42] the BRB reversed an earlier decision which calculated benefits based on income at the time of manifestation of injury.[43] In *Dunn*, the BRB examined several possible approaches to calculating benefits[44] before deciding that the "time of exposure" approach was the most appropriate.[45]

Drydock Co., 81-1668 (4th Cir. 1983), the Fourth Circuit remanded the case to the BRB to determine the issue of subsequent exposure. The BRB determined there was no subsequent exposure. 15 Ben. Rev. Bd. Serv. (MB) 465 (July 29, 1983).

36. 337 U.S. 163 (1949).

37. Federal Employers' Liability act, 45 U.S.C. §§ 51-60 (1976).

38. 337 U.S. at 170. The claimant developed silicosis caused by exposure to dust entering the locomotive in which he worked. *Id.*

39. 337 U.S. at 165.

40. *Id.* at 170.

41. *Hon*, 699 F.2d at 443; Todd Shipyards Corp. v. Allan, 666 F.2d 399, 401 (9th Cir. 1982); *Aerojet-General Shipyards, Inc.*, 647 F.2d at 52; Stancil v. Massey, 436 F.2d 274, 276-77; (D.C. Cir. 1970); Aerojet-General Shipyards, Inc. v. O'Keeffe, 413 F.2d 793, 795 (5th Cir. 1969); *Cardillo*, 225 F.2d at 142-43.

42. 13 Ben. Rev. Bd. Serv. (MB) 647 (June 12, 1981).

43. *Dunn* reversed Stark v. Bethlehem Steel Corp., 6 Ben. Rev. Bd. Serv. (MB) 600 (August 31, 1977), *reaff'd on reconsideration*, 10 Ben. Rev. Bd. Serv. (MB) 350 (March 30, 1979).

44. 13 Ben. Rev. Bd. Serv. (MB) at 663. The BRB examined "time of injury" as being "time of exposure," "time of disability," and "time of manifestation." *Id.*

45. The reasons the *Dunn* BRB found were: First, the date of exposure is easiest to

C. Court's Analysis

Liability Assessment

The Ninth Circuit, addressing the issue of how to assess liability, rejected Todd's contention that the *Cardillo* rule should be applied to assess liability only to the last employer, Boeing.[46] Noting that the purpose of the *Cardillo* under *Fulks*[47] was to simplify liability assessment among culpable LHWCA-covered employers, the Ninth Circuit reasoned that application of the rule is limited to situations where all the employers are covered by the LHWCA.[48] The court suggested that strict application of the *Cardillo* rule could result in denial of compensation to an injured worker, defeating the LHWCA's purpose of providing covered workers with compensation for their injuries.[49] The court also compared the last covered employer rule to state workers' compensation laws, noting that many states allow a worker to claim against the last employer in that state even when a subsequent employer in a different state contributed to the worker's injuries.[50]

With respect to Todd's contention that liability should be apportioned, the court noted that the congressional intent in enacting the LHWCA was to assure full compensation to injured workers without burdening them with the necessity of litigating proportions of liability.[51] The court, noting that *Cardillo* and *Cordero* prohibited the apportionment of liability under the

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ascertain, therefore litigation is simplified. Second, the date of exposure will always parallel the worker's dates of employment. Third, the employer's insurance may have expired since the time of the injured worker's employment. Fourth, retired workers have no wages on which to base benefits. Fifth, the date of manifestation approach may subject employers to liability in excess of that anticipated when the insurance was purchased. *Id.* at 663-665.

46. 717 F.2d at 1285.

47. *See supra* notes 28-31 and accompanying text.

48. 717 F.2d at 1285.

49. *Id.*

50. *Id.* at 1285-86, *citing* Garner v. Vanadium Corp. of America, 194 Colo. 358, 572 P.2d 1205 (1977), and Smith v. Lawrence Baking Co., 370 Mich. 169, 121 N.W. 2d 684 (1963). For a discussion of the last employer rule as applied in both federal and state laws, *see* 4 A. Larson, *Law of Workman's Compensation* § 95.21 (1981).

51. 717 F.2d at 1286. The court also rejected as irrelevant Todd's argument that Black may have a remedy against Boeing under Washington State Workers' Compensation Law. The court noted that state law may not grant Black full recovery and the result would be that Black would not be adequately compensated. *Id.* at 1286 n.5.

LHWCA, referred to the difficulty of apportioning fault for a disease that had a long latency period.[52] The court concluded that it would be practically impossible to apportion liability with respect to the injury or disease caused by each employer.[53]

Time of Injury

Subsequent to finding Todd liable, the court addressed the problem of determining the amount of Black's benefits. The court acknowledged the trend in other workers' compensation system of defining "time of injury" as "time of manifestation" for commencing the statute of limitations.[54] Recognizing that the purpose behind the LHWCA is to compensate workers for wages lost due to occupational injuries,[55] the court rejected the "time of exposure" approach because compensation would be based on earnings unrelated to the worker's income at the time he or she must stop working.[56]

The court found the "time of manifestation" approach appropriate in the context of asbestosis, noting that while asbestosis begins when asbestos fibers are inhaled, over ninety percent of urban dwellers have some asbestos-related scarring.[57] Since most of these people will never develop asbestosis, the court found it unrealistic to consider a person "injured" at the time of the initial exposure.[58]

In rejecting the "time of exposure" approach espoused by *Dunn*,[59] the court explained the "time of manifestation" is easier to ascertain in occupational disease cases since long latency periods render impossible the precise determination of the moment the exposure became injurious.[60] The court stated that the LHWCA requires only that the injury arise from the worker's

52. *Id.* at 1286.
53. *Id.*
54. *Id.* at 1290.
55. Palacios v. Campbell Industries, 633 F.2d 840, 843 (9th Cir. 1980).
56. 717 F.2d at 1289-90.
57. *Id.*, *citing* Eagle-Picher Industries v. Liberty Mutual Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982).
58. 717 F.2d at 1290.
59. *See supra* notes 42-45 and accompanying text.
60. 717 F.2d at 1290.

employment,[61] not that the injury manifest itself during the course of employment.[62] Additionally, the court found no reason to burden a claimant with any inadequacies in the employer's insurance coverage.[63] Finally, provided the worker is retired when manifestation of the injury occurs, benefits could be based on the wages earned during the last year of active employment.[64]

D. SIGNIFICANCE

The *Todd* decision provides precise rules for future administration of the LHWCA in the Ninth Circuit. Since it is estimated that up to eleven million workers were exposed to asbestos before the dangers became widely known in the late 1960's,[65] it is likely that many workers will be filing LHWCA claims for asbestosis and asbestos-related injuries. The *Todd* rules facilitate assessment of liability and provide a realistic standard for computing benefits in situations involving an occupational disease.

The BRB decisions in *Black* and *Dunn* illustrate the problems administrators faced prior to *Todd.* On the same day, two BRB panels reached opposite decisions with respect to the definition of "time of injury" for the purpose of calculating benefits.[66] Furthermore, neither BRB panel was able to reach a unanimous decision.[67] After *Todd*, claimants, employers, and administrators can expect a uniform determination of benefits in cases involving occupational diseases.

The Ninth Circuit's definition of "time of injury" achieves a realistic measurement of a claimant's loss. A person's wages in 1945 bear little relationship to earnings lost due to disability in 1977. Over a period of years, factors such as inflation and acquired work skills increase the income of most workers. Given that the purpose of the LHWCA is to compensate workers for

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61. *See* U.S.C. § 910 (1976).

62. 717 F.2d at 1291.

63. *Id.* at 1291-92.

64. *Id.* at 1292.

65. *Fitzhugh, supra* note 27, at 478. For a discussion of the increasing problems of occupational disease litigation, *see* Smith & Channon, *The Rising Storm*, 17 Forum 139 (1982).

66. *See supra* notes 9, 42-45 and accompanying text.

67. *Id.*

wages lost due to disability, compensation for last wages should be commensurate with an employer's actual earning capacity over the period covered.

Additionally, the *Todd* approach is consistent with a majority of other compensation systems in its method of determining benefits, in that the "time of manifestation" approach prevails in most jurisdictions.[68] *Todd* also adds consistency within the LHWCA to judicial definitions of terms. Previous courts have defined "time of injury" as "time of manifestation of disease" under the LHWCA statute of limitations.[69] It seems inconsistent to define the same term as "time of exposure to a harmful substance" for another provision of the LHWCA. The court disposed of this anomoly with its definition of "time of injury" as "time of manifestation" for the purpose of calculating benefits.

While the *Todd* decision might appear unfair to Todd Shipyards with respect to liability assessment, in that liability was not assessed in proportion to fault, the major impediment to more fairly assessing liability under the facts of the case was the LHWCA's lack of jurisdiction over Boeing. The *Cardillo* reasoning[70] is inapplicable where there is a noncovered employer, because a noncovered employer is outside the LHWCA's jurisdiction and therefore cannot be held liable a proportionate number of times. Implicit in the *Todd* decision is a balancing between implementation of Congressional intent to compensate workers and the desire to assess liability equitably among multiple employers. The court feared that Black would not be fully compensated if he were forced to seek relief from state workers' compensation laws.[71] Accordingly, the court sacrificed the desire to devise a more equitable scheme of liability in favor of following the LHWCA directive of compensating workers.

68. *See* 2 A. Larson, *Law of Workman's Compensation* § 60.11(d) (1979). One example is California, which has utilized the "time of manifestation" approach for several decades. Cal. Lab. Code § 5412 (West 1976); Argonaut Mining Co. v. Industrial Accident Comm'n, 104 Cal. App. 2d 27, 31, 230 P.2d 637, 639 (1951).

69. *See supra* notes 36-41 and accompanying text.

70. *See supra* notes 21-27 and accompanying text.

71. *See supra* notes 48-49 and accompanying text.

E. Conclusion

The *Todd* decision is encouraging to maritime workers because the court's ruling furthers congressional efforts to protect these workers. After *Todd*, workers are covered even if subsequent employment contributes to disabilities, and compensation will be based on a realistic method of computation when the injury manifests itself long after employment ceased.

Had the *Todd* court devised a method of apportioning liability between covered and non-covered employers, the worker would be forced to bring a second claim under state law because federal courts would have no jurisdiction to enforce a decision against a non-covered employer. This result would be contrary to past legislative and judicial efforts to relieve LHWCA claimants of complicated litigation.[72]

*Herbert F. Miller**

OTHER DEVELOPMENTS IN ADMINISTRATIVE LAW

A. Battling The Secretary: The Ninth Circuit's Protection Against Wrongful Termination of Social Security Benefits

In a series of recent cases, the Ninth Circuit has repeatedly found that the Secretary of the Department of Health and Human Services has wrongfully terminated benefits to recipients of Supplemental Security income (SSI), and Social Security Disability Income (SSDI).

In the landmark case of *Patti v. Schweiker*,[1] the Ninth Circuit held that once the Secretary has found a disability to exist,

72. *See supra* note 51.

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a presumption arises that the disability continues to exist,[2] and the Secretary has the burden of coming forward with evidence that the claimant's condition has changed.[3]

In that case, Patti had undergone a lumbar laminectomy in 1973, and began receiving SSDI benefits in 1976.[4] In 1979 the Secretary informed Patti that her benefits would be terminated, as she was no longer disabled.[5] This determination was upheld by the Administrative Law Judge (ALJ) on the basis of medical reports from two doctors, and electromyographic and radiographic studies.[6]

The Ninth Circuit held that although the claimant never loses the burden of proving continuing disability after the Secretary has determined that the disability has ceased, the claimant is entitled to a presumption that his condition has remained unchanged, and the Secretary therefore has the burden of coming forward with evidence to rebut that presumption.[7]

After a careful analysis of the medical records, the Ninth Circuit was unable to find any evidence that showed that Patti's condition had changed since the initial determination.[8] The determination of the ALJ was therefore reversed.[9]

In *Iida v. Heckler*,[10] the Ninth Circuit applied the *Patti* standard, finding that the Secretary had not come forward with sufficient evidence to show that Iida's condition had improved before ordering termination of benefits.[11] Iida had been receiving benefits due to a back injury.[12] When his case was scheduled for reexamination, he was seen by four doctors, including one hired by the Secretary. None of the doctors found Iida's condition to

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2. *Id.* at 586-87.

3. *Id.* at 587.

4. *Id.* at 583.

5. *Id.* The Secretary had previously attempted to terminate benefits in 1977, but was overruled at that time by an A.L.J.

6. *Id.*

7. *Id.* at 586-87.

8. *Id.* at 586.

9. *Id.* at 587.

10. 705 F.2d 363 (9th Cir. 1983) (per Alarcon, J.; the other panel members were Choy and Canby, JJ.)

11. *Id.* at 364.

12. *Id.*

have improved, but the Secretary nonetheless ordered termination of benefits.[13]

The Ninth Circuit rejected the Secretary's contention that there was conflicting medical evidence which the Secretary had merely resolved. The court therefore ordered reinstatement of benefits without further proceedings.[14]

In *Brown v. Heckler*,[15] the Ninth Circuit again found that the *Patti* standard had not been met. Brown had been receiving SSI benefits for leg and back injuries, alcoholism, and psychoneurosis.[16] These benefits were terminated by the Secretary on the sole basis that Brown's back injury had improved.[17] On appeal to the ALJ, the Secretary's decision was upheld, on the further finding that Brown was not addicted to alcohol.[18] The ALJ held no hearing, predicating his finding of non-addiction on Brown's responses to interrogatories, in which she denied present or former alcohol abuse.[19]

The Ninth Circuit held that the ALJ had a duty to fully and fairly develop the record in social security cases, even when the claimant is represented by counsel.[20] Bearing in mind an alcoholic's tendency to deny or rationalize his abuse, the court found that by proceeding without a hearing, on the basis of the interrogatories alone, the ALJ had failed to perform his duty.[21] The court found that the ALJ, in proceeding without a hearing, had denied Brown the benefit of the *Patti* presumption, by relieving the Secretary of the burden of coming forward with evidence that Brown's alcohol abuse had changed.[22] The court therefore remanded the case for a hearing.[23]

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13. *Id.* at 365.
14. *Id.*
15. 713 F.2d 441 (9th Cir. 1983) (per curiam; the panel members were Goodwin and Hug, JJ. and Solomon, D.J., sitting by designation).
16. *Id.* at 442.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 443.
21. *Id.*
22. *Id.*
23. *Id.*

In *Leschniok v. Heckler*,[24] the Secretary terminated SSDI benefits of three claimants who were involved in vocational rehabilitation programs.[25] The Ninth Circuit held this to be in violation of 42 U.S.C. section 425(b),[26] which provides that the Secretary shall not terminate or suspend disability payments on cessation of the recipient's impairments if the recipient is participating in an approved vocational rehabilitation program and the Commissioner of Social Security determines that continuation of the program will increase the likelihood that the person may be permanently removed from the disability rolls.

The Secretary here terminated benefits on the basis of medical improvement without investigating whether any of the claimants met the statutory criteria for continued benefits under section 425(b).[27] The claimants appealed. In hearings before ALJ's, two claimants were found to have improved medically, and the denials of benefits were upheld.[28] The ALJ's were instructed by the Social Security Administration to ignore section 425(b), and claimants were therefore not permitted to raise that section.[29]

The Ninth Circuit reversed the District Court's denial of an application for a preliminary injunction restraining the Secretary from denying benefits without first determining whether section 425 requires that benefits be continued.[30] The court rejected the arguments made by the Secretary opposing the granting of an injunction, noting that the proper forum for the Secre-

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24. 713 F.2d 520 (9th Cir. 1983) (per Goodwin, J.; the other panel members were Sneed, J. and Reed, J., sitting by designation).

25. *Id.* at 521.

26. *Id.* at 522.

27. *Id.* at 521.

28. The third was found not to have improved medically. His benefits were reinstated; the Ninth Circuit therefore dismissed his claim on the basis of lack of present claim or controversy.

29. 713 F.2d at 521.

30. *Id.* at 524. The court predicated jurisdiction, as had the District Court, on 28 U.S.C. § 1361, which permits a federal court to compel officers of the United States to perform their duties. In Weinberger v. Salfi, 422 U.S. 749 (1975), the Supreme Court interpreted 42 U.S.C. § 405(g) to require exhaustion of administrative remedies for Social Security claims, and the Ninth Circuit held in RoAne v. Mathews, 538 F.2d 832 (9th Cir. 1976) that § 1361 does not provide a separate avenue from § 405 for seeking refunds. The *Leschnoik* court disginguished *RoAne* on the grounds that that case had involved payment of funds, holding that § 1361 is an independent ground of jurisdiction in review of constitutional challenges which do not directly seek payment of benefits.

tary's expression of dissatisfaction with an existing law was Congress, not the Ninth Circuit.[31]

In *Lopez v. Heckler*,[32] the Ninth Circuit refused to grant a partial stay pending appeal of a preliminary injunction restraining the Secretary from failing to follow, implement, or accord precedential value to the *Patti* decision.[33] The Secretary had announced that she "did not acquiesce in" and would not follow the *Patti* and *Finnegan* decisions.[34] In *Lopez*, the Secretary did not contest that part of the injunction requiring her to follow *Patti*, but sought a stay of that portion of the order requiring reinstatement of benefits to any member of the class of plaintiffs who was terminated subsequent to August 25, 1980 that applied for reinstatement on the grounds that he had had no medical improvement.[35]

The Ninth Circuit applied the interrelated tests for reviewing stays pending appeal enunciated in *Los Angeles Memorial Commission v. National Football League*,[36] requiring the moving party to show the possibility of irreparable injury, balancing the hardships, as well as the probability of success on the merits, which the court equated with the existence of serious legal questions.[37]

In balancing the hardships, the court found that the interests of the Secretary, as a representative of the public, were not exclusively to be found in conserving the government's finances, noting that "the government must be concerned not just with the public fisc, but with the public weal."[38] The court found that the plaintiffs, on the other hand, could never be made whole for benefits denied now by their reinstatement in the future.[39]

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31. *Id.*
32. 713 F.2d 1432 (9th Cir. 1983) (per Reinhard, J.; the other panel members were Pregerson and Boochever, JJ.).
33. *Id.* at 1434.
34. *Id.* In Finnegan v. Mathews, 641 F.2d 1340 (9th Cir. 1981), the court held that benefits to claimaints "grandfathered" into the Social Security program from state programs may not be terminated absent a showing of previous clear and specific error, or medical improvement.
35. 713 F.2d at 1434.
36. 634 F.2d 1197, 1201 (9th Cir. 1980).
37. 713 F.2d at 1435.
38. *Id.* at 1437.
39. *Id.*

Regarding the probability of success on the merits, the Court rejected the Secretary's jurisdictional arguments. The court deemed the Secretary to have taken a "final position" regarding the termination of benefits, and thus to have waived the requirement under 42 U.S.C. section 405(g) of exhaustion of administrative remedies.[40] The court declined to find those class members barred who had failed to apply for reinstatement within 60 days (required under section 405(g)) as the Secretary had not raised the issue below.[41]

The *Patti* decision and its progeny represent the latest chapter in the history of the judicial supremacy doctrine. As in *Marbury v. Madison*,[42] these cases take place against the backdrop of quite different political struggles in the executive and legislative branches. While the Ninth Circuit has consistently held in favor of claimants, preferring the risk of unnecessary expenditure to that of human suffering, the court has equally shown itself capable of guarding its own prerogatives, and resisting incursions from coordinate branches of government.

40. *Id.* at 1439. 42 U.S.C. § 405 (g) consists of three requirements. First, a claimant must have presented a claim for benefits to the Secretary. Second, a final decision must have been made by the Secretary. Finally, appeals must be made within 60 days of the Secretary's final decision. The court deemed the first requirement to have been complied with once the Secretary had a chance to act and benefits had actually been terminated. The second requirement was deemed by the court to have been waived by the Secretary, or excused, or complied with. The court declined to consider the third requirement, saying that since the 60 day requirement may be waived by the parties, and since the Secretary had not raised the issue below, the court need not consider the matter.

41. On September 9, 1983, 16 days after the Ninth Circuit's *Lopez* opinion was issued, Justice Rehnquist granted a stay of the District Court's order. 104 S.Ct. 9 (1983). In so doing, the Justice made it clear that he was not staying or reversing the decision, and that the Ninth Circuit's opinion remains the law of this circuit. *Id.* at 12.

Justice Rehnquist focused on the exhaustion requirement of § 405(g), which he noted had been held to be composed of a waivable and a nonwaivable component. The nonwaivable component — that a claim for benefits have been presented to the Secretary before judicial review can be sought — was held by the Ninth Circuit to be satisfied once the Secretary had had an opportunity to act, and benefits had been terminated. Justice Rehnquist did not address this argument, but merely stated that he "had difficulty in seeing" how the plaintiffs had satisfied the requirement. *Id.* at 14.

Having also determined that some members of the class had not satisfied the waivable component of § 405(g), Justice Rehnquist turned to the issue of whether the District Court had the authority to issue an injunction to a coordinate branch of government. Justice Rehnquist nowhere expressly stated what he considered to be the rule in this area, but implied that the District Court had exceeded its constitutional authority under Article III of the Constitution. *Id.* at 15-16.

42. 5 U.S. (1 Cranch) 137 (1803).