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# Federal Circuit Bar Journal

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# Advocate—Don't Hallucinate! Appellate Court Staff Attorneys as Vanguards for Ethical AI Usage

Ashley M. London\*

## Introduction

Upon asking the free version of ChatGPT if lawyers can trust it to give accurate case citations and facts to include in legal briefs, the machine's response is frank: "Lawyers should not fully rely on me alone for accurate case citations or factual claims in legal briefs without independent verification."<sup>1</sup> Yet large numbers of lawyers across the country are still using Artificial Intelligence ("AI") platforms like ChatGPT to create court filings without contemporaneously exercising the requisite competence, diligence, and candor to the tribunal.<sup>2</sup> Following recent high-profile examples of lawyers receiving scathing show cause orders by judges and monetary sanctions for the misuse of AI

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\* Prof. Ashley M. London is an associate professor at The Thomas R. Kline School of Law of Duquesne University in Pittsburgh, PA. She teaches Professional Responsibility, and her scholarship focuses on the intersection of technology and legal ethics. The author would like to thank the members of the National Association of Appellate Court Attorneys ("NAACA") for their vital input for this article. The author also thanks Profs. April Milburn-Knizner and Megan Montcalm for their support and assistance. Lastly, the author dedicates this article to her husband, Rudi, and daughter Larken, without whom none of this is possible.

<sup>1</sup> Ashley M. London, ChatGPT, "Can lawyers trust you to give accurate case citations and facts to include in legal briefs?" (May 28, 2025) (on file with the Federal Circuit Bar Journal). ChatGPT's response: "Lawyers should not fully rely on me alone for accurate case citations or factual claims in legal briefs without independent verification." *Id.* This has led to real world consequences, including: lawyers sanctioned by courts for citing fake cases generated by AI tools, and ethical concerns around competence and Rule 11 (FRCP) or state equivalents. *See, e.g.,* Mata v. Avianca 678 F. Supp. 3d 443, 466 (S.D.N.Y. 2023) (imposing a \$5,000 penalty under Rule 11 for citing AI-generated cases). Because ChatGPT is always changing and adding new information, if I ask it the same prompt again later, I might not get the same response.

<sup>2</sup> *See* Johnson v. Dunn, No. 2:21-cv-1701-AMM, 2025 U.S. Dist. LEXIS 141805, at \*5–8 (N.D. Ala. July 23, 2025). A lawyer allegedly used ChatGPT to generate his motion for leave and submitted fabricated legal authority in the filing. *Id.* Alabama law firm Butler Snow was hired by the state of Alabama to defend prison cases, but three attorneys from the firm are now facing sanctions. *Id.* at \*4–8, \*62–63; *see also* Nicholas Chrastil, *Alabama Paid a Law Firm Millions to Defend its Prisons. It Used AI and Turned in Fake Citations*, GUARDIAN

systems in court filings, it is astonishing that an intelligent profession bound by an actionable code of ethics still has not appeared to imprint one fundamental lesson – no one should blindly trust AI to generate content without double checking it for accuracy.<sup>3</sup> Citing fake and nonexistent case law is a “growing headache” for judges,<sup>4</sup> and already more than 500 cases (from lawyers and pro se litigants) have been cited from around the world with the number increasing almost daily.<sup>5</sup> In June 2025, U.S. District Court Judge William P. Dimitrouleas ordered ByoPlanet International LLC to explain why it should not be sanctioned for allegedly citing to “misrepresentations of case law” in three separate but related cases against company executives and former business partners in a contract case.<sup>6</sup> Days earlier, U.S. District Judge David Leibowitz issued a similar show cause order to ByoPlanet’s counsel based on citations that allegedly came from generative AI research tools.<sup>7</sup> The story goes something like this: litigants cite to hallucinated cases in court filings, litigants get caught, judges get mad, litigants apologize and pay a fee, and the cycle continues.

Much has already been written regarding the misuse of AI. This article, however, will distinguish itself by placing the spotlight on one cohort of lawyers often standing in the shadows of the legal system and burdened with the weight of promoting judicial efficiency. This article will also provide actionable and affordable steps courts can take to empower these specially-placed lawyers to help stem the tide of generative AI misuse.

Appellate court staff attorneys already play a crucial role in our justice system because they assist in resolving disputes of statutory and constitutional

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(May 24, 2025), [<https://perma.cc/C6JA-UKMQ>]. See also A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (offering guidance to lawyers on the ethical use of AI tools.).

<sup>3</sup> Michael Hiltzik, *AI ‘Hallucinations’ are a Growing Problem for the Legal Profession*, L.A. TIMES (May 22, 2025), [<https://perma.cc/XH89-4AGD>] (“I can’t believe people haven’t yet cottoned to the thought that AI-generated material is full of errors and fabrications, and therefore every citation in a filing needs to be confirmed.” (quoting UCLA Professor Eugene Volokh)).

<sup>4</sup> Lauren Berg, *Judge Warns Attys Using AI to ‘Advocate- Not Hallucinate,’* LAW360 (May 21, 2025, 9:12PM EDT), [<https://perma.cc/3C9R-MAE4>].

<sup>5</sup> See Damien Charlotin, *AI Hallucination Cases*, DAMIEN CHARLOTIN, [<https://perma.cc/WJ8Z-7SKN>] (last visited July 21, 2025) (documenting the majority of cases are from the United States and lawyers and pro se litigants are using ChatGPT, Claude, Westlaw, LexisNexis, CoCounsel, and Ulokued).

<sup>6</sup> See David Minsky, *Fla. Sanitizer Co. Faces Penalties Over Fake AI Legal Citations*, LAW360 (June 2, 2025, 8:30PM EDT), [<https://perma.cc/2UAJ-CMNG>]; *Byoplanet Int’l, LLC v. Johansson*, Nos. 0:25-cv-60630, -60647, -60646, 2025 U.S. Dist. LEXIS 144449, at \*12–14 (S.D. Fla. July 15, 2025) (Leibowitz, J.).

<sup>7</sup> *Byoplanet Int’l*, 2025 U.S. Dist. LEXIS 144449, at \*12.

magnitude.<sup>8</sup> These lawyers work with issues framed in a manner where reasonable minds could plausibly disagree about the interpretation of the law. Appellate court staff attorneys are asked to grapple with tough questions and provide accurate and unbiased assessments for both sides of an issue, all while maintaining doctrinal consistency. In short, these lawyers bridge the gap between theory and judicial decision-making and play an essential role in maintaining the integrity and functionality of the courts.<sup>9</sup> These attorneys also play a critical role in managing the workload of the courts and are empowered to screen cases to streamline the appellate process. Because of their specialized roles, appellate court staff attorneys are uniquely positioned to champion the ethical use of AI due to their high level of responsibility for justice, as well as their close connection to the judges determining whether the proceedings below were fair and the law applied correctly.<sup>10</sup> After all, both state and federal courts of appeal are charged with developing the law for “general application in future cases filed in all levels of the legal system.”<sup>11</sup> Consistency is neither foolish, nor the hobgoblin of little minds in the legal profession.<sup>12</sup> Rather, it is a desirable aspect of legal representation and *stare decisis*, the analytical system used to guide the rules for resolving disputes that come before a court.<sup>13</sup> In contrast, generative AI systems struggle with consistency, accuracy, and nuance, and, as a result, remain a poor substitute for human judgment and ethical considerations, prompting experts to issue warnings about relying solely on AI in fields that require such skills.<sup>14</sup> AI sys-

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<sup>8</sup> A special thank you for this framing of an appellate court staff attorney’s role by Timothy R. Geiger, Capital Case Staff Attorney with the Arizona Supreme Court, and a member of the NAACA.

<sup>9</sup> *Id.*

<sup>10</sup> See *About the U.S. Courts of Appeals*, U.S. CTS., [https://perma.cc/X7A8-3J7S] (last visited July 17, 2025); see also JOHN P. DOERNER & CHRISTINE A. MARKMAN, STATE JUST. INST., *THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS: PRINCIPLES FOR ADAPTING TO CHANGE* 25–26, 29 (Nov. 2012), [https://perma.cc/56SV-NUK].

<sup>11</sup> See DOERNER & MARKMAN, *supra* note 10, at 27; *About the U.S. Courts of Appeals*, U.S. CTS., [https://perma.cc/X7A8-3J7S] (last visited July 17, 2025).

<sup>12</sup> See RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* 224–25 (U. Wis.-Madison, 1841). The author cannot help but wonder what this great thinker and American philosopher would say about the growing use and abuse of AI systems, rather than cultivating reliance on the powers of human cognition. See *id.*

<sup>13</sup> Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412–13 (2010). The doctrine describes a court’s choice to stand by a precedent and has been deemed of “fundamental importance to the rule of law.” *Id.* (quoting *Welch v. Tex. Dep’t of Highways & Pub. Trans.*, 483 U.S. 468, 494 (1987)).

<sup>14</sup> See Tshilidzi Marwala, *Never Assume that the Accuracy of Artificial Intelligence Information Equals the Truth*, UNITED NATIONS UNIV. (July 18, 2024), [https://perma.cc/5HCG-VKRO].

tems craft responses based on existing data sets that can be accurate.<sup>15</sup> However, AI systems can also produce answers riddled with errors such as including outdated, biased, incomplete, or flatly wrong information.<sup>16</sup> Despite this, and the fact that AI systems developers in the United States are not bound by an actionable code of ethical conduct,<sup>17</sup> the legal profession has hastened to adopt AI systems without adequate guardrails such as consistent policies for policing the misuse of AI in state and federal courts.<sup>18</sup>

It is apodictic that all licensed lawyers should adhere to the Rules of Professional Conduct, which have clearly outlined how the rules for competence, diligence, confidentiality, communication, and candor to the courts apply in relation to AI system use.<sup>19</sup> However, the draw of AI tools and their promises of fast and easy results may be too difficult for the human lawyer with billable hour requirements, and the judiciary with ever-increasing case-loads, to resist.<sup>20</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See generally UNESCO, RECOMMENDATION ON THE ETHICS OF ARTIFICIAL INTELLIGENCE (2021), <https://unesdoc.unesco.org/ark:/48223/pf0000381137>. The report contains no “shall” language, and does not include an enforcement provision for violations of the proposed ethical standards. See *id.* at 7. In the US, under the Biden Administration, the White House set forth a Blueprint for an AI Bill of Rights in October 2023, and released Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of AI. *Blueprint for an AI Bill of Rights*, BIDEN WHITE HOUSE, [<https://perma.cc/V25B-JK4R>] (last visited July 17, 2025); Executive Order No. 14110, 88 Fed. Reg. 75,191 (Nov. 1, 2023). On January 23, 2025, those AI policies were largely revoked by the Trump Administration. Executive Order No. 14179, 90 Fed. Reg. 8,741 (Jan. 23, 2025).

<sup>18</sup> See *Litigation Comparison Table- Federal Court Judicial Standing Orders on Artificial Intelligence*, BLOOMBERG LAW, [<https://perma.cc/VD4K-MY9R>] (last visited July 17, 2025) (showing a list of 19 different federal courts from California to the Court of International Trade and their individualized take on requirements for the use, and disclosure of use, of AI systems). In all jurisdictions, the only consistent application is that of Fed. R. Civ. P. 11. *Id.*

<sup>19</sup> See MODEL RULES OF PRO. CONDUCT r. 1.1, 1.3, 1.4, 1.6, and 3.3 (A.B.A. 2025); see also A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (setting forth the basic standards for lawyer use of generative AI tools.).

<sup>20</sup> See Pamela Langham, *ABA’s 2024 Legal Technology Survey Report: Trends in Online Research*, MD. STATE BAR ASS’N (Apr. 9, 2025), [<https://perma.cc/79LQ-HHWJ>]. This survey of 512 attorneys in private practice across firms of varying size showed that in 2023, 11% of respondents reported using AI-based tools in practice, but that number jumped to 30% the next year of the survey. *Id.*; Sarah Martinson, *5 Key Takeaways From the ABA’s Latest Legal Tech Survey*, LAW360 (Mar. 10, 2025), <https://www-law360-com.gwlaw.idm.oclc.org/pulse/articles/2306728>. Additionally, the survey showed that 13% of respondents say that AI use is “mainstream” in legal practice, which is up from 4% that responded similarly in 2023. Langham, *supra*. See also Madison Alder, *U.S. Court System Eyeing AI Use Cases for*

AI hallucinations are entirely preventable by real, live lawyers, and appellate court staff attorneys are positioned to check AI misuse in the justice system. Cautionary tales and costly sanctions have not instilled the knowledge that while technology may appropriately assist with legal work, it is no substitute for the truly human functions of good judgment, professional integrity, and an adherence to ethical principles.<sup>21</sup> As U.S. District Court Chief Magistrate Judge William Matthewman observed, “[t]here is no room in our court system for the submission of fake, hallucinated case citations, facts, or law. And it is entirely preventable by competent counsel who do their jobs properly and competently.”<sup>22</sup> This article suggests that appellate court staff attorneys should be given specialized technology training and an opportunity to become ethical advisors on the implementation of generative AI systems in the courts.<sup>23</sup> It concludes with practical suggestions such as the development of outward facing resources to advise and guide the proper use of generative AI in court filings.<sup>24</sup> It also shows courts how to use no-cost technologies as training tools and discusses the advisability of developing partnerships with local universities and non-profit organizations to create easily referenced tools for all litigants to promote the ethical use of generative AI.<sup>25</sup>

## I. The Ethical and Institutional Role of Appellate Court Staff Attorneys

Today, appellate courts employ central staff attorneys, and most maintain a department charged with working behind the scenes, reviewing thousands of briefs, conducting comprehensive prehearing research, drafting opinions, and suggesting dismissal of cases on procedural grounds.<sup>26</sup> Every appellate court has lawyers assigned to assist the judges, and these include: clerks of

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*Access to Justice, Cost Savings*, FEDSCOOP (May 6, 2025), [<https://perma.cc/7QE5-PBDK>]. The Administrative Office of U.S. Courts has appointed Paul Drutz-Hannahs to be the lead for an AI pilot program focusing on the use of AI technologies in the court to save money and increase the potential for access. *Id.*

<sup>21</sup> Khaled Moyeed, *AI, Fake Cases, and the Courts: A Cautionary Tale for the Legal Profession*, GUNNERCOOKE (May 19, 2025), [<https://perma.cc/G47J-GSLE>].

<sup>22</sup> *Versant Funding LLC v. Teras Breakbulk Ocean Navigation Enters., LLC*, No. 17-cv-81140, 2025 U.S. Dist. LEXIS 98418, at \*21 (S.D. Fla. May 20, 2025) (order imposing sanctions due to submission of “hallucinated” case by counsel for defendants and third-party defendants).

<sup>23</sup> See *infra* Parts I.B, III.A.

<sup>24</sup> See *infra* Part III.B.

<sup>25</sup> See *infra* Part III.B.

<sup>26</sup> See Joseph R. Weisberger, *A Profile of Appellate Staff: A Survey*, 24 JUDGES J. 31, 32–33 (1985); ROGER A. HANSON, CAROL R. FLANGO, & RANDALL M. HANSEN, THE

court, central staff attorneys, short-term in-chamber law clerks, and career in-chambers law clerks.<sup>27</sup> These roles developed from two pre-existing positions: pro-se deputy clerks of the clerk's office, and law clerks to senior judges.<sup>28</sup> Both positions initially served as reviewers for their sitting judges; they did not engage in the full range of activities of today's appellate court staff attorneys.<sup>29</sup> But soon the utility of these attorneys became self-evident, and more tasks would be added to keep court dockets moving.<sup>30</sup>

In the late 1960s, Judge T. John Lesinski of Michigan and Judge Winslow Christian of California, initiated the movement toward increasing appellate court efficiency through hiring central staff attorneys.<sup>31</sup> It makes sense this movement began in the intermediate state appellate courts because they are often referred to as the “workhorses” of the appellate justice system.<sup>32</sup> These state appellate courts are charged with handling appeals by right in civil and criminal cases, and are often courts of general jurisdiction.<sup>33</sup> The workload of intermediate state appellate courts has increased with growing populations and a societal trend of litigiousness, as well as expanded post-conviction and appellate rights in criminal cases, and the broadening of jurisdiction to include reviewing agency decisions.<sup>34</sup>

The transformation of case processes by utilizing appellate court staff attorneys to screen cases is credited with beginning in the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”) in the early 1970s.<sup>35</sup> The

WORK OF APPELLATE COURT LEGAL STAFF 62–64 (State Just. Inst. 2000), [<https://perma.cc/6NHH-AP5G>].

<sup>27</sup> HANSON, FLANGO, & HANSEN, *supra* note 26, at 1 (noting “. . . there is very little information on what tasks the staff actually performs”).

<sup>28</sup> FED. JUD. CTR., CENTRAL LEGAL STAFFS IN THE UNITED STATES COURTS OF APPEALS 1 (Apr. 1978), [<https://perma.cc/PNL2-MJRQ>].

<sup>29</sup> *Id.* at 1–2.

<sup>30</sup> *Id.* at 1–3.

<sup>31</sup> Donald P. Ubell, *Evolution and Role of Appellate Court Central Staff Attorneys*, 2 COOLEY L. REV. 157, 159–60 (1984) (noting the slightly different approaches taken in Michigan and California that sparked the national and federal movement toward employing long-term central staff attorneys to maximize judicial efficiency.).

<sup>32</sup> DOERNER & MARKMAN, *supra* note 10, at 1.

<sup>33</sup> See Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 467 (2004).

<sup>34</sup> DOERNER & MARKMAN, *supra* note 10, at 2, 11–13 (noting this trend of expanding the role of intermediate appellate courts directly results in an increased workload, and this increase in workload has led to the employment of more central staff attorneys and law clerks, many brought on as permanent employees.).

<sup>35</sup> See Elizabeth Lee Thompson, *The Perilous Focus Shift from the Rule of Law to Appellate Efficiency*, 56 CONN. L. REV. 791, 824 (2024).

idea caught on, and by 1980, 117 staff attorneys were employed by appellate courts across the country.<sup>36</sup> In 2004, the number of staff attorneys had grown to 380.<sup>37</sup> Screening cases slated for oral argument on appeal and to divert simpler cases to a lower level of judicial review.<sup>38</sup> This saves increasingly shallow state and federal budget pools for court staffing for the complex cases.<sup>39</sup> In this context, screening means that appellate court staff attorneys will review the submitted briefs and draft an opinion, and the case will not be slated for oral argument.<sup>40</sup> The opinion will then be reviewed and approved by a panel of federal judges, and “will sometimes result in an unsigned per curium opinion.”<sup>41</sup> While the extent of appellate staff attorney involvement in screening varies from jurisdiction to jurisdiction, as well as across state and federal courts, by 1998 most courts had adopted one form of screening or another despite criticisms about the over-delegation of what should be a job for the sitting judges.<sup>42</sup>

It is precisely because of their special position that these appellate court staff attorneys are in the right place, at the right time, and possess critical legal analysis skills that could also be applied to analyze whether or not lawyer or pro se petitioners have used or misused AI systems in their briefs to the courts.<sup>43</sup>

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<sup>36</sup> *Staff Attorney Offices Help Manage Rising Caseloads*, FED. CT. MGMT. REP., Feb. 2004, at 3.

<sup>37</sup> *Id.*

<sup>38</sup> See John B. Oakley, *The Screening of Appeals: The Ninth Circuit's Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 860 (1991).

<sup>39</sup> See Letter from the Jud. Conf. U.S., to the House Appropriations Comm. (Apr. 10, 2025) (noting a second year of freezing of funds for the operations of the Judicial Branch, impacting the United States Court of Appeals for the Federal Circuit). Funding for courts' salaries and expenses is at a “hard freeze level” of \$6.0 billion for fiscal year 2025, “\$221 million below the Judicial Branch’s December 2024 funding appeal of \$6.23 billion.” *Id.*; see also *Position Paper on State Judicial Branch Budgets in Times of Fiscal Crisis*, CONF. OF CHIEF JUSTS. (Jan. 21, 2004), [ <https://perma.cc/7RER-XW4Q>] (noting that in the early 2000s, state court budgets were being cut so deeply that concerns for securing adequate resources to operate undermined the state courts’ ability to carry out their mission as a co-equal branch of state government); Colter L. Paulson, *Sixth Circuit Review: Will a Judge Read My Brief? Prejudice to Pre Se Litigants from the Staff Attorney Track*, 76 OHIO STATE L.J. FURTHERMORE 103, 104 (2015).

<sup>40</sup> See Paulson, *supra* note 39, at 103.

<sup>41</sup> *Id.*

<sup>42</sup> See Thompson, *supra* note 35, at 826; see also Oakley, *supra* note 38, at 860, 864–66 (detailing the various models of screening programs employed by the 13 federal circuit courts of appeals).

<sup>43</sup> See Weisberger, *supra* note 26, at 32 (noting that appellate court caseloads have “doubled since the advent of the 1980s, with judges on some courts required to produce 100

## A. Detecting and Responding to Ethical Violations in Pro Se Litigant Filings

Pro se litigants around the world are increasingly being warned or fined for citing hallucinated cases in their court filings after employing an AI tool to assist in their legal matters.<sup>44</sup>

Staff attorneys are tasked with reviewing and screening an increasing number of pro se filings, and the rate at which individuals are choosing to represent themselves in state and federal courts has steadily risen.<sup>45</sup> This trend may become further pronounced if the current administration succeeds with its proposed plan to cut federal funding for civil legal aid services for fiscal year 2026.<sup>46</sup>

Pro se means, simply, to represent oneself,<sup>47</sup> and it is a right enshrined in the U.S. Code.<sup>48</sup> Pro se litigants choose to represent themselves in civil and criminal actions for a number of reasons, including mistrust of the system, inability to pay for a lawyer, or a desire to advocate for themselves.<sup>49</sup> In the United States court of appeals, filings by pro se litigants accounted for 48% of new cases for the fiscal year ending on September 30, 2024, which represented a three percent increase over the prior year.<sup>50</sup> In the United States Court of Appeals for the Sixth Circuit, appellate court staff attorneys review filings with pro se litigants, and of the approximately 5,000 appeals the court

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written opinions per year, and participate in the approval of more than 300 written opinions per year”).

<sup>44</sup> See Charlotin, *supra* note 5.

<sup>45</sup> See Drew A. Swank, *The Pro Se Phenomenon*, 19 *BYU J. PUB. L.* 373, 377 (2005) (noting a rise in pro se litigation and how appellate courts are responding).

<sup>46</sup> See Carl Rauscher, *White House Budget Proposes Eliminating LSC, Defunding Civil Legal Aid for Millions of Low-Income Americans*, LEGAL SERVS. CORP. (May 30, 2025), [<https://perma.cc/P57T-QLQV>]. President Donald Trump’s budget for fiscal year 2026 proposed the wholesale elimination of the Legal Services Corporation (“LSC”), the nation’s single largest funder of civil legal aid. See *id.* LSC funds legal services for more than 5 million low-income Americans annually. See *id.*

<sup>47</sup> *Pro se*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining pro se as “[f]or oneself” or “on one’s own behalf”).

<sup>48</sup> See 28 U.S.C. § 1654 (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”).

<sup>49</sup> Brooke K. Brimo, *How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants?*, 35 *GEO. J. LEGAL ETHICS* 549, 549 (2022) (citing Debra Slone, *10 Reasons to Represent Yourself in Court*, COURTROOM5 (Sep. 7, 2021), [<https://perma.cc/WET6-U63S>]).

<sup>50</sup> *Judicial Business 2024*, U.S. CTS., [<https://perma.cc/4XWA-Y38L>] (last visited July 17, 2025) (report on caseloads).

received in 2010, over 50% of those cases were decided upon the recommendation of the court's 28 staff attorneys.<sup>51</sup>

It is no surprise that with the rise in use and availability of AI system tools such as ChatGPT, CoCounsel, Copilot, and Google Bard (known now as "Gemini"), pro se litigants are availing themselves of these tools to assist in the preparation of complex legal documents when lodging their appeals.<sup>52</sup> Promoters of AI in the legal context often cite the utility of such systems in addressing a very real access to justice problem faced in the United States today.<sup>53</sup> AI systems could be used to help pro se litigants advocate for themselves and make "legal services more accessible broadly to the masses, as well as specifically to historically underserved groups."<sup>54</sup> Except that without proper guidance and expertise, these pro se litigants use AI systems at their peril, and often to their detriment.

On June 2, 2025, in the case of *Powhatan County School Board v. Todd Skinger and Kandise Lucas*,<sup>55</sup> in the U.S. District Court for the Eastern District of Virginia, the court found that "after diligent searches" the counsel for the school board could not locate "many cases" cited by Lucas.<sup>56</sup> Upon being pressed, Lucas admitted to using ChatGPT.<sup>57</sup> No monetary remedy was sought, but the court remedied the situation by striking Lucas' filings. Senior U.S. District Judge Robert E. Payne noted, "[i]t causes an enormous waste of judicial resources to try to find cited cases that do not exist and to determine whether a cited authority is relevant or binding, only to determine that most are neither."<sup>58</sup>

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<sup>51</sup> Colter Paulson, *Case Management at the Sixth Circuit: The Role of Staff Attorneys*, SIXTH CIR. APP. BLOG (Aug. 12, 2011), [<https://perma.cc/AV5S-9RY2>].

<sup>52</sup> Each of the systems named here has been cited by Damien Charlotin in his AI Hallucination Cases database as being used (or misused) by pro se litigants. Charlotin, *supra* note 5.

<sup>53</sup> See, e.g., Drew Simshaw, *Access to A.I. Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 YALE J.L. & TECH. 150, 150–51 (2022) (arguing that jurisdictions should facilitate access to legal AI because this technology is a promising tool to use in closing the access-to-justice gap).

<sup>54</sup> *Id.* at 155 (citing Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. 347, 349 (2019) ("Lawyers are using technology to make the practice of law more efficient, more affordable, and more accessible."); and then citing Lori D. Johnson, *Navigating Technology Competence In Transactional Practice*, 65 VILL. L. REV. 159, 163 (2020) ("[T]echnological advances that reduce costs and increase efficiency typically open up services to a broader and more diverse group of consumers.")).

<sup>55</sup> No. 3:24-cv-874, 2025 U.S. Dist. LEXIS 104564 (E.D. Va. June 2, 2025).

<sup>56</sup> *Id.* at \*2.

<sup>57</sup> *Id.* at \*21.

<sup>58</sup> *Id.* at \*22.

In *Newburn v. DeSoto County School District*,<sup>59</sup> in the U.S. District Court for the Northern District of Mississippi, Oxford Division, when a pro se plaintiff offered non-existent authorities to support her argument for reconsideration of an earlier ruling to sustain a defendant's qualified immunity defense.<sup>60</sup> Here, the court admitted that it had to apply "closer scrutiny" to the cases cited in the pro se plaintiff's reconsideration motion because they appeared "somewhat specific and on point."<sup>61</sup> When pressed, the plaintiff suggested the citations to fake cases were an "innocent mistake,"<sup>62</sup> an argument the court ultimately found unpersuasive.<sup>63</sup> The court noted, "even plaintiffs who have potentially strong evidence in their favor cannot be permitted to fabricate legal authorities in their briefing, for reasons which should be obvious."<sup>64</sup>

These two cases represent examples of a small sample of AI system misuse by pro se litigants in the United States. According to researcher HEC Paris Research Fellow Damien Charlotin, out of 567 cases featuring AI hallucinations from countries around the world, 314 of those cases show the party using AI and citing fake cases are pro se litigants.<sup>65</sup> The free tools are out there, and those without the specialized skill and knowledge of lawyers will continue to fall prey to the convincing-looking fake citations generated by AI systems and courts will spend valuable time and resources cleaning up the violations.

### **B. Appellate Court Staff Attorneys are Natural Front-Line AI Ethicists**

Bound by the professional codes of ethical conduct and integral to the efficient operation of our system of justice, appellate court staff attorneys are natural front-line legal ethicists for policing the use and misuse of AI systems. To do this, however, they must be rigorously trained to understand how these systems hallucinate cases, recognize work generated by AI systems, and develop competent and efficient ways to identify AI misuse. Even more, their role could expand to proactively advise the courts on the creation of processes and procedures for identifying AI misuse before the court wastes time drafting orders and meting out sanctions.

On August 7, 2024, the AI Rapid Response Team ("AI RRT") at the National Center for State Courts published a 17-page study initiated by the Conference of Chief Justices and the Conference of State Court Administrators

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<sup>59</sup> 782 F. Supp. 3d 329 (N.D. Miss. May 12, 2025).

<sup>60</sup> *See id.* at 332.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *Id.*

<sup>65</sup> Charlotin, *supra* note 5.

to help courts “plan for the impact that Generative Artificial Intelligence [“GenAI”] may have on the courts.”<sup>66</sup> After an eight-month study, the AI RRT recommended that all state court leaders establish internal working groups to look at the impact of AI use in the courts and to develop plans to address the issues moving forward.<sup>67</sup> The overall tone of the report is one of caution, with seven pages devoted to warnings about the limitations, hallucinations, and ethical issues to be considered when approaching the use of AI in the court systems.<sup>68</sup> While judicial officers have an ethical duty under Model Code of Judicial Conduct 2.12 to supervise staff and ensure compliance with ethical rules and guidance about the use of AI systems,<sup>69</sup> the staff lawyers will largely be at the forefront when it comes to implementing any AI use policies.

The ethical duty of candor toward the tribunal puts the focus on the role appellate court staff attorneys can play in policing AI misuse, and yet it is given fairly short shrift in the American Bar Association (“ABA”) Formal Opinion 512.<sup>70</sup> This opinion, the first from the ABA addressing generative AI tools, focuses on the bedrock ethical rules of competence, confidentiality, and communication.<sup>71</sup> This makes sense generally because if these basic duties are adhered to, then the ill effects from AI misuse could be prevented before a filing is submitted. Lawyers have an evergreen duty to be competent when using AI systems, even though AI system technology is changing “in ways that may be difficult or impossible to anticipate.”<sup>72</sup> The ethical implications triggered by the fundamental mutability of AI systems were echoed a month later in the AI RRT report, where judicial officers and lawyers are reminded of their duties to “keep current with technology and to know the benefits and risks associated with all types of technology . . . .”<sup>73</sup> But when these duties are neglected, courts are forced to deal with the aftermath. “Strong deterrence is needed to make sure that attorneys don’t succumb to this easy shortcut,” wrote Special Master Michael R. Wilner in his order for sanctions in *Lacey v.*

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<sup>66</sup> AI RAPID RESPONSE TEAM, NAT’L CTR. FOR STATE CTS., ARTIFICIAL INTELLIGENCE: GUIDANCE FOR USE OF AI AND GENERATIVE AI IN COURTS 3 (2024), [<https://perma.cc/BC6M-LZTF>].

<sup>67</sup> *See id.*

<sup>68</sup> *See id.* at 6–12.

<sup>69</sup> *See id.* at 12 (citing MODEL CODE OF JUD. CONDUCT r. 2.12(A) (A.B.A. 2020) (“A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.”)).

<sup>70</sup> *See* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512, at 9–10 (2024).

<sup>71</sup> *See id.* at 2.

<sup>72</sup> *See id.*

<sup>73</sup> AI RAPID RESPONSE TEAM, *supra* note 66.

*State Farm General Insurance Co.*<sup>74</sup> in May 2025.<sup>75</sup> Yet, as Benjamin Franklin stated in 1735, “an Ounce of Prevention is worth a Pound of Cure.”<sup>76</sup> AI systems are inconsistent and changing every day due to the very purpose of their existence—the scraping of indiscriminate data on a routine basis, organized through human-created algorithms to make predictions or recommendations for the user upon the entry of an inquiry.<sup>77</sup> But a consistent application of ethical rules and sanctions for violators would be a significant step toward preventing their misuse by lawyers and pro se litigants.

Under ABA Model Rule 3.3, which has been substantially adopted in a majority of jurisdictions,<sup>78</sup> all lawyers have a mandatory obligation not to present false statements of fact or law to a tribunal.<sup>79</sup> Comment 12 to Rule 3.3 states, “[l]awyers have a special obligation to protect a tribunal against criminal

<sup>74</sup> No. CV 24-5205, 2025 U.S. Dist. LEXIS 90370 (C.D. Cal. May 5, 2025).

<sup>75</sup> *Id.* at \*13. In that case, it was discovered that the plaintiff’s supplemental brief was written using an AI system and it contained at least nine false or misleading citations, with at least two completely non-existent cases cited. *Id.* at \*3–4. The plaintiff was represented by two law firms, one of which was the national law firm K&L Gates. *Id.* The judge concluded,

A final note. Directly put, Plaintiff’s use of AI affirmatively misled me. I read their brief, was persuaded (or at least intrigued) by the authorities that they cited, and looked up the decisions to learn more about them—only to find that they didn’t exist. That’s scary. It almost led to the scarier outcome (from my perspective) of including those bogus materials in a judicial order. *Id.* at \*13.

<sup>76</sup> BENJAMIN FRANKLIN, ON PROTECTION OF TOWNS FROM FIRE (1735), *reprinted in 2 THE PAPERS OF BENJAMIN FRANKLIN* 12–15 (Leonard W. Labaree ed. 1961). Franklin was writing to instruct the general populace on how to prevent fires in homes by taking preventative actions, such as cleaning the chimneys from houses in town. *Id.* When writing about ethics and new technology, this author finds the advice of old philosophers and statesmen strangely applicable.

<sup>77</sup> See Cole Styker, *What are Large Language Models (LLMs)?*, IBM, [https://perma.cc/XBB2-FJXV] (last visited Nov. 1, 2025).

<sup>78</sup> See CAL. RULES OF PRO. CONDUCT r. 3.3 note on national background (STATE BAR OF CAL. 2018), [https://perma.cc/D5YA-498V] (“Every jurisdiction except California has adopted some version of Model Rule 3.3. Twenty-one jurisdictions have adopted Model Rule 3.3 verbatim. Sixteen jurisdictions have adopted a slightly modified version of Model Rule 3.3. Thirteen jurisdictions have adopted a version of the rule that is substantially different from Model Rule 3.3.”).

<sup>79</sup> See MODEL RULES OF PRO. CONDUCT r. 3.3(a) (A.B.A. 2025)

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

or fraudulent conduct that undermines the integrity of the adjudicative process . . . .”<sup>80</sup> Today, presenting cases to the court filled with hallucinated citations is one way lawyers and pro se litigants are misleading the courts “[w]ith greater frequency.”<sup>81</sup> The risks involved in utilizing AI systems have moved beyond the theoretical, with even closed proprietary systems developed by legal research experts Thomson Reuters (Ask Practical Law AI) and LexisNexis (Lexis+AI) producing machine-driven hallucinations 17%–33% of the time in a March 2025 study.<sup>82</sup> As of November 2025, 59 federal judges from California to Rhode Island have issued orders regarding the use of AI in court filings.<sup>83</sup> As a California Superior Court Judge S. Raj Chatterjee notes in a March 2025 AI hallucination case, *Evans v. Execushield, Inc.*,<sup>84</sup> “Honesty in dealing with the courts is of paramount importance, and misleading a judge is, regardless of motives, a serious offense.”<sup>85</sup> Therefore, appellate court staff attorneys should take a primary role in developing and implementing the AI policies courts need to ensure the ethical duty of candor to the courts is maintained.

If policing ethical violations from litigants’ use of AI systems is a natural extension of the appellate court staff attorney, so too is the duty of developing processes and procedures to streamline the work involved with their heavy caseloads. Therefore, it is a parallel imperative that these lawyers consider ways in which AI systems could properly assist them in matters “such as automating repetitive functions, data analysis, summarizing, drafting, and other tasks.”<sup>86</sup> Even as courts across the country are disciplining lawyers and pro se litigants alike, few judges deny the potential benefits that the use of AI could bring to the legal system if used in an ethical and transparent way.

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(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. *Id.*

<sup>80</sup> MODEL RULES OF PRO. CONDUCT r. 3.3 cmt. 12 (A.B.A. 2025).

<sup>81</sup> See *Lacey v. State Farm Gen. Ins. Co.*, No. CV 24-5205, 2025 U.S. Dist. LEXIS 90370, at \*7 (C.D. Cal. May 5, 2025).

<sup>82</sup> See Varun Magesh et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, 22 J. EMPIRICAL L. STUD. 216, 225–29 (2025).

<sup>83</sup> See *Tracking Federal Judge Orders on Artificial Intelligence*, LAW360, [https://perma.cc/5E5Y-KCRK] (last visited Nov. 18, 2025).

<sup>84</sup> No. 21CV002240, 2025 Cal. Super. LEXIS 662 (Cal. Super. Ct. Mar. 10, 2025).

<sup>85</sup> *Id.* at \*5 (quoting *Paine v. State Bar of Cal.* 14 Cal. 2d 150, 154 (1939)). In this case, counsel for the plaintiffs cited several AI-generated hallucinated cases. See *id.* at \*2–4.

<sup>86</sup> See AI RAPID RESPONSE TEAM, *supra* note 66, at 13.

For example, in *Wadsworth v. Walmart, Inc.*,<sup>87</sup> Judge Kelly H. Rankin from the U.S. District Court for the District of Wyoming noted, “When done right, AI can be incredibly beneficial for attorneys and the public . . . . Courts will be able to efficiently analyze briefs and make correct rulings, which may speed up the judicial process for litigants.”<sup>88</sup> Appellate court staff attorneys with their intimate knowledge of the legal system, their duties under the rules of professional conduct, and their specialized roles in facilitating efficiency in the courts are a well-placed group to lead the charge in both policing AI misuse and adopting reliable AI systems.

## II. AI Systems and Jurisdictional Guidance Consistently Inconsistent

When the Fifth Circuit announced a proposed amendment to Rule 32.3 and Form 6 in November 2023, it was one of the most daring actions put forth by a court in the age of AI, and would have greatly impacted lawyers and pro se litigants.<sup>89</sup> In fact, the Fifth Circuit was the first federal appeals court to propose a rule that would govern the use of AI.<sup>90</sup> The proposed rule required lawyers and pro se litigants to fully disclose the extent to which AI systems were used to draft court filings and certify that all filings complied with the new rules.<sup>91</sup> But by June 2024, the proposed amendment was dead, with the court settling for a strongly worded scold for parties and counsel, “‘I used AI’ will not be an excuse for an otherwise sanctionable offense.”<sup>92</sup> What accounts for this change of position? Lawyers.

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<sup>87</sup> 348 F.R.D. 489 (D. Wyo. 2025).

<sup>88</sup> *Id.* at 493.

<sup>89</sup> See U.S. CT. OF APPEALS FOR THE FIFTH CIR., NOTICE OF PROPOSED AMENDMENT TO FIFTH CIR. R. 32.3 (Nov. 22, 2023), [<https://perma.cc/74DJ-L9FZ>] (“Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.”). Proposed changes to Form 6 would require lawyers to certify that all filings comply with the AI usage reporting requirement with a signature and date. See *id.*

<sup>90</sup> See Nate Raymond & Sara Merken, *Two US Appeals Courts Form Committees to Examine AI Use*, REUTERS (Jan. 24, 2024), [<https://perma.cc/S3C5-S7M8>].

<sup>91</sup> See *id.*; U.S. CT. OF APPEALS FOR THE FIFTH CIR., *supra* note 89.

<sup>92</sup> See U.S. CT. OF APPEALS FOR THE FIFTH CIR., COURT DECISION ON PROPOSED RULE (June 12, 2024), [<https://perma.cc/5S3B-YENT>].

The court, having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, has decided not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time. Parties and counsel are reminded of their duties regarding their filings before the court under

Seventeen comments from lawyers in Florida, California, Texas, Louisiana, Maryland, Mississippi, and Virginia, were publicly filed regarding the proposed rule change in the Fifth Circuit, nine of which were strongly against the court adopting this measure, several thought it did not go far enough, and others suggested small revisions.<sup>93</sup> One lawyer opposing the measure called it “unnecessary, harmful, and counterproductive” and stated the rule would impose “undue burdens, create[] confusion, and divert[] attention from core legal priorities.”<sup>94</sup> Another lawyer commenter suggested the rule could place an “undue burden on filers,” because it was impossible for filers to discern whether or not AI is “a part of search features.”<sup>95</sup> Another lawyer cheekily used ChatGPT-3.5 to help draft the argument he put forth to oppose adoption of Rule 32.2, writing, “I imagine, as such tools become a part of daily life, that no capable user will submit generated materials without some revisions.”<sup>96</sup> These comments reveal several truths about why lawyers fail to use AI systems properly. AI misuse revolves around the failure of lawyers to understand how AI systems work, what they can produce, and how to evaluate the work product of AI systems when they are used.<sup>97</sup>

In contrast to the Fifth Circuit, the Judicial Council of California’s Artificial Intelligence Task Force has taken the lead on the development of a model

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Federal Rule of Appellate Procedure 6(b)(1)(B). Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. “I used AI” will not be an excuse for an otherwise sanctionable offense. *Id.*

<sup>93</sup> See *Comments on Proposed Rule Change to Fifth Circuit Rule 32.2 and Form 6*, U.S. Cts. (Jan. 29, 2024) [hereinafter *Comments on Proposed Rule Change*], [<https://perma.cc/VTQ4-YN7D>].

<sup>94</sup> E-mail from Shelby L. Shanks to Margaret Dufour (Jan. 2, 2024), in *Comments on Proposed Rule Change*, *supra* note 93. The lawyer further states that “[t]his rule unfairly singles out generative AI as a tool in need of special regulation, ignoring the widespread use of other, arguably more impactful technologies in legal practice.” *Id.*

<sup>95</sup> E-mail from Carolyn Elefant to the Clerk of the Ct., U.S. Ct. of Appeals for the Fifth Cir. (Jan. 1, 2024), in *Comments on Proposed Rule Change*, *supra* note 93.

<sup>96</sup> E-mail from Josh Cottle to Margaret Dufour (Nov. 30, 2023), in *Comments on Proposed Rule Change*, *supra* note 93 (further suggesting that Federal Rule of Civil Procedure 11(b) already provided the framework to address the concerns of AI hallucinations in court filings).

<sup>97</sup> See Jessica R. Gunder, *Rule 11 is No Match for Generative AI*, 27 STAN. TECH. L. REV. 308, 316–17 (2024) (noting that lawyers perceive AI systems to be more akin to a search engine than a large language model that uses statistical models to predict an answer after indiscriminately scraping sources for information without the ability to check for its veracity).

uniform court policy regarding the use of AI in the courts that balances both flexibility and consistency.<sup>98</sup> On July 18, 2025, the Judicial Council of California adopted Rule of Court 10.430, which states that courts that do not prohibit AI must adopt a policy governing the use of this technology by court staff and judicial officers.<sup>99</sup> It applies to California's superior courts, Courts of Appeal, and Supreme Court.<sup>100</sup> The goal was to create a standard rule to address "confidentiality, privacy, bias, safety, and security risks posed by use of generative AI in court-related work."<sup>101</sup> California is, at present, the largest court system to adopt a comprehensive set of guidelines meant to promote innovation in court operations, build public confidence in the system, and address the issues with the misuse of AI technology.<sup>102</sup> Courts may adopt the model rules, or they have the flexibility to create their own more restrictive policies that address both the risks and benefits of AI usage.<sup>103</sup> The Task Force also noted that, "courts and judicial officers are in the best position to identify acceptable uses of generative AI to meet their specific needs."<sup>104</sup>

As lawyers appear to use these models without evaluating their output in increasing numbers, jurisdictions must decide whether or not to police AI misuse by providing model guidelines like the Judicial Council of California or ignore the problem like the Fifth Circuit.<sup>105</sup>

### **A. The Normalization of AI Misuse Among Lawyers**

While the Fifth Circuit's move to adopt guidance on AI misuse in the courts was killed by lawyers, lawyers themselves routinely violate their ethical duties by filing documents with courts around the world citing to AI-hallucinated cases.<sup>106</sup> The first such case in the United States that garnered national and international attention was *Mata v. Avianca, Inc.*,<sup>107</sup> where lawyers Steven Schwartz and Peter LoDuco instituted a personal injury action against an airline in the U.S. Southern District of New York and cited six non-existent

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<sup>98</sup> See Karen Sloan, *California Court System Adopts Rule on AI Use*, REUTERS (July 18, 2025), [<https://perma.cc/LP8F-EN8C>].

<sup>99</sup> JUD. COUNCIL OF CAL., ITEM NO. 25-109, REPORT TO THE JUDICIAL COUNCIL 1–2 (2025), [<https://perma.cc/8NYL-N3U7>].

<sup>100</sup> *Id.* at 2.

<sup>101</sup> *Id.* at 5.

<sup>102</sup> See Jeffrey Niemczura, *California Courts Adopt Rule Governing the State's Generative AI Use*, MORGAN LEWIS (Aug. 7, 2025), [<https://perma.cc/5K64-FAPP>].

<sup>103</sup> See JUD. COUNCIL OF CAL., *supra* note 99, at 3–4, 7.

<sup>104</sup> *Id.* at 6.

<sup>105</sup> See *supra* notes 89–92, 98–102 and accompanying text.

<sup>106</sup> See Charlotin, *supra* note 5.

<sup>107</sup> 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

cases from ChatGPT, including fake quotes.<sup>108</sup> The lawyers did not admit to their error until pressed by the court, resulting in an Order to Show Cause issued by Judge P. Kevin Castel.<sup>109</sup> In his opinion, Judge Castel noted, “[i]n researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance.”<sup>110</sup> Where Schwartz and LoDuco erred was standing by their assertions after their veracity was questioned, and Rule 11 sanctions and a \$5,000 penalty were imposed.<sup>111</sup> Schwartz testified he was “operating under the false perception that [the] website . . . could not possibly be fabricating cases on its own.”<sup>112</sup>

In April 2025, in the U.S. District Court for the Eastern District of Pennsylvania, the lawyer in *Bevins v. Colgate-Palmolive Co.*<sup>113</sup> was sanctioned pursuant to Rule 11, his appearance in the case was stricken with prejudice, and a copy of the order was sent to the State Bar of Pennsylvania after it was discovered he cited two fake cases.<sup>114</sup> Additionally, his client Patricia Bevins had to be informed she would have to find new counsel or re-file her case pro se.<sup>115</sup> This result not only impacted the lawyer but also impaired the client.

Since *Mata*, more than 500 cases involving lawyers and judges citing to AI-hallucinated cases have appeared around the world, though primarily in the United States.<sup>116</sup> With the amount of media attention paid to these cases, coupled with a sharp rise in continuing legal education courses offered cautioning about the correct use of AI systems,<sup>117</sup> and a formal ethics opinion

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<sup>108</sup> *See id.* at 449–59.

<sup>109</sup> *See id.* at 449.

<sup>110</sup> *Id.* at 448.

<sup>111</sup> *See id.* at 448, 466.

<sup>112</sup> *Id.* at 451.

<sup>113</sup> No. 25-576, 2025 U.S. Dist. LEXIS 68399 (E.D. Pa. Apr. 10, 2025).

<sup>114</sup> *Id.* at \*16–17. The lawyer in this case is Nicholas L. Palazzo, and he asserted that his citation to the non-existent cases was “unintentional.” *Id.* at \*15. He did not reveal which AI system he used to generate the fake cases, and contended that the issue was the “result and consequence of tired, rather than fresh eyed, last proof reading of the filing.” *Id.*

<sup>115</sup> *Id.* at \*18–19.

<sup>116</sup> *See* Charlotin, *supra* note 5.

<sup>117</sup> *See, e.g., Artificial Intelligence CLE Course Catalog*, LAW.COM: CLE CTR., [https://perma.cc/BWJ5-YNWV] (last visited Oct. 29, 2025) (offering 111 courses on Artificial Intelligence); *Explore Courses*, ABA LEARNING CTR., https://learningcenter.americanbar.org/courses?courses%5Bquery%5D=artificial%20intelligence (last visited Nov. 11, 2025) (offering approximately 60 CLEs focused on Artificial Intelligence best practices).

issued in 2024 by the ABA regarding generative AI use by lawyers,<sup>118</sup> it seems as though the threat of Rule 11 sanctions or disciplinary actions is insufficient to motivate lawyers to abide by best practices for utilizing AI tools. Prevention, then, appears to be the better cure. AI literate Appellate court staff attorneys could help lawyers and pro se litigants prevent AI system misuse, at least in state and federal courts of appeals.

### **B. The Ethical Dilemma of AI: Not “Trustworthy,” but Already Ingrained in Legal Practice**

The myth of so-called “trustworthy AI” is persistent and powerful, almost to the point that many people—lawyers and non-lawyers alike—assume it must be fact.<sup>119</sup> But AI is neither trustworthy, nor untrustworthy, because it is a non-sentient machine operating on complex algorithms developed by humans.<sup>120</sup> The first step is recognizing that generative AI systems’ output is circumscribed by its input, and hallucinating cases is an example of a significant impediment to an unquestioning reliance on the accuracy of AI-generated information.<sup>121</sup> To rephrase this using a term common in the technology development field, garbage in, garbage out (“GIGO”).<sup>122</sup>

Judge Rankin, in *Wadsworth*, lays out a straightforward explanation of this principle.<sup>123</sup> AI systems are developed and trained on data sets, and the machine uses those data sets to make predictions.<sup>124</sup> The accuracy of machine-generated predictions will depend on the accuracy of the training data.<sup>125</sup> “If

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<sup>118</sup> A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (discussing generative artificial intelligence tools).

<sup>119</sup> See Daniel Leufer, *Why We Need to Bust Some Myths About AI*, PATTERNS, Oct. 2020, [<https://perma.cc/U272-3EPL>].

<sup>120</sup> See *id.*; Inquiry to ChatGPT, *supra* note 1.

<sup>121</sup> See Magesh et al., *supra* note 82, at 225.

<sup>122</sup> Rahul Awati, *garbage in, garbage out (GIGO)*, TECH TARGET (June 14, 2023), [<https://perma.cc/5MK2-MQ5K>] (“GIGO simply means that the output a system produces depends on the input it receives. If you put garbage in, chances are high that you will get garbage out. This fact holds even if the program’s logic is accurate. Thus, while logic is important, the correct input is equally — if not more — important to generate the correct and useful output.”).

<sup>123</sup> *Wadsworth v. Walmart, Inc.*, 348 F.R.D. 489, 492–93 (D. Wyo. 2025).

<sup>124</sup> *Id.* at 493.

<sup>125</sup> *Id.*

the training data is incomplete, biased, or otherwise flawed, the AI model may learn incorrect patterns, leading to inaccurate predictions or hallucinations.<sup>126</sup>

AI systems do not just hallucinate case citations, they can also create non-existent legal propositions that find their way into court filings. In March 2025, in the Superior Court of California, County of Alameda, lawyers argued that the court could “constructively” add new claims to a complaint for class certification.<sup>127</sup> This was news to Judge Chatterjee, who quickly discovered the cases cited in the lawyer’s Reply Brief did not support that assertion.<sup>128</sup> When questioned, the lawyer stated she used a “tool” to help prepare the brief “which the [c]ourt understood to mean an electronic program that most likely employed some form of artificial intelligence.”<sup>129</sup> The lawyer’s failure to take corrective action drew the judge’s ire, not the fact AI was used in the first place.<sup>130</sup> “In this [c]ourt’s view, artificial intelligence assisted software can assist counsel in research and in preparing drafts of documents like any other ‘tool,’” wrote Judge Chatterjee.<sup>131</sup> “But, counsel who sign and submit legal documents must *own* and take *full responsibility* for the final product and must ensure that they discharge their obligations under the Rules of Professional Conduct, the Business & Professions Code, the Code of Civil Procedure, and otherwise.”<sup>132</sup> Other areas where AI systems have struggled as shown in a recent study is in misunderstanding the holdings of cases, failing to distinguish between arguments made by litigants versus statements made by the court, and respecting hierarchy of authority.<sup>133</sup>

Lawyers and law firms, once traditionally reticent about change,<sup>134</sup> have quickly acceded to the demands of technology companies promoting AI systems as a way to streamline practice and maximize profits.<sup>135</sup> In other words, lawyers are buying into the AI hype, a zeal incessantly nurtured by investors,

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<sup>126</sup> *Id.* (quoting *What are AI Hallucinations?*, GOOGLE CLOUD, [https://perma.cc/PP33-V4DY]).

<sup>127</sup> *Evans v. Execushield, Inc.*, No. 21CV002240, 2025 Cal. Super. LEXIS 662, at \*2 (Cal. Super. Ct. Mar. 10, 2025).

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Id.* at \*3–4.

<sup>130</sup> *See id.* at \*5–6.

<sup>131</sup> *Id.* at \*8.

<sup>132</sup> *Id.* at \*8–9.

<sup>133</sup> *See* Magesh et al., *supra* note 82, at 225–29.

<sup>134</sup> *See generally, Overcoming Lawyer’s Resistance to Change*, THOMSON REUTERS, [https://perma.cc/S56G-A7BA] (describing the characteristics of the legal profession that make it resistant to change) (last visited Nov. 17, 2025).

<sup>135</sup> *See* Justin Smith, *Lawyers Are Adopting Generative AI Faster than Other Technologies*, EVERLAW (Sep. 10, 2024), [https://perma.cc/42ME-M6MY].

the media, academia, and press coverage,<sup>136</sup> and the 2024 ABA Legal Technology Survey Report, illustrates the point. In 2024, 46% of large law firms reported using AI tools currently, a 35% increase from the prior year.<sup>137</sup> The leading AI system tools lawyers reported using include, in descending order of popularity, ChatGPT, Thomson Reuters CoCounsel, and Lexis+AI.<sup>138</sup> The least reliable source, according to the Stanford empirical study – ChatGPT was the leading product that lawyers reported using.<sup>139</sup>

According to the recent ABA study, the largest perceived benefit of using AI in legal work was “saving time/increasing efficiency.”<sup>140</sup> This was followed by “document management/document review,” and “reducing costs.”<sup>141</sup> The most significant concern noted by survey respondents, at 74.7%, was accuracy, followed by reliability, data privacy, and cost of implementation and amount of time required to learn how to use the AI system tools.<sup>142</sup> Given the weight of these concerns, which are being borne out in real time in courts across the nation, the ABA survey respondents largely reported that AI system use will become “mainstream” in the law over the next three to five years.<sup>143</sup> This is what developers of AI system technology are banking on, with the legal tech market projected to grow from \$23.9 billion in 2025 to \$53.8 billion by 2034.<sup>144</sup> A recent study from Thomson Reuters surveying over 2,000 professionals across the legal industry in 2025 suggested that using AI could save \$20 billion annually.<sup>145</sup> Of course, Thomson Reuters is also investing \$200

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<sup>136</sup> See Alva Markelius et al., *The Mechanisms of AI Hype and Its Planetary and Social Costs*, 4 AI & ETHICS 727, 727 (2024).

<sup>137</sup> Langham, *supra* note 20 (“Firms of 10-49 attorneys increased their use of AI tools by 36%, and firms of 2-9 attorneys increased their use by almost 38%, in comparison to the preceding year. Solo attorneys increased their usage by 55.5%. Additionally, 15% of all law firms are seriously considering purchasing AI-based technology tools, while 15% are not interested, a slight decrease in 2023 from 21%. The data indicates a significant upward trend in the adoption of AI-driven tools among law firms.”).

<sup>138</sup> See Mark Calaguas, *2024 Artificial Intelligence TechReport*, ABA (Apr. 25, 2025), [https://www.americanbar.org/groups/law\\_practice/resources/tech-report/2024/2024-artificial-intelligence-techreport/](https://www.americanbar.org/groups/law_practice/resources/tech-report/2024/2024-artificial-intelligence-techreport/).

<sup>139</sup> See *id.*; Magesh et al., *supra* note 82, at 225.

<sup>140</sup> Calaguas, *supra* note 138.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *Legal Tech Market to Hit USD 53.80 Billion By 2034*, LEGAL PRAC. INTEL. (Jan. 20, 2025), <https://www.legalpracticeintelligence.com/blogs/practice-intelligence/legal-tech-market-to-hit-usd-53-80-billion-by-2034>.

<sup>145</sup> *The AI Adoption Reality Check: Firms with AI Strategies are Twice as Likely to see AI-driven Revenue Growth; Those Without Risk Falling Behind*, THOMSON REUTERS (June 26, 2025),

million annually to “integrate responsible AI into its flagship content and technology solutions,”<sup>146</sup> so it has a vested interest in promoting this narrative.

AI systems are already being employed with some, notably, positive effects to help address the access to justice gap, identified as the 90% of U.S. households who are unable to afford professional help for legal matters.<sup>147</sup> Chief Justice John Roberts of The United States Supreme Court hyped AI tools in his 2023 Year-End Report on the Judiciary as having the potential to improve the access to justice gap because they could provide accessible tools, templates, and forms to pro se litigants.<sup>148</sup> AI system developers have been building chatbots and virtual kiosks that help pro se litigants identify their legal issues, as well as help draft a filing, or connect to a human lawyer for help.<sup>149</sup> AI systems are here, and it appears they will become a regular feature in the practice of law, so blanket prohibitions are unlikely to be as effective as consistently applying regulation to innovation to minimize ethical pitfalls in the development of AI systems.<sup>150</sup> However, optimism for the current and future uses of AI systems must still be balanced with care and consideration for legal and ethical obligations. As Justice Roberts himself stated, “any use of AI requires caution and humility.”<sup>151</sup>

### C. Confusion Across Jurisdictions: The Need for Institutional Consistency and Staff Attorney Guidance

As courts across the country grapple with instituting rules and guidance for the use of AI systems in filings by both lawyers and pro se litigants, the

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[<https://perma.cc/MZC8-B775>].

<sup>146</sup> *Id.*

<sup>147</sup> See Colleen V. Chien & Miriam Kim, *Generative AI and Legal Aid: Results from a Field Study and 100 Use Cases to Bridge the Access to Justice Gap*, 57 *LOY. L.A. L. REV.* 903, 911 (2025).

<sup>148</sup> See HON. JOHN G. ROBERTS, JR., U.S. SUP. CT., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–6 (2023), <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf> [<https://perma.cc/MQ4N-H9EV>] (“As AI evolves, courts will need to consider its proper uses in litigation. In the federal courts, several Judicial Conference Committees . . . will be involved in that effort.”).

<sup>149</sup> See Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 *TENN. L. REV.* 347, 354–55 (2019).

<sup>150</sup> See generally Sydnie Grace Leigh, *Navigating the Ethical Intersection: AI in Law and Computer Scientists’ Responsibilities*, 37 *GEO. J. LEGAL ETHICS* 673 (2024) (promoting a realistic approach to generative AI models that balances regulation and innovation to minimize ethical pitfalls of the technology, and suggesting that developers of AI systems should be held to a higher level of scrutiny similar to lawyers who are governed by the Rules of Professional Conduct).

<sup>151</sup> HON. JOHN G. ROBERTS, JR., *supra* note 148, at 5.

resulting rules are anything but clear or consistent.<sup>152</sup> The generality and variability of much of the guidance promulgated thus far could lead to continued issues with noncompliance. Without adequate guardrails for all litigants relating to the practical and ethical use of generative AI systems, missteps such as the inclusion of hallucinated cases in court filings will likely continue. As illustrated above, the Fifth Circuit already backtracked on a proposal that would have required litigants to fully disclose the extent to which AI systems were used to draft court filings, and to certify that all filings complied with the new rules.<sup>153</sup> In May 2023, Illinois Magistrate Judge Gabriel A. Fuentes issued a standing order on the use of generative AI systems requiring all litigants to disclose the extent and use of AI system-generated products for legal research and drafting purposes.<sup>154</sup> Just over a year later, Judge Fuentes sat on a panel at the ABA's annual meeting in Chicago that he was considering rolling back that order because he found it "no longer necessary and slightly burdensome."<sup>155</sup> He also stated in the year the order was in place, "not a single litigant disclosed using generative AI in filings submitted to his court."<sup>156</sup> During that same year, LexisNexis announced the rollout of its newest AI product, Lexis+AI, making the service available to customers beyond North America into Asia and the Middle East.<sup>157</sup> ChatGPT-4 was released earlier in May 2023 to paid subscribers,<sup>158</sup> and in November 2023, Thomson Reuters launched its newest AI-powered legal research platform.<sup>159</sup> It is improbable that every litigant appearing before the U.S. District Court in the Northern District of Illinois declined to avail themselves of the technology to assist in drafting filings or doing research that year. Today, Judge Fuentes' standing order states, "The Court has gravitated toward a more collaborative approach in which attorneys have been requested, and not required, to disclose their use of generative AI in their legal research and brief drafting."<sup>160</sup> It further

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<sup>152</sup> See Sarah Martinson, *Judges and Law Scholars Divided Over AI Standing Orders*, LAW360 (Mar. 22, 2024), [https://perma.cc/6TMB-G8C3].

<sup>153</sup> See U.S. CT. OF APPEALS FOR THE FIFTH CIR., *supra* note 92.

<sup>154</sup> Sarah Martinson, *Ill. Magistrate Judge Talks Pulling Back AI Order*, LAW360 (Aug. 2, 2024), [https://perma.cc/RJ8D-D9XA].

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *LexisNexis Launches Second-Generation Legal AI Assistant on Lexis+AI*, LEXISNEXIS (Apr. 23, 2024), [https://perma.cc/6B5B-JE5G].

<sup>158</sup> Tyler Weitzman, *GPT-4 Released: What It Means for the Future of Your Business*, FORBES (Mar. 28, 2023), [https://perma.cc/A9TJ-WEGS].

<sup>159</sup> *Thomson Reuters Launches Generative AI-Powered Solutions to Transform How Legal Professionals Work*, THOMSON REUTERS (Nov. 15, 2023), [https://perma.cc/W852-JE3F].

<sup>160</sup> N. DIST. OF ILL., *STANDING ORDER FOR CIVIL CASES BEFORE MAGISTRATE JUDGE FUENTES 12–13* (Dec. 20, 2024), [https://perma.cc/T5X7-N46G] ("Prior to employing any

states that litigants, attorneys, and judicial and court staff, are expected to use AI in accordance with all legal and ethical standards.<sup>161</sup>

The standard for disclosing AI use in court filings is different in the U.S. District Court for the District of Hawaii.<sup>162</sup> There, the court remains concerned about both the “reliability and accuracy of filings and other court submissions” relating to the increased use of AI platforms and the errors contained therein.<sup>163</sup> However, the court limits its concern to what it calls “unverified sources,” without specifying exactly what that term means as the order further states it does not affect “basic research tools such as Westlaw, Lexis[Nexis], or Bloomberg,”<sup>164</sup> even though those products demonstrate that hallucinations are still a potential issue. Litigants in that court district must submit a declaration that: “(1) advises the court that counsel or the pro se party has relied on one or more unverified sources; and (2) verifies that the counsel or pro se party has confirmed that any such material is not fictitious.”<sup>165</sup>

Across the country in the U.S. District of New Jersey, Judge Evelyn Padin issued General Pretrial and Trial Procedures with a strict rule regarding usage of generative AI system work product.<sup>166</sup> In her court, the using a generative AI system, including ChatGPT or Google Bard, requires mandatory

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technology, including generative AI applications, users must understand both general AI capabilities and the specific tools being utilized.” (quoting ILLINOIS SUPREME COURT POLICY ON ARTIFICIAL INTELLIGENCE (Jan .1, 2025), [<https://perma.cc/FNF7-4NFF>])).

<sup>161</sup> *Id.* at 13 (“The use of AI by litigants, attorneys, judges, judicial clerks, research attorneys, and court staff providing similar support may be expected, should not be discouraged, and is authorized provided it complies with legal and ethical standards. Disclosure of AI use should not be required in a pleading. The Rules of Professional Conduct and the Code of Judicial Conduct apply fully to the use of AI technologies. Attorneys, judges, and self-represented litigants are accountable for their final work product.” (quoting ILLINOIS SUPREME COURT POLICY ON ARTIFICIAL INTELLIGENCE (Jan .1, 2025), [<https://perma.cc/FNF7-4NFF>])).

<sup>162</sup> *See* D. Haw., Order 23-1, In re: Use of Unverified Source (Nov. 14, 2023).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (“This order does not affect the use of basic research tools such as Westlaw, Lexis, or Bloomberg, and no declaration is required if all sources can be located on such well-accepted basic research tools.”).

<sup>165</sup> *Id.* (“To address these concerns, if any counsel or pro se party submits to the court any filing or submission generated by an unverified source, that attorney or pro se party must submit a declaration concurrently with that material captioned ‘Reliance on Unverified Source’ that: (1) advises the court that counsel or the pro se party has relied on one or more unverified sources; and (2) verifies that the counsel or pro se party has confirmed that any such material is not fictitious.”).

<sup>166</sup> *See* DIST. N.J., JUDGE EVELYN PADIN’S GENERAL PRETRIAL AND TRIAL PROCEDURES 2 (Nov. 13, 2023), [<https://perma.cc/LY5X-H8PH>]. However, Judge Padin gives deference to the United States Court of Appeals for the Third Circuit (“the Third Circuit”) and its rules: “To the extent that the rules for the Third Circuit or the District of New Jersey conflict with

disclosures and certification that: “(1) identifies the GAI [known as “generative AI”] program; (2) identifies the portion of the filing drafted by GAI; and (3) certifies that the GAI work product was diligently reviewed by a human being for accuracy and applicability.”<sup>167</sup> Similarly, in the U.S. District Court in Nevada, Judge Maximiliano D. Couvillier III, includes in his standing order and chamber practices a requirement that any counsel or pro se parties using AI must identify said usage in a brief, pleading, or other document in its title or pleading caption.<sup>168</sup>

The standing order regarding the use of generative AI for the U.S. Bankruptcy Court of the Northern District of Texas issued June 21, 2023 by Chief Judge Stacey G.C. Jernigan sums up the baseline approach to using AI systems in their current iterations: “Artificial intelligence systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States and are likewise not factually or legally trustworthy sources without human verification.”<sup>169</sup>

### **III. Building on Institutional Competence – Leveraging Appellate Court Staff Attorneys to Navigate the Ethical Use of AI**

Appellate court staff attorneys are intimately familiar with both precedential cases in their home jurisdictions, as well as the operation of the court system itself. They are experts in context, bringing individualized expertise that cannot be done by an AI system. For all of the capabilities of generative AI, they cannot generate human curiosity or engage in spontaneous initiative-taking.<sup>170</sup> These expert lawyers are uniquely positioned inside the judicial system and are responsible for shouldering much of the non-decisional work of the appellate courts, they are ideally suited to be active and contributing

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any of the preferences set forth in this document, the rules of the Third Circuit and the District of New Jersey control.” *Id.* at 2 n.1.

<sup>167</sup> *Id.* at 2.

<sup>168</sup> See *Standing Orders, Local Rules, and Decisions on the Use of AI: Nevada*, ROPES & GRAY, [https://perma.cc/E6W6-SNH5].

<sup>169</sup> Bankr. N.D. Tex., Ord. 2023-03, In re: Pleadings Using Generative Artificial Intelligence (June 21, 2023), [https://perma.cc/Y7XH-3EN4] (“If any portion of a pleading or other paper filed on the Court’s docket has been drafted utilizing generative artificial intelligence, including but not limited to ChatGPT, Harvey.AI, or Google Bard, the Court requires that all attorneys and pro se litigants filing such pleadings or other papers verify that any language that was generated was checked for accuracy, using print reporters, traditional legal databases, or other reliable means.”).

<sup>170</sup> Robert Spangler, *Balancing Technology and Judgment: AI’s Ongoing Impact on the Legal Field*, 353 N.J. LAW, 28, 29 (2025).

partners on the frontlines of identification, integration, and likely inevitable use of AI systems by the courts.

Instead, they must be viewed as active and contributing partners. In addition to the ethical duties required of licensed lawyers, appellate court staff attorneys often have combined decades of specialized expertise and training in legal writing and analysis that will make them even more useful when interfacing with generative AI systems because they can act as an ethical and factual check on AI system output.

Legal writing requires the author to conduct careful and thorough research, read deeply, and be able to summarize complex issues and relevant facts, as well as draft the memorandum, filing, or document.<sup>171</sup> Subtle judgments are required for a complete understanding of a complex case, and then conveying that understanding in clear, concise, and readable writing. Though AI can assist legal professionals with organization by creating outlines or generalized texts, expert users can improve it, bearing in mind the ethical instruction of the Model Rules outlining competence, diligence, confidentiality, and candor to the courts.<sup>172</sup> Implementing smart protocols around the usage of AI is key, but so is ensuring that human lawyers engage fully in the writing and review process.<sup>173</sup> When wielded by experts such as appellate court staff attorneys, tools like generative AI systems enhance the delivery of justice rather than impede it.

### **A. Institute Rigorous AI Training for Appellate Court Staff Attorneys**

The oft-repeated trope about people who become lawyers doing so because they are not good at math is trite but largely true.<sup>174</sup> Yet generative AI systems are powered by math, specifically complex linear algebraic equations, and results are delivered without a confidence index allowing users to know immediately if the information provided contains errors.<sup>175</sup> The good news is that appellate court staff attorneys do not need to go back to school to learn how to code generative AI systems, but they do need to undergo rigorous and guided training to understand the strengths and weaknesses of this powerful

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<sup>171</sup> See Joe Regalia, *From Briefs to Bytes: How Generative AI is Transforming Legal Writing and Practice*, 59 TULSA L. REV. 193, 213 (2024).

<sup>172</sup> See Corinne Taylor-Davis, *Wielding AI Advantage: Best Practices for Lawyers*, 42 GPSOLO 24, 26 (2025).

<sup>173</sup> See *id.* at 28.

<sup>174</sup> See Lisa Milot, *Illuminating Innumeracy*, 63 CASE W. RESRV. L. REV. 769, 769–70 (2013).

<sup>175</sup> See Liz Neunsinger, *Powered by Math, Generative AI Requires New Knowledge for Safe Use*, OAK RIDGE NAT'L LAB'Y (Apr. 9, 2024), [<https://perma.cc/47GM-X7FC>].

tool. Recognizing the benefits and detriments of using generative AI in legal work is a skill that, once obtained by appellate court staff attorneys, could have a far-reaching effect in influencing judges, alongside pro se and lawyer litigants to use these tools ethically and efficiently.

Appellate court staff attorneys are, above all, expert critical thinkers, knowledge workers,<sup>176</sup> and practiced jurists. Their value lies in their skills honed over years of experience, insider knowledge of the judicial system, and enforceable adherence to the ethical rules governing lawyers. This expertise can be used to increase efficiency in these busy courts through the ethical use of generative AI provided they receive adequate training and instruction. A recent trial conducted by researchers at the University of California Berkeley Center for Law and Technology evaluated the way AI tools, both supported and unsupported by contemporaneous education, were introduced to legal professionals working in legal aid positions.<sup>177</sup> It showed the participants who received specialized “concierge services” such as weekly emails, tailored trainings, and weekly office hours in addition to AI system access reported better outcomes than the group who received no training.<sup>178</sup> As lawyers saw how AI systems could augment, but not replace, their work, it became productive rather than threatening.<sup>179</sup>

Using generative AI requires knowledge workers like appellate court staff attorneys to develop new skills, such as the ability to critically assess AI system output “to determine its relevance and applicability to their specific tasks.”<sup>180</sup> But it also means that foundational skills such as high-level legal analysis and problem-solving, will remain equally important. “[T]raining knowledge workers to think critically when working with GenAI should focus on developing skills in information verification, response integration, and task stewardship.”<sup>181</sup> Stewardship in this context means the accountability for the

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<sup>176</sup> Knowledge workers are defined as employees whose job involves developing and using knowledge rather than producing goods and services. *Knowledge worker*, CAMBRIDGE DICTIONARY, [https://perma.cc/T7WT-6MD6] (last visited Nov. 22, 2025).

<sup>177</sup> See Chien & Kim, *supra* note 147.

<sup>178</sup> *Id.* at 928.

<sup>179</sup> See Riley Kelly, *The Power of Training: The Importance of Educating Lawyers on AI Tools to Successfully Scale Pro Bono Efforts*, PRO BONO INST.: THE PBEYE (Aug. 28, 2024), [https://perma.cc/ZG7C-E2CL].

<sup>180</sup> Hao-Ping Lee et al., *The Impact of Generative AI on Critical Thinking: Self-Reported Reductions in Cognitive Effort and Confidence Effects from a Survey of Knowledge Workers*, in CHI '25: PROCEEDINGS OF THE 2025 CHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 15 (2025).

<sup>181</sup> *Id.*

accuracy, relevance, and context of the legal work will continue residing with the human user of the generative AI tool.<sup>182</sup>

Training for appellate court staff attorneys should include workshops, seminars, and hands-on training with generative AI systems from various technology companies. They should learn the basics of the systems' input and outputs, whether the system is self-contained or if it accesses the Internet generally (like ChatGPT), and how to develop tailored prompts. They should also be trained to discern inaccurate generative AI content in filings submitted by pro se and lawyer litigants,<sup>183</sup> while also understanding that such discernment is not always possible with tools currently available. Finally, appellate court staff attorneys should be steeped in the ethical pitfalls of the improper use of generative AI as outlined above. Because in June 2025, the cynically-anticipated, but likely inevitable, generative AI fail finally happened. A trial court judge in Georgia decided a case and issued an order based on hallucinated case law, and the appellate court had to rectify the lower court's mistake.<sup>184</sup>

### **B. Develop Accessible, Ethically Informed, AI Resources for All Litigants**

Implementing training for generative AI system usage by appellate court staff attorneys, while providing the most up-to-date tools, is admittedly a large-scale task that requires manpower, time, and money. However, providing outward-facing information to pro se and lawyer litigants regarding the appropriate use of these systems should not be a heavy lift for state and federal appellate courts since most already have accessible websites to post such information. Although there does not seem to be current empirical research regarding the practical effects of error reduction checklists in the legal profession, in the medical profession, checklists and error reporting systems have been shown to reduce medical errors, increase efficiency, and foster a "culture of continuous improvement and learning from mistakes to prevent their

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<sup>182</sup> *Id.*

<sup>183</sup> See AI RAPID RESPONSE TEAM, *supra* note 66, at 7 (listing indications that generative AI may have been used in creating a document). For example, AI often uses idioms and slang incorrectly and may contain grammatical errors and stilted language. *Id.*

<sup>184</sup> See *Shahid v. Esaam*, 918 S.E.2d 198, 200 (Ga. Ct. App. 2025). The trial court relied on two fictitious cases in an order denying Appellant's petition to reopen her divorce case and set aside the final judgment. *Id.* "To be clear, we make no factual finding as to who (or what) inserted the fictitious cases into the superior court's order. We are deeply troubled, however, that Lynch submitted to this Court an Appellee's Brief . . . and provided 11 bogus case citations out of 15 total, one of which was in support of a frivolous request for attorney fees." *Id.* at 202 (footnotes omitted).

recurrence.”<sup>185</sup> As it stands, lawyers and pro se litigants continue to show that guidance on ethical usage of generative AI is necessary.<sup>186</sup> Because appellate court staff attorneys are largely responsible for analyzing motions in pending cases from pro se litigants, as well as screening petitions for certiorari and summary disposition, ensuring the input they receive is accurate is a good start in fostering the ethical and efficient use of AI systems in the courts.

One court leading the way in providing easy access to information regarding the proper use of generative AI systems is the Arizona Supreme Court.<sup>187</sup> The court established a dedicated and easy-to-navigate web page that provides pro se and lawyer litigants detailed information from the Supreme Court’s Artificial Intelligence Steering Committee.<sup>188</sup> The court also created a Tools & Usage Agreements Subteam with the goal of providing “court users with specific guidance on appropriate tools and related cautions as the generative AI market sorts itself out over time.”<sup>189</sup> The web page includes links to approved, local, and prohibited tools, alongside a new tool approval process, with detailed example uses, cautions, and prohibitions that make it easy for readers to know not only what can be used, but also how and why.<sup>190</sup> For example, while Copilot, Claude, ChatGPT, Gemini, Perplexity, and Adobe AI appear as the first “approved” generative AI tools, the court provides cautions such as, “[d]o not rely on GenAI to provide 100-percent accurate answers; always review and edit generated content.”<sup>191</sup> It also instructs users of those tools not to include confidential information when creating prompts.<sup>192</sup> The court does not single out any one generative AI system for a direct

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<sup>185</sup> See Emmanuel Aoudi Chance, Dia Florence, & Innocent Sardi Abdoul, *The Effectiveness of Checklists and Error Reporting Systems in Enhancing Patient Safety and Reducing Medical Errors in Hospital Settings: A Narrative Review*, 11 INT’L J. NURSING SCIS. 387, 395 (2024). Inspired by the aviation industry, the healthcare industry began instituting checklists and error reporting systems to increase better patient outcomes. *Id.* at 390. This 2024 study shows that instituting such systems has, in fact, proven to be a breakthrough in standardizing medical procedures and reduce variations in healthcare delivery. *Id.* at 392. They ensure adherence to established protocols and minimize deviations in clinical practice. *Id.* at 390.

<sup>186</sup> See *Coomer v. Lindell*, No. 22-cv-01129, 2025 U.S. Dist. LEXIS 128372, at \*2, \*24–25 (D. Colo. July 7, 2025) (imposing a \$3,000 sanction under Rule 11 for each of the two lawyers representing MyPillow CEO Mike Lindell for submitting a brief citing “nearly thirty defective citations,” including citations to non-existing cases).

<sup>187</sup> See ARIZ. SUP. CT. CTR. FOR FORENSICS & A.I., *Artificial Intelligence Information for Courts*, AZCOURTS.GOV, [https://perma.cc/T7LV-DA28] (last visited Nov. 22, 2025).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *id.*

<sup>191</sup> *Id.*

<sup>192</sup> See *id.*

prohibition, but does note that free versions of ChatGPT, Gemini, Perplexity, and DeepSeek lack sufficient controls for security and the limiting of data sharing.<sup>193</sup> The language used throughout is direct, and uncomplicated, so it is easily understood by pro se litigants along with legal professionals.

Buried on its website, the U.S. Bankruptcy Court for the District of Delaware has a section dedicated to “Legal Ethics and Artificial Intelligence.”<sup>194</sup> This document defines what AI is, explains how and when users might encounter these tools, and goes into depth with the ethical rules implicated by its use.<sup>195</sup> This section of the website appears to be aimed primarily at lawyers, as it cautions lawyers to always check the accuracy of the answers they receive from these programs and ends by stating, “[c]ounsel must be aware of the novel risks when using generative AI as the potential for confidential information being submitted through prompts to the AI program.”<sup>196</sup> However, if keen pro se litigants searched, they could find this information. Finally, the U.S. District Court for the Eastern District of Missouri has a section regarding the use of GenAI tools on its website landing page for self-represented litigants.<sup>197</sup> Litigants must acknowledge they will be held responsible for all contents of their filings including “any portion generated with artificial intelligence.”<sup>198</sup> There is no mention of why generative AI misuse is unethical, instead it refers only to a threat of FRCP Rule 11(b) sanctions.<sup>199</sup>

Easy accessibility of this information will be critical to its widespread use, especially for pro se litigants. Even as courts seek to adopt AI-driven solutions to the access to justice problem for civil litigants such as chatbots, online dispute resolution, and form completion,<sup>200</sup> it would also benefit unrepresented parties if the court provided easy-to-locate guidance on when and how to use AI systems to generate court filings. Creating AI-driven solutions to help pro se litigants requires money and technical knowledge that many courts cannot afford. But creating a website landing page with general information about ethical usage of generative AI could be a fairly easy and inexpensive step to address the immediate issue of increasingly frequent generative AI

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<sup>193</sup> *See id.*

<sup>194</sup> *Consumer Bankruptcy Program*, U.S. BANKR. CT. DIST. DEL. (Jan. 21, 2025), [<https://perma.cc/Y2LU-65X2>] (click “Legal Ethics and Artificial Intelligence” under “Related Files”).

<sup>195</sup> *See id.*

<sup>196</sup> *Id.*

<sup>197</sup> *See Artificial Intelligence*, U.S. DIST. CT. FOR THE E. DIST. OF MO., <https://www.moed.uscourts.gov/self-represented-litigants-srl> [<https://perma.cc/F599-M69K>] (last visited Nov. 22, 2025).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See Sarah Martinson, How Courts Can Use Generative AI To Help Pro Se Litigants*, LAW360 (May 3, 2024), [<https://perma.cc/XKY2-VBM2>].

hallucinations in court filings from unrepresented parties. It is possible it could also give lawyers pause before submitting an AI system-generated or assisted filing without reviewing it for accuracy.

Finally, courts could partner with local universities or large law firms to cooperatively develop online landing pages. Bridget McCormack, the president and chief executive officer at the American Arbitration Association and former chief justice of the Michigan Supreme Court, suggested this form of partnership in a May 2024 interview with Law360.<sup>201</sup> In March 2023, the Georgetown University Law Center announced its inaugural Judicial Innovation Fellowship, a program that would “embed technologists and software designers in state, local, and tribal courts to develop tech-based solutions to improve access to the judicial system.”<sup>202</sup> The program worked with the Utah State Courts to develop guidelines staff could use to help self-represented litigants, the Kansas State Courts to design a prototype of an electronic filing portal, and the Hamilton County General Sessions Court in Tennessee to assess what data the court already had to assist with debt, homelessness, and criminal recidivism.<sup>203</sup> While the program’s goals to make courts more transparent and accountable are laudable, none of the inaugural projects appear to have addressed the use of AI system technology. Perhaps they will in the future.

Well-trained appellate court staff attorneys could take the lead in encouraging their courts to institute low-cost programs for publicizing the ethical use of generative AI systems. It is possible that helping pro se and lawyer litigants use technology in an ethical and competent way could bolster court efficiency, pleasing judges in the process by stemming a portion of the tide of AI hallucinations in court filings.

### **C. Encourage Participation in Innovative Programs Like the “AI Sandbox”**

During the 2025 National Association of Appellate Court Attorneys (“NAACA”) annual meeting held in Utah, several attendees confessed that they had not begun experimenting with generative AI.<sup>204</sup> It can be difficult

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<sup>201</sup> *See id.*

<sup>202</sup> Matt Perez, *Georgetown Tech Program to Begin in Tenn., Utah, Kan.*, LAW360 (Mar. 17, 2023), [<https://perma.cc/B24A-BQEM>]; *see also*, *The Judicial Innovation Fellowship Program*, GEO. L., [<https://perma.cc/B9RV-P4PN>] (last visited Nov. 22, 2025).

<sup>203</sup> JASON TASHEA & TANINA ROSTAIN, *JUD. INNOVATION FELLOWSHIP, THE JUDICIAL INNOVATION FELLOWSHIP: A REVIEW OF THE PILOT AND PATH FORWARD* 5 (2024), [<https://perma.cc/ZWH7-7G3Z>].

<sup>204</sup> *See* Ashley London, Professor, Thomas R. Kline Sch. of L. of Duquesne Univ., *From Lawfluencers to #AttorneyTok: Legal Ethics in the Age of Social Media*, Address at the National Association of Appellate Attorneys Eighteenth Annual Conference (July 9, 2025).

to know where to start. Add the very valid concerns about confidentiality and accuracy of commercially available generative AI products, and, understandably, some lawyers would approach the use of these tools with caution. This is where the “AI Sandbox” comes in as a handy tool for appellate court staff attorneys to explore and meet the requirement of competency under Model Rule 1.1.<sup>205</sup>

Currently, the independent, non-profit organization, National Center for State Courts (“NCSC”), is working in partnership with the Thompson Reuters Institute (“TRI”) to educate the judiciary about how AI can be “appropriately harnessed” to improve issues such as access to justice, while also streamlining the work flow of the busiest courts in the nation.<sup>206</sup> In June 2024, the partnership resulted in a program called the *TRI/NCSC AI Policy Consortium for Law and Courts*.<sup>207</sup> Since launching in August 2024, the NCSC has conducted webinars, produced informational guidelines on the use of generative AI in the courts, is tracking state court orders regarding AI, and has created a robust online presence for its AI Rapid Response Team.<sup>208</sup> But perhaps its most intriguing tool is its “AI Sandbox.”

The NCSC’s AI Sandbox is a secure generative AI system designed for the use of judges and court staff members to experiment with generative AI tools.<sup>209</sup> It is accessible only through the NCSC portal after creating an account.<sup>210</sup> It offers access to generative AI models gpt-40-mini, gpt-35-turbo, and gpt-40, and the user may select which model to engage with each session.<sup>211</sup> The system also allows lawyers to add documents that the AI assistant can summarize, respond to questions about, or add citations.<sup>212</sup> Finally, the system encourages users to engage with pre-set prompts in addition to showing them how to create their own prompts that can be marked public or

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<sup>205</sup> See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt.8 (A.B.A. 2025) (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).

<sup>206</sup> NAT’L CTR. FOR STATE CTS., 2024 ANNUAL REPORT 7 (2024), [<https://perma.cc/XGY9-GWXL>].

<sup>207</sup> *Id.*

<sup>208</sup> See AI RAPID RESPONSE TEAM, *supra* note 66, at 4.

<sup>209</sup> See *Artificial Intelligence: AI Sandbox*, NAT’L CTR. FOR STATE CTS., [<https://perma.cc/EE5H-Z6YH>] (last visited Nov. 22, 2025).

<sup>210</sup> See *Artificial Intelligence*, NAT’L CTR. FOR STATE CTS., [<https://perma.cc/3AFN-NW6K>] (last visited Nov. 22, 2025).

<sup>211</sup> *Artificial Intelligence: AI Sandbox*, NAT’L CTR. FOR STATE CTS., [<https://perma.cc/EE5H-Z6YH>] (last visited Nov. 22, 2025).

<sup>212</sup> See *id.*

private.<sup>213</sup> Prompts are essentially rules the user sets to assist the generative AI model to produce the results desired.<sup>214</sup> These assist the model in analyzing output designed for the user's specific needs.<sup>215</sup>

This tool uses the same generative AI as all publicly available AI tools but comes with the promise of security. The AI Sandbox engineer, Andre Assumpcao, stated that, “[a]ll the data input and information generated stays within the system.”<sup>216</sup> This is to encourage the court and its employees to “experiment with ideas and explore AI possibilities.”<sup>217</sup> However, even this comes with a big caveat: “Users should only enter publicly available information and avoid using sensitive case details when testing in the private tool.”<sup>218</sup> Which is currently the most ethical way to engage with generative AI tools- cautiously. According to the NCSC, courts are using AI for things like: “Creating job descriptions,” “[d]rafting court orders,” “[p]roviding access to policies and procedures through internal-use chatbots,” “[d]elivering information through public-facing chatbots,” “[r]etrieving and docketing information from filed documents,” and “[p]rocessing invoices.”<sup>219</sup>

One area appellate court staff attorneys reportedly spend a considerable amount of time on is generating pre-hearing reports or memoranda.<sup>220</sup> These reports are designed to assist judges before the conferencing of cases. In intermediate courts of appeal, central staff lawyers are tasked with preparing pre-hearing memoranda for cases assigned to a regular calendar in addition to parallel work for cases handled under procedures like expedited calendars.<sup>221</sup> It is possible that the right generative AI tool could assist in streamlining this process, which leaves open more time for appellate court staff attorneys to research and write for substantive motions and applications for writs. By engaging with tools like the AI Sandbox, appellate court staff attorneys could participate in the development of a generative AI tool that could be used alongside their expertise to streamline court processes and procedures.

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<sup>213</sup> *See id.*

<sup>214</sup> *See How to Use Prompt Engineering*, NAT'L CTR. FOR STATE CTS., [<https://perma.cc/RD3Z-29E2>] (last visited Nov. 22, 2025).

<sup>215</sup> *See id.*

<sup>216</sup> *New AI 'Sandbox' Tool Aims to Help Courts Utilize Artificial Intelligence Systems?*, LEGALNEWS.COM (Mar. 14, 2025), [<https://perma.cc/4QMN-ZBZJ>].

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See HANSON, FLANGO, & HANSEN, supra note 26, at 46–48.*

<sup>221</sup> *See id.* at 46.

## Conclusion

A projected increase in filings, budget freezes, and potential staff downsizing by the Judicial Conference of the United States,<sup>222</sup> amidst the rise of generative AI, creates a chaotic environment for the sustained application of ethical guardrails for new technology uses. Banning the use of generative AI systems is neither practical, nor realistic. Asking lawyers to disclose their use of AI in filings has also proven to be a losing strategy.<sup>223</sup> That's why one of the system's constants, appellate court staff attorneys, are now in a pivotal position to become vanguards of ethical AI usage in ways that could also assist their own productivity.

Court filings are projected to rise due to the advent of accessible generative AI systems, which make it easier and cheaper for high-volume filers and pro se litigants to have their matters heard and decided.<sup>224</sup> In 2023, technology journalist Keith Porcaro likened the rise of chatbot-assisted filings to the 2008 financial crisis that flooded the courts with foreclosure cases and resulted in thousands of people losing their homes—even though the court filings used in the litigation matters were “rife with defects.”<sup>225</sup> Generative AI systems do not have to sleep, they do not have to take breaks, and they do not charge by the hour like licensed lawyers do.<sup>226</sup> They are also not subject to the rules of professional conduct. In 2023, the Court Statistics Project showed that though civil caseloads have not returned to pre-pandemic levels, the increase that year was the largest since 2020.<sup>227</sup> More state court cases filed could lead to more appeals, even though last year the filings in the United States courts of appeals decreased overall by three percent.<sup>228</sup> The overall decrease is attributed to a drop in criminal appeals, as the private civil appeals rose seven percent.<sup>229</sup>

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<sup>222</sup> See Letter from the Jud. Conf. U.S., *supra* note 39. The letter notes that, in terms of court salaries and expenses, the Judicial Branch projects that 37% of appellate, district, and bankruptcy clerks of court offices and probation and pretrial services offices cannot afford on-board staff which could result in downsizing for the remainder of FY 2025. *Id.* Any such downsizing would come on top of year-over-year staffing losses. *Id.*

<sup>223</sup> See *supra* Part I.C.

<sup>224</sup> See CT. STAT. PROJECT & TRI/NCSC AI POL'Y CONSORTIUM, *Is GenAI Revolutionizing Court Filings?*, NAT'L CTR. FOR STATE CTS. (June 24, 2025), [<https://perma.cc/PP2E-32UY>].

<sup>225</sup> Keith Porcaro, *Robot Lawyers Are About to Flood the Courts*, WIRED (Apr. 13, 2023), [<https://perma.cc/7AKE-T9EQ>].

<sup>226</sup> See *id.*

<sup>227</sup> CT. STAT. PROJECT & TRI/NCSC AI POL'Y CONSORTIUM, *supra* note 224.

<sup>228</sup> *Federal Judicial Caseload Statistics 2024*, U.S. CTS. (2024), [<https://perma.cc/G7RP-A29H>].

<sup>229</sup> *Id.*

Meanwhile, in the U.S. district courts, the combined filings of civil cases and criminal defendants increased 17%.<sup>230</sup>

Even with new technologies potentially on the horizon for the judiciary, the lawyers on the frontlines in the intermediate courts remain appellate court staff attorneys. Since AI systems will have a direct impact on their workloads, these specially placed experts should both engage with the existing technology and have a seat at the table with any group making AI policy determinations in their courts. Putting a powerful tool in the hands of experts who are charged with maintaining a high ethical standard while assisting in the efficient operations of the courts can only benefit the justice system. After all, the success of evolution has almost always proven to be a tool-based endeavor with humans augmenting their unique attributes and skills with new technologies but not replacing themselves completely.

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<sup>230</sup> *Id.* (“Civil case filings in the U.S. district courts increased 22 percent (up 63,771 cases) to 347,991. This growth occurred because of several multidistrict litigation (MDL) dockets involving cases directly filed in single districts, including more than 57,600 MDL cases alleging that the 3M Company sold its Combat Arms earplugs to the U.S. military without disclosing defects that reduced hearing protection. Filings of cases involving diversity of citizenship (i.e., disputes between citizens of different states and/or between U.S. citizens and citizens of foreign nations) rose 46% to 159,732.”).

# Two Decades of *Althen*, But Petitioner’s Burden Is Higher Than Ever

Sydney Leifermann\*

## Introduction

One December day, a Pennsylvania postmaster dutifully received his flu vaccine for the influenza A virus.<sup>1</sup> Two weeks after vaccine administration, Mr. Niles Leeper began experiencing “unusual and severe” back pain, as well as tingling, numbness, and loss of control in his feet.<sup>2</sup> He was admitted to a hospital, where his condition worsened tremendously over just a few days.<sup>3</sup> Mr. Leeper suffered an immense increase of pain and a progression in paralysis where he was unable to use any of his muscles.<sup>4</sup> His treating physicians were concerned that he would lose the ability to breathe on his own, so Mr. Leeper lay awake, fearing that he would die in his sleep.<sup>5</sup> Luckily,<sup>6</sup> Mr. Leeper survived, though he experienced residual symptoms for years afterwards.<sup>7</sup> Mr. Leeper suffered from Guillain-Barre Syndrome (“GBS”) caused by the flu vaccine he received.<sup>8</sup>

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\* J.D. Candidate, 2025, The George Washington University Law School. Many thanks to Professor Charles Pollack for his guidance and encouragement to justly highlight this topic I am so passionate about. Further thanks to my family and friends for supporting me while I talked about this Note endlessly. Perhaps most importantly, a very special thank you to my mentor for the inspiration to write this Note.

<sup>1</sup> See *Leeper v. United States*, 756 F.2d 300, 302 (3d Cir. 1985). The influenza A virus is also known as the “H1N1 flu” and colloquially known as “swine flu.” *H1N1 Flu (Swine Flu)*, MAYO CLINIC, <https://perma.cc/Y7TP-FDWY> (last visited Apr. 1, 2025).

<sup>2</sup> *Leeper*, 756 F.2d at 302.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Guillain-Barre Syndrome (“GBS”) has a reported mortality rate of 3–13%. Bianca van den Berg et al., *Mortality in Guillain-Barré Syndrome*, 80 *NEUROLOGY* 1650, 1650 (2013).

<sup>7</sup> Mr. Leeper’s feet were often in pain, with symptoms consisting of burning and stinging. He continued to suffer from “lack of stamina and patience, uncharacteristic disinterest in social activities, and permanent nerve damage in his feet, causing him to suffer unrelenting and painful paresthesias.” *Leeper*, 756 F.2d at 302.

<sup>8</sup> *Id.*

Though Mr. Leeper was able to receive compensation from the federal government for his injuries,<sup>9</sup> many people would not be so lucky in the coming years. Despite the federal government stipulating in this 1985 case that GBS could be caused by the flu vaccine, the federal government refused to officially recognize this for over thirty more years.<sup>10</sup> Multiple reputable scientific studies had all but confirmed since 1976 that there was an association between the flu vaccine and GBS development.<sup>11</sup> Further, the federal government consistently accepted<sup>12</sup> claims with this association in settlements as early as 2008.<sup>13</sup> Until 2017, Congress had not admitted that individuals injured by the flu vaccine by means of GBS symptoms were able to receive compensation for their suffering and medical needs.<sup>14</sup>

Just one year after Mr. Leeper's case, Congress passed the National Vaccine Injury Compensation Act ("the Act")<sup>15</sup>, establishing a no-fault compensation program ("the Program"),<sup>16</sup> wherein individuals who suffered an injury due to the administration of certain vaccines may be compensated. This Program consists of vaccines and injuries approved for compensation—listed on the Vaccine Injury Table—and avenues for injuries that are not already recognized but may have still occurred due to one of the vaccines listed in the Act.<sup>17</sup> For

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<sup>9</sup> *Id.* at 301.

<sup>10</sup> National Vaccine Injury Compensation Program: Revisions to the Vaccine Injury Table, 82 Fed. Reg. 6294 (Jan. 19, 2017) (to be codified at 42 C.F.R. pt. 100).

<sup>11</sup> See Kathy Koch, *Vaccine Controversies: Are Today's Vaccines Safe Enough?*, 10 CONG. Q. RESEARCHER 641, 645 (2000).

<sup>12</sup> However, "[s]ettlements are not an admission by the United States or the Secretary of Health and Human Services that the vaccine caused the petitioner's alleged injuries." *Vaccine Compensation: Frequently Asked Questions*, HEALTH RES. & SERVS. ADMIN., <https://perma.cc/TN2Q-NGZQ> (last visited Jan. 19, 2025).

<sup>13</sup> The Secretary of the Department of Health and Human Services has informally recognized through consistent settlement for injury claims involving development of Guillain-Barre Syndrome after a seasonal influenza vaccination. See, e.g., *Holliday v. Sec'y of Health & Hum. Servs.*, No. 07-459V, 2008 WL 2917771, at \*1 (Fed. Cl. Apr. 7, 2008); *Ami v. Sec'y of Health & Hum. Servs.*, No. 07-480V, 2008 WL 2937577, at \*1 (Fed. Cl. May 19, 2008); *Hill v. Sec'y of Dep't of Health & Hum. Servs.*, No. 07-469V, 2008 WL 2464274, at \*1 (Fed. Cl. May 28, 2008).

<sup>14</sup> National Vaccine Injury Compensation Program: Revisions to the Vaccine Injury Table, 82 Fed. Reg. at 6301.

<sup>15</sup> The National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C.A. §§ 300aa-10 to -34) [hereinafter Vaccine Act or the Act]. All citations in this Note to individual sections of the Vaccine Act are to 42 U.S.C.A. § 300aa.

<sup>16</sup> *About the National Vaccine Injury Compensation Program*, HEALTH RES. & SERVS. ADMIN., <https://perma.cc/C43N-7FT8> (last reviewed Sept. 2025) [hereinafter the Program].

<sup>17</sup> Vaccine Act, *supra* note 15, §§ 300aa-14(a), (c)(3).

injuries that are not listed in the Vaccine Injury Table, petitioners may present their own evidence to the court to prove their injury was in fact caused by such a vaccine.<sup>18</sup>

Petitioners establish causation in fact by meeting the requirements set forth by a three-pronged test outlined in *Althen v. Secretary of Health & Human Services*.<sup>19</sup> Under the Act, petitioners must prove their case by a simple preponderance of the evidence.<sup>20</sup> However, recent judicial interpretations of the first prong of the *Althen* test have impermissibly raised petitioner's burden,<sup>21</sup> which is inconsistent with the spirit of the Act and reason for the Program's implementation.<sup>22</sup> The Act's purpose provides a strong presumption in favor of petitioner, but Program litigation has not determined whether a medical theory presented by the petitioner needs to be biologically plausible, or just biologically possible.<sup>23</sup> Despite years of inconsistent rulings, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") has failed to resolve the interpretation of *Althen* Prong One.<sup>24</sup>

This Note argues that the Federal Circuit should clarify Prong One of the *Althen* framework because its current application leads to a higher burden of proof for petitioners and negates the Program's purpose. Instead, the Federal Circuit must adopt a biological possibility standard of proof for Prong One because it is most consistent with *Althen* and the Act. Part I of this Note explains the foundation of the Program, the process for compensation, and the legal standard petitioners must meet for entitlement of compensation. Part II of this Note analyzes how a prevalent interpretation of Prong One results in a higher evidentiary burden for petitioner. It further examines the impermissible implications of such an interpretation in relation to the authorized functions in the Act. Part III of this Note recommends that the Federal Circuit issue a decision assuming the biological possibility standard of proof for petitioner under Prong One because it adequately recognizes the role of all three prongs of the *Althen* test, and it more effectively advances the Act's purpose.

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<sup>18</sup> *Id.* § 300aa-11(c)(1)(C)(ii)(I).

<sup>19</sup> 418 F.3d 1274, 1278 (Fed. Cir. 2005).

<sup>20</sup> Vaccine Act, *supra* note 15, § 300aa-13(a)(1)(A).

<sup>21</sup> *See infra* Part II.A.

<sup>22</sup> *See infra* Part II.C.

<sup>23</sup> *See infra* Part II.C.

<sup>24</sup> *See infra* Part III.

## I. Background

People have used vaccines for centuries as a way to develop immunity against foreign invaders in the human body.<sup>25</sup> Humans, since as early as the tenth century, have purposely exposed themselves to small doses of disease or ingested toxins to prevent against future lethal vulnerability.<sup>26</sup> In 1986, Congress enacted a program to support federally promoted vaccine administration amongst the American public.<sup>27</sup> Part of this program recognizes the statistically rare, but possible, injuries that vaccines can cause due to large scale administration.<sup>28</sup> Despite these instances, the greater good necessitates public immunity.<sup>29</sup> An evaluation of seminal case law and the inconsistent application of its legal standard reveal deficiencies in clarity of the standard and results that stray from the Act's purpose.<sup>30</sup>

### A. Foundation & Purpose of the Program

Congress passed the Act to address public health concerns regarding the continued use of vaccines.<sup>31</sup> During the 1970s and 1980s, mass media stoked public anxieties regarding the potential dangers of vaccines, resulting in an influx of lawsuits by individuals against manufacturers and vaccine administrators.<sup>32</sup> These lawsuits led many pharmaceutical companies to stop producing and distributing vaccines.<sup>33</sup> By 1985, only four manufacturers remained, and vaccine prices rose higher and higher.<sup>34</sup> The following year, Congress passed the Vaccine Act, establishing the National Vaccine Injury

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<sup>25</sup> See FRANK FENNER ET AL., SMALLPOX AND ITS ERADICATION 245–58 (1988); see also Angela Ki Che Leung, “Variolation” and Vaccination in Late Imperial China, Ca 1570–1911, in HISTORY OF VACCINE DEVELOPMENT 5, 5–12 (Stanley A. Plotkin ed., 2011).

<sup>26</sup> FENNER ET AL., *supra* note 25, at 247.

<sup>27</sup> Vaccine Act, *supra* note 15, §§ 300aa-10 to -19.

<sup>28</sup> See Katherine E. Strong, Note, *Proving Causation Under the Vaccine Injury Act: A New Approach for a New Day*, 75 Geo. Wash. L. Rev. 426, 433 (2007).

<sup>29</sup> See *id.* at 432, 435.

<sup>30</sup> See *infra* Part II.

<sup>31</sup> See Strong, *supra* note 28, at 435.

<sup>32</sup> See A.H. Griffith, *Permanent Brain Damage and Pertussis Vaccination: Is the End of the Saga in Sight?*, 7 VACCINE 199, 200–01 (1989) (referencing a popular documentary in April 1974 that wavered public confidence in the safety of vaccine science followed by the resurgence of major epidemics in the late 70s and early 80s).

<sup>33</sup> See Mary Beth Neraas, Comment, *The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?*, 63 WASH. L. REV. 149, 152 (1988); see also Koch, *supra* note 11, at 645.

<sup>34</sup> Derry Ridgway, *No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*, 24 J. HEALTH POL. POL'Y & L. 59, 61, 76 (1999).

Compensation Program to provide manufacturers with a shield from liability and compensate injured individuals.<sup>35</sup> Manufacturers would continue producing and developing new vaccines, and the American public would remain sufficiently vaccinated.<sup>36</sup>

National vaccine administration plays a vital role in the health of the population.<sup>37</sup> The federal government has a public health interest in ensuring that its citizens continue to receive vaccinations to eradicate the presence of diseases among the population.<sup>38</sup> In doing so, the federal government has enacted many initiatives to encourage its citizens to get vaccinated.<sup>39</sup> The principle behind the Program's foundation is that it is safer for Americans to receive the required immunizations than to risk the public health consequences of contracting and spreading such diseases.<sup>40</sup>

Despite the overwhelming benefits of a vaccination scheme, the risk of injury will never be absolutely zero.<sup>41</sup> Though the national vaccine scheme has consisted of over five billion doses of covered vaccines administered from 2006–2022,<sup>42</sup> only a small percentage of people have and will suffer serious adverse effects from vaccines.<sup>43</sup> The federal government recognizes the sacri-

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<sup>35</sup> See Strong, *supra* note 28, at 435.

<sup>36</sup> See Ridgway, *supra* note 34, at 76.

<sup>37</sup> See Elizabeth A. Breen, *A One Shot Deal: The National Childhood Vaccine Injury Act*, 41 WM. & MARY L. REV. 309, 311–12 (2000) (citing H.R. REP. NO. 99-908, pt 1, at 4 (1986), as reprinted in 1986 U.S.C.C.A.N. 6344, 6345 (“Vaccination of children against deadly, disabling, but preventable infectious diseases has been one of the most spectacularly effective public health initiatives this country has ever undertaken.”)).

<sup>38</sup> See *id.*

<sup>39</sup> See generally *id.* (discussing programs such as the Childhood Immunization Initiative and vaccines requirements for schools).

<sup>40</sup> See *id.* at 314–15, 317.

<sup>41</sup> See *id.* at 313.

<sup>42</sup> Symptoms from vaccines may develop due to a human body's natural evolutionary response to exposure of antigens. This is a sign that the immune system is working. As with any activity, there is at least a miniscule risk of injury. See Interview by Frontline with Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases (conducted Mar. 22, 2010) (transcript available Apr. 27, 2010; edited Mar. 23, 2015), <https://perma.cc/QW3M-DBRK>; see also HEALTH RES. & SERVS. ADMIN., *National Vaccine Injury Compensation Program Data Report* (2025); see also COMM. ON THE ASSESSMENT OF STUDS. OF HEALTH OUTCOMES RELATED TO THE RECOMMENDED CHILDHOOD IMMUNIZATION SCHEDULE, INST. OF MED., *THE CHILDHOOD IMMUNIZATION SCHEDULE AND SAFETY: STAKEHOLDER CONCERNS, SCIENTIFIC EVIDENCE, AND FUTURE STUDIES 2* (The National Academies Press ed. 2013).

<sup>43</sup> See WENDY K. MARINER, ADMIN. CONF. OF THE U.S., REPORT FOR RECOMMENDATION 91-4, *Innovation and Challenge: The First Year of the National Vaccine Injury Compensation Program*, at 431 (1991); see also H.R. REP. NO. 99-908, pt. 1, at 4 (1986), as reprinted in

fice that these few individuals make for the greater public interest.<sup>44</sup> As such, Congress established a no-fault compensation program for injuries sustained from vaccines provided nationally.<sup>45</sup> The Program attempts to compensate petitioners for their injuries efficiently by not requiring arbiters to determine a scientific conclusion for each case.<sup>46</sup> Rather, the arbiters determine if *legal causation* has occurred.<sup>47</sup>

The Program primarily promotes public health initiatives designed to keep vaccines safe, effective, and administered in a widespread manner, while creating a safety net for the few, yet inevitable, injured.<sup>48</sup> A no-fault compensation program wherein the federal government covers the cost of any injuries caused by vaccines protects manufacturers from lawsuits.<sup>49</sup> This encourages the development of new and improved vaccines in the market, thus promoting public health.<sup>50</sup> Litigation against vaccine manufacturers would lead to increased consumer costs, fewer manufacturers engaged in the market, and less incentive to further develop vaccine science.<sup>51</sup>

### **B. How Claims Proceed Under the Program**

Claims filed by petitioners seeking compensation through the Program are adjudicated within the U.S Court of Federal Claims by the Office of Special Masters.<sup>52</sup> A separate office within the court facilitates informal and flexible case proceedings for quicker resolutions.<sup>53</sup> Petitioners may receive compensation through two categories of vaccine injuries: Table and off-Table claims.<sup>54</sup>

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1986 U.S.C.C.A.N. 6344, 6345 (“While most of the Nation’s children enjoy great benefit from immunization programs, a small but significant number have been gravely injured.”).

<sup>44</sup> See MARINER, *supra* note 43, at 431.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 413.

<sup>47</sup> See *infra* Part II.B; see also MARINER, *supra* note 43, at 438.

<sup>48</sup> Litigation regarding negligence and defects of vaccines also increases public skepticism that vaccines are effective or worth the risk. Establishment of a no-fault compensation program for vaccine injuries does not just contribute to a competitive economic market. See MARINER, *supra* note 43, at 416–18.

<sup>49</sup> *Id.* at 417–18; see generally *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (holding that the Vaccine Act preempts all design-defect claims brought against vaccine manufacturers).

<sup>50</sup> See MARINER, *supra* note 43, at 421–22.

<sup>51</sup> The threat of tort liability claims presented concerns that there might be no manufacturers for certain vaccines in the United States. *Id.* at 417–18.

<sup>52</sup> *Vaccine Claims / Office of Special Masters*, U.S. FED. CL., <https://perma.cc/C6HG-J5WQ>.

<sup>53</sup> *Id.*

<sup>54</sup> See Vaccine Act, *supra* note 15, §§ 300aa-11(c)(1)(C)(ii), -13(a)(1)(A). This Note will refer to claims arising under § 300aa-11(c)(1)(C)(ii) as “off-Table claims” for brevity.

### 1. *The Role of Special Masters*

“The procedures to be followed in adjudicating vaccine cases are set forth in the Vaccine Act, in the Vaccine Rules adopted by the judges of the U. S. Court of Federal Claims, and in the Guidelines for Practice adopted by the special masters.”<sup>55</sup> Special masters oversee proceedings in the Program and issue decisions in accordance with statutory and legal requirement, regarding whether petitioners are entitled to compensation.<sup>56</sup> Congress assigned the litigation of these cases to special masters on the grounds that they are specialists with expertise in the Program.<sup>57</sup>

Claimants file a petition for compensation that summarizes the facts and grounds for compensation.<sup>58</sup> This is accompanied by medical records relevant to the case, affidavits from any potential witnesses, and any medical expert opinions that petitioner intends to rely on.<sup>59</sup> Respondent—Secretary of the U.S. Department of Health and Human Services—subsequently files a reply with any issues that they intend to contest.<sup>60</sup> Special masters then must issue a final decision<sup>61</sup> in the case within 240 days of the petition's date of filing.<sup>62</sup>

### 2. *Types of Cases*

Petitioners may receive compensation from vaccine injuries listed in the Vaccine Injury Table, and those which are not.<sup>63</sup> The Vaccine Injury Table lists all vaccines covered by the Act.<sup>64</sup> Petitioners may receive compensation for

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<sup>55</sup> Peter H. Meyers, *Fixing the Flaws in the Federal Vaccine Injury Compensation Program*, 63 ADMIN. L. REV. 785, 795 (2011).

<sup>56</sup> See Vaccine Act, *supra* note 15, § 300aa-12(c).

<sup>57</sup> With this expertise, a level of deference is awarded by the Act upon review to appellate courts. See *Hodges v. Sec'y of Health & Hum. Servs.*, 9 F.3d 958, 961 (Fed. Cir. 1993).

<sup>58</sup> See FED. CL. VACCINE R. 2(c)(1)(A).

<sup>59</sup> See Vaccine Act, *supra* note 15, § 300aa-11(c)(2); OFF. OF SPECIAL MASTERS, GUIDELINES FOR PRACTICE UNDER THE NATIONAL VACCINE INJURY COMPENSATION PROGRAM § II(B) (2004) [hereinafter GUIDELINES FOR PRACTICE].

<sup>60</sup> FED. CL. VACCINE R. 4(c). See GUIDELINES FOR PRACTICE, *supra* note 59, § II.

<sup>61</sup> These cases are typically divided into two phases: entitlement and damages. The entitlement phase is first, wherein the special master decides whether petitioner has been injured by the vaccine in accordance with the Act. The second phase proceeds if petitioner is found to be entitled to compensation. This phase determines what and how much compensation petitioner is awarded. This Note will address only the entitlement phase. 23 AM. JUR. 3D *Proof of Facts* 71 (1993).

<sup>62</sup> Vaccine Act, *supra* note 15, § 300aa-12(g); FED. CL. VACCINE R. 10(b). Note that this is often not accomplished, for many reasons. However, the procedural efficiency with regard to timing of cases within the Program are not at issue in this Note.

<sup>63</sup> Vaccine Act, *supra* note 15, § 300aa-14(a).

<sup>64</sup> See *id.* Revisions to the Table are promulgated by the Secretary of the Department of Health and Human Services through notice and public comment procedures. Any person

injuries sustained because of any of the vaccines listed in the Table.<sup>65</sup> Also in this Table is a list of injuries which, if sustained within a certain time frame from date of vaccination, will be presumed to be related to the vaccine.<sup>66</sup> As such, to receive compensation, petitioner will only be burdened with providing proof that the listed injury occurred within that specified time frame.<sup>67</sup> In that case, respondent has the higher burden of proof; respondent must show by a preponderance of evidence that the source of petitioner's injury is unrelated to the vaccine.<sup>68</sup> This burden is significant; the government may not rely on a claim that the cause is unknown due to petitioner's injuries being completely unrelated to their vaccination.<sup>69</sup> Providing compensation for any such injuries would validate claims that vaccines cause more harm than is the reality, thereby eroding public trust in the vaccines.<sup>70</sup>

On the other hand, if the injury petitioner is claiming is not on the Table or its onset was not in the specified timeframe, petitioner must establish a causal link between vaccine and injury.<sup>71</sup> Petitioners must establish that the vaccine *can* cause the injury and that it *did* cause the injury in their case.<sup>72</sup> Today, a large majority of vaccine cases are off-Table.<sup>73</sup>

### C. Legal Standard for Off-Table Claims

A petitioner of an off-Table claim must prove by preponderance of the evidence that the vaccine they received caused their injury.<sup>74</sup> There has been

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may petition proposed amendments to the Table. *Id.* § 300aa-14(c); see *Covered Vaccines*, HEALTH RES. & SERVS. ADMIN., <https://perma.cc/TDM9-TA3Q> (last visited Aug. 10, 2025).

<sup>65</sup> See *Covered Vaccines*, HEALTH RES. & SERVS. ADMIN., <https://perma.cc/TDM9-TA3Q>, (last visited Aug. 10, 2025).

<sup>66</sup> Vaccine Act, *supra* note 15, § 300aa-14(a).

<sup>67</sup> See *id.* § 300aa-11(c); see also *Ridgway*, *supra* note 34, at 63 (“Negative expert evidence demonstrating that the vaccine does not cause the injury cannot overcome the legal presumption created by the table.”).

<sup>68</sup> See Vaccine Act, *supra* note 15, § 300aa-13(a)(1)(B).

<sup>69</sup> See *id.* § 300aa-13(a)(2)(A). Sudden Infant Death Syndrome (SIDS) is such an idiopathic cause. See *Doe ex rel. Est. of Doe v. Sec’y of Dep’t of Health & Hum. Servs.*, 83 Fed. Cl. 157, 159 (2008); see also *Davis ex rel. Dudley v. Sec’y of Dep’t of Health & Hum. Servs.*, 54 Fed. Cl. 230, 235 (2002).

<sup>70</sup> Vaccine Act, *supra* note 15, § 13(a)(2)(A).

<sup>71</sup> See *Meyers*, *supra* note 55, at 798 (“In such off-Table cases, the special masters must base their decisions on medical opinions or published articles linking the vaccine to the injury involved in the case.”).

<sup>72</sup> See *Ridgway*, *supra* note 34, at 68.

<sup>73</sup> See *Meyers*, *supra* note 55, at 801.

<sup>74</sup> See, e.g., *Capizzano v. Sec’y of Health & Hum. Servs.*, 440 F.3d 1317, 1320 (Fed. Cir. 2006).

much confusion in the Program about what exactly this burden of proof requires.<sup>75</sup> Since 2005, the Federal Circuit has attempted to clarify the legal standard for the off-Table causation-in-fact cases.<sup>76</sup> These cases have maintained that the petitioner's burden in off-Table cases is to demonstrate that the vaccine was a substantial factor in causing an injury, but not necessarily the sole or primary factor.<sup>77</sup> Though petitioners are required to establish that the injury would not have occurred except for the vaccine—a “but for” cause<sup>78</sup>—it is not necessary to identify “specific biological mechanisms” to establish causation, or eliminate all other possible causes of the injury.<sup>79</sup> This is due to the substantial uncertainty about the mechanisms of immunology that still largely exist.<sup>80</sup> Off-Table cases typically encompass complex medical questions that do not even have a singular or predominant view among experts.<sup>81</sup> As a result, causation is determined on a case-by-case basis, with “no hard and fast per se scientific or medical rules.”<sup>82</sup>

Petitioner's burden of proof standard for off-Table cases has been illuminated by the Federal Circuit into a three-pronged test.<sup>83</sup> The test was outlined in *Althen*, wherein the Federal Circuit defined that sufficient proof of causation occurs when petitioners provide: “(1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that vaccination was reason for injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.”<sup>84</sup>

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<sup>75</sup> See *infra* Part II.

<sup>76</sup> See, e.g., *Andreu ex rel. Andreu v. Sec'y of Health & Hum. Servs.*, 569 F.3d 1367 (Fed. Cir. 2009); *Walther v. Sec'y of Health & Hum. Servs.*, 485 F.3d 1146 (Fed. Cir. 2007); *Pafford ex rel. Pafford v. Sec'y of Health & Hum. Servs.*, 451 F.3d 1352 (Fed. Cir. 2006); *Capizzano*, 440 F.3d 1317; *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274 (Fed. Cir. 2005).

<sup>77</sup> See *Althen*, 418 F.3d at 1278.

<sup>78</sup> Petitioners may also establish causation in off-Table claims through “significant aggravation” of a disease or symptoms they already had or were predisposed to. See *Doles v. Sec'y of Health & Hum. Servs.*, No. 2023-2404, 2025 WL 1177875, at \*8 (Fed. Cir. Apr. 23, 2025); see also *W.C. v. Sec'y of Health & Hum. Servs.*, 704 F.3d 1352, 1356 (Fed. Cir. 2013). This Note will not address “significant aggravation” claims.

<sup>79</sup> See *Capizzano*, 440 F.3d at 1325 (quoting *Althen*, 418 F.3d at 1280).

<sup>80</sup> See Meyers, *supra* note 55, at 801.

<sup>81</sup> *Id.*

<sup>82</sup> See *Knudsen ex rel. Knudsen v. Sec'y of Health & Hum. Servs.*, 35 F.3d 543, 548 (Fed. Cir. 1994).

<sup>83</sup> See *Althen*, 418 F.3d at 1278.

<sup>84</sup> *Id.*

*Althen* abrogated a five-prong test created by *Stevens v. Secretary of the Department of Health & Human Services*<sup>85</sup> because *Stevens*'s medical literature requirement "prevent[ed] the use of circumstantial evidence envisioned by the preponderance standard and negat[ed] the system created by Congress" that favored resolving conflicts towards petitioners.<sup>86</sup> The *Althen* standard has since been accepted and applied by special masters.<sup>87</sup>

A medical theory under the *Althen* standard does not necessitate medical literature for sufficient proof of entitlement.<sup>88</sup> Petitioners have a burden to prove by a preponderance of the evidence that their injury was in fact caused by vaccine administration.<sup>89</sup> The first element to meeting the burden of proof requirement, as set forth in *Althen*, instructs petitioners to demonstrate a "reputable medical theory" that the vaccine received *can* cause the type of injury alleged.<sup>90</sup> The Federal Circuit has held that the purpose of the Act's preponderance standard is to allow for findings of fact in a field "bereft of complete and direct proof of how vaccines affect the human body."<sup>91</sup> A lack of medical literature supporting a particular theory of causation cannot serve as a bar to recovery in such a field.<sup>92</sup>

Petitioner's medical theory under Prong One must be supported by a "reputable medical or scientific explanation."<sup>93</sup> In *Althen*, the Federal Circuit quoted its opinion in *Grant ex rel. Grant v. Secretary of Health and Human Services*,<sup>94</sup> which defines a persuasive medical theory as one that is "proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury," such that this sequence is supported by the "reputable medical or scientific explanation."<sup>95</sup> This does not require medical literature or scientific *certainty*; rather, it accepts an explanation that is regarded as logical in

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<sup>85</sup> No. 99-594V, 2001 WL 387418 (Fed. Cl. Mar. 30, 2001).

<sup>86</sup> See Sharla Kooiker, *The Burden: Establishing an Appropriate Standard in an Area of Scientific Uncertainty*, 23 FED. CIR. B.J. 107, 114 (2013); see *infra* note 99 and accompanying text.

<sup>87</sup> See Meyers, *supra* note 55, at 802.

<sup>88</sup> See *Andreu ex rel. Andreu v. Sec'y of Health & Hum. Servs.*, 569 F.3d 136, 1380–81 (Fed. Cir. 2009).

<sup>89</sup> Vaccine Act, *supra* note 15, § 300aa-13(a)(1).

<sup>90</sup> See *Pafford ex rel. Pafford v. Sec'y of Health & Hum. Servs.*, 451 F.3d 1352, 1355–56 (Fed. Cir. 2006); see also *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

<sup>91</sup> *Althen*, 418 F.3d at 1280.

<sup>92</sup> See *Andreu*, 569 F.3d at 1379 (quoting *Althen*, 418 F.3d at 1280).

<sup>93</sup> See *id.* (quoting *Althen*, 418 F.3d at 1278).

<sup>94</sup> 956 F.2d 1144 (Fed. Cir. 1992).

<sup>95</sup> *Id.* at 1148 (emphasis added).

science.<sup>96</sup> This level of proof also does not require that the theory be substantiated with epidemiological studies otherwise necessary to achieve widespread acceptance by experts in the field.<sup>97</sup> In fact, this was key to *Althen*'s overturning of *Stevens*—the *Stevens* test required *biological confirmation* of petitioner's causation theory through recognition from the medical community—contravening the plain language of the statute.<sup>98</sup> Nevertheless, petitioners must provide testimony from experts who can generally support the theory through medical literature.<sup>99</sup>

Simple testimony from experts is sufficient under Prong One of *Althen*.<sup>100</sup> For instance, under *Stevens*, a petition must include medical literature or research studies conducted by experts in the field that specifically support petitioner's theory.<sup>101</sup> This sets forth a standard that the theory must have already been reported by the scientific community.<sup>102</sup> Under *Althen* however, a theory set forth by a singular expert is sufficient, so long as the concepts underlying the theory are biologically possible and have not been disproven.<sup>103</sup> Petitioners' experts may choose to support their opinion with medical literature, but it is not required to certify an acceptable theory.<sup>104</sup>

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<sup>96</sup> The theory need only be “legally probable, not medically or scientifically certain,” but it still must be *informed* by a “sound and reliable” medical or scientific *explanation*. *Andreu*, 569 F.3d at 1380 (emphasis added); see *Boatmon ex rel. J.B. v. Sec’y of Health & Hum. Servs.*, 941 F.3d 1351, 1359 (Fed. Cir. 2019); see also *Knudsen ex rel. Knudsen v. Sec’y of Health & Hum. Servs.*, 35 F.3d 543, 548–49 (Fed. Cir. 1994); *Veryzer v. Sec’y of Health & Hum. Servs.*, 98 Fed. Cl. 214, 223 (2011) (noting that special masters are bound by both § 300aa-13(b)(1) and Vaccine Rule 8(b)(1) to consider only evidence that is both “relevant” and “reliable”).

<sup>97</sup> See *W.C. v. Sec’y of Health & Hum. Servs.*, 704 F.3d 1352, 1356 (Fed. Cir. 2013) (citing *Andreu*, 569 F.3d at 1378); see also *Althen*, 418 F.3d at 1280 (“[T]o require identification and proof of specific biological mechanisms would be inconsistent with the purpose and nature of the vaccine compensation program.” (quoting *Knudsen*, 35 F.3d at 549)).

<sup>98</sup> See *Althen*, 418 F.3d at 1281. When there is ambiguity over what a standard or statute means, courts use canons of interpretation to help resolve that ambiguity. See *Facebook, Inc. v. Duguid*, 141 U.S. 395, 402 (2021). For instance, courts look to the “plain language” of the text, rather than construe any implications that are not written in. See *id.* at 402–03.

<sup>99</sup> See *LaLonde ex rel. M.L. v. Sec’y of Health & Hum. Servs.*, 746 F.3d 1334, 1341 (Fed. Cir. 2014).

<sup>100</sup> See *Althen*, 418 F.3d at 1280.

<sup>101</sup> See *Stevens v. Sec’y of Dep’t of Health & Hum. Servs.*, No. 99-594V, 2001 WL 387418, at \*24 (Fed. Cl. Mar. 30, 2001), *abrogated by, Althen*, 58 Fed. Cl. 270 (2003).

<sup>102</sup> *Id.*

<sup>103</sup> See *Althen*, 418 F.3d at 1280.

<sup>104</sup> See *Stevens*, 2001 WL 387418, at \*23.

### 1. *Collective Prong Interpretation*

There are two main interpretations of the *Althen* standard that are applied by lower court judges.<sup>105</sup> One faction of *Althen* application suggests that its three prongs are part of an overlapping and collaborative analysis.<sup>106</sup> The *Althen* factors have been characterized as “pleading requirements” by the Federal Circuit, wherein the sum of these factors *is* the preponderance standard.<sup>107</sup> It is not necessary for each pleading requirement to be met by preponderance because petitioners will reach this burden when they fulfill all three.<sup>108</sup> Whether the preponderance burden of proof has been met is based on the totality of the case.<sup>109</sup> With this interpretation, Prong One may be fulfilled by presenting a medical theory that is not impossible.<sup>110</sup> Through the other two prongs, the theory is then tested against facts to show that it could have occurred in the

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<sup>105</sup> Decisions made by the Office of Special Masters are accepted as the ruling by the U.S. Court of Federal Claims unless one party files a petition for review, which is then heard by a judge on that court, who upholds, sets aside, or remands the special master’s findings. Vaccine Act, *supra* note 15, §§ 300aa-12(e)(1)–(3).

<sup>106</sup> See Betsy J. Grey, *The Plague of Causation in the National Childhood Vaccine Injury Act*, 48 HARV. J. ON LEGIS. 343, 394 (2011) (“Although one piece of evidence may not be sufficient, the totality of the evidence . . . was sufficient to meet the standard to prove cause-in-fact.”).

<sup>107</sup> See *Cloer v. Sec’y of Health & Hum. Servs.*, 654 F.3d 1322, 1331–32 nn.3–4 (Fed. Cir. 2011) *aff’d sub nom.*, *Sebelius v. Cloer*, 568 U.S. 369 (2013).

<sup>108</sup> *But see Boatmon ex rel. J.B. v. Sec’y of Health & Hum. Servs.*, 941 F.3d 1351, 1360 (Fed. Cir. 2019) (reversing findings by the special master because they failed to evaluate according to the preponderance burden and subsequently found that petitioner failed to demonstrate the preponderance of the evidence for each prong of the *Althen* test); see also *Henkel ex rel. V.H. v. Sec’y of Health & Hum. Servs.*, 165 Fed. Cl. 153, 159–60 (2023), *aff’d*, 2024 WL 3873569 (Fed. Cir. Aug. 20, 2024) (identifying that the *Althen* prongs are independent obligations all of which a successful claimant must satisfy, but, in the case analysis, separately evaluates Prong II and Prong III using the preponderant evidence standard for each).

<sup>109</sup> *Porter v. Sec’y of Health & Hum. Servs.*, 663 F.3d 1242, 1249–50 (Fed. Cir. 2011) (“[B]ased on the record evidence as a whole and the totality of the case, whether it has been shown by a preponderance of the evidence that a vaccine caused the [petitioner’s] injury.” (quoting *Lombardi v. Sec’y of Health & Hum. Servs.*, 656 F.3d 1343, 1351 (Fed. Cir. 2011))); see also *Knudsen ex rel. Knudsen v. Sec’y of Dept of Health & Hum. Servs.*, 35 F.3d 543, 549 (Fed. Cir. 1994).

<sup>110</sup> *J. v. Sec’y of Health and Hum. Servs.*, 155 Fed. Cl. 20, 43 (2021) (“[T]he Federal Circuit was specifically analyzing the overall standards for ‘petitioners’ burden to prove actual causation[,] . . . not [the] standard for [petitioner’s theory required by] *Althen* [prong] one.” (quoting *Boatmon*, 941 F.3d at 1360)).

instant case.<sup>111</sup> Fulfilling all three prongs is defined as meeting the preponderant evidence standard.<sup>112</sup>

Petitioners must only present evidence to meet each prong *prima facie*.<sup>113</sup> For example, the Federal Circuit in *Andreu ex rel. Andreu v. Secretary of Department of Health and Human Services*<sup>114</sup> reversed the decision of lower courts to deny compensation for petitioner when petitioner's expert presented a theory of causation that was *biologically plausible* even by respondent's expert witness.<sup>115</sup> In *Kottenstette ex rel. C.K. v. Secretary of Health & Human Services*,<sup>116</sup> the Federal Circuit affirmed a finding of sufficient evidence under Prong One in 2021 when the special master accepted a theory that was *possible* despite questions of probability and lack of scientific knowledge because even respondent's expert noted that the theory could occur.<sup>117</sup> Further, in April 2025, the Federal Circuit reversed a lower court decision finding that circumstantial evidence in the form of a potentially-relevant scientific study was insufficient to find a successful medical theory.<sup>118</sup> In contrast, in *Valentine v. Secretary of Health & Human Services*,<sup>119</sup> the special master rejected a petitioner's claim

<sup>111</sup> See *id.* at 43, 56–57.

<sup>112</sup> See generally *id.*

<sup>113</sup> See *Shyface ex rel. Est. of Shyface v. Sec'y, Health & Hum. Servs.*, 165 F.3d 1344, 1351 (Fed. Cir. 1999) (“The Committee does not intend, however, to suggest that variance from the Table should act as a presumption against the petitioner . . .” (quoting H.R. REP. NO. 99-908, pt. 1, at 15 (1986), as reprinted in 1986 U.S.C.C.A.N. 6287, 6356)).

<sup>114</sup> 569 F.3d 1367 (Fed. Cir. 2009).

<sup>115</sup> *Id.* at 1372. Though respondent's expert described symptoms he would “expect to see” if this theory occurred in petitioner's case, he conceded that the theory was biologically plausible and even “reasonable” despite his expectations. *Id.*

<sup>116</sup> 861 F. App'x 433 (Fed. Cir. 2021).

<sup>117</sup> See *id.* at 440–42 (citing *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1281 (Fed. Cir. 2005)); see also Appellant's Corrected Brief at \*21–22, *Loyd ex rel. C.L. v. Sec'y of Health and Hum. Servs.*, No. 22-1371, 2022 WL 898534 (Fed. Cir. Mar. 18, 2022).

<sup>118</sup> *Doles v. Sec'y of Health & Hum. Servs.*, No. 23-2404, 2025 WL 1177875, at \*8 (Fed. Cir. Apr. 23, 2025). The court opined:

Langer-Gould contains circumstantial evidence which demonstrates that Ms. Doles' vaccines are capable of impacting the brain's white matter in the manner posited by Ms. Doles' underlying molecular mimicry theory of causation of her aggravated MS. By narrowing the evidentiary relevance of Langer-Gould, the Claims Court incorrectly deprived Ms. Doles of evidence that showed how her underlying causation theory can work. SM Horner was not arbitrary and capricious in his assessment of Langer-Gould and his conclusion that it provides support for Ms. Doles' theory of causation.

*Id.* Note that this case was one of a “significant aggravation” injury. *Id.* at \*1. The causation factors for significant aggravation are not referred to as *Althen* factors, but they are the functional equivalent. *Id.*

<sup>119</sup> No. 17-547V, 2025 WL 444654 (Fed. Cl. Jan. 13, 2025).

for compensation because, when tested against petitioner's contemporaneous symptoms and opinions of his treating physicians, the theory did not match.<sup>120</sup>

## **2. Each Prong Interpretation**

The second perspective on *Althen* application accepts only a higher burden of proof wherein each prong must meet the preponderance standard. *Boatmon ex rel. J.B. v. Secretary of Health and Human Services*<sup>121</sup> is consistently relied on by respondents who advocate that this is the correct standard and special masters who heed *Boatmon* as such.<sup>122</sup> In this case, the Federal Circuit rejected biological plausibility as insufficient for the standard of proof.<sup>123</sup> The court criticized the findings of sufficient proof when a theory merely establishes that the vaccination at issue “can be” a stressor or cause of the petitioner's injury.<sup>124</sup> Further, the Federal Circuit upheld a decision by the U.S. Court of Federal Claims in *Moberly ex rel. Moberly v. Secretary of Health and Human Services*<sup>125</sup>, affirming a special master's denial of compensation because no physician offered a statement that the vaccination “probably caused” petitioner's condition.<sup>126</sup> In *Oliver ex rel. E.O. v. Secretary of Health & Human Services*,<sup>127</sup> the special master compared the evidence presented by each party for each prong to determine who was more persuasive, rather than conducting a holistic review of petitioner's theory consistent with a collective-prongs interpretation.<sup>128</sup> Thus, under this interpretation, evidence under each prong must meet the preponderance standard.

## **D. Review of Petitions and Decisions**

Petitions that arise out of injuries from vaccine administration are overseen by eight special masters.<sup>129</sup> The process that these special masters adjudicate is

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<sup>120</sup> See *id.* at \*23.

<sup>121</sup> 941 F.3d 1351 (Fed. Cir. 2019).

<sup>122</sup> See, e.g., *Downing-Powers ex rel. M.D.P. v. Sec'y of Health & Hum. Servs.*, No. 15-1043V, 2020 WL 4197303, at \*11 (Fed. Cl. June 2, 2020); Corrected Brief of Respondent-Appellee at \*21–22, *Loyd ex rel. C.L. v. Sec'y of Health and Hum. Servs.*, No. 22-1371, 2022 WL 1261506 (Fed. Cir. Mar. 18, 2022).

<sup>123</sup> See *Boatmon*, 941 F.3d at 1359–60.

<sup>124</sup> See *id.* at 1360–62.

<sup>125</sup> 592 F.3d 1315 (Fed. Cir. 2010).

<sup>126</sup> See *id.* at 1323.

<sup>127</sup> 900 F.3d 1357 (Fed. Cir. 2018).

<sup>128</sup> See *id.* at 1362; see also *Munoz v. Sec'y of Health & Hum. Servs.*, 174 Fed. Cl. 276, 285–87 (2024) (affirming the special master's articulation of the evidentiary standard for Prong One as “preponderance of the evidence”), *appeal docketed*, No. 25-1409 (Fed. Cir. Feb. 4, 2025).

<sup>129</sup> Vaccine Act, *supra* note 15, §§ 300aa-12(c)–(d).

both inquisitorial and adversarial.<sup>130</sup> They are expected to act as expert decision makers with substantial knowledge of vaccine injuries and the structure of the Program, rather than as a neutral umpiring president.<sup>131</sup> This allows for a less adversarial, more speedy, and more straightforward case proceeding with flexible evidence admissibility standards as mandated by the Act.<sup>132</sup>

Special masters make all final decisions regarding vaccine injury litigation within the Program, subject to review by the U.S. Court of Federal Claims, then the Federal Circuit, and finally The United States Supreme Court.<sup>133</sup> These appellate courts review findings of fact with deference under the “arbitrary and capricious” standard.<sup>134</sup> But they review interpretations of legal principles under the non-deferential *de novo* standard.<sup>135</sup> Though their rulings are reviewed with regard to the expertise that special masters have in vaccine litigation, rulings by the special masters are often appealed and remanded with concern to the “preponderance of evidence” standard.<sup>136</sup>

## II. Analysis

Analysis of *Althen*'s Prong One in isolation has resulted in a raised burden of proof for petitioners.<sup>137</sup> Subsequent case law has often mischaracterized Prong One by neglecting to view it in the context of the entire test, thereby unnecessarily strictly construing Prong One.<sup>138</sup> Prongs Two and Three sufficiently address the concerns presented by judges utilizing this mischaracterization, resulting in a heightened standard overall.<sup>139</sup> Such a standard negates the Program's purpose to allow for findings of causation in favor of petitioners<sup>140</sup>

<sup>130</sup> See Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORN. L. REV. 1181, 1195 (2005).

<sup>131</sup> See GUIDELINES FOR PRACTICE, *supra* note 59, at § IV(1) (explaining that special masters have a more inquisitorial role than judges in typical litigation); see also *Robinson v. United States*, 513 A.2d 218, 222 (D.C. Cir. 1986) (quoting *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945)) (explaining that a judge must not have a partisan role).

<sup>132</sup> Vaccine Act, *supra* note 15, §§ 300aa-12(d)(2)(A)–(B) (2006).

<sup>133</sup> *Id.* §§ 300aa-12(e)–(f).

<sup>134</sup> *Id.* § 300aa-12(e)(2)(B); see *Lampe ex rel. Lampe v. Sec'y of Health & Hum. Servs.*, 219 F.3d 1357, 1360 (Fed. Cir. 2000).

<sup>135</sup> See *Saunders ex rel. Saunders v. Sec'y of Dep't of Health & Hum. Servs.*, 25 F.3d 1031, 1033 (Fed. Cir. 1994).

<sup>136</sup> See, e.g., *Grey*, *supra* note 106, at 381–82; see also Vaccine Act, *supra* note 15, § 300aa-13(a)(1).

<sup>137</sup> See *infra* Part II.B.

<sup>138</sup> See *infra* Part II.A–B.

<sup>139</sup> See *infra* Part II.A.

<sup>140</sup> See *infra* Part II.B–C.

and neglects Congress' clear intention to generously compensate those injured while contributing to public immunity.<sup>141</sup>

### A. A Correct Interpretation of the *Althen* Test

The *Althen* test describes how a petitioner must meet the preponderance standard: by completing three prongs.<sup>142</sup> The *Boatmon* faction of interpretation describes the *Althen* test as requiring preponderant evidence for *each* of the prongs.<sup>143</sup> However, the actual wording of *Althen* is: “[the petitioner’s] burden is to show by preponderant evidence that the vaccine brought about her injury by providing [the three prongs].”<sup>144</sup> The use of “that” in the standard stipulates that the injury is deemed to be brought out by the vaccine if such factors are met by preponderant evidence.<sup>145</sup> Further, preponderant evidence is accomplished “by” providing the three prongs.<sup>146</sup> Therefore, the most natural reading of *Althen*’s text is a collective prong interpretation.<sup>147</sup>

The *Boatmon* faction does not merely restate *Althen*, rather, it misunderstands the requirements of *Althen* and what the test comprises. The *Boatmon* faction conflates petitioner’s burden by requiring each prong to be met by a preponderance of the evidence.<sup>148</sup> Rather than saying, for example, that “petitioner’s burden is to show by preponderant evidence that [the three prongs],” the *Althen* court highlighted the pathway to petitioner’s success requiring a lower burden of proof.<sup>149</sup> Thus, a textual reading of *Althen* reveals that a higher burden of proof required by the *Boatmon* interpretation is inaccurate and inconsistent with case law.

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<sup>141</sup> See *infra* Part III.C; see also MARINER, *supra* note 43, at 418–19; see also H.R. REP. NO. 99-908, pt. 1, at 15 (1986), as reprinted in 1986 U.S.C.C.A.N. 6344, 6356 (“[E]vidence in the form of scientific studies or expert medical testimony is necessary to demonstrate causation for such a petitioner . . . . The Committee does not intend, however, to suggest that variance from the Table should act as a presumption against the petitioner but rather only that such a petitioner is not to be deemed to be eligible for compensation without further showings of causation.”) (emphasis added).

<sup>142</sup> See *Althen v. Sec’y of Health & Hum. Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

<sup>143</sup> See *Oliver ex rel. E.O. v. Sec’y of Health & Hum. Servs.*, 900 F.3d 1357, 1361 (Fed. Cir. 2018); see also *Broekelschen v. Sec’y of Health & Hum. Servs.*, 618 F.3d 1339, 1350 (Fed. Cir. 2010); *Olson v. Sec’y of Health & Hum. Servs.*, 758 F. App’x 919, 922 (Fed. Cir. 2018).

<sup>144</sup> *Althen*, 418 F.3d at 1278 (emphasis added).

<sup>145</sup> See *id.*

<sup>146</sup> *Id.*

<sup>147</sup> See *supra* Part I.C.1.

<sup>148</sup> See *Boatmon ex rel. J.B. v. Sec’y of Health & Hum. Servs.*, 941 F.3d 1351, 1355 (Fed. Cir. 2019).

<sup>149</sup> See *Althen*, 418 F.3d at 1278.

Overruling the *Stevens* test, which required medical literature, in favor of a less stringent *Althen* test was a signal from the Federal Circuit that special masters should prioritize compensation for petitioners in cases that may seem otherwise unclear.<sup>150</sup> Despite thorough instructions from the *Althen* court, several subsequent decisions proceed to degrade *Althen's* authority by taking *Boatmon's* rejection of a biological plausible medical theory to mean that it is insufficient for Prong One.<sup>151</sup> However, the *Boatmon* opinion only rejected the use of theory alone to be sufficient to meet the *entire* preponderance burden.<sup>152</sup> In fact, the *Boatmon* opinion reserved a separate section to address what is required under Prong One: only a “sound and reliable medical theory.”<sup>153</sup> Regardless of the incorrect interpretation of *Boatmon* by its successors, *Boatmon* nevertheless defied the design from *Althen* that allowed for nuanced understanding of possibility in theories of vaccine science.

### **B. The *Boatmon* Interpretation of *Althen* Leads to a Higher Burden for Petitioner**

Petitioner's burden of proof has been unduly raised to a higher degree of medical *certainty*<sup>154</sup> when the Federal Circuit requires *plausibility* or *probability*, rather than simple preponderance of medical *possibility*. Application of the *Althen* test through the *Boatmon* “each prong” lens criticizes Prong One in isolation, thereby failing to consider the test comprehensively.<sup>155</sup> Utilizing a textual analysis of the statute, the wording of *Althen* imparts that a petitioner must “show by preponderant evidence . . . by providing” the three prongs.<sup>156</sup> The plain language of *Althen* suggests that the three prongs amount to a showing of preponderant evidence.<sup>157</sup> Requiring biological plausibility degrades the integrity of *Althen* by unnecessarily conflating Prong One rather than analyzing Prong One within the crucial context of the other two prongs.

Though the biological possibility standard is a relatively low burden for a viable theory under Prong One, Prong Two, and Prong Three account for the concerns presented in *Boatmon* by requiring the theory to be put to the test in

<sup>150</sup> See Grey, *supra* note 106, at 380.

<sup>151</sup> See, e.g., Moberly *ex rel.* Moberly v. Sec'y of Health & Hum. Servs., 592 F.3d 1315, 1322 (Fed. Cir. 2010).

<sup>152</sup> See *Boatmon*, 941 F.3d at 1360.

<sup>153</sup> *Id.* at 1360–62; see also J. v. Sec'y of Health & Hum. Servs., 155 Fed. Cl. 20, 43 (2021).

<sup>154</sup> See *supra* Part II.A.

<sup>155</sup> See *supra* Part II.A.

<sup>156</sup> See *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005).

<sup>157</sup> See *supra* Part II.A; see also Hines v. Sec'y of Health & Hum. Servs., 940 F.2d 1518 (Fed. Cir. 1991).

application to the instant case facts, including petitioner's medical records.<sup>158</sup> For instance, though a theory may be sound and reliable under Prong One, it must also be consistent with petitioner's medical history.<sup>159</sup> In *Valentine*, the special master denied petitioner compensation because the medical theory was not consistent with the symptoms petitioner experienced and the contemporaneous opinions of his treating physicians.<sup>160</sup> Therefore, each prong is sufficient to check the theory in application to the instant case.

*Boatmon* asserts that merely stating that the vaccine at issue "can be" the cause of petitioner's injury is not enough to meet the burden.<sup>161</sup> This is true, but that requirement is just Prong One of the three-part test to meet the burden.<sup>162</sup> The deficiencies that the *Boatmon* court feared are addressed with the subsequent two prongs.<sup>163</sup> The complete *Althen* test requires a showing that the theory has occurred in petitioner's specific case.<sup>164</sup> Illustrating how the theory occurred in petitioner's instant case is accomplished through symptoms and reports made by treating physicians.<sup>165</sup> Contemporaneous medical records are crucial in identifying the immunological timeline necessary for the medical theory to have actually occurred in the petitioner.<sup>166</sup> Like in *Valentine*, the medical records reveal whether the petitioner's symptoms follow the proposed theory.<sup>167</sup> As such, raising the petitioner's burden under Prong One of *Althen* fulfills the requirement of the other two prongs.<sup>168</sup>

Further, *Boatmon* concerns that compensation will be too-easily awarded fail to recall that once petitioner fulfills all the *Althen* prongs, respondent is presented with an opportunity to reject the theory by providing evidence that

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<sup>158</sup> See *supra* Part I.C.

<sup>159</sup> See *Valentine v. Sec'y of Health & Hum. Servs.*, No. 17-547V, 2025 WL 444654, at \*23 (Fed. Cl. Jan. 13, 2025).

<sup>160</sup> See *id.*

<sup>161</sup> See *Boatmon ex rel. J.B. v. Sec'y of Health & Hum. Servs.*, 941 F.3d 1351, 1356, 1359 (Fed. Cir. 2019).

<sup>162</sup> See *supra* Part II.A.

<sup>163</sup> See *supra* Part II.B.

<sup>164</sup> See *supra* Part II.A.

<sup>165</sup> See, e.g., *Kooiker*, *supra* note 86, at 116 n. 75 (citing *De Bazan v. Sec'y of Dep't of Health & Hum. Servs.*, 539 F.3d 1347, 1352 (Fed. Cir. 2008)).

<sup>166</sup> *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005) ("A persuasive medical theory is demonstrated by 'proof of a logical sequence of cause and effect showing that the vaccination was the reason for the injury[,]'" (quoting *Grant v. Sec'y of Health & Hum. Servs.*, 956 F.2d 1144, 1148 (Fed. Cir.1992)).

<sup>167</sup> See *Valentine v. Sec'y of Health & Hum. Servs.*, No. 17-547V, 2025 WL 444654, at \*23 (Fed. Cl. Jan. 13, 2025).

<sup>168</sup> See *supra* Part II.C.; see also *Valentine*, 2025 WL 444654, at \*19 ("[T]he theory advanced for *Althen* prong one influences the remaining two *Althen* prongs.").

a separate theory is more likely.<sup>169</sup> Though it is up to respondent to provide an alternative theory, the special master must still weigh the likelihood that petitioner's theory occurred in the instant case.<sup>170</sup> Special masters are granted this discretion per the Act.<sup>171</sup> Instead of just eliminating these prongs as a result, courts that utilize this standard proceed to the second and third *Althen* prongs but require more specificity so that they are not deemed unnecessary.<sup>172</sup> Consequently, petitioner's burden of proof under Prong One is raised from simple preponderance of medical *possibility* to a degree of medical *certainty*.<sup>173</sup>

The *Kottenstette* opinion from the court just two years after *Boatmon* analyzes *Boatmon* as requiring a sense of *credibility*.<sup>174</sup> *Boatmon* explains that biological "credibility"<sup>175</sup> still does not require specific identification or proof of the theory's proposed biological mechanism.<sup>176</sup> Actually, the *Boatmon* requirement equates to "biological plausibility." Nonetheless, as per *Althen*, petitioner's theory must set forth an explanation that would be recognized by other experts as something that *can* conceivably happen.<sup>177</sup> *Boatmon* was therefore incorrect in differentiating between "plausibility" and "credibility."<sup>178</sup>

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<sup>169</sup> See Vaccine Act, *supra* note 15, § 300aa-13(a)(1)(B).

<sup>170</sup> See *De Bazan v. Sec'y of Dep't of Health & Hum. Servs.*, No. 03-0620V, 2006 WL 5616948, at \*1 (Fed. Cl. June 30, 2006); see also *supra* Part I.C.1.

<sup>171</sup> See Vaccine Act, *supra* note 15, §§ 300aa-13(a)(1)(B), (b)(1).

<sup>172</sup> See, e.g., *Boatmon ex rel. J.B. v. Sec'y of Health & Hum. Servs.*, 941 F.3d 1351, 1356, 1359–63 (Fed. Cir. 2019).

<sup>173</sup> See *id.* at 1359–60.

<sup>174</sup> See *Kottenstette ex rel. C.K. v. Sec'y of Health & Hum. Servs.*, 861 F. App'x 433, 440–41 (Fed. Cir. 2021) (referring to the assertion that causation can be found without detailed medical and scientific explanations of the biological mechanisms involved, and affirming that "*Boatmon* did not, and indeed, could not, overrule these previous articulations of the standard for causation").

<sup>175</sup> The *Boatmon* case uses the phrase "medical credibility", but "medical" and "biological" in the Program are used interchangeably, as the *Kottenstette* court elucidated. See *id.* at 440 (quoting *Boatmon*, 941 F.3d at 1359).

<sup>176</sup> See *id.*; see also *Knudsen ex rel. Knudsen v. Sec'y of Dep't of Health & Hum. Servs.*, 35 F.3d 543, 549 (Fed. Cir. 1994).

<sup>177</sup> See *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005); *Capizzano v. Sec'y of Health & Hum. Servs.*, 440 F.3d 1317, 1324 (Fed. Cir. 2009); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993) ("[I]n some instances well-grounded but innovative theories will not have been published . . . Some propositions, moreover, are too particular, too new or of too limited interest to be published.").

<sup>178</sup> See *Hoffman v. Sec'y of Health & Hum. Servs.*, 172 Fed. Cl. 477, 494 (2024) (first citing *Kottenstette*, 861 Fed. App'x at 437; then citing *Andreu ex rel. Andreu v. Sec'y of Dep't of Health & Hum. Servs.* 569 F.3d 1367, 1375 (Fed. Cir. 2009)) ("The Federal Circuit has thus said a biologically credible, or plausible, theory is sufficient under *Althen* prong one.").

The “credibility” and “plausibility” standards are the same; both are improper according to the Act and should be replaced by “possibility.”

The biological probability standard conflates legal probability with medical probability. A medical theory under *Althen* need only be “logical” and “legally probable”; it does not require a degree of medical certainty.<sup>179</sup> Petitioners need only successfully show legal causation.<sup>180</sup> Legal causation is different from what would be established as medical causation, because legal causation requires only that the injury may be correlated to the vaccine, not that it be definitive.<sup>181</sup> While the medical field may not recognize with any certainty that the vaccine is the cause of petitioner’s injury, the Program can recognize the vaccine as a cause through the law.<sup>182</sup> In *Knudsen*, the Federal Circuit established that off-Table causation is determined by a logical sequence of cause and effect, rather than what is “medically or scientifically certain.”<sup>183</sup> *Boatmon* and its progeny unnecessarily raise petitioner’s burden of proof by requiring a degree of medical certainty.

*Moberly*’s application requires the Prong One theory to be medically *probable*, not *possible*, before moving through the next two *Althen* prongs.<sup>184</sup> However, the sum of the three Prongs produces a burden that *is* the higher preponderance standard.<sup>185</sup> A key distinction here is that *Althen* requires *legal* probability, not medical or biological certainty.<sup>186</sup> Thus, the text of the *Althen*

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<sup>179</sup> See *Knudsen*, 35 F.3d at 548–49 (emphasis added).

<sup>180</sup> See *id.* at 547.

<sup>181</sup> See Russel G. Thornton, *Utilizing Causation*, 14 BAYLOR UNIV. MED. CTR. PROCS. 455, 455 (2001) (explaining the elements of proximate cause in health care liability contexts).

<sup>182</sup> See Vaccine Act, *supra* note 15, § 300aa-11(c)(1)(C)(ii).

<sup>183</sup> See *Knudsen*, 35 F.3d at 548–49.

<sup>184</sup> See *Moberly ex rel. Moberly v. Sec’y of Health & Hum. Servs.*, 592 F.3d 1315, 1322–23 (Fed. Cir. 2010). In this case, the Federal Circuit incorrectly rejected a medical theory that was possible because none of the treating physicians had presumed that the cause of petitioner’s symptoms may be due to vaccination. *Id.* at 1323.

<sup>185</sup> See *Cloer v. Sec’y of Health & Hum. Servs.*, 654 F.3d 1322, 1331–33 nn.3–4 (Fed. Cir. 2011); see also *J. v. Sec’y of Health and Hum. Servs.*, 155 Fed. Cl. 20, 43 (2021) (“[T]he Federal Circuit was specifically analyzing the overall standards for ‘petitioners’ burden to prove actual causation[;] . . . not [the] standard for [petitioner’s theory required by] *Althen* [prong] one.” (quoting *Boatmon ex rel. J.B. v. Sec’y of Health & Hum. Servs.*, 941 F.3d 1351, 1360 (Fed. Cir. 2019))); *Hibbard v. Sec’y of Health & Hum. Servs.*, 698 F.3d 1355, 1364–65 (Fed. Cir. 2012) (“Ms. Hibbard had to show both the medical plausibility of her theory of causation and that she suffered an injury consistent with that theory of causation . . .” along with the third prong requiring a showing of the temporal relationship in Ms. Hibbard’s case).

<sup>186</sup> See *supra* note 180 and accompanying text.

test is that preponderant evidence must be shown “*by providing* [the three prongs]”<sup>187</sup>.

Further, in the *Oliver* case, the special master found that petitioner did not meet Prong One of *Althen* despite petitioner's expert offering a medical theory that may be possible according to studies he presented.<sup>188</sup> The special master did not find the theory sufficient under Prong One because petitioner's expert was “not as persuasive” as respondent's expert.<sup>189</sup> Here, the special master applied the preponderance standard to Prong One (i.e., *each* prong) rather than correctly accepting a theory that was medically sound and then evaluating its application through Prong Two and Three.<sup>190</sup> The Federal Circuit upheld the special master's application of the preponderance standard to each prong, while relying on the “each prong” faction's misstatement of the text of *Althen*.<sup>191</sup> The misstatement of *Althen* utilized by the Federal Circuit in this case may have been detrimental to *Oliver's* case. In reality, legal probability may be achieved by applying the theory from Prong One to Prong Two and Three. Accordingly, the specific text of *Althen* unambiguously identifies the three prongs, collectively, as the preponderance standard.<sup>192</sup>

### C. A Higher Burden of Proof is Inconsistent with the Vaccine Act

Congress structured the Program as generous for petitioners, ensuring that petitioners were justly compensated for their injuries.<sup>193</sup> The Act is designed to accept petitioners' injury explanations rather liberally, despite scientific evidence that may only be suggestive rather than probable.<sup>194</sup> The Act envisioned a simple, speedy, and non-adversarial compensation program wherein

<sup>187</sup> See *Doe ex rel. Est. of Doe v. Sec'y of Health & Hum. Servs.*, 83 Fed. Cl. 157, 173 (2008) (citing *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005)) (emphasis added).

<sup>188</sup> See *Oliver v. Sec'y of Health & Hum. Servs.*, No. 10-394V, 2017 WL 747846, at \*12–14 (Fed. Cl. Feb. 1, 2017), *review denied*, 133 Fed. Cl. 341 (2017), *aff'd*, 900 F.3d 1357 (Fed. Cir. 2018).

<sup>189</sup> See *id.* at \*16.

<sup>190</sup> See *id.*

<sup>191</sup> See *supra* note 143 and accompanying text.

<sup>192</sup> See *J. v. Sec'y of Health and Hum. Servs.*, 155 Fed. Cl. 20, 43 (2021) (“[T]he Federal Circuit was specifically analyzing the overall standard for ‘petitioners’ burden to prove actual causation by a preponderance of the evidence in off-table cases,’ not a standard for *Althen* element one.” (quoting *Boatmon ex rel. J.B. v. Sec'y of Health & Hum. Servs.*, 941 F.3d 1351, 1360 (Fed. Cir. 2019))).

<sup>193</sup> See *MARINER*, *supra* note 43, at 424; see also H.R. REP. NO. 99-908, pt. 1, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 6344, 6344.

<sup>194</sup> See, e.g., *Henley v. Sec'y of Health & Hum. Servs.*, No. 16-499V, 2024 WL 2272670, at \*35 (Fed. Cl. Apr. 25, 2024).

a petitioner would meet their burden simply by relying on the facts and opinions laid out by their medical records, supplemented by an occasional expert testimonial for explanation.<sup>195</sup>

### *1. Statutory History and Intent*

Congress specifically chose not to heighten petitioner's burden in instances that vary from those outlined in the Table, therefore the Federal Circuit must not overreach its power by increasing the burden.<sup>196</sup> The Federal Circuit has long held that the requirement to prove a legal cause is not a requirement of scientific certainty.<sup>197</sup> The court reviewed a House Report concerning the Act, and held that off-Table injuries do not act as a presumption against the petitioner, i.e., does not raise petitioner's burden.<sup>198</sup> Special masters should take care not to increase the burden on petitioners to prove their case. The purpose of the standard outlined in the Act is to allow for findings of causation even when they have yet to be proven in medicine.<sup>199</sup>

Federal courts require that remedial or welfare legislation should be given broad construction and liberal interpretation to further the purposes behind the statute it stems from.<sup>200</sup> Congress designed the Act to favor broad acceptance of claims and recognized that there will likely be cases of over-compensation, where the vaccine was not actually the cause of an injury.<sup>201</sup> However, erring on the side of overinclusion best promotes the policy behind the Act.<sup>202</sup> Accordingly, the Act, in its intention to provide compensation for individuals injured by the national vaccination scheme, must be construed as such. This principle of statutory interpretation by federal courts, applied here, favors interpreting a lower burden of proof for *Althen* Prong One.

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<sup>195</sup> Vaccine Act, *supra* note 15, §§ 300aa-12(d), 13.

<sup>196</sup> See *supra* Part II.C.

<sup>197</sup> See *supra* Part II.B; see also *Golub v. Sec'y of Health & Hum. Servs.*, 243 F.3d 561, 2000 WL 1471643, at \*1 (Fed. Cir. Oct. 3, 2000) (emphasis added) (requiring a “reasonably reliable medical theory”) (unpublished opinion); *Bunting ex rel. Bunting v. Sec'y of Dep't of Health & Hum. Servs.*, 931 F.2d 867, 873 (Fed. Cir. 1991); *Contreras v. Sec'y of Health & Hum. Servs.*, 121 Fed. Cl. 230, 245 (2015).

<sup>198</sup> See *supra* notes 114–15 and accompanying text.

<sup>199</sup> See *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

<sup>200</sup> See *Atchinson, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987); see also *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994).

<sup>201</sup> See H.R. REP. NO. 99-908, pt 1, at 18 (1986), as reprinted in 1986 U.S.C.C.A.N. 6344, 6359.

<sup>202</sup> *Id.*

## 2. Case Law Discussion

The Federal Circuit contemplated the purpose of the Act and the intent of the Program in its interpretations of the legal standard.<sup>203</sup> First, Congress envisioned the Program to award injured individuals through petitions that are “fair, simple, and easy to administer.”<sup>204</sup> Thus, requiring more medical certainty from petitioner would negate the aspect of the Act’s purpose that seeks to promote this efficiency.<sup>205</sup> In *Knudsen*, the Federal Circuit contemplates the extent of proof required under Prong One, finding that a requirement of identification of precise biological mechanisms directly opposes the purpose and nature of the program.<sup>206</sup> The desire for expeditious and favorable decisions, and thereby a lower burden of proof, is necessary to meet the efficiency goal of the Act.

Second, it has been consistently held that the Program cannot require the level of proof that is seen for traditional tort plaintiffs due to the nature of vaccines and immunological science.<sup>207</sup> However, *Boatmon* has been interpreted as rejecting theories that are “plausible” or “possible” by asserting they are not sufficient to satisfy petitioner’s burden of proof.<sup>208</sup> But petitioners have always been able to rely on a theory that is based on “sound and reliable medical or scientific explanation”<sup>209</sup>—i.e., a theory that is possible according to what science and medicine has so far established.<sup>210</sup> Further, the court in *Moberly* rejected petitioner’s claims that the special master applied an improperly heightened burden of proof because the Act does not relax proof of causation for off-Table injuries.<sup>211</sup> This is an inaccurate depiction of the Act. Rather, the Federal Circuit has described the area of vaccine science as “a field bereft of complete and direct proof of how vaccines affect the

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<sup>203</sup> See *supra* Part II.C.

<sup>204</sup> See H.R. REP. NO. 99-908, pt. 1, at 7 (1986), as reprinted in 1986 U.S.C.C.A.N. 6344, 6348.

<sup>205</sup> See *supra* Part II.A; see also *About the National Vaccine Injury Compensation Program*, HEALTH RES. & SERVS. ADMIN. (last visited Feb. 22, 2025), <https://perma.cc/C43N-7FT8>.

<sup>206</sup> See *Knudsen ex rel. Knudsen v. Sec’y of Health & Hum. Servs.*, 35 F.3d 543, 549 (Fed. Cir. 1994).

<sup>207</sup> See, e.g., *id.* (noting that “[t]he Vaccine Act does not contemplate full blown tort litigation in the Court of Federal Claims.”).

<sup>208</sup> See *Boatmon ex rel. J.B. v. Sec’y of Health & Hum. Servs.*, 941 F.3d 1351, 1360 (Fed. Cir. 2019); see also *Moberly ex rel. Moberly v. Sec’y of Health & Hum. Servs.*, 592 F.3d 1315, 1322 (Fed. Cir. 2010).

<sup>209</sup> See *Knudsen*, 35 F.3d at 548.

<sup>210</sup> Scientific uncertainty identifying specific injuries as vaccine-related is still very prevalent in immunology. See Meyers, *supra* note 55, at 797.

<sup>211</sup> See *Moberly*, 592 F.3d at 1322.

human body.”<sup>212</sup> Such a burden of proof would require conclusive scientific evidence, or medical *certainty*.<sup>213</sup>

Third, Congress explicitly prescribed that petitioners are to succeed on their claims barring proof from respondent that the injury was due to a definitive, identifiable alternate cause.<sup>214</sup> For instance, the Federal Circuit in *Knudsen* reversed a decision denying compensation to petitioner when the special master attributed petitioner’s injuries to a viral infection because a specific viral infection was not identified.<sup>215</sup> The court reiterated the statutory standard that once petitioner meets their required burden of proof to establish causation in fact, respondent has the burden to prove the injury is more likely due to an alternative cause, where such a cause cannot be idiopathic.<sup>216</sup> Though the court does not make a determination on whether there may be specific alternative cause in the instant case, the Federal Circuit remands that factual determination to the special master while emphasizing the strong presumption for petitioner according to the “generosity” of the Act.<sup>217</sup> In *Knudsen*, the Federal Circuit further reexamines the purpose of the Act and the nature of the compensation program as a way to ameliorate potential vaccine-related injuries rather than serve as a method for “ascertaining *precisely how and why*” vaccines cause these injuries.<sup>218</sup> Therefore, when applying the intent of Congress to a theory under Prong One, such a theory need only be possible.

In contrast, the Federal Circuit has justified a higher burden according to the distinction between on-Table and off-Table proof required by the Act.<sup>219</sup>

<sup>212</sup> See *Althen v. Sec’y of Health & Hum. Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

<sup>213</sup> See *K.L. v. Sec’y of Dep’t of Health & Hum. Servs.*, 134 Fed. Cl. 579, 597 (2017) (affirming the special master’s decision to deny petitioner compensation because the special master did not raise the burden of proof by requiring scientific certainty or a scientific study that conformed to petitioner’s causation theory); see also *Graves ex rel. Est. of Graves v. Sec’y of Dep’t of Health & Hum. Servs.*, 101 Fed. Cl. 310, 331 (2011) (finding the special master erroneously raised petitioner’s burden of proof because they required evidence of scientific acceptance in addition to a plausible medical theory).

<sup>214</sup> See 23 AM. JUR. 3D *Proof of Facts* 71, § 44, Westlaw (database updated July 2025) (respondents may overcome petitioners’ success by alleging a “very definite cause of the injury, and support it with specific medical evidence”).

<sup>215</sup> See *Knudsen ex rel. Knudsen v. Sec’y of Health & Hum. Servs.*, 35 F.3d 543, 547 (Fed. Cir. 1994).

<sup>216</sup> See *id.* at 547–48.

<sup>217</sup> See *id.* at 551.

<sup>218</sup> See *id.* at 549 (emphasis added).

<sup>219</sup> Vaccine Act, *supra* note 15, § 300aa-13(a)(1); see, e.g., *Hodges ex rel. Hodges v. Sec’y of Dep’t of Health & Hum. Servs.*, 9 F.3d 958, 961 (Fed. Cir. 1993); *Lampe ex rel. Lampe v. Sec’y of Health & Hum. Servs.*, 219 F.3d 1357, 1360 (Fed. Cir. 2000).

In cases like *Hodges ex rel. Hodges v. Secretary of Health & Human Services*,<sup>220</sup> the court rejects petitioner's claim for compensation because of the higher burden it imposes, despite acknowledging that the scientific field lacks the knowledge and proof for petitioners to present theories with certainty.<sup>221</sup> Further, in *Munoz v. Secretary of Health & Human Services*,<sup>222</sup> the U.S. Court of Federal Claims has allowed the special master to deny petitioner's theory under Prong One because the theory was not persuasive.<sup>223</sup> The court refers to the Act's language that petitioner's burden is one of persuasion, but allows the heightened burden by applying this method to each *Althen* prong, rather than a comparison of petitioner's argument as a whole versus any alternative causation theory presented by respondent.<sup>224</sup> Accordingly, the Federal Circuit should remedy these misapplications through new, clear case law.<sup>225</sup>

### III. Recommendation

The lack of clarity from the Federal Circuit addressing *Althen's* implications on Program petitioners' burden of proof has resulted in two decades of confusion.<sup>226</sup> Practitioners, special masters, and judges struggle to predict the application of Prong One that the Federal Circuit desires.<sup>227</sup> This lack of direction has led to inconsistent rulings and straying from the purpose of the Act.<sup>228</sup> Congress's goal of ensuring compensation for petitioners with "generosity" has become increasingly more difficult.<sup>229</sup> As such, the Federal Circuit should issue a ruling that enunciates the structure of the three-pronged *Althen* test by clarifying that a simple performance of each prong is the equivalent of fulfilling petitioner's preponderance burden of proof.<sup>230</sup> In doing so, the

<sup>220</sup> 9 F.3d 958 (Fed. Cir. 1993).

<sup>221</sup> *See id.* at 961.

<sup>222</sup> 174 Fed. Cl. 276 (2024), *appeal docketed*, No. 25-1409 (Fed Cir. Feb. 4, 2025). This case is currently on appeal to be presented in front of the Federal Circuit regarding the required burden of proof under Prong One. Currently, no date for oral argument has been set.

<sup>223</sup> *See id.* at 287–88.

<sup>224</sup> *Id.*

<sup>225</sup> The *Munoz* case is currently on appeal in front of the Federal Circuit. The court has not set a date for oral arguments but should consider this opportunity to rectify the *Althen* Prong One confusion. *See id.*

<sup>226</sup> *See supra* Part II.

<sup>227</sup> *See supra* Part I.C.

<sup>228</sup> *See supra* Part I.C.

<sup>229</sup> *See Strong, supra* note 28, at 458; *see also* H.R. REP. NO. 99-908, pt. 1, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6344, 6344.

<sup>230</sup> *See infra* text accompanying notes 243–45.

court must proclaim that petitioner's causation theory under Prong One must only be a biological possibility.<sup>231</sup>

Both petitioners and special masters in the Program have opined that the proof required in state court has become less stringent than that now required by the Act.<sup>232</sup> Strict standards directly oppose Congress's goal of creating a compensation scheme that is generous to petitioners.<sup>233</sup> Congress has identified the need to provide generous compensation to those injured by vaccine administration because these individuals have been harmed while serving the public interest.<sup>234</sup> The Federal Circuit should recognize that this generous intent is reflected in the construction of the Act and should therefore be preserved in its application via petitioners' burden of proof requirement.<sup>235</sup>

Strict standards not only deprive victims of vaccine-related injury compensation that Congress intended to provide for, but it also leads off-Table petitioners to reject the Program in favor of filing civil suits against vaccine manufacturers.<sup>236</sup> This is exactly what this Program was designed to prevent.<sup>237</sup> The generous intent of Congress in instituting the Program is best manifested in an adoption by the Federal Circuit to apply the lower burden of proof under *Althen* Prong One.<sup>238</sup>

The lower burden of proof does not thereby create a scheme wherein petitioners can succeed on any medical theory they present. Rather, special masters are the ultimate decision makers in their role as the fact finders.<sup>239</sup> Special masters must evaluate the evidence brought by petitioner—and any refutation brought by respondents—to determine if the evidence is reputable,

<sup>231</sup> The *Althen* court upheld a special master's decision that a possible link between TT vaccination and central nervous system injury was sufficient under the Act. See *Althen v. Sec'y of Health & Hum. Servs.*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

<sup>232</sup> See Strong, *supra* note 28, at 446–47.

<sup>233</sup> See *supra* Part II.C.

<sup>234</sup> See *The National Vaccine Injury Program: Is it Working as Congress Intended?: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 15 (2001) (statement of Rep. Henry Waxman, Member, H. Comm. on Gov't Reform) (“We mandate the vaccinations, for the most part, for all the children in this country, as a public health preventative. So if somebody's injured, we ought to make sure that person is compensated.”).

<sup>235</sup> See Meyers, *supra* note 55, at 847.

<sup>236</sup> See MARINER, *supra* note 43, at 417; see also H.R. REP. NO. 99-908, pt. 1, at 26 (1986), as reprinted in 1986 U.S.C.A.N. 6344, 6367.

<sup>237</sup> Congress recognized this problem as early as 2001. See *The National Vaccine Injury Program: Is it Working as Congress Intended?: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 9 (2001) (opening statement of Rep. Burton, Chairman, H. Comm. on Gov't Reform).

<sup>238</sup> See MARINER, *supra* note 43, at 417.

<sup>239</sup> See *supra* Part I.B.1.

persuasive, and applicable.<sup>240</sup> Thus, determination often relies on affirmative scientific research regarding the theory (or similar ones), or even a lack of negative research.<sup>241</sup> It is still the case that petitioner's theory must be considered *reputable*.<sup>242</sup>

Accordingly, the correct interpretation of *Althen* Prong One is to require petitioners to present a medical theory of biological possibility.<sup>243</sup> This allows petitioner under Prong One to present a theory for the injury that "has not been ruled out by the scientific or medical community."<sup>244</sup> The Federal Circuit should therefore review a case wherein the issue on appeal debates the application of the *Althen* standard of proof as a whole, or Prong One specifically, and clarify that biological possibility is the correct burden under Prong One, and fulfillment of the three prongs altogether satisfy the preponderance standard.<sup>245</sup>

## Conclusion

The Federal Circuit should clarify the necessary burden of proof to satisfy Prong One of the *Althen* test. The Federal Circuit is well-equipped to resolve the confusion in the National Vaccine Injury Compensation Program. Promises of the Program to honor the sacrifices that Americans made for the nation's health may be secured by the Federal Circuit if the court holds that a biologically possible medical theory is sufficient under Prong One of the *Althen* test, when combined and applied through Prong Two and Prong Three.

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<sup>240</sup> See *D'Tiole v. Sec'y of Health & Hum. Servs.*, 132 Fed. Cl. 421, 430–33 (2017) (affirming that the special master did not apply a higher burden of proof when he found petitioner's theory unpersuasive because he articulated the reasons why he made this decision).

<sup>241</sup> See *Andreu ex rel. Andreu v. Sec'y of Health & Hum. Servs.*, 569 F.3d 1367, 1377–80 (Fed. Cir. 2009) (quoting *Andreu ex rel. Andreu v. Sec'y of Health & Hum. Servs.*, No. 98-817V, 2008 WL 2517179, at \*8 (Fed. Cl. Spec. Mstr. May 29, 2008)) (the evidence provided to the special master was that "numerous medical studies . . . failed to find a relationship between afebrile seizures and DPT vaccination").

<sup>242</sup> See *Pafford ex rel. Pafford v. Sec'y of Health & Hum. Servs.*, 451 F.3d 1352, 1355–56 (Fed. Cir. 2006); see also *Olson v. Sec'y of Health & Hum. Servs.*, 758 F. App'x 919, 924 (Fed. Cir. 2018) (affirming that the special master applied the correct standard under Prong One when she allowed a *possible* theory and found it to be *reputable*).

<sup>243</sup> See *supra* Part II.

<sup>244</sup> See *Grey*, *supra* note 106, at 348.

<sup>245</sup> Currently on appeal is *Munoz v. Secretary of Health & Human Services*, 174 Fed. Cl. 276 (2024), regarding whether the special master, in requiring preponderance for Prong One, impermissibly raised the burden. The U.S. Court of Federal Claims affirmed the special master's decision. Oral arguments are not currently scheduled for this case. The Federal Circuit calendar at time of publishing has been announced through December 2025.



# The Good, the Bad, and the Ugly: How *Loper Bright* Favors the United States Court of the Appeals for the Federal Circuit’s Restored Jurisdiction over MSPB Mixed-case Appeals

Victoriana A. Smith\*

## Introduction

Too many cooks spoil the broth. This proverb captivates the state of civil service law as adjudicated by district courts. The United States Supreme Court (“Supreme Court”) itself has said the “only way to ‘ensure that the law will not merely change erratically, but will develop in a principled fashion,’ is for us to leave *Chevron* behind.”<sup>1</sup> Erratic change of civil service law will likely occur if district courts adjudicate civil service law provided the lack of instruction to district courts regarding the adjudication of civil services disputes.<sup>2</sup> Congress created the United States Court of Appeals for the Federal Circuit (“CAFC”) to alleviate the federal appellate court caseload by granting this Court exclusive jurisdiction over subject matters.<sup>3</sup> Congress granted the CAFC exclusive review of appeals from the U.S. Court of International Trade, the U.S. Board of Contract Appeals, the U.S. Court of Custom and Patent Appeals, and from the U.S. Merit Systems Protection Board (“MSPB”).<sup>4</sup> In particular, the consolidation of MSPB appeals to the CAFC was to establish a “uniform body of appellate case law” for civil service issues.<sup>5</sup> Yet the CAFC’s jurisdiction over mixed-case appeals has been relinquished to district courts to which Congress has not given guidance on how to adjudicate civil service

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<sup>1</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 411–12 (2024) (citation omitted) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

<sup>2</sup> *See Perry v. MSPB*, 582 U.S. 420, 441 (2017) (Gorsuch, J., dissenting).

<sup>3</sup> *See* 28 U.S.C. § 1295(a).

<sup>4</sup> *See id.* §§ 1295(a)(5), (7), (9), (10).

<sup>5</sup> *See Perry*, 582 U.S. at 438–39, 443 (Gorsuch, J., dissenting).

issues.<sup>6</sup> Little guidance has left district courts to answer when and how they should adjudicate civil service disputes which has resulted in district court solutions departing further away from the text of the Civil Service Reform Act (“CSRA”).<sup>7</sup>

This proverb is also consistent with the fate of most federal employees able to file mixed-case appeals with the MSPB in light of *Loper Bright Enterprises v. Raimondo*.<sup>8</sup> In *Loper Bright*, the Supreme Court absolved the forty-year precedent that executive agencies should be given absolute deference in their respective area of expertise; rather, the Court limited deference of agency interpretations of ambiguous statutes.<sup>9</sup> The Court’s rejection of absolute deference of agency interpretations will likely lead to expanded judicial discretion when federal district courts exercise independent judgment when Congress has left questions of law unclear.<sup>10</sup> While the CAFC maintains jurisdiction over most MSPB appeals,<sup>11</sup> federal district courts currently retain jurisdiction over mixed-case appeals,<sup>12</sup> which contain allegations that an adverse employment action violates federal civil service law and anti-discrimination law.<sup>13</sup> For mixed-case appeals in particular, this proclamation of judicial authority will likely spur inconsistent decisions by lower courts.

The CAFC generally has jurisdiction on review to determine whether the MSPB has acted within its statutory authority.<sup>14</sup> On the contrary, the CAFC does not have authority to hear mixed-case appeals within its jurisdiction.<sup>15</sup> Federal district courts have been delegated the authority to these appeals, as

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<sup>6</sup> See *id.* at 438–39 (Gorsuch, J., dissenting).

<sup>7</sup> See *id.* at 441 (Gorsuch, J., dissenting).

<sup>8</sup> 603 U.S. 369 (2024).

<sup>9</sup> See *id.* at 400–03, 412 (“And although an agency’s interpretation of a statute ‘cannot bind a court,’ it may be especially informative ‘to the extent it rests on factual premises within [the agency’s] expertise.’”) (alteration in original) (quoting *ATF v. FLRB*, 464 U.S. 89, 98 (1983)).

<sup>10</sup> See *id.*

<sup>11</sup> See *Perry v. MSPB*, 582 U.S. 420, 422 (2017).

<sup>12</sup> See *id.* at 437.

<sup>13</sup> See 29 C.F.R. § 1614.302(a)(1).

<sup>14</sup> See *Perry*, 582 U.S. at 438–39 (Gorsuch, J., dissenting); U.S. MERIT SYS. PROT. BD., *The Limited Powers of the U.S. Merit System Protection Board*, in *ADVERSE ACTIONS: A COMPILATION OF ARTICLES 49, 49* (2016) [hereinafter *Limited Powers of MSPB*], [https://www.mspb.gov/studies/studies/Adverse\\_Actions\\_A\\_Compilation\\_of\\_Articles\\_1361510.pdf](https://www.mspb.gov/studies/studies/Adverse_Actions_A_Compilation_of_Articles_1361510.pdf) [<https://perma.cc/N42E-V376>]. The Federal Circuit is specifically tasked with review of MSPB decisions to determine if the MSPB’s final decision was “arbitrary, capacious, an abuse of discretion, or otherwise not in accordance with the law” as written by Congress. See 5 U.S.C. § 7703(c)(1).

<sup>15</sup> See 5 U.S.C. § 7703(b)(2); *Perry*, 582 U.S. at 439 (Gorsuch, J., dissenting).

opposed to the CAFC, so that district courts may conduct de novo factfinding on the discrimination issues.<sup>16</sup>

The decision in *Loper Bright* overturned the doctrine established in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*,<sup>17</sup> which required courts to defer to agency interpretation of ambiguous federal legislation when such agency interpretation was reasonable.<sup>18</sup> *Loper Bright* now requires district courts exercise more discretion when rectifying ambiguous statutes rather than deferring to a reasonable interpretation made by the agency in question.<sup>19</sup> Similarly, the CAFC has often referred to legislative history to determine congressional intent for MSPB,<sup>20</sup> but generally “[d]isputes arising under civil service laws head to the Federal Circuit for deferential review.”<sup>21</sup>

This Note argues that an increase in judicial discretion following the Supreme Court’s decision in *Loper Bright* will create inconsistent interpretations of civil service law when district courts hear MSPB mixed-case appeals because Congress has given little guidance on district court adjudication of civil service issues. Accordingly, MSPB mixed-case appeals should be heard exclusively by the CAFC to encourage uniform and predictable outcomes. Part II discusses the CAFC’s relationship with the MSPB, the nature of mixed-case appeals, the district court function in mixed-case appeals, and the inherently discombobulating scenarios district courts impose onto the MSPB. Part III analyzes the impact *Loper Bright* will have on judicial efficiency and uniform implementation of civil service law. Part IV advocates for the reinstatement of the CAFC’s jurisdiction to include the merits of civil service law, jurisdictional, and procedural issues in mixed-case appeals. Consolidating these matters exclusively to the CAFC is most consistent with *Loper Bright*, the text of the CSRA, and the Federal Courts Improvement Act of 1982 (“FCIA”) to promote national consistency in government personnel.<sup>22</sup>

## I. Background

Mixed-case appeals occur when an employee has alleged an adverse employment action reviewable by the MSPB that allegedly occurred due to a violation of an anti-discrimination law within the Equal Employment Opportunity

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<sup>16</sup> See *Perry*, 582 U.S. at 439 (Gorsuch, J., dissenting).

<sup>17</sup> 467 U.S. 837 (1984).

<sup>18</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 396–97, 412 (2024).

<sup>19</sup> See *id.* at 412–13.

<sup>20</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>21</sup> *Perry*, 582 U.S. at 439 (Gorsuch, J., dissenting) (distinguishing different standards of review applied for discrimination claims and civil service issues).

<sup>22</sup> See *United States v. Fausto*, 484 U.S. 439, 449 (1988).

Commission's ("EEOC") jurisdiction.<sup>23</sup> Unlike the CAFC that is statutorily required to defer to MSPB when reasonable,<sup>24</sup> district courts review MSPB mixed-case appeal dismissals under a *de novo* standard review.<sup>25</sup> District courts use of increased judicial discretion has historically caused confusion<sup>26</sup> and circuit splits in their interpretations of anti-discrimination law therefore it is likely this problem will persist with mixed-case appeals given district courts have less guidance with civil service law and now increased judicial discretion following *Loper Bright*.<sup>27</sup>

### A. Federal Circuit Jurisdiction

The CAFC was created to "improve[] the administration of law in the area[] of . . . merit system protection . . . ; provide[] a tribunal capable of exercising intermediate appellate jurisdiction nationwide; and . . . result[] in improved functioning of the federal appellate system."<sup>28</sup> Legislative history implies Congress created the CAFC to thwart a "trend toward increased . . . court filings" and to "help alleviate the docket pressures on the regional courts."<sup>29</sup> When drafting the FICA, Congress clearly stated it intended for the CAFC to have jurisdiction over *all* MSPB appeals including cases the Court of Claims (now known as the "U.S. Court of Federal Claims") did not have jurisdiction over.<sup>30</sup>

The Supreme Court and CAFC are the only courts that have authority to determine whether the MSPB acts within its authority as provided

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<sup>23</sup> See 5 U.S.C. § 7702(a)(1).

<sup>24</sup> See *Romero v. Dep't of Def.*, 658 F.3d 1372, 1377 (Fed. Cir. 2011).

<sup>25</sup> See 5 U.S.C. § 7703(c).

<sup>26</sup> See *Perry*, 582 U.S. at 441 (Gorsuch, J., dissenting).

<sup>27</sup> Compare *Muldrow v. City of St. Louis*, 30 F.4th 680, 688–89 (8th Cir. 2022) (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers v. District of Columbia*, 35 F.4th 870, 881 (D.C. Cir. 2022) (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>28</sup> H. R. REP. NO. 97-312, at 16–17 (1981); see also *Perry*, 582 U.S. at 439 (Gorsuch, J., dissenting) (citing *United States v. Fausto*, 484 U.S. 420, 449 (1988)) (explaining Congress articulated its intent that "civil service issues should be decided by the Federal Circuit so they might be subject to a uniform body of appellate case law").

<sup>29</sup> H.R. REP. NO. 97-312, at 17–18.

<sup>30</sup> See H.R. REP. NO. 97-312, at 18. (citing *Dunn v. Dep't of Agric.*, 654 F.2d 64 (Ct. Cl. 1981)) (where Court of Claims found they did not have jurisdiction to hear claims under 5 U.S.C. § 7703(b)(1)); see also 5 U.S.C. § 7703(b)(1)(A) (providing CAFC forum for review of MSPB decisions); 28 U.S.C. § 1295(a)(9) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final order or final decision of the Merit Systems Protection Board . . .").

by the statute under review by the court.<sup>31</sup> Ordinarily, the Supreme Court only determines whether the MSPB has acted within its authority upon review of CAFC decisions.<sup>32</sup> It is typical for the CAFC to be the only court, upon initial review, to determine when the MSPB is acting within its statutory authority by accessing whether the MSPB determinations, conduct, or action is within the limitations imposed onto the MSPB.<sup>33</sup> Consequently, it is the CAFC's judicial review which determines whether the MSPB has acted in a manner that is "arbitrary, capricious, or contrary to law."<sup>34</sup> Unless the CAFC determines the MSPB has acted in such a manner, the CAFC reviews MSPB appeals under a deferential standard.<sup>35</sup> Under most circumstances, the MSPB is subject to the CAFC's jurisdiction and upon deference the CAFC affirms the MSPB's decision when consistent with the law.<sup>36</sup> However, there is an exception permitting *de novo* review for discrimination cases brought before the MSPB in mixed-case appeals before district courts.<sup>37</sup> Thus, most MSPB appeal cases are reviewed by the CAFC under a deferential standard of review.<sup>38</sup>

The CAFC hears all MSPB appeals other than mixed-case appeals.<sup>39</sup> While the MSPB is under the jurisdiction of the CAFC as to almost all of the matters that the MSPB hears or enforces, there are exceptions to this general rule.<sup>40</sup> Historically, the Supreme Court has held the CAFC does not have jurisdiction to hear cases under 5 U.S.C. § 7703(b)(2).<sup>41</sup> Therefore, the CAFC does not have jurisdiction to hear mixed-case appeals brought before the MSPB when those mixed-cases contain grievance claims as to: employment discrimination,<sup>42</sup> age discrimination,<sup>43</sup> and minimum wage or maximum

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<sup>31</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See *Romero v. Dep't of Def.*, 658 F.3d 1372, 1377 (Fed. Cir. 2011); 5 U.S.C. § 7703(c).

<sup>36</sup> See *Romero*, 658 F.3d at 1377; 5 U.S.C. § 7703(c).

<sup>37</sup> See 5 U.S.C. § 7703(c).

<sup>38</sup> See *id.*; *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>39</sup> See *Kloeckner v. Solis*, 568 U.S. 41, 50, 56 (2012).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*; see also 5 U.S.C. § 7703(b)(2) (providing "cases of discrimination" brought under the following laws should be filed as contained in the respective law: "section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)).").

<sup>42</sup> See 42 U.S.C. § 2000e-16(c).

<sup>43</sup> See 29 U.S.C. § 633a(c).

hour violations.<sup>44</sup> While the CAFC does not have jurisdiction over mixed-case appeals, district courts do.<sup>45</sup>

### *1. Mixed-Case Appeals Explained*

There must be an anchor claim that would ordinarily be within the MSPB's jurisdiction to serve as a basis for a mixed-case appeal to successfully proceed before the MSPB.<sup>46</sup> A matter falls within MSPB's purview when it has appellate jurisdiction to review adverse employment actions.<sup>47</sup> Adverse employment actions within the MSPB's appellate jurisdiction include: removals, suspensions for more than fourteen days, a reduction in pay, a reduction in grade, furlough of thirty days or less.<sup>48</sup> The MSPB also reviews appeals on: performance-based removals or reductions in grade, denials of salary increases, reduction-in force-actions, denials of within-grade salary increases, reduction in force actions, OPM suitability determinations, OPM employment practices, denials of restoration of reemployment rights, and certain terminations of probationary employees.<sup>49</sup> The MSPB will have jurisdiction over a mixed-case appeal so long as the claims allege an action listed in 5 U.S.C. § 7702(a) occurred.<sup>50</sup> Additionally, for the MSPB to have jurisdiction over the action, it must also have jurisdiction over the individual bringing forth the action.<sup>51</sup> MSPB has jurisdiction to have claims of violations of civil service laws brought by most federal employees.<sup>52</sup> Therefore for the MSPB to have jurisdiction over a mixed-case appeal, the action must contain an appealable matter within the MSPB's jurisdiction and the employee must be within the MSPB's jurisdiction.<sup>53</sup> Generally, most mixed-case appeals contain an "issue of prohibited discrimination in connection with the [adverse] action."<sup>54</sup>

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<sup>44</sup> See *id.* § 216(b).

<sup>45</sup> See *Kloekner*, 568 U.S. at 44.

<sup>46</sup> See *id.* at 46.

<sup>47</sup> See JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RSCH. SERV., R45630, U.S. MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW ii (2019).

<sup>48</sup> See 5 C.F.R. § 1201.3(a)(2)–(3).

<sup>49</sup> See *id.* § 1201.3(a); *Jurisdiction*, U.S. MERIT SYS. PROT. BD., [<https://perma.cc/H76D-L5FZ>] (last visited Sep. 24, 2025).

<sup>50</sup> See 5 U.S.C. § 7701(a).

<sup>51</sup> See *id.* § 7702(a)(1)(A).

<sup>52</sup> See *Jurisdiction*, U.S. MERIT SYS. PROT. BD., *supra* note 49. MSPB's jurisdiction excludes particular agencies and employees listed in laws or regulations governing the action at issue, for example, political appointees, employees of intelligence agencies, and employees of the General Accounting Office. See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> *Id.*

As it relates to mixed-case appeals, the MSPB is not allowed to create or adjudicate a claim on its face.<sup>55</sup> While mixed-case appeals permit MSPB to hear EEOC Claims, the MSPB is only permitted to hear EEOC Claims when the EEOC claims are brought before the MSPB as an affirmative defense to adverse employment actions such as demotions and terminations.<sup>56</sup> The MSPB can only review EEOC claims alleging violations of federal discriminations laws when the “personnel actions that an employee . . . challenge[s] before the MSPB [would] in the first instance [] serve as the basis for a mixed case.”<sup>57</sup>

## ***2. Removal of Mixed-Case Appeal Jurisdiction as to the Merits and Procedural Issues***

Over time, the CAFC’s ability to hear appeals of MSPB mixed-case appeal decisions has been eroded.<sup>58</sup> First, the CAFC lost jurisdiction to hear mixed-case appeals on procedural grounds.<sup>59</sup> In *Kloeckner v. Solis*,<sup>60</sup> the Supreme Court held that district courts possess jurisdiction over procedural disputes in mixed-case appeals.<sup>61</sup> The Court in *Kloeckner* determined the CAFC had jurisdiction over MSPB final decisions except when the MSPB dismissed a mixed-case on procedural grounds or the merits.<sup>62</sup> The *Kloeckner* Court held, regardless of whether the MSPB dismissed the claim on the merits or for procedural matters, the claim should be filed in district court.<sup>63</sup> According to the Court, Congress had distinguished whether it intended to send merit decisions to federal district courts and procedural dismissals to the CAFC.<sup>64</sup> In making its decision, the Court in *Kloeckner* relied on an EEOC regulation to reach its holding that the CAFC does not have jurisdiction over mixed-case

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<sup>55</sup> See *id.*; *Prohibited Personnel Practices* (5 U.S.C. § 2302(b)), U.S. MERIT SYS. PROT. BD., [<https://perma.cc/C48M-H5AH>] (last visited Oct. 11, 2025).

<sup>56</sup> See *Prohibited Personnel Practices* (5 U.S.C. § 2302(b)), U.S. MERIT SYS. PROT. BD., *supra* note 55.

<sup>57</sup> See *Zachariasiewicz v. Dep’t of Just.*, 48 F.4th 237, 241, 243–44 (4th Cir. 2022) (explaining that the MSPB could not address Plaintiff’s claims or appeal because his non-selection had to first be heard before the Office of Special Counsel).

<sup>58</sup> See, e.g., *Kloeckner v. Solis*, 568 U.S. 41, 50 (2012).

<sup>59</sup> *Id.* at 44, 56.

<sup>60</sup> 568 U.S. 41 (2012).

<sup>61</sup> See *id.* at 44.

<sup>62</sup> See *id.* at 56.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 52 (holding that if Congress intended to send merit decisions to district courts, and procedural matters to the CAFC, it would have explicitly said so).

appeals.<sup>65</sup> The Court explained Section 7703 of the CSRA governs judicial review of MSPB decisions and specifically analyzed the exception outlined in Section 7703(b)(2) of the CSRA.<sup>66</sup> The exception the Court refers to when removing the CAFCs jurisdiction states

Cases of discrimination subject to the provision of section 7702 of this title shall be filed under [the enforcement sections of the Civil Rights Act, Age Discrimination Employment Act, and Fair Labor Standards Act], as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.<sup>67</sup>

The *Kloeckner* Court relied on the Court's adoption of the definition of mixed-case appeal as provided in 29 C.F.R. § 1614.302, an EEOC regulation.<sup>68</sup> The Court stated

[u]nder § 7703(b)(2), 'cases of discrimination subject to [§ 7702]' shall be filed in district court. Under § 7702(a)(1), the 'cases of discrimination subject to [§ 7702]' are mixed cases—those appealable to the MSPB and alleging discrimination. Ergo, mixed cases shall be filed in district court.<sup>69</sup>

Therefore, the Court in *Kloeckner* utilized the EEOC's definition of mixed-cases and applied the EEOC's definition to the phrase "cases of discrimination" to conclude that district courts maintained jurisdiction over procedural dismissals in mixed-case appeals.<sup>70</sup> Provided "cases of discrimination" are reviewed under the de novo standard, under *Kloeckner*, the civil service issue is also reviewed under the de novo standard.<sup>71</sup> In summation, the court found procedural and meritorious MSPB dismissals of any agency action to the MSPB based on the violation of an anti-discrimination statute listed in 5 U.S.C. § 7702(B) are not within the jurisdiction of the CAFC, but within the jurisdiction of the district courts.<sup>72</sup>

### ***3. Removal of Mixed-Case Appeal Jurisdiction as Jurisdictional Matters***

The Court in *Kloeckner* explained the CAFC did not have jurisdiction to hear MSPB procedural dismissals or meritorious dismissals of mixed-case

<sup>65</sup> See *id.* at 44–45 (first citing 29 C.F.R. § 1614.302; then citing 5 C.F.R. pt. 1201, subpt. E; and then citing 29 C.F.R. pt. 1614, subpt. C).

<sup>66</sup> See *id.* at 45.

<sup>67</sup> *Id.* at 45–46 (alteration in original) (quoting 5 U.S.C. § 7703(b)(2)). All enforcement provisions referenced provide federal district courts proper forum for the respective discrimination claim. See *id.* at 46.

<sup>68</sup> See *id.* at 49–50.

<sup>69</sup> *Id.* at 50.

<sup>70</sup> See *id.*

<sup>71</sup> See 5 U.S.C. §§ 7703(b)(2), (c).

<sup>72</sup> See *Kloeckner*, 568 U.S. at 50.

appeals.<sup>73</sup> Five years later, the Supreme Court proceeded to remove the CAFC's jurisdiction to hear MSPB jurisdictional dismissals of mixed-case appeals.<sup>74</sup> The Supreme Court in *Perry v. MSPB*,<sup>75</sup> held the proper forum for review of MSPB jurisdictional dismissals<sup>76</sup> of mixed-case appeals is the federal district courts, not the CAFC.<sup>77</sup> The Court clarified the proper review route for appeals of MSPB mixed-case appeals dismissals on the merits, procedural, and jurisdictional grounds is before district courts.<sup>78</sup> The Court relied largely on its decision in *Kloeckner* stating "*Kloeckner*, EEOC regulations, and Courts of Appeals' decisions are corroborative" in its decision to overturn the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") decision.<sup>79</sup> The Court overturned the D.C. Circuit's decision holding the CAFC maintained jurisdiction over MSPB jurisdictional dismissals of mixed-case appeals because jurisdiction was a question of civil service law.<sup>80</sup> Therefore, as the law stands today, district courts have jurisdiction over mixed-case appeals.<sup>81</sup>

The MSPB is bound by district court opinions interpreting civil service law and must apply those standards when adjudicating civil service claims.<sup>82</sup> Just as the MSPB is bound by CAFC cases or opinions, the MSPB is also bound by district court opinions because such courts also have authority over the MSPB.<sup>83</sup> Therefore as it relates to district court decisions and claims under 5 U.S.C. § 7703(b)(2), the MSPB is bound to the decisions of the various district courts.<sup>84</sup>

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<sup>73</sup> See *Kloeckner*, 568 U.S. at 55 n.4 (rejecting MSPB's national uniformity argument in support of the CAFC maintaining jurisdiction over mixed-case appeals by providing the rationale that the CAFC did not exist when Congress enacted the CSRA, therefore Congress could not have intended for government national uniformity because Congress had not considered this when they enacted the CSRA).

<sup>74</sup> See *Perry v. MSPB*, 582 U.S. 420, 430–32 (2017).

<sup>75</sup> 582 U.S. 420 (2017).

<sup>76</sup> A MSPB jurisdictional dismissal of a mixed-case appeals finds that (1) the employee was affected by an agency action (2) that the employee may not appeal to the MSPB because (3) the case is not a mixed-case appeal and therefore not in the MSPB's jurisdiction. See *Perry v. MSPB*, 829 F.3d 760, 761–62 (D.C. Cir. 2016), *rev'd*, 582 U.S. 420 (2017).

<sup>77</sup> *Perry*, 582 U.S. at 423.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 431.

<sup>80</sup> See *id.* at 428–29, 435–38.

<sup>81</sup> See *id.* at 437–38.

<sup>82</sup> See *id.* at 437.

<sup>83</sup> See *id.*

<sup>84</sup> The CAFC does have the ability to hear claims under 5 U.S.C. § 7703, which includes adverse actions that are ordinarily within MSPB's jurisdiction. See generally 5 U.S.C. § 7703.

#### 4. *Jury Trial Exception*

The right to a trial provided under § 7703(b)(2) prevents the CAFC from hearing mixed-case appeals.<sup>85</sup> Given that the CAFC is an appellate court, the CAFC does not try cases, hear new evidence, nor is there a jury.<sup>86</sup> Therefore, it logically follows that the CAFC cannot hear mixed-case appeals.<sup>87</sup> Provided that the CAFC does not have jurisdiction over mixed-case appeals, the MSPB is bound to the decisions of every district court and all determinations made by those courts as it relates to claims under 5 U.S.C. § 7703(b)(2).<sup>88</sup>

While district courts maintain jurisdiction over discrimination claims and civil service issues brought before mixed-case appeals, the standard of review for the civil service issue is unclear.<sup>89</sup> Mixed-case appeals are currently reviewed by district courts under a *de novo* standard of review; however, civil service disputes before the CAFC are heard under deferential standard unless the MSPB decision is found arbitrary and capricious.<sup>90</sup> However, the statute does not address the standard of review district courts should utilize for civil service disputes.<sup>91</sup> Furthermore, it is widely accepted the *de novo* standard for review is not suitable for decisions on civil service issues.<sup>92</sup>

##### a. **Creation of Law by the MSPB**

The MSPB has no authority to create favorable outcomes for employees when the action appealed before it is not authorized or inconsistent with the law.<sup>93</sup> The MSPB is only permitted to use “established constitutional law, statutes, and case decisions and apply that body of law to the facts presented to it.”<sup>94</sup> Therefore when the MSPB is not persuaded by an EEOC position or regulation, the MSPB is expected to defer to the opinions of courts above it, namely the district courts.<sup>95</sup> Generally, the MSPB defers to the EEOC in most cases when the EEOC has overruled the MSPB’s determination of discrimination law.<sup>96</sup> Similarly, courts have generally done the same with respect to the

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<sup>85</sup> See 5 U.S.C. §§ 7703(b)(2), (c).

<sup>86</sup> See 28 U.S.C. § 1295.

<sup>87</sup> See 5 U.S.C. §§ 7703(b)(2), (c).

<sup>88</sup> See *Perry v. MSPB*, 582 U.S. 420, 437 (2017).

<sup>89</sup> See *id.* at 439 (Gorsuch, J., dissenting).

<sup>90</sup> See *id.* at 439–40 (Gorsuch, J., dissenting); *Romero v. Dep’t of Def.*, 658 F.3d 1372, 1377 (Fed. Cir. 2011).

<sup>91</sup> See *Perry*, 582 U.S. at 447 (Gorsuch, J., dissenting).

<sup>92</sup> See *id.* at 441 (Gorsuch, J., dissenting).

<sup>93</sup> See *Limited Powers of MSPB*, *supra* note 14, at 51.

<sup>94</sup> *Id.*

<sup>95</sup> See *id.* at 49.

<sup>96</sup> *Developments at the MSPB: MSPB vs. EEOC on Reasonable Accommodation*, GILBERT EMP. L., P.C. (Aug. 14, 2014) [<https://perma.cc/6XFJ-FDPY>].

laws EEOC has authority to issue legislative regulations on.<sup>97</sup> Alternatively, while courts have considered EEOC's interpretive opinions, courts have previously taken a more liberal approach to their use of judicial discretion when those interpretative regulations were merely persuasive.<sup>98</sup> Within the actions of discrimination appealable to MSPB under 5 U.S.C. § 7702, the EEOC issues interpretative regulations on the following laws: Section 717 of the Civil Rights Act, Section 6(d) of the Fair Labor Standards Act of 1938 and Section 501 of the Rehabilitation Act are laws the EEOC issues interpretative regulations.<sup>99</sup> Therefore, when the MSPB does not defer to the EEOC as to its interpretations of those laws, the MSPB must look to cases in district courts, or other higher authorities, to substantiate its decisions.<sup>100</sup>

### **B. Impact of Court Uniformity on the MSPB**

Because the MSPB may look to district courts for guidance, a uniform opinion among the courts is tantamount to MSPB's role as an arbiter in mixed-case appeals.<sup>101</sup> When several district courts have concluded various interpretations of law, this places the MSPB in a predicament because the MSPB is authorized to produce outcomes that are authorized by the law.<sup>102</sup> Given that the MSPB is authorized to use district court opinions to justify its decision when the MSPB does not concur with the EEOC's determination of discrimination in a mixed-case appeals, it is plausible that the MSPB could use other decisions that may produce a favorable outcome for employees. The MSPB could use a district court, or regional appellate court case that produces a favorable outcome for employees despite other cases finding an alternative conclusion as to a similar set of facts brought forth by the MSPB.<sup>103</sup>

When there is limited guidance under the law where district courts have maintained discretion, district courts have previously reached a variety

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<sup>97</sup> U.S. Equal Emp. Opportunity Comm'n, *What You Should Know About EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, GovDELIVERY (May 5, 2016), [<https://perma.cc/E487-6YPC>]. See generally 29 U.S.C. § 628 (2023) (granting EEOC authority to issue legislative regulations under the Age Discrimination in Employment Act).

<sup>98</sup> See *id.*

<sup>99</sup> See 5 U.S.C. § 7702(a)(1)(B).

<sup>100</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49–51.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*; see also *Perry v. MSPB*, 582 U.S. 420, 423 (2017) (explaining that district courts have jurisdiction over mixed-case appeals).

<sup>103</sup> Compare *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022) (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers v. District of Columbia*, 35 F.4th 870, 873 (D.C. Cir. 2022) (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

of interpretations.<sup>104</sup> Courts have specifically come to a variety of conclusions when it pertains to the Section 717 of the Civil Rights Act of 1964.<sup>105</sup> Incorporated by reference, the MSPB may hear Title VII claims for disparate treatment as it applies to federal employees.<sup>106</sup> Disparate treatment claims, under Section 717, include prohibitions of discrimination as to federal employees who were treated less favorably because of their protected characteristic.<sup>107</sup> Therefore, when a mixed-case is brought before the MSPB and the case includes a Section 717 claim, when the MSPB does not defer to the EEOC it is expected to look to district court decisions, or higher courts, who have determined what actions specifically constitute disparate treatment.<sup>108</sup> In summary, the MSPB is required to look to the district courts when a mixed-case appeal includes a claim of employment discrimination based on a protected characteristic as it relates to hiring, promotion, terms of employment, or other employment actions.<sup>109</sup>

### ***1. Judicial Discretion with Limited Congressional Guidance***

Generally, courts have struggled to agree whether particular actions are protected under Title VII.<sup>110</sup> Specifically, courts have issued different opinions as to whether job transfers constituted discrimination under Title VII.<sup>111</sup> Title VII makes it unlawful for employers to “discriminate against any individual with respect to . . . [the] terms [and] conditions . . . of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>112</sup> Historically,

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<sup>104</sup> Compare *Muldrow*, 30 F.4th at 688 (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers*, 35 F.4th at 873 (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>105</sup> Civil Rights Act of 1964 § 717(c), 42 U.S.C. § 2000e-16(c).

<sup>106</sup> See *id.*

<sup>107</sup> See *id.* § 717(a).

<sup>108</sup> See 5 U.S.C. § 7703(b).

<sup>109</sup> Compare *Muldrow*, 30 F.4th at 688 (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers*, 35 F.4th at 872, 876–77 (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>110</sup> See *Muldrow*, 30 F.4th at 688; see also *Caraballo-Carballo v. Corr. Admins.*, 892 F.3d 53, 61 (1st Cir. 2018); *Williams v. R. Donnelley, Corp.*, 368 F.3d 123, 128 (2d Cir. 2004); *O’Neal v. Chicago*, 392 F.3d 909, 911 (7th Cir. 2004); *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998); *Webb-Edwards v. Orange Cnty. Sheriff’s Off.*, 525 F.3d 1013, 1033 (11th Cir. 2008).

<sup>111</sup> See *Muldrow*, 30 F.4th at 688; see also *Caraballo-Carballo*, 892 F.3d at 61; *Williams*, 368 F.3d at 128; *O’Neal*, 392 F.3d at 911; *Sanchez*, 164 F.3d at 532; *Webb-Edwards*, 525 F.3d at 1033.

<sup>112</sup> *Webb-Edwards*, 525 F.3d at 1026; see *Chambers*, 35 F.4th at 873, 876–77.

job transfers were required to be proven substantially “disadvantageous”, causing the plaintiff to demonstrate the job transfer would amount to a significant harm.<sup>113</sup> Prior to resolution by the Supreme Court in *Muldrow v. City of St. Louis*,<sup>114</sup> the United States Court of Appeals for the Seventh, Eighth (“Eighth Circuit”), and Eleventh Circuits required an employee to demonstrate an employment action demonstrating a significant harm on their employment terms and conditions such as significant changes in pay, rank or benefits.<sup>115</sup> Meanwhile, the D.C. Circuit required a lower standard of some change to an employee’s terms or conditions for such a change to constitute as discrimination under Title VII.<sup>116</sup>

When exercising independent judicial discretion where Congress had not clearly spoken to the issue of what constituted an adverse employment action, the Eighth Circuit conclusion was not consistent with the D.C. Circuit’s opinion.<sup>117</sup> For instance, the Eighth Circuit held that a successful claim under Title VII was required to display significant or material harm with regard to an individual’s terms, or conditions of employment.<sup>118</sup> In 2022, the Eighth Circuit found a police officer had not established a *prima facie* case for sex discrimination.<sup>119</sup> Despite the officer establishing she was transferred to the City of St. Louis Police Department’s Intelligence Division from her position as a patrol detective, which resulted in a revocation of task force status, and denial of her requested transfer, the Eighth Circuit found these actions had not constituted an adverse employment action because the officer failed to prove the actions caused her a material harm.<sup>120</sup>

Prior to *Loper Bright*, when exercising independent judicial discretion, the D.C. Circuit held a lower standard of what constituted an adverse employment action than the Eighth Circuit concluded in *Muldrow*.<sup>121</sup> Alternatively, just the year prior to the Eighth Circuit’s decision, the D.C. Circuit ruled the alternative.<sup>122</sup> The D.C. Circuit held an employee’s transfer request or

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<sup>113</sup> See *Muldrow v. City of St. Louis*, 601 U.S. 346, 353 n.1 (2024).

<sup>114</sup> 601 U.S. 346 (2024).

<sup>115</sup> See *id.* at 353 n.1.

<sup>116</sup> *Chambers*, 35 F.4th at 872, 876–77.

<sup>117</sup> Compare *Muldrow*, 30 F.4th at 688 (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers*, 35 F.4th at 872, 886 (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>118</sup> See *Muldrow*, 30 F.4th at 688.

<sup>119</sup> See *id.* at 687.

<sup>120</sup> See *id.* at 684–85, 688.

<sup>121</sup> See *Chambers*, 35 F.4th at 879.

<sup>122</sup> Compare *Muldrow*, 30 F.4th at 688 (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion),

denial of a transfer request did constitute an adverse employment action.<sup>123</sup> The D.C. Circuit held the denial of transfer had constituted an adverse employment action because the employee experienced some change with regard to the terms and conditions of employment because of her sex.<sup>124</sup> Specifically, the court held that the Office of the Attorney General for the District of Columbia's denial of an employee's request to transfer out of a unit with a particularly large caseload constituted discrimination, given that male employees had been granted similar transfers.<sup>125</sup> Notably, these were all cases the MSPB may have been required to consider.<sup>126</sup> This could have been relevant when determining whether a reduction in grade or pay, removals, demotions, or non-selection for promotions were discriminatory.<sup>127</sup>

The Supreme Court's involvement has previously been necessary to resolve circuit splits when lower courts exercised increased judicial discretion provided that Congress had not directly addressed the disputed issue.<sup>128</sup> The circuit split was resolved by the Supreme Court in *Muldrow*, holding that an individual need only show that action showed some harm with respect to the terms and conditions of their employment to succeed on a claim for discrimination.<sup>129</sup> In summary, the Supreme Court had to step in to provide uniformity with regard to determining when an action would amount to an adverse action under Title VII because the courts themselves, when given judicial discretion, came to a variety of conclusions on what constituted discriminatory treatment under Title VII.<sup>130</sup>

### C. Statutory Ambiguity and Progression of Judicial Discretion

District courts have historically seen an increase in the number of jury trials brought before them in periods of time when the courts have more

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with *Chambers*, 35 F.4th at 876–77 (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>123</sup> See *Chambers*, 35 F.4th at 874.

<sup>124</sup> See *id.* at 873–74.

<sup>125</sup> See *id.*

<sup>126</sup> See Mixed Case Complaints Rule, 29 C.F.R. § 1614.302(a) (2024).

<sup>127</sup> These cases would be appealable before the MSPB when a federal employee has filed an appealable agency action with the MSPB. See 29 C.F.R. § 1614.302(a). The MSPB is required to review the personnel actions, such as removal or suspension, while also determining whether the personnel action was motivated by discrimination. See 5 C.F.R. § 1201.151 (2024). So generally, the MSPB must determine first whether the personal action was arbitrary or justified. See *id.* Then the MSPB would determine whether the unjustified or arbitrary personnel action was based on a discriminatory motive. See *id.* § 1201.153(a)(1).

<sup>128</sup> See SUP. CT. R. 10(a).

<sup>129</sup> See *Muldrow v. City of St. Louis*, 601 U.S. 346, 353 (2024).

<sup>130</sup> See *id.* at 353 n.1.

judicial discretion.<sup>131</sup> Since the inception of the Civil Rights Act of 1964, there appeared to be a positive increase on the amount of civil rights cases heard each year.<sup>132</sup> With an exception of an increase in cases following the Civil Rights Act of 1991, following *Chevron*, there has been a negative trend in civil rights cases filed.<sup>133</sup> Therefore, limited judicial discretion likely results in increased judicial efficiency provided that when judicial discretion has been reduced, the amount of cases filed also reduced.<sup>134</sup>

The CAFC's MSPB appeals have not substantially decreased following the CAFC loss of mixed-case appeal jurisdiction.<sup>135</sup> The year following *Kloeckner*, the CAFC saw a decrease of less than 30 MSPB cases filed with a total of 218 MSPB cases filed in the CAFC in 2013.<sup>136</sup> Similarly, the year following *Perry*, the CAFC saw a decrease of 30 MSPB cases filed with a total of 122 MSPB cases filed in the CAFC in 2018.<sup>137</sup> In years immediately following cases that removed the CAFC's jurisdiction in mixed-case appeals, the CAFC

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<sup>131</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Civil Rights Cases Filed From 1963–2013*, [https://perma.cc/QV29-WC5W] (last visited Sept. 28, 2025) (demonstrating substantial increases in the number of jury trials following the passages the Civil Rights Act of 1964, the American Disabilities Act of 1990, and the Civil Rights Act of 1991).

<sup>132</sup> See *id.*

<sup>133</sup> See *id.* (illustrating 18% of civil rights cases filed in 2013 were employment cases, while education, ADA housing, ADA employment, voting, and welfare claims each accounted for less than 10%).

<sup>134</sup> See *id.*

<sup>135</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2012*, [https://perma.cc/WJK7-VDLE] (last visited Feb. 22, 2025); ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2013*, [https://perma.cc/4D5J-8L8U] (last visited Feb. 22, 2025).

<sup>136</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2012*, [https://perma.cc/WJK7-VDLE] (last visited Feb. 22, 2025); ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2013*, [https://perma.cc/4D5J-8L8U] (last visited Feb. 22, 2025).

<sup>137</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2017*, [https://perma.cc/QQV3-PV52] (last visited Feb. 22, 2025); ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2018*, [https://perma.cc/X476-Y585] (last visited Feb. 22, 2025).

caseload reduced by less than 25%.<sup>138</sup> Therefore, the CAFC's MSPB case load has not substantially changed following cases removing CAFC jurisdiction over mixed-case appeals.<sup>139</sup>

### ***1. Judicial Discretion Under Chevron: Courts Have More Judicial Discretion Following Loper Bright***

The Court has spoken to the issue of judicial deference<sup>140</sup> several times in the last century.<sup>141</sup> The Court in *Skidmore v. Swift & Co.*,<sup>142</sup> held agency legal interpretations were merely one persuasive factor of consideration when courts determined an issue of statutory ambiguity.<sup>143</sup> The Court in *Loper Bright* overturned the two-step *Chevron* doctrine applied to the interpretation of ambiguous statutes.<sup>144</sup> *Chevron* required courts to follow a two part test.<sup>145</sup> The two part test was utilized to determine when courts should defer to an agency's interpretation.<sup>146</sup> First, courts would examine the wording and context of statutes to see if the text was clear.<sup>147</sup> When there was unambiguous text, the text was clear given Congress had directly spoken to the issue within

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<sup>138</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2017*, [https://perma.cc/QQV3-PV52] (last visited Feb. 22, 2025); ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2018*, [https://perma.cc/X476-Y585] (last visited Feb. 22, 2025).

<sup>139</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2017*, [https://perma.cc/QQV3-PV52] (last visited Feb. 22, 2025); ADMIN. OFF. OF THE U.S. COURTS, *Table B-8, U.S. Court of Appeals for the Federal Circuit – Appeals Filed, Terminated, and Pending During the 12-Month Period Ending December 31, 2018*, [https://perma.cc/X476-Y585] (last visited Feb. 22, 2025).

<sup>140</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 379 (2024).

<sup>141</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Auer v. Robbins*, 518 U.S. 452 (1997) (applying to agency interpretations of an agency's rules or regulation); *Loper Bright*, 603 U.S. 369 (2024).

<sup>142</sup> 323 U.S. 134 (1944).

<sup>143</sup> *Id.* at 140. Courts were expected to consider the “thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”

<sup>144</sup> *Loper Bright*, 603 U.S. at 412–13.

<sup>145</sup> See *Chevron*, 467 U.S. at 842–43.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

the statute.<sup>148</sup> The court need not continue its assessment and give effect to the expressed congressional intent when the text was clear.<sup>149</sup> In the alternative, the second step was required when the court determined the text was unclear and Congress had not directly spoken to the issue.<sup>150</sup> When the text was unambiguous, the court could not directly decide the issue presented regarding statutory interpretation.<sup>151</sup> If the court found text ambiguous, the courts were required to review whether the agency's interpretation was a permissible or reasonable construction of the statute.<sup>152</sup> An agency's interpretation of a statute was permissible when the agency's interpretation aligned with the purpose or the language of the statute.<sup>153</sup> An agency's interpretation of a statute was reasonable when it was logical, supported by evidence, and consistent with the statute's goals.<sup>154</sup>

Under *Chevron*, courts were not expected to arbitrarily rule on issues of statutory interpretation that an agency had directly spoken to and done so reasonably.<sup>155</sup> The Court in *Chevron* maintained "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."<sup>156</sup> Under *Chevron*, courts would employ these gap filling procedures, by referring to the regulations agencies created such as the EEOC's interpretative and legislative regulations.<sup>157</sup> While courts were not expected to follow interpretative regulations or rules, such as those created by the EEOC, under the *Chevron* doctrine courts were permitted to defer to those regulations.<sup>158</sup>

## 2. Judicial Discretion Under *Loper Bright*

The Court in *Loper Bright* determined when a statute has expressly delegated the power to interpret a statutory term to an agency, by either expressed or implied delegation, courts must review the agency's action under a more

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<sup>148</sup> *See id.*

<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 843.

<sup>151</sup> *See id.* at 842–43.

<sup>152</sup> *See id.* at 843.

<sup>153</sup> *See id.* at 845.

<sup>154</sup> *See id.* at 843–45.

<sup>155</sup> *See id.* at 844.

<sup>156</sup> *Id.* at 843–44.

<sup>157</sup> *See id.* at 843. *See also EEOC v. West Meade Place, LLP*, 841 Fed. Appx. 962, 967 (relying on the definition of "physical or mental impairment" as it was defined in a federal regulation when the court established the standard to successfully state an 'regarded' as claim under the American with Disabilities Act).

<sup>158</sup> *See Chevron*, 467 U.S. at 842–43.

deferential arbitrary and capricious standard.<sup>159</sup> Alternatively, when the best reading of a statute does not provide that it delegates discretion authority to an agency, the court is to independently interpret the statute and effectuate the will of Congress subject to congressional limits.<sup>160</sup> A statutory ambiguity is an not implicit delegation to agencies.<sup>161</sup> The presence of an ambiguous statute does not necessarily mean Congress intended that an agency resolve the ambiguities of the statute.<sup>162</sup>

In addition to overturning the *Chevron* doctrine, the Supreme Court has required additional areas for judicial discretion.<sup>163</sup> While *Loper Bright* overturned the judicial deference doctrine provided in *Chevron*, it did not overturn the Administrative Procedure Act's ("APA") "mandate that judicial review of agency policymaking and factfinding be deferential."<sup>164</sup> However, the Court in *Loper Bright* explained courts have an obligation to determine whether an agency is acting within its authority as permitted under the APA.<sup>165</sup> *Loper Bright* distinguished agency policy making and fact finding from determinations as to questions of law.<sup>166</sup> When a reviewing court is presented with a question of law, the reviewing court is to "interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."<sup>167</sup> When an agency has created a rule or regulation within the scope that Congress has permitted, the courts should defer to the agency's action because Congress has already explicitly permitted this.<sup>168</sup> Alternatively, when there are determinations about what the law means, the courts should review the decision independently, using its judicial discretion.<sup>169</sup> This independent judicial discretion is exclusive to questions of law determined by agencies that are disguised as policymaking.<sup>170</sup> When the court finds the agency policy is determining what the law means, as opposed to how to implement the law, the court should find the agency is not acting within its authority under the APA.<sup>171</sup> Therefore, courts are now required to determine whether the agency is making determinations of the law and if the

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<sup>159</sup> See *Loper Bright*, 603 U.S. at 392, 395–96.

<sup>160</sup> See *id.* at 395.

<sup>161</sup> See *id.* at 399–400.

<sup>162</sup> See *id.*

<sup>163</sup> See *id.* at 392.

<sup>164</sup> *Id.*

<sup>165</sup> See *id.*

<sup>166</sup> See *id.* at 391 (citing 5 U.S.C. § 706).

<sup>167</sup> *Id.*

<sup>168</sup> See *id.* at 394–95.

<sup>169</sup> See *id.* at 391.

<sup>170</sup> See *id.* at 391–93.

<sup>171</sup> See *id.*

court determines the agency was not acting within its authority under the APA, the court is required to review the decision without deference to the agency's determination, even when the agency's determination of law may have been reasonable.<sup>172</sup>

## II. Analysis

There is a direct correlation between increased judicial discretion and inconsistent opinions amongst federal district courts which could have directly impacted MSPB's application of law in mixed-case appeals.<sup>173</sup> *Loper Bright* increases the opportunity for judicial discretion.<sup>174</sup> Increased judicial discretion is incompatible with adjudication of civil service laws, yet federal district courts continue to interject interpretations of law likely attributable to little understanding of civil service issues.<sup>175</sup> Federal district courts will continue to stray from the CSRA when hearing mixed-case appeals if *Kloeckner* is not overturned.

### A. Impact of *Loper Bright* on Mixed-Case Appeals

Under *Loper Bright*, civil services issues in mixed-case appeals are to be reviewed under a de novo standard of review.<sup>176</sup> The courts in *Kloeckner* and *Perry* determined district courts possess jurisdiction over both the civil service and discrimination issues in mixed-case appeals and those cases are reviewed de novo.<sup>177</sup> 5 U.S.C. § 7703(b) explicitly provides that the CAFC defer to MSPB unless its decisions were arbitrary.<sup>178</sup> However, 5 U.S.C. § 7703(b) does not mention district court review of MSPB decisions.<sup>179</sup> *Loper Bright* provides when the best reading of a statute does not provide that it delegates discretion authority to an agency, the court is to independently interpret

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<sup>172</sup> See *id.*

<sup>173</sup> Compare *Muldrow v. City of St. Louis*, 30 F.4th 680, 688–89 (8th Cir. 2022) (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers v. Dist. of Columbia*, 35 F.4th 870, 881 (D.C. Cir. 2022) (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>174</sup> See *Loper Bright*, 603 U.S. at 462–63 (Kagan, J., dissenting).

<sup>175</sup> See *Perry v. MSPB*, 582 U.S. 420, 441 (Gorsuch, J., dissenting); 5 U.S.C. § 2301.

<sup>176</sup> See *Loper Bright*, 603 U.S. at 391–92 (requiring that courts exercise independent judicial discretion when Congress has not explicitly granted agency rulemaking authority).

<sup>177</sup> See *Kloeckner v. Solis*, 568 U.S. at 50; *Perry*, 582 U.S. at 430, 432.

<sup>178</sup> See 5 U.S.C. § 7703(b)(1)(A); see also *Perry*, 582 U.S. at 438–39, 441 (Gorsuch, J., dissenting) (explaining that the Federal Circuit applies a deferential, APA-style standard of review for MSPB decisions).

<sup>179</sup> See 5 U.S.C. § 7703(b)(1)(A).

the statute and effectuate the will of Congress subject to congressional limits.<sup>180</sup> Despite it being widely accepted, *de novo* review is not best standard to adjudicate civil service issues. However, under *Loper Bright* courts will likely find federal district courts should apply a *de novo* standard rather than defer to the MSPB in mixed-case appeals as the CSRA does not explicitly state district courts should defer to MSPB.<sup>181</sup> Therefore, under *Loper Bright* civil service disputes will likely be held subject to increased judicial discretion given that Congress did not specify that district courts should review MSPB appeals under a deferential standard.<sup>182</sup> The Court has previously determined Congress intended *de novo* review for cases of discrimination, and the Court has found civil service disputes in mixed-case appeals are within the scope of “cases of discrimination.”<sup>183</sup> In conclusion, under *Loper Bright*, district courts will exercise independent judicial discretion when adjudicating civil service disputes in mixed-case appeals, despite the district court’s continuance to stray further from the CSRA.<sup>184</sup>

## **B. Inconsistent Opinions Following Use of Judicial Discretion Pre-*Loper Bright***

Pre-*Loper Bright*, courts already created inconsistent opinions and circuit splits when utilizing independent judicial discretion.<sup>185</sup> When courts have previously exercised more judicial discretion, with regard to statutory interpretation, this has resulted in circuit splits.<sup>186</sup> It is plausible for courts to have varying opinions with a statute that does not speak to an issue on its face.<sup>187</sup> This was the case for courts when reviewing the Title VII provision.<sup>188</sup> Regardless of *Loper Bright*, Title VII is a statute whereby Congress has not granted the EEOC authority to issue legislative regulations.<sup>189</sup> Because Congress had not granted the EEOC authority to issue legislative regulations,

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<sup>180</sup> See *Loper Bright*, 603 U.S. at 395.

<sup>181</sup> See *Perry*, 582 U.S. at 441 (Gorsuch, J., dissenting); 5 U.S.C. § 7703(c); *id.* § 7702(b).

<sup>182</sup> See 5 U.S.C. § 7703.

<sup>183</sup> See *Kloeckner v. Solis*, 568 U.S. 41, 46 (2012); see also *Perry*, 582 U.S. at 429–32.

<sup>184</sup> See *Perry*, 582 U.S. at 441 (Gorsuch, J., dissenting).

<sup>185</sup> Compare *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022) (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers v. District of Columbia*, 35 F.4th 870, 872, 876 (D.C. Cir. 2022) (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>186</sup> See *Muldrow*, 601 U.S. at 353 n.1.

<sup>187</sup> See *id.*

<sup>188</sup> See 29 C.F.R. § 1608.3(a).

<sup>189</sup> Compare 29 U.S.C. § 628 (2023) (granting EEOC explicit authority to issue rules and regulations consistent with enforcement of the American Discrimination in Employment

even under *Chevron*, the district courts could only at best find EEOC interpretive regulations persuasive.<sup>190</sup> As such, courts exercised judicial discretion and naturally concluded a variety of determinations as to whether or not a material adversity standard is required under Title VII.<sup>191</sup>

As exhibited by the Eighth Circuit's decision in *Muldrow* and the D.C. Circuit's decision in *Chambers*, even operating under *Chevron* when courts more liberally deferred to agencies, courts had inconsistent opinions and circuit splits existed.<sup>192</sup> The facts in the Eighth Circuit's decision in *Muldrow* were analogous to those presented in the D.C. Circuit's decision in *Chambers* yet when each court exercised independent judicial discretion they held varying standards of what constituted an adverse employment action.<sup>193</sup> Therefore, when courts apply their own judicial discretion when Congress gives little guidance, courts may conclude varying determination on their conclusions of law.<sup>194</sup>

The circuit split regarding what constitutes an adverse action is plausible and likely to occur when these same district courts utilized increased judicial discretion for civil service laws issues as required by *Loper Bright*.<sup>195</sup> It is possible, like in *Muldrow*, where the Court rectified what the standard is for adverse employment actions, that the Court will have to step in when district courts have concluded various issues of law given that district courts are already struggling with little congressional guidance on how they should adjudicate civil service law.<sup>196</sup>

### C. The Impact of *Loper Bright* and Inconsistent Opinions

The MSPB has not frequently faced the issue of circuit splits because the MSPB ordinarily is only under the jurisdiction of one appellate court.<sup>197</sup> Typically the MSPB does not have an issue of choosing the law to implement,

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Act) with 42 U.S.C. § 2000e-16(b) (2023) (granting EEOC explicit authority to issue solely procedural rules and regulations necessary for the enforcement of Title VII).

<sup>190</sup> See 29 C.F.R. 1608.1 § (c); see also *Muldrow*, 601 U.S. at 353 n.1.

<sup>191</sup> See *Muldrow*, 601 U.S. at 353 n.1.

<sup>192</sup> See *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022); *Chambers v. Dist. of Columbia*, 35 F.4th 870, 872, 876–77 (D.C. Cir. 2022).

<sup>193</sup> Compare *Muldrow*, 30 F.4th at 684, 688 (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers*, 35 F.4th at 873, 876–77 (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>194</sup> See *Muldrow*, 30 F.4th at 684, 688; *Chambers*, 35 F.4th at 873, 876–77.

<sup>195</sup> See *Perry v. MSPB*, 582 U.S. 420, 441 (2017) (Gorsuch, J., dissenting) (explaining result of district court judicial discretion when utilized in civil service disputes).

<sup>196</sup> See *id.*; *Muldrow*, 601 U.S. at 350.

<sup>197</sup> See *Perry*, 582 U.S. at 422.

because all other MSPB appeals are exclusive to the CAFC.<sup>198</sup> Because the CAFC is “one” court, all other MSPB issues will not be subjected to a circuit split.<sup>199</sup> Alternatively, mixed-case appeals, because they are not within the jurisdiction of the CAFC, subjects the MSPB to issue it ordinarily would not face.<sup>200</sup> Therefore, all laws that can be brought before the MSPB in a mixed-case appeal ultimately subjects the MSPB to circuit splits.<sup>201</sup>

In addition, the possibility that more judicial discretion will cause more circuit splits will create more confusion and chaos for the MSPB. It is likely, following *Loper Bright*, there will be an increase in civil rights claims brought generally which could be filed in conjunction with a civil service dispute in a mixed-case appeal.<sup>202</sup> Prior to *Chevron* there was consistently an increase in civil rights cases before the district courts.<sup>203</sup> Following *Chevron*, where courts were expected to defer to agencies, there was a negative relationship between civil rights cases filed in district courts as time progressed.<sup>204</sup> Now that courts again are no longer required to defer to agencies interpretations,<sup>205</sup> it is likely there will be a positive correlation between civil rights cases filed in district courts as time progresses.<sup>206</sup> The potential of increasing cases before district courts, brings more opportunities for district courts to decide similar questions of law differently and therefore there are more opportunities to create circuit splits.<sup>207</sup>

In summary, it is likely the courts will continue to have circuit splits because the Court in *Loper Bright* granted the judiciary leeway to exercise more judicial discretion.<sup>208</sup> Given that courts have more opportunities to exercise judicial discretion, it is likely courts will more frequently have a variety of opinions.<sup>209</sup> This is especially true, given the patterns of civil rights cases being

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<sup>198</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.*; *Perry*, 582 U.S. at 422–23.

<sup>201</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>202</sup> See ADMIN. OFF. OF THE U.S. COURTS, *Civil Rights Cases Filed from 1963–2013*, <https://perma.cc/J6XD-9J27> (last visited Dec. 6, 2025).

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*

<sup>205</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399 (2024). *Loper Bright* effectively upheld *Skidmore* deference, finding that courts can, but are not required to consider agency interpretation, among three other factors when resolving statutory ambiguities. See *id.* at 402 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>206</sup> See *id.* at 407.

<sup>207</sup> See *id.* at 475 (Kagan, J., dissenting).

<sup>208</sup> See *id.*

<sup>209</sup> See *Muldrow v. City of St. Louis*, 601 U.S. 346, 353 n.1.

filed before courts exercised deference to agencies under *Chevron*.<sup>210</sup> This is particularly concerning for the MSPB provided that this is an issue the MSPB would ordinarily not face under all other circumstances that are held under the CAFC.<sup>211</sup> There are several laws the MSPB has under its jurisdiction that district courts have jurisdiction over, this will be a frequent problem for the MSPB when it does not concur with the EEOC for laws where the EEOC does not have authority to issue legislative regulations.<sup>212</sup> In effect this problem requires the MSPB to either enforce interpretations of the laws that are favorable to employees, ignore some binding authority, or both in any given instant that district courts do not have similar conclusions of law.<sup>213</sup> The MSPB is not permitted to ignore its binding authorities nor is it permitted to create favorable outcomes arbitrarily, but in effect *Loper Bright* will inevitably require this of the MSPB.<sup>214</sup>

The CAFC is the forum that will provide the most consistency and be least costly to taxpayers.<sup>215</sup> Overtime the Supreme Court has weathered the CAFC's ability to hear mixed-case appeals and instead converted the CAFC's jurisdiction to the federal district courts.<sup>216</sup> This was mostly explained given reliance on an EEOC regulation to justify removal of the CAFC's jurisdiction of mixed-case appeals.<sup>217</sup> As such, mixed-case appeals that are appealed for judicial review are appealed to the federal district courts. Even prior to *Loper Bright*, federal districts courts have struggled with providing consistent conclusions of law when exercising increased judicial discretion.<sup>218</sup> This includes the cases under the MSPB's purview with mixed-case appeals.<sup>219</sup> The pattern of courts coming to varying conclusions of law when Congress has left them little guidance will likely follow and exacerbate following *Loper Bright*.<sup>220</sup> Given that district courts and the courts of appeals have variance

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<sup>210</sup> See *Civil Rights Cases Filed from 1963–2013*, *supra* note 202.

<sup>211</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>212</sup> See generally 5 U.S.C. § 7703.

<sup>213</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>214</sup> See *id.*

<sup>215</sup> See *Perry v. MSPB*, 582 U.S. 420, 443 (2017) (Gorsuch, J., dissenting).

<sup>216</sup> See *id.* at 422–23.

<sup>217</sup> See *id.* at 431–32.

<sup>218</sup> Compare *Muldrow v. City of St. Louis*, 30 F.4th 680, 688 (8th Cir. 2022) (holding that only transfers causing a material employment disadvantage qualify as adverse actions, leaving application to judicial discretion), with *Chambers v. District of Columbia*, 35 F.4th 870, 872, 876–77 (D.C. Cir. 2022) (rejecting tangible-harm requirement and noting that such standards have produced inconsistent outcomes across circuits).

<sup>219</sup> See 5 U.S.C. § 7703.

<sup>220</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391–94.

in conclusions of law, this leaves the MSPB with the issue of which conclusion of the law to apply.<sup>221</sup>

### III. Recommendations

Consolidation of mixed-case appeals to the CAFC will resolve confusion regarding the adjudication of civil service law and prevent confusion following any potential nonuniform district interpretations of civil service.<sup>222</sup> It is less complex and more consistent with the CSRA and the FCIA if the CAFC retains jurisdiction over the civil service claims in mixed-case appeals because individuals still maintain the ability to hear their discrimination claims in a district court and the civil service issue is heard before the uniform appellate court for civil service issues.<sup>223</sup> In the alternative, the CAFC regaining its jurisdiction to hear procedural and jurisdictional questions in mixed-case appeals is most consistent with ideals of judicial economy, preservation of congressional intent when constructing the CAFC, and use of subject matter expertise.<sup>224</sup>

#### A. Restoration of Federal Circuit's Jurisdiction Over MSPB Mixed-Case Appeals

The CAFC should repossess its jurisdiction to include the merits of civil service law and procedural and jurisdictional dismissals in mixed-case appeals to decrease confusion, chaos, and costs that may potentially incur in the wake of *Loper Bright*. While mixed-case appeals contain discrimination claims with the inability to waive jury trials, this is not an issue that should circumvent the CAFC from hearing the merits of civil service disputes in mixed-case appeals.<sup>225</sup> However, the CAFC's retention of its jurisdiction over mixed-case appeals will not prevent alleged violations of federal discrimination law from being heard *de novo*.<sup>226</sup> The alternative for the MSPB is to wait for the Supreme Court to resolve circuit splits while the MSPB pushes the boundaries of its authority by creating favorable outcomes or decisions in opposition to some authority issued by one of the many federal district courts, and such an alternative is more burdensome.<sup>227</sup>

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<sup>221</sup> See *Limited Powers of MSPB*, *supra* note 14, at 49–53.

<sup>222</sup> See *Perry*, 582 U.S. at 441 (Gorsuch, J., dissenting).

<sup>223</sup> See *id.* at 448 (Gorsuch, J., dissenting).

<sup>224</sup> See *id.* at 443–44.

<sup>225</sup> See 5 U.S.C. § 7703(b).

<sup>226</sup> See *Perry*, 582 U.S. at 448 (Gorsuch, J., dissenting) (explaining nothing in the statute would prevent an employee from bringing a discrimination claim in district court after employee has exhausted its claim before its employer).

<sup>227</sup> See *id.* at 438–39 (“No doubt this makes sense, too, for Congress established the Federal Circuit in no small part to ensure a uniform case law governs Executive Branch

Under *Loper Bright*, the Court would likely find that the CAFC has jurisdiction over the merits of civil service issues and jurisdictional and procedural MSPB dismissals. *Kloeckner* and *Perry*'s removal of the CAFC's jurisdiction would likely be overturned under *Loper Bright* because *Kloeckner* and *Perry* relied largely on the Court's adoption of an EEOC regulation to remove the CAFC's jurisdiction, but neither the CSRA nor the Federal Appellate Courts Act require the Court to defer to the EEOC or grant EEOC authority to dictate the CAFC's jurisdiction.<sup>228</sup> In fact, the Supreme Court decisions in *Kloeckner* and *Perry* derive their holding from section 7702 of the CSRA, yet the EEOC has not been granted authority to issue legislative regulations under the anti-discrimination laws listed therein.<sup>229</sup> Provided that the EEOC has not been granted explicit authority from Congress to dictate the CAFC's jurisdiction over the MSPB and mixed-case appeals nor authority to issue regulations under the anti-discrimination provisions provided in 5 U.S.C. § 7702, under *Loper Bright* the Court would need to independently interpret whether the CAFC maintains its jurisdiction under 5 U.S.C. 7703(b).<sup>230</sup>

Under *Loper Bright* when the Court independently interprets the statute and likely would overturn *Kloeckner* and *Perry*, restoring the CAFC's jurisdiction over mixed-case appeals. Justice Gorsuch has already independently interpreted the statute.<sup>231</sup> Justice Gorsuch explained nothing in the statute suggests challenges of civil services issues in mixed-case appeals should proceed before the district court.<sup>232</sup> Furthermore, Justice Gorsuch emphasized that neither the regulations relied on in *Kloeckner* and *Perry* state the civil service questions go to district courts but instead recognize that there are administrative matters that are within the MSPB's authority and raise issues addressed by federal anti-discrimination statutes.<sup>233</sup> Therefore, Justice Gorsuch reasoned that "cases of discrimination" merely includes claims filed under the specified anti-discrimination laws listed in 5 U.S.C. § 7703(b)(2) which should proceed before the district court.<sup>234</sup> Furthermore, Justice Gorsuch emphasized

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personnel actions and guarantees the equal treatment of civil servants without regard to geography."); see also *Limited Powers of MSPB*, *supra* note 14, at 49.

<sup>228</sup> See *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012); see also *Perry*, 582 U.S. at 430–31.

<sup>229</sup> See 5 U.S.C. § 7702; see also U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-0000-25, EEOC Guidance, What You Should Know: EEOC Regulations, Subregulatory Guidance and Other Resource Documents (2016).

<sup>230</sup> See 5 U.S.C. § 7702; see also U.S. Equal Emp. Opportunity Comm'n, EEOC-NVTA-0000-25, EEOC Guidance, What You Should Know: EEOC Regulations, Subregulatory Guidance and Other Resource Documents (2016).

<sup>231</sup> See *Perry*, 582 U.S. at 444–45 (Gorsuch, J., dissenting).

<sup>232</sup> See *id.* at 445 (Gorsuch, J., dissenting).

<sup>233</sup> See *id.* at 445–46 (Gorsuch, J., dissenting).

<sup>234</sup> See *id.* at 445–47 (Gorsuch, J., dissenting).

that the phrase “cases of discrimination” is limited to anti-discrimination law violations rather than to proceed to and does not include civil service disputes.<sup>235</sup> Therefore, when a court independently interprets this statute, it should find the CAFC should maintain its jurisdiction over civil service issues and overturn *Perry* and *Kloeckner*.<sup>236</sup>

The text of the CSRA is consistent with the CAFC regaining exclusive jurisdiction over all MSPB civil service appeals including mixed-case appeals.<sup>237</sup> The CSRA’s establishment of the CAFC is indicative Congress intended to ensure uniformity in federal personnel enforcement of civil service law.<sup>238</sup> Because the CSRA text suggest Congress’s intended to provide a single appellate court to adjudicate civil service law, the CAFC’s jurisdiction of MSPB mixed-case appeals would likely be restored under *Loper Bright*.<sup>239</sup> Therefore, the CSRA text, congressional will, and independent interpretation by the Courts, as done by Justice Gorsuch, favor the restoration of the CAFC’s jurisdiction over mixed-case appeals.<sup>240</sup>

In the event the Court found the EEOC was granted authority to issue regulations, the Court would have to determine whether this regulation amounted to policymaking or rulemaking.<sup>241</sup> The Court’s adoption of an EEOC regulation to define “cases of discrimination” is akin to permitting the EEOC to “rule make” by allowing the EEOC to define the laws rather than explain how the EEOC intended to implement the laws as permitted under *Loper Bright*.<sup>242</sup> Given that the Court would likely find the EEOC was not determining how to enforce a law but instead defining the law, the Court would find the EEOC was acting beyond its scope consistent with the APA.<sup>243</sup> After finding the EEOC was acting beyond its scope the Court would

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<sup>235</sup> See *id.* at 446 (Gorsuch, J., dissenting).

<sup>236</sup> See *id.* at 445–47 (Gorsuch, J., dissenting).

<sup>237</sup> See *id.* at 438–39 (Gorsuch, J. dissenting); see also 5 U.S.C. § 7703(b).

<sup>238</sup> See *Perry*, 582 U.S. at 438–39.

<sup>239</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 371 (2024).

<sup>240</sup> See *id.*; see also *Perry*, 582 U.S. at 438–39 (Gorsuch, J. dissenting).

<sup>241</sup> See generally *Loper Bright*, 603 U.S. at 395 (explaining “[w]hen the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The Court fulfills that role by recognizing constitutional delegations, ‘fixing the boundaries of the delegated authority,’ and ensuring the agency has engaged in ‘reasoned decisionmaking’ within those boundaries. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.”) (citation omitted).

<sup>242</sup> See *id.* at 394–95.

<sup>243</sup> See *id.* at 388–89.

independently review the issue and conclude similarly to Justice Gorsuch's dissent in *Perry*.<sup>244</sup>

### **B. New Question Should Be Challenged Before the Supreme Court**

The proper forum to litigate the appealed civil service claims in mixed-case appeals should be challenged in the Supreme Court. The Court in *Loper Bright* stated it did not call into question prior cases that relied on *Chevron*; however, the “only way to ‘ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,’ is for us to leave *Chevron* behind.”<sup>245</sup> The aforementioned issue is not that the Supreme Court should relitigate the issue of what constitutes a claim of discrimination; rather, the Court should review whether civil service law appeals should proceed before the CAFC, consistent with the CSRA and FCIA, or before federal district courts.<sup>246</sup> The above analysis demonstrates that the text strongly supports the CAFC's reclamation of its jurisdiction over mixed-case appeals.

The Court need not rely on what will “‘best serv[e]’ the statute's ‘objective of creating an integrated scheme of review[, which] would be seriously undermined’ by ‘parallel litigation’” or EEOC guidance as it did in *Kloeckner*.<sup>247</sup> The Court need not partake in judicial tinkering when the text speaks for itself when: (1) the text of the FCIA is unambiguous,<sup>248</sup> (2) the text of the CSRA is unambiguous,<sup>249</sup> and (3) a sitting Supreme Court Justice has already noted the unambiguous nature of 5 U.S.C. § 7703(b)(2) and its relationship with civil service law.<sup>250</sup> Accordingly, the Supreme Court would draw parallels from Justice Gorsuch's dissent, the text of the FCIA, the CSRA, and 5 U.S.C. § 7703(b)(2) to hold the CAFC maintains exclusive jurisdiction over MSPB civil service claims appealed, including the civil service claims brought in mixed-case appeals.<sup>251</sup>

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<sup>244</sup> See *Perry*, 582 U.S. at 439–40 (Gorsuch, J., dissenting).

<sup>245</sup> *Loper Bright*, 603 U.S. at 411–12 (citation omitted) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

<sup>246</sup> See *Perry*, 582 U.S. at 444 (Gorsuch, J., dissenting).

<sup>247</sup> *Id.* at 447 (Gorsuch, J., dissenting) (alteration in original) (emphasis added) (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 14 (2012)).

<sup>248</sup> See 28 U.S.C. § 1295(9).

<sup>249</sup> See 5 U.S.C. § 2301(b) (stating “[f]ederal personnel management should be implemented consistent[ly]”).

<sup>250</sup> See *Perry*, 582 U.S. at 439, 448 (Gorsuch, J., dissenting).

<sup>251</sup> See 28 U.S.C. § 1295(9); 5 U.S.C. § 2301(b); *Perry*, 582 U.S. at 440–44 (Gorsuch, J., dissenting).

### ***1. CAFC Should Hear Civil Service Law Claims Moving Forward***

In light of *Loper Bright*, the CAFC should stop transferring the civil service claims brought in mixed-case appeals because the Court has not ruled on nor been asked if the MSPB decides a mixed-case without determining the merits of the discrimination claim.<sup>252</sup> The Court also has not been asked whether the court with jurisdiction over *the Civil Service Claim* is the CAFC or the district courts.<sup>253</sup> Accordingly, unless the Supreme Court holds that civil service law falls within the jurisdiction of district courts, the CAFC should retain authority to hear questions of civil service law.<sup>254</sup> The questions of *civil service law* should be brought to CAFC where petitioners would argue their appeal of their civil service dispute.<sup>255</sup> Upon the CAFC's review of the civil service claim the Court can either (1) agree with the petitioner that the MSPB did not act within its authority, return their claim to the mixed-case appeal to the MSPB, and argue the merits of their civil service law claim and their anti-discrimination law claim or (2) the CAFC will find the MSPB acted within its authority and the petitioner still retains their right to exhaust their discrimination claim before a district court.<sup>256</sup>

### **C. Congress Should Amend 5 U.S.C. § 7703(b) to Include a Subsection Addressing Civil Service Law**

Alternatively, Congress could add an additional subsection in 5 U.S.C. § 7703(b) that explicitly addresses the pathway for civil service law claims.<sup>257</sup> The language could mirror 5 U.S.C. § 7703(b)(2) and state the following: Claims of civil service law subject to provisions set forth in 5 U.S.C. § 2302(b), 5 U.S.C. § 4303, and 5 U.S.C. § 7512 shall be filed under 28 U.S.C. § 1295(9).<sup>258</sup> This amendment would clearly designate the CAFC the proper forum and absolve any ambiguity, if they persist.<sup>259</sup>

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<sup>252</sup> See *id.* at 444. (Gorsuch, J., dissenting) (quoting Petition for Writ of Certiorari, *Kloeckner v. Solis*, 568 U.S. 41 (2012) (No. 11-184)) (“If the [Board] decides a mixed-case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?”).

<sup>253</sup> See *id.*

<sup>254</sup> See 28 U.S.C. § 1295(9); 5 U.S.C. § 2301(b).

<sup>255</sup> See *Perry*, 582 U.S. at 444 (Gorsuch, J., dissenting).

<sup>256</sup> See *id.* at 440.

<sup>257</sup> See 5 U.S.C. § 7703(b)(2) (addressing jurisdiction for “cases of discrimination”).

<sup>258</sup> See *id.*

<sup>259</sup> See *id.* (designating district courts proper forum for “cases of discrimination”).

## Conclusion

Civil Service Law, particularly federal personnel principles, should be adjudicated consistently. With expanded judicial discretion, courts will likely produce inconsistent interpretations of law. Under *Loper Bright*, judicial discretion has expanded.<sup>260</sup> As such, the Supreme Court should hear a challenge regarding what court is the proper to hear civil service issues, the CAFC should continue to address MSPB to promote consistency in civil service law, or Congress should amend 5 U.S.C. § 7703(b) to include to a provision that explicitly addresses where civil service claims should be brought. If the Supreme Court and CAFC continue to permit district courts adjudicate of civil service law in mixed-case appeals, federal personnel principles will no longer be consistent and will change erratically as cautioned by Justice Gorsuch.<sup>261</sup>

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<sup>260</sup> See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391–94 (2024); *id.* at 478 (Kagan, J., dissenting).

<sup>261</sup> See *Perry*, 568 U.S. at 441 (Gorsuch, J., Dissenting).



# Radical Change in Recoupment: How Due Process and Legislative Reform Can Be Used to Address Recoupment of Veteran Disability Benefits

Logan D. Younce\*

## Introduction

Vernon Reffitt was a U.S. Army serviceman who served in Panama and Honduras before performing two tours of duty across thirteen years as a military policeman in Germany.<sup>1</sup> In 1992, while the Army was seeking to reduce the amount of people working in specific fields, some active-duty service members were offered special separation benefits (“SSB”) in exchange for their withdrawal from service.<sup>2</sup> Reffitt was one such service member, and he accepted \$30,000 for his retirement.<sup>3</sup> After retiring due to a disability caused by his time in service, Reffitt began collecting disability benefits from the U.S. Department of Veterans Affairs (“VA”), and continued doing so for thirty years.<sup>4</sup> However, in May of 2024, the 62-year-old Reffitt applied for further disability benefits made available by the PACT Act, but was informed by the VA that his disability benefits would be entirely withheld until he repaid the \$30,000.<sup>5</sup> As justification, the VA cited an obscure statutory prohibition forbidding the collection of disability benefits if one received separation benefits.<sup>6</sup>

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<sup>1</sup> See Melissa Chan, *He got \$30K to leave the military when it needed to downsize. Now the government wants that money back.*, NBC NEWS (July 4, 2024, 7:00 AM), [https://perma.cc/4CN9-GGNN].

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* The PACT Act increased access to disability benefits for veterans who were exposed to certain toxic substances during their period of service. See *infra* Part I.A.6.

<sup>6</sup> See Chan, *supra* note 1; see also 10 U.S.C. § 1174(h); 38 C.F.R. § 3.700. The following benefits must be recouped before the VA can pay compensation to a Veteran: readjustment

Reffitt is not the only veteran suffering from recoupment; between 2013 and 2020, more than 72,000 veterans had their voluntary or involuntary separation pay recouped, 2,600 had their SSB taken back, and 4,700 voluntary separation incentives (“VSI”) were recouped.<sup>7</sup> The burden represented by recoupment and a resulting outrage has led to proposed legislation aimed at resolving the this issue, yet it has failed to find meaningful traction in Congress.<sup>8</sup> While reform sits in limbo, disabled veterans continue to have their benefits withheld, risking a critical repetition of America’s cyclical history of slow and inadequate responses to the plight of its servicemen.<sup>9</sup>

Part I of this Note introduces the unique issue of recoupment. Part II provides the historical context of veterans’ affairs, discusses past and present legislation on veterans’ benefits, and delves into how the VA can enforce recoupment. Part III addresses why recoupment has been difficult to resolve on a judicial and legislative level. Finally, Part IV proposes how the judiciary and legislation can effectively navigate the precarious legal position recoupment occupies and address the issue. To relieve the burden on disabled veterans, change must be wrought either by advocates in the courts, or by legislators willing to cooperate with a financially concerned VA.

## I. Background

### A. History of the Relationship Between Veterans and U.S. Veterans Affairs

There exists a glut of contradictions between the positive perception of veterans in America, and the historically neglectful way the country takes care of them.<sup>10</sup> According to a study done by Pew Research, most (64%) Americans “look up to” veterans, and consider them more “disciplined” (67%) or “patriotic” (59%) on average.<sup>11</sup> Additionally, it is a frequent hallmark of Presidential rhetoric—perhaps owing to the Executive’s role as Commander-in-Chief—to

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pay, non-disability severance pay, separation pay, Reservists’ Involuntary Separation Pay (RISP), Special Separation Benefit (SSB), Voluntary Separation Pay (VSP), disability severance pay. U.S. DEP’T OF VETERANS AFFS., VA ADJUDICATION PROCEDURES MANUAL, M21-1, PART III, SUBPART V, CHAPTER 4, SECTION B: RECOUPMENT OF SEPARATION BENEFITS (2014).

<sup>7</sup> See *infra* note 77–79 and accompanying text.

<sup>8</sup> See *infra* note 88 and accompanying text.

<sup>9</sup> See *infra* Part I.A.

<sup>10</sup> See Ruth Igielnik, *Key Findings about America’s Military Veterans*, PEW RSCH. CTR. (Nov. 7, 2019), [<https://perma.cc/2T3Y-L5ML>]; Kristi Estrada, Comment, *Welcome Home: Our Nation’s Shameful History of Caring for Combat Veterans and how Expanding Presumptions for Service Connection can Help*, 26 T.M. COOLEY L. REV. 113, 116–23 (2009).

<sup>11</sup> See Igielnik, *supra* note 10.

drum up support for veterans and veteran benefits.<sup>12</sup> Contradictorily, the government historically has neglected the financial, physical, and therapeutic needs of veterans.<sup>13</sup>

Revolutionary War veterans were denied the lifetime pension they were promised for their service until twenty-five years after the conclusion of the war, long after many veterans—struggling with income and debt—had lost their family farms and were incarcerated in debtors' prison.<sup>14</sup> When those pensions were eventually made available, malicious actors falsely claimed an undetermined amount of money under fake names, spawning deep scrutiny of future claims and, as a result, many were arbitrarily denied.<sup>15</sup>

Civil War veterans, left without any pension, faced widespread sentiment that they should fend for themselves.<sup>16</sup> Veterans were also blamed for

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<sup>12</sup> See Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865) (“[L]et us strive on to finish the work we are in[,] to bind up the nation’s wounds[,] to care for him who shall have borne the battle, and for his widow, and his orphan . . . .”); Dwight Eisenhower, Proclamation No. 3071, 19 Fed. Reg. 6545, 6545(1954) (“I . . . hereby call upon all of our citizens to observe . . . Veterans Day. On that day let us solemnly remember the sacrifices of all those who fought . . . .”); Barbara Matos, *Object 41: Creating the Department of Veterans Affairs*, U.S. DEP’T OF VETERANS AFFS. (Oct. 6, 2022), [<https://perma.cc/C48V-KLZW>] (quoting Ronald Reagan on creating the Department of Veterans Affairs: “Veterans have always had a strong voice in our government. It’s time to give them the recognition they so rightly deserve.”); Jim Garamone, *Biden Thanks Vets for Service, Says Nation Has Obligation to Honor, Support Them*, U.S. DEP’T OF DEF. (Nov. 11, 2024), [<https://www.defense.gov/News/News-Stories/Article/Article/3961562/biden-thanks-vets-for-service-says-nation-has-obligation-to-honor-support-them/>] (quoting Joe Biden: “Too many veterans have served only to return home to suffer from permanent effects of poisonous chemicals . . . . This is the moment to come together as a nation . . . to keep honoring the women and the men and the families who have borne the battle . . . .”).

<sup>13</sup> See Estrada, *supra* note 10, at 116–23; see also William Chin, *Serving Those Who Served: Providing Government-Funded Attorneys to Veterans Seeking Disability Benefits from the United States Department of Veterans Affairs*, 54 U. S.F.L. REV. 87, 87–88 (2019).

<sup>14</sup> See Estrada, *supra* note 10, at 116–17, 117 n.16 (discussing varied and often arbitrary pension denials, including due to age, race, role, lack of records, or mistaken identity).

<sup>15</sup> See RICHARD SEVERO & LEWIS MILFORD, *THE WAGES OF WAR: WHEN AMERICA’S SOLDIERS CAME HOME – FROM VALLEY FORGE TO VIETNAM*, 94, 114 (1989) (“[T]here were scandals about whatever money reached veterans, and there were judgments about those scandals, spelled out in many words in Government documents, which caused the Government to grow wary of the very men who had made its founding possible.”); see also Estrada, *supra* note 10, at 117 n.16.

<sup>16</sup> See Estrada, *supra* note 10, at 118; SEVERO & MILFORD, *supra* note 15, at 146, 149. The U.S. Sanitary Commission followed three main principles when rendering support to veterans: (1) an aversion to “outside interference” with “natural laws”—a euphemism for simply allowing a veteran for whom succumbing to their condition seemed inevitable to

a drug epidemic resulting from narcotics administered during their service.<sup>17</sup> After enduring the government's blame for America's drug crisis at the time, veterans and their widows were eventually granted compensation via the Dependent Pension Act.<sup>18</sup> However it was, once more, twenty-five years after the Civil War had ended.<sup>19</sup>

A Veterans' Bureau ("VB") was established after World War I, reflecting formal government recognition of the uniform needs of Veterans.<sup>20</sup> But Charles Forbes, who was put in charge of it, was wildly corrupt, embezzling at least \$250,000 of bureau funds.<sup>21</sup> Under his command, the VB accepted a meager 47,000 of the 300,000 claims by wounded veterans.<sup>22</sup> However, in the same act that created the VB, Congress made the first provisions for presumptions of service connection for a veteran's disability.<sup>23</sup> Post World War II saw a number of marked improvements to the treatment of veterans,<sup>24</sup> yet

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die; (2) inducing veterans to depend on "natural reliances' with their own families[;]" (3) enabling the "invalid class" to be absorbed "into the homes and into the ordinary industry of the country." *Id.* at 150.

<sup>17</sup> See Estrada, *supra* note 10, at 118.

<sup>18</sup> See *id.* at 118–19 (the Dependent Pension Act faced heavy scrutiny for its generosity, as dependents were still collecting Civil War-era pensions as late as 2007).

<sup>19</sup> See *id.* at 118.

<sup>20</sup> See *id.* at 119; see also SEVERO & MILFORD, *supra* note 15, at 269.

<sup>21</sup> See Estrada, *supra* note 10, at 119; SEVERO & MILFORD, *supra* note 15, at 269. These funds were alleged to have been spent on illicit parties, prostitutes, and alcohol. See Estrada, *supra* note 10, at 119. Additionally, Forbes is believed to have pilfered millions of dollars' worth of supplies purchased for Veterans' Bureau purposes, including, but not limited to, thousands of gallons of floor wax, 45,000 gallons of soap, and 750,000 bath towels. SEVERO & MILFORD, *supra* note 15, at 272–73. It is understood that a total quantity of around \$7 million in various goods were sold off to others for prices far below market value for a total of \$600,000. *Id.*

<sup>22</sup> See SEVERO & MILFORD, *supra* note 15, at 280; Estrada, *supra* note 10, at 120.

<sup>23</sup> See Estrada, *supra* note 10, at 119; see also SIDATH VIRANGA PANANGALA, UMAR MOULTALI, & DANIEL T. SHEDD, CONG. RSCH. SERV., R41405, VETERANS AFFAIRS: PRESUMPTIVE SERVICE CONNECTION AND DISABILITY COMPENSATION 4–5 (2014). The 1921 amendment to the Risk Insurance Act relieved ex-servicemen from the burden of proof of showing that their disability because of tuberculosis or neuropsychiatric disease explicitly derived from their term of service, a rather difficult standard for a disabled veteran in the 1920s to meet. See Estrada, *supra* note 10, at 119.

<sup>24</sup> See Estrada, *supra* note 10, at 121–22. The Selective Service Act guaranteed soldiers' ability to return to the same jobs they held prior to the war, the GI Bill of Rights entitled veterans to home and business loans, one year of unemployment compensation, and educational funding. See *id.* at 121. Additionally, more "presumptions of service-connection" were implemented, taking effect when veterans' disabilities derived from "diseases of 'tropical

much of this development was undercut by continuing leadership failures within the VB.<sup>25</sup>

Veterans returned from Vietnam to a society that despised them for their role in the highly unpopular war.<sup>26</sup> Additionally, while the true impact of war upon the mental and physical health of veterans was gaining more recognition in the public eye, a lack of presumption meant disability benefit claimants were denied en masse for disabilities they believed derived from their exposure to Agent Orange during service.<sup>27</sup> The VA vehemently denied the existence of Agent Orange disability at the time—likely due to their studies having been performed in partnership with the companies that produced the defoliant.<sup>28</sup> However, as of 2024, the VA recognizes the vast array of presumptive conditions associated with its exposure.<sup>29</sup>

### ***1. Service Presumption***

Administrative barriers to needed care and income as well as painstakingly slow efforts to amend the barriers have spawned an entire class of veterans being deprived of crucial support.<sup>30</sup> Instances of veterans suffering as they struggle to prove service connection of their disability are as numerous as they are tragic.<sup>31</sup> For reference, “service connection of the disability” is one

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origin.” *Id.* at 121. Finally, the VA Benefit of the Doubt Rule was created, resolving equally balanced questions of fact on behalf of veterans. *Id.* at 122.

<sup>25</sup> See *id.* at 121; SEVERO & MILFORD, *supra* note 15, at 329–30. Frank Hines, the successor to Charles Forbes, is blamed for the abundance of bureaucratic barriers which prevented veterans at the time from receiving their benefits from the Veterans’ Bureau. See Estrada, *supra* note 10, at 121.

<sup>26</sup> See Estrada, *supra* note 10, at 122.

<sup>27</sup> See *id.* at 122. Hundreds of veterans petitioned the VA regarding unexplained “cancerous conditions, stillborn and deformed children, miscarriages, lack of sex drive, low sperm counts, weaknesses and pains, strange lumps, and festering sores.” *Id.*

<sup>28</sup> See *id.* at 122–23, 123 n. 61; SEVERO & MILFORD, *supra* note 15, at 398.

<sup>29</sup> See *Veterans’ Diseases Associated with Agent Orange*, U.S. DEP’T OF VETERANS AFF.S., (Sep. 30, 2024), [<https://perma.cc/Y2HZ-9NHM>]. Presumptive diseases associated with Agent Orange exposure include, but are certainly not limited to: AL Amyloidosis, Bladder Cancer, Chronic B-cell Leukemias, Chloracne (or similar acneform disease), Diabetes Mellitus Type 2, Hypertension, Hodgkin’s Disease, Hypothyroidism, Ischemic Heart Disease, Monoclonal gammopathy of undetermined significance (MGUS), Multiple Myeloma, Non-Hodgkin’s Lymphoma, Parkinsonism, Parkinson’s Disease, Peripheral Neuropathy, Early-Onset, Porphyria Cutanea Tarda, Prostate Cancer, Respiratory Cancers (includes lung cancer), and Soft Tissue Sarcomas. *Id.*

<sup>30</sup> See Estrada, *supra* note 10, at 116–23; SEVERO & MILFORD, *supra* note 15, at 459.

<sup>31</sup> See AARON GLANTZ, *THE WAR COMES HOME: WASHINGTON’S BATTLE AGAINST AMERICA’S VETERANS* 105–11 (2009) (describing how James Eggemeyer, suffering from 100% disability due to physical injuries and severe PTSD, had his claim process stalled for

of the five critical elements of a claim for disability benefits,<sup>32</sup> and requires proof of medical diagnosis of the disability, medical evidence which indicates the disease or injury either was brought about as a result of or exasperated by the service, as well as medical evidence linking the disability to the service-related disease or injury.<sup>33</sup>

A presumptive service connection bypasses this proof requirement by automatically presuming specific disabilities were caused by one's service in the military; these presumptions are organized by conflict and disabling diseases or injuries associated with that conflict (as opposed to diseases and injuries associated with military service in general).<sup>34</sup> "Atomic veterans" (those who were exposed to radiation during and after World War II either by virtue of being involved in nuclear testing or stationed in post-bombing Hiroshima and Nagasaki)<sup>35</sup> did not receive presumptive service connection for their cancerous conditions until the Radiation Exposed Veterans Compensation Act of 1988—forty-three years after the closing of the war.<sup>36</sup> Sufficiently broad presumptions of service connection for Vietnam veterans exposed to Agent Orange were only granted in 2022 with the passage of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics

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months by bureaucratic delay, after he'd already lost his home and almost all his possessions); Estrada, *supra* note 10, at 113–15 (noting that a purple heart Vietnam veteran was still being denied benefits as of 2009 for hearing loss and PTSD due to an inability to obtain medical records from his time in service that simply do not exist by no fault of his own).

<sup>32</sup> D'Amico v. West, 209 F.3d 1322, 1326 (Fed. Cir. 2000); Hansen-Sorensen v. Shulkin, No. 15-2685, 2017 U.S. App. Vet. Claims LEXIS 697, at \*3 (Vet. App. May 15, 2017); *see also* 38 U.S.C. § 1110 (laying out the requirements of service connection).

<sup>33</sup> *See* Griego v. Peake, 2007 U.S. App. Vet. Claims LEXIS 2083, at \*19 (Vet. App. Dec. 21, 2007); *see also* 38 U.S.C. § 1110; 38 C.F.R. § 3.303(a).

<sup>34</sup> *See Presumptive Disability Benefits*, U.S. DEP'T OF VETERANS AFFS. (Oct. 2022), [<https://perma.cc/4EFR-885Z>].

<sup>35</sup> *See* Melinda F. Podgor, *The Inability of World War II Atomic Veterans to Obtain Disability Benefits: Time is Running Out on Our Chance to Fix the System*, 13 ELDER L.J. 519, 520–21 (2006).

<sup>36</sup> *See id.* at 522; Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. No. 100-321, 102 Stat. 485.

Act of 2022 (“PACT Act”).<sup>37</sup> For many, the lengthy time frame for updates to VA’s claim process causes these benefits to come too little and too late.<sup>38</sup>

## 2. *Models of Government Benefits*

The history of the relationship between veterans and the Veterans Association is one pockmarked by stigma, reluctance to provide benefits, insufficiency of those benefits, and when that eventual providence occurs, it proves to be severely tardy.<sup>39</sup> These unsatisfying outcomes repeatedly occur under the oversight of a department that is intended to serve veterans.<sup>40</sup> Professor Richard Levy’s “charity model of government benefits” as it pertains to the development of veteran benefits offers an explanation for this inconsistency.<sup>41</sup>

According to Professor Levy, government benefits fall into two models: charity and social insurance.<sup>42</sup> A benefit aligns with the charity model when it reflects a purely discretionary judgment given paternalistically out of a “sense of moral obligation,” without a “legally enforceable right to receive or duty to provide benefits.”<sup>43</sup> Such benefits thus become “mere gratuities” as

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<sup>37</sup> See Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022, Pub. L. No. 117-168, § 403, 136 Stat. 1759, 1780–81 [hereinafter PACT Act]; see also Estrada, *supra* note 10, at 131–32; Agent Orange Act of 1991, Pub. L. No. 102-4, § 2, 105 Stat. 11, 11. The Agent Orange Act of 1991 introduced presumptive service-connections for conditions related to Agent Orange (and specifically exposure to dioxin), but only three such conditions, all with stringent restrictions as to what would be covered: “[1] Non-Hodgkin’s lymphoma becoming manifest to a degree of disability of 10 percent or more . . . [2] Each soft-tissue sarcoma becoming manifest to a degree of disability of 10 percent or more other than osteosarcoma, chondrosarcoma, Kaposi’s sarcoma, or mesothelioma . . . [3] Chloracne or another acneform disease consistent with chloracne becoming manifest to a degree of disability of 10 percent or more within one year after the last date on which the veteran performed active . . . service.” *Id.*

<sup>38</sup> See *supra* Part I.A.

<sup>39</sup> See *supra* Part I.A.

<sup>40</sup> See U.S. Department of Veterans Affairs (VA), USA.GOV, [https://perma.cc/X8SN-M9Q6] (“The Department of Veterans Affairs (VA) runs programs benefiting veterans and members of their families.”); see also Matos, *supra* note 12 (quoting Ronald Reagan on creating the Department of Veterans Affairs, “[The VA] gives those who have borne America’s battles, who have defended the borders of freedom, who’ve protected our Nation’s security in war and in peace, it gives them what they’ve deserved for so long – a seat at the table in our national affairs”).

<sup>41</sup> Richard E. Levy, *Of Two Minds: Charitable and Social Insurance Models in the Veterans Benefits System*, 13 KAN. J.L. & PUB. POL’Y 303, 304 (2003); see also Estrada, *supra* note 10, at 123.

<sup>42</sup> See Levy, *supra* note 41, at 303–04.

<sup>43</sup> *Id.* at 304.

opposed to “legally enforceable entitlements.”<sup>44</sup> A benefit falls under the social insurance model when they take on a “quasi-contractual” nature, and reflect a governmental obligation to protect its citizenry.<sup>45</sup> The paradigmatic example of a social insurance model benefit is social security, wherein payments serve to purchase government protection in the future.<sup>46</sup> However, other programs, such as unemployment insurance or welfare, also fall into the social insurance model, as they, too, are a form of social insurance which creates legally cognizable rights subject to due process protection.<sup>47</sup>

Mere gratuities from charitable benefits lack the protection of social insurance benefits, thus making adversarial procedures inapplicable.<sup>48</sup> Additionally, the discretionary nature of distribution renders independent adjudication irrelevant.<sup>49</sup>

Veteran benefits originated in line with the charity model, with the U.S. Government considering itself to be making distributions out of goodwill, not legal obligation.<sup>50</sup> Over time, the once-purely discretionary judgments of veteran benefit administration would come to take on aspects of the social insurance model,<sup>51</sup> but many other features of the system have remained

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<sup>44</sup> *Id.* at 305.

<sup>45</sup> *Id.* at 305–06.

<sup>46</sup> *See id.* at 305; *About Social Security*, SOC. SEC. ADMIN., [https://perma.cc/Z96Q-9WQW] (last visited Nov. 11, 2025).

<sup>47</sup> *See Levy, supra* note 41, at 305–06; *see also* *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (finding that welfare benefits “are a matter of statutory entitlement for persons qualified to receive them” and “[t]heir termination involves state action that adjudicates important rights”).

<sup>48</sup> *See Levy, supra* note 41, at 305.

<sup>49</sup> *See id.*

<sup>50</sup> *See id.*; *see also* Ann Hubbard, *A Military-Civilian Coalition for Disability Rights*, 75 *Miss. L.J.* 975, 979–80 (2006). (quoting K. Walter Hickel, *Medicine, Bureaucracy, and Social Welfare: The Politics of Disability Compensation for American Veterans of World War I*, in *THE NEW DISABILITY HISTORY: AMERICAN PERSPECTIVES* 228, 241 (Paul K. Longmore & Lauri Umansky eds., 2001)) (discussing how advocacy by post-Civil War Union veterans transformed public perception of veterans from a sterile “medical model” of disability to a “social model,” in which they came to be seen as a “social contingency”) (internal quotations omitted); *Lynch v. United States*, 292 U.S. 571, 577 (1934) (finding that “[p]ensions, compensation allowances and privileges are gratuities . . . and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress”).

<sup>51</sup> *See Levy, supra* note 41, at 313 (pointing to the formation of the Veterans’ Bureau, then the Department of Veteran Affairs, and the increased bureaucratization of administering benefits).

reflective of the charity model.<sup>52</sup> Additionally, Professor Levy notes that public perception of veterans benefits seems more in line with the social insurance model, with many servicemen and women enlisting with the expectation that they will receive benefits afterwards in exchange.<sup>53</sup>

### **3. Modern Treatment of Veteran Entitlement to Benefits**

While it was after the time of Levy's writing, the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Cushman v. Shinseki*,<sup>54</sup> found that a veteran's entitlement to benefits upon a showing that they satisfy statutory and regulatory requirements creates a property interest and grants protection under the Due Process Clause.<sup>55</sup> Professor Michael P. Allen notes the fundamental strangeness of the existing review system at VA, in how the initial claim is purportedly non-adversarial, but contests of claim determinations go before the U.S. Court of Appeals for Veteran Claims ("CAVC") in an adversarial procedure.<sup>56</sup> Professor Allen also notes how the court's finding in *Cushman* creates a third form of review, where alleged Constitutional violations of Due Process can be contested in the Federal Circuit, rendering it capable of effectively altering the veterans benefits claim system.<sup>57</sup> The Federal Circuit claims nationwide jurisdiction over veterans' benefits.<sup>58</sup> In reviewing decisions from the CAVC, its jurisdiction is limited to interpreting the Constitution itself and reviewing the CAVC's interpretation of constitutional and statutory provisions.<sup>59</sup> The Federal Circuit makes clear that it "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."<sup>60</sup>

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<sup>52</sup> See *id.* at 315. Such examples include the retaining of non-adversarial procedures, and the fact that judicial review was not allowed for benefit determinations until the Veterans' Judicial Review Act was passed in 1988, creating the Court of Appeals for Veteran Claims. See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> 576 F.3d 1290 (Fed. Cir. 2009).

<sup>55</sup> See *id.* at 1298.

<sup>56</sup> See Michael P. Allen, *Due Process and the American Veteran: What the Constitution Can Tell Us About the Veterans' Benefits System*, 80 U. CIN. L. REV. 501, 507, 531–32 (2012).

<sup>57</sup> See *id.* at 529 ("[w]hat *Cushman* effectively does is shift the locus of responsibility for the construction of important parts of the [VA] system to the [judiciary].").

<sup>58</sup> See *Types of Cases the Federal Circuit Handles*, FED. CIR., [<https://perma.cc/2P3L-T2GK>] (last visited Nov. 11, 2025).

<sup>59</sup> See *Cushman*, 576 F.3d at 1296; *Hudick v. Wilkie*, 755 F. App'x 998, 1004 (Fed. Cir. 2018); 38 U.S.C. §§ 7292(c)–(d).

<sup>60</sup> *Hudick*, 755 F. App'x at 1004 (internal quotations omitted) (first quoting 38 U.S.C. § 7292(d)(1); and then quoting 38 U.S.C. § 7292(d)(2)).

One can observe the paternalistic attitude of the charity model in action by examining the VA's website.<sup>61</sup> The VA describes itself as “[s]upporting, caring for, and honoring Veterans,” providing “services,” allowing veterans to “collect on the benefits they [are] eligible for” and otherwise “help[ing]” them.<sup>62</sup> At no point is the implication made that benefits are owed to veterans, or that the VA is providing benefits out of any obligation other than goodwill.<sup>63</sup> The distinction between charity and social insurance as it related to veterans benefits, and whether those benefits are a gift or an obligation, becomes particularly salient when the VA attempts to deny or—as with the present issue—recoup benefits.<sup>64</sup>

#### 4. *The Issue of Recoupment*

Per statute, the VA is required to recoup SSB or other forms of separation benefits if the recipient later qualifies for disability benefits.<sup>65</sup> The prohibition against collecting both SSB and disability benefits is intended to prevent “double dipping”<sup>66</sup> on the same term of service by collecting both.<sup>67</sup> Practically, however, veterans assert that they remain uninformed on the prohibition, and are left under the presumption that the two categories of benefits are entirely separate.<sup>68</sup> Many appear to have gone under the radar of the VA, collecting much-needed disability benefits for a period of decades, only to have their source of income unexpectedly withheld.<sup>69</sup> Thus, veterans, who may be 100% disabled and fully dependent on their disability income find themselves effectively tens of thousands of dollars in debt to the VA, with

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<sup>61</sup> See *VA History Summary*, U.S. DEP'T OF VETERANS AFFS., [https://perma.cc/9SHH-YNZ8] (last updated June 13, 2025).

<sup>62</sup> *Id.*

<sup>63</sup> See *id.*

<sup>64</sup> See Chan, *supra* note 1; see also Patricia Kime, *In the Past Decade, VA has Recouped \$2.4 Billion in Separation Pay, Bonuses from Disabled Vets*, MILITARY.COM, [https://perma.cc/3H8S-AQ69] (Aug 26, 2024, 5:45 PM) [hereinafter Kime, *VA Has Recouped \$2.4 Billion*].

<sup>65</sup> See 10 U.S.C. § 1174(h)(2); 38 C.F.R. § 3.700(a)(5); see also U.S. DEP'T OF VETERANS AFFS., VA ADJUDICATION PROCEDURES MANUAL, M21-1, PART III, SUBPART V, CHAPTER 4, SECTION B: RECOUPMENT OF SEPARATION BENEFITS (2014).

<sup>66</sup> Patricia Kime, *VA's Threat to Withhold Disability Checks over Decades-Old Separation Pay Surprises Vets*, MILITARY.COM (July 17, 2024, 4:47 PM), [https://perma.cc/7T3E-9ZXC] [hereinafter Kime, *VA's Threat to Withhold*].

<sup>67</sup> See Chan, *supra* note 1; 10 U.S.C. § 1174(h); 38 C.F.R. § 3.700; see also *Majeed v. Nicholson*, 19 Vet. App. 525, 529–30 (2006) (finding that one can collect both SSB and disability benefits if the term of service from which the disability originates from is different from the term of service SSB was collected on).

<sup>68</sup> See Chan, *supra* note 1 (“Reffitt and two other veterans . . . said they were not aware of the law that prohibits both benefits when they took the payout”).

<sup>69</sup> See *id.*; Kime, *VA's Threat to Withhold*, *supra* note 66.

the VA having discretion to choose whether to implement a payment plan or deduct the sum from their disability checks until they are fully paid off.<sup>70</sup>

Critics of the recoupment process point to the burden it places on veterans, with National Service Director Jim Marszalek of Disabled American Veterans for one noting that “VA disability compensation can often be the difference between making ends meet and homelessness for many of our nation’s disabled veterans.”<sup>71</sup> Veteran unawareness of recoupment requirements, recoupment periods stretching across years, and the confusion on how recoupment arises from separate payments from separate federal agencies are also frequent points of contention.<sup>72</sup>

### 5. *Scope of Recoupment*

Reffitt is far from alone in this struggle. Other veterans have come forward, including Daphne Young, a fully disabled, thirty-six-year-old veteran who faced \$15,000 in recoupment costs,<sup>73</sup> and Raymond Thomas, rated 100% disabled and facing the recoupment of \$30,000 in separation pay.<sup>74</sup> A study by Rand Corporation on behalf of Congress found that between 2013 and 2020, over 72,000 veterans were subjected to “recoupment of . . . voluntary separation pay [“VSP”] or involuntary separation pay [“ISP”].”<sup>75</sup> Furthermore, 2,600 veterans were subjected to recoupment of their SSB, and an additional

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<sup>70</sup> See 10 U.S.C. § 1174(h)(1); Kime, *VA’s Threat to Withhold*, *supra* note 66 (only after he had gone public with his case, Raymond Thomas was allowed to enter into a \$500-a-month payment plan with the VA); Chan, *supra* note 1 (at the time of writing, Reffitt was still not granted any sort of plan, and due to the withheld payments, had to reduce the number of medical appointments for his “mental health, knee injury and chronic obstructive pulmonary disease.”).

<sup>71</sup> John Plahovinsak, *Op-Ed: Separation Pay and VA Recoupment Plague Veterans*, THE CLERMONT SUN (Jul. 31, 2024), [https://perma.cc/CBP6-MA6A].

<sup>72</sup> See Press Release, Congressman Gus Bilirakis, Bilirakis, Gellego, and DeSaulnier Introduce Legislation to Protect Veterans’ Disability Pay (Feb. 2, 2022), [https://perma.cc/GWD8-S6ZU]; Rennane et al., *Recouping Separation Pay from U.S. Service Members and Veterans Who Later Receive Veterans Affairs Disability Compensation*, RAND 2 (Feb. 7, 2022); Chan, *supra* note 1 (reporting that Shane Collins took three years to repay the \$33,000 SSB he received); Plahovinsak, *supra* note 71.

<sup>73</sup> See Chan, *supra* note 1. It is worth noting that “fully disabled” and “100% disabled” refer both to the state of total disability, where VA determines you are wholly unable to work and entitled to the maximum possible compensation. See *About Disability Ratings*, U.S. DEP’T OF VETERANS AFFS. (Nov. 5, 2024), [https://perma.cc/5F8D-4KH5]; *What Does It Mean to Be 100% Disabled by the VA?*, CHISHOLM CHISHOLM & KILPATRICK LTD (Jun. 12, 2025), [https://perma.cc/R3FW-SQYT].

<sup>74</sup> See Kime, *VA Has Recouped \$2.4 Billion*, *supra* note 64.

<sup>75</sup> Rennane et al., *supra* note 72, at vi–vii (brackets in original).

4,700 had their voluntary separation incentive (“VSI”) recouped.<sup>76</sup> In the period of time between 2013 and 2020, a total of \$1.4 billion were withheld from veterans for the purpose of recoupment.<sup>77</sup>

### ***6. How the PACT Act Exacerbated Existing Recoupment Issues***

What the PACT Act lacks in titular brevity, it compensates for in expansive increases to presumptive conditions for toxic exposure.<sup>78</sup> Presumption was discussed earlier in this Note,<sup>79</sup> but in short, presumptive conditions are those which VA will presume derive from service without requiring a showing from the benefit-seeker.<sup>80</sup> The PACT Act makes benefits available to millions of veterans that otherwise would not have access to them.<sup>81</sup> For veterans who have applied for certain benefits and been denied in the past, the PACT Act provides an avenue by which to try again and file a supplemental claim, receiving new consideration.<sup>82</sup> However, by introducing so many new classes of eligible beneficiaries, and inviting so many applicants, the PACT

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<sup>76</sup> See *id.* at vii.

<sup>77</sup> See *id.* While recoupment had been performed prior to 2013, data provided by the VA only goes back to 2013, making the number of veterans subject to recoupment and the amount recouped unknown. *Id.* at vii–viii.

<sup>78</sup> See PACT Act, Pub. L. No. 117-168, 136 Stat. 1759 (2022); see also *The PACT Act and your VA benefits*, U.S. DEP’T OF VETERANS AFFS. (Mar. 5, 2024), [<https://perma.cc/M2BM-SR8C>]. For Gulf War and War on Terror veterans, the following conditions are now presumptive: “brain cancer, gastrointestinal cancer of any type, glioblastoma, head cancer of any type, kidney cancer, lymphoma of any type, melanoma, neck cancer of any type, pancreatic cancer, reproductive cancer of any type, respiratory (breathing-related) cancer of any type . . . asthma that was diagnosed after service, chronic bronchitis, chronic obstructive pulmonary disease (COPD), chronic rhinitis, chronic sinusitis, constrictive bronchiolitis or obliterative bronchiolitis, emphysema, granulomatous disease, interstitial lung disease (ILD), pleuritis, pulmonary fibrosis, sarcoidosis” *Id.* (punctuation added). For Vietnam veterans, “high blood pressure (also called hypertension), and monoclonal gammopathy of undetermined significance (MGUS)” *Id.* (punctuation added).

<sup>79</sup> See *supra* notes 31–38 and accompanying text.

<sup>80</sup> See *supra* notes 31–38 and accompanying text.

<sup>81</sup> *In Two Years of the PACT Act, VA has Delivered Benefits and Health Care to Millions of Toxic-Exposed Veterans and Their Survivors*, U.S. DEP’T OF VETERANS AFFS. (Aug. 9, 2024, at 13:00 EDT), [<https://perma.cc/N6XE-39YG>]. The VA reports that record highs in benefit applications have led to over 1 million disabled veterans and their survivors receiving financial compensation, 740,000 veterans enrolling in health care programs, and over 5 million veterans going through the toxic exposure screening process. *Id.*

<sup>82</sup> See *Supplemental Claims*, U.S. DEP’T OF VETERANS AFFS. (Sep. 3, 2025), [<https://perma.cc/DT76-Y4ZY>]. One of the two requirements for a supplemental claim is to either “have new and relevant evidence to submit . . .” OR “request[] a review of your claim based on a change in law (such as the PACT Act).” *Id.*

Act naturally subjected more veterans to recoupment procedures.<sup>83</sup> For some veterans who were collecting benefits prior to the PACT Act's passage, applying for new benefits under the Act caused the VA to realize their error and begin recoupment out of the veterans' disability payments.<sup>84</sup>

### 7. *The Restore Veterans' Compensation Act of 2023*

Legislation has been proposed to address the recoupment issue, yet it has failed to find traction in Congress and has yet to be considered by the Subcommittee on Disability Assistance and Memorial Affairs.<sup>85</sup> The fact that Congress was aware of this issue prior to the passage of the PACT Act, yet did not take measures to prepare accordingly or remedy the situation, shows a clear disregard for the plight of disabled veterans.<sup>86</sup> The PACT Act greatly improved the ease of access to benefits for veterans suffering from a wide variety of disability-causing conditions,<sup>87</sup> so it is only natural that it would cause more veterans to be flagged for requiring recoupment (as with the case of Vernon Reffitt).<sup>88</sup> While the VA is bound by statute to enforce recoupment,<sup>89</sup> the existence of the issue reflects a fundamental problem with the statute.

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<sup>83</sup> See Melissa Chan, *A Little-Known Law has Forced Over 120,000 Veterans to Return the Money They got to Leave the Military, New Data Shows*, NBC News (Aug. 2, 2024, at 17:43 EDT), [<https://perma.cc/VU7X-VRB7>] (“The recoupments demanded from vets in fiscal year 2023 grew to nearly 9,300, from 7,940 in 2022”). This spike in recoupment coincides with the passage of the PACT Act in 2022 and the resulting increase in claims from the categorical expansion of presumption. See PACT Act, Pub. L. No. 117-168, 136 Stat. 1759 (2022).

<sup>84</sup> See Chan, *supra* note 83. Two examples include Vernon Reffitt, and Shawn Teller, the latter of which received \$10,700 of SSB in 1996 and had been collecting disability for a service-related knee injury. *Id.* Upon filing a claim for asthma under the PACT Act, which increased his disability rating, the VA commenced recoupment. *Id.*

<sup>85</sup> See Restore Veterans' Compensation Act of 2023, H.R. 3489, 118th Cong. (2023). The Restore Veterans' Compensation Act of 2023 is the only piece of proposed legislation addressing the matter, yet did not make it past the committee phase. See *H.R. 3489 – Restore Veterans' Compensation Act of 2023*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/3489> (last visited Nov. 12, 2025).

<sup>86</sup> See Rennane et al., *supra* note 72, at iii–iv (showing that Congress was concerned about recoupment before February, 2022, when Rand Corporation published their study); see also PACT Act §§ 401–06 (expanding classes of eligible beneficiaries and attracting applicants, which inadvertently subjected more veterans to recoupment when new claims exposed prior VA payment errors).

<sup>87</sup> See PACT Act §§ 401–06.

<sup>88</sup> See Chan, *supra* note 1.

<sup>89</sup> See 10 U.S.C. § 1174(h)(2) (“A member who has received separation pay under this section . . . based on service in the armed forces shall not be deprived . . . of any disability compensation to which he is entitled . . . but there **shall** be deducted from that disability compensation an amount equal to the total amount of separation pay . . .”) (emphasis

## II. Analysis

### A. Levy's Government Benefit Models as an Explanation of the Recoupment Issue

When one considers the recoupment issue through the lens of Professor Levy's government benefit models, the issue of why the government has not made more efforts to address it becomes clearer.<sup>90</sup> Language used by critics of recoupment and the veterans affected by it are reflective of a perception of veterans' disability benefits in line with the social insurance model.<sup>91</sup> Referring to veterans benefits as "owed" or "earned" implies an inherent government obligation to grant these benefits,<sup>92</sup> and such a government obligation hearkens to the quasi-contractual nature of the social insurance model.<sup>93</sup> As previously discussed, however, in the mind of the government, veterans benefits are fundamentally reflective of the charity model.<sup>94</sup> If the premise of disability benefits being a gift, not a quasi-contractual obligation, is accepted, then the statutes preventing double-dipping and requiring recoupment become less abhorrent.<sup>95</sup> After all, nothing is truly being denied if there was no right to receive it in the first place.

### B. *Cushman's* Effects on the Disability Benefit Property Interest

*Cushman*, despite creating a property interest in claimants seeking veterans disability benefits, grounds this interest in meeting "the eligibility requirements set forth in the governing statutes and regulations."<sup>96</sup> Implicit within *Cushman* is the finding that a veterans benefit claimant's property interest

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added); Chan, *supra* note 83 ("VA press secretary Terrence Hayes said . . . the VA is legally bound to recover special separation benefits from veterans before those eligible can begin receiving disability payments."); 38 C.F.R. § 3.700(a)(5)(i) ("Where payment of separation pay was made . . . VA **will** recoup . . .") (emphasis added).

<sup>90</sup> See Levy, *supra* note 41, at 304–06.

<sup>91</sup> See Chan, *supra* note 83 ("Advocates say the law not only blindsides veterans, but it **robs** them of **earned** benefits that should not be linked financially.") (emphasis added); Bilirakis Press Release, *supra* note 72 (Rep. Bilirakis: "[Veterans] should be able to receive all of the benefits **promised** to them . . . [without] unnecessary bureaucratic roadblocks when attempting to access the benefits they have **earned**." Rep. DeSaulnier: "We must ensure [veterans] receive the full financial support they are **owed** for their sacrifice.") (internal quotations omitted) (emphasis added); *supra* notes 65–75 and accompanying text.

<sup>92</sup> See Bilirakis Press Release, *supra* note 72.

<sup>93</sup> See Levy, *supra* note 41, at 305–06.

<sup>94</sup> See *supra* notes 62–64 and accompanying text.

<sup>95</sup> See 10 U.S.C. § 1174(h)(2); 38 C.F.R. § 3.700(a)(3)–(4).

<sup>96</sup> *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

starts and ends with the legislature's discretion.<sup>97</sup> So when a veteran's disability payments are recouped due to having accepted SSB, due process is not implicated, as being ineligible for both disability benefits and SSB are both part of the same "statutorily created right."<sup>98</sup> This property interest has no conflict with the charity model, as the interest is still only being granted by the goodwill of the legislature.<sup>99</sup> Critics and veterans subject to recoupment may see benefits being withheld and consider it a denial of rights. However, in the eyes of the court, to the degree that their entitlement to receive disability benefits conflicts with the restrictions placed by recoupments, they were never entitled to it at all.<sup>100</sup>

Courts have had no issue applying this principle to disability benefit claims, affirming the VA claim determinations so long as the claimant does not fit within the narrow exception of the disability compensation and SSB deriving from different periods of service.<sup>101</sup> No due process issue has been raised regarding recoupment in the CAVC or the Federal Circuit, with the closest analog being two cases in the U.S. Court of Federal Claims, but both refused to consider the issue due to lack of subject matter jurisdiction and did not offer an explanation for the gap in the precedent.<sup>102</sup> The courts, however, make clear that if such a review of benefit-entitlement determinations is to occur, it should be brought to a higher court with the statutory authority to overturn VA's initial findings.<sup>103</sup>

### **C. Explanation for the Restore Veterans' Compensation Act's Failure**

The Restore Veterans' Compensation Act of 2023 ("RVCA"), proposed in May of 2023, purported to address recoupment by banning its application

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<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 1297; see 10 U.S.C. § 1174(h)(2).

<sup>99</sup> See Levy, *supra* note 41, at 304–05.

<sup>100</sup> See *supra* note 51 and accompanying text; *Cushman*, 576 F.3d. at 1298.

<sup>101</sup> See *Johnson v. McDonough*, No. 21-1632, 2022 U.S. App. LEXIS 1599, at \*9–10 (Fed. Cir. Jan. 20, 2022); *Majeed v. Nicholson*, 19 Vet. App. 525, 529 (2006); *Colage v. McDonough*, No. 23-8027, 2024 U.S. App. Vet. Claims LEXIS 2974, at \*5–6 (Vet. App. Dec. 26, 2024).

<sup>102</sup> See *Bailey v. United States*, No. 15-09, 2015 U.S. Claims LEXIS 915, at \*5 (Fed. Cl. July 23, 2015) ("Although this court may sometimes consider due process or equal protection claims when alleged violations of fundamental rights are part of a larger claim . . . these constitutional protections do not give rise, standing alone, to claims over which this court may exercise jurisdiction."); *Moss v. United States*, 101 Fed. Cl. 611, 619, 622 (2011) (acknowledging that the review of benefit determinations is a power vested only in the United States Court of Veterans Appeals).

<sup>103</sup> See *Bailey*, 2015 U.S. Claims LEXIS 915, at \*4; *Moss*, 101 Fed. Cl. at 619.

to veterans eligible for disability benefits, and reducing the amount other veterans would have to pay in recoupment as well as the rate at which they'd be forced to repay it.<sup>104</sup> Yet, as previously discussed, this legislation failed to make it out of the committee phase.<sup>105</sup> The reason for its failure is not explicitly clear, but U.S. Representative Ruben Gallego, one of the co-sponsors, stated that “it is costly . . . and that’s kind of been the biggest hindrance of why I can’t get it through.”<sup>106</sup> The cost Gallego is referring to is also unclear, but presumably the committee is concerned about writing off money that legally belongs to the VA. However, these costs would be felt more severely by the disabled veterans shouldering them than the U.S. Government.<sup>107</sup> As it is three years after the passage of the PACT Act,<sup>108</sup> and two after the proposal of the RCVA,<sup>109</sup> it would be a grave repetition of history to further delay action, only granting relief to veterans long after they were needed.<sup>110</sup>

### III. Proposed Remedies for Addressing Recoupment

#### A. Judicial Proposal: Using a Due Process Argument on Grounds of Lack of Notice to Bar Recoupment

Regardless of a precedent that has failed to answer the issue, the Federal Circuit’s incursion into the system of veterans benefits in *Cushman* presents an opportunity for advocates.<sup>111</sup> As Professor Allen recognizes, *Cushman*’s due process implications give the Federal Circuit control over significant elements of constructing the veterans claims system.<sup>112</sup> Allen’s call to action applies here, encouraging “[t]hose involved in the important work on behalf of America’s veterans [to] seize this opportunity to consciously consider how they can best serve those who have borne the battle.”<sup>113</sup> To bring a case before the Federal Circuit, arguing that recoupment is a violation of due process under the assertion that it implicates a separate property interest than disability benefits could see a decision rendered which favors veterans in need.

While a full legal analysis of due process is beyond the scope of this Note, the argument could be framed around the due process requirements of notice

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<sup>104</sup> See Restore Veterans’ Compensation Act of 2023, H.R. 3489, 118th Cong. § 2 (2023); Bilirakis Press Release, *supra* note 72.

<sup>105</sup> See *supra* note 87 and accompanying text.

<sup>106</sup> Chan, *supra* note 1.

<sup>107</sup> See *supra* note 71 and accompanying text.

<sup>108</sup> See PACT Act, Pub. L. No. 117-168, 136 Stat. 1759 (2022).

<sup>109</sup> See Restore Veterans’ Compensation Act of 2023, H.R. 3489, 118th Cong. (2023).

<sup>110</sup> See *supra* Part I.A.

<sup>111</sup> See *Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009).

<sup>112</sup> See Allen, *supra* note 56, at 529; *Cushman*, 576 F.3d at 1298.

<sup>113</sup> Allen, *supra* note 56, at 534.

and a hearing.<sup>114</sup> Protected property interests, which include disability benefits and (per *Cushman*) prospective disability benefits for eligible applicants, cannot be terminated without satisfaction of the notice and hearing requirements.<sup>115</sup> There is no hearing offered to veterans subject to recoupment—the VA is simply able to begin withholding payments when they determine recoupment is required.<sup>116</sup> Ostensibly, the notice given that recoupment is to occur would be whatever information was given to veterans upon their acceptance of SSB payments, yet veterans assert they remained unaware of the risk of recoupment—a glaring issue that may be reflective of insufficient notice.<sup>117</sup> An insufficient notice about the possibility of benefits being removed subject to conditions is analogous to cases where courts have found that such notices violated due process.<sup>118</sup> On such grounds, the Federal Circuit would be within its authority to uphold a challenge to the recoupment process as it exists.<sup>119</sup> However, if the courts are unwilling to engage in such activism, it would fall to the legislature to enact the needed change.

### **B. Legislative Proposal: Amending the RVCA to Address the VA Concerns of Cost While Still Relieving the Burden on Veterans**

If cost is truly an insurmountable barrier to legislation seeking to address recoupment, then the RVCA could be amended to reduce immediate costs to the VA while limiting its impact on disabled veterans. The prohibition on recoupment against a veteran receiving disability compensation could be

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<sup>114</sup> See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (making clear that despite longstanding constitutional debates about the meaning of due process, “there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case”); see also *Cushman*, 576 F.3d at 1297 (finding that “[d]ue process of law has been interpreted to include notice and a fair opportunity to be heard”).

<sup>115</sup> See *Cushman*, 576 F.3d at 1297; 5 U.S.C. § 554(a).

<sup>116</sup> See U.S. DEPT OF VETERANS AFFS., VA ADJUDICATION PROCEDURES MANUAL, M21-1, PART III, SUBPART V, CHAPTER 4, SECTION B: RECOUPMENT OF SEPARATION BENEFITS, (2014); see also 5 U.S.C. § 554(a).

<sup>117</sup> See *supra* notes 68–69 and accompanying text; see also *Rennane et al.*, *supra* note 72, at v (theorizing that recoupment being a surprise to veterans may derive from their perception of the two categories of benefits being entirely separate, particularly in regard to voluntary separation incentives or special separation benefits).

<sup>118</sup> See *Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 835 (Minn. 1984) (en banc) (finding that a misleading and inadequate notice as to the consequences of not following up an appeal violated due process); *Willis v. Lascaris*, 499 F.Supp 749, 760 (N.D.N.Y. 1980) (finding that a notice which did not adequately explain the reason for a reduction to food stamp benefits or the degree to which those benefits would be reduced violated due process).

<sup>119</sup> See *Allen*, *supra* note 56, at 529; *Cushman*, 576 F.3d at 1297–98.

forward-looking, only affecting SSB payments after the passage of the legislation.<sup>120</sup> Protections could still be granted to disabled veterans currently subject to recoupment by applying to them the portions of the statute which limit the amount of recoupment by requiring only the repayment of the net amount of separation pay rather than gross amount,<sup>121</sup> and which limit the percentage of payment deducted for recoupment.<sup>122</sup>

It is critical that members of the Judiciary and members of Congress do not wait for their colleagues to act. Anyone with an eye towards American politics knows of the glacial pace at which new laws pass through Congress, a polarization-driven inadequacy that proves to only be on the rise.<sup>123</sup> Furthermore, rulings against the Trump administration have spawned a critical sentiment against judicial action perceived as “activist.”<sup>124</sup> Policy goals are strengthened when multiple governmental branches collaborate towards common ends,<sup>125</sup> and the sooner such decisive action can be taken, the sooner the very real burden of recoupment can be taken off the shoulders of veterans.

## Conclusion

If recoupment is to no longer be an unequitable burden on disabled veterans, then change must be wrought either by advocates in the courts, or by legislators willing to cooperate with the VA. The above analysis provides a framework by which the statutes surrounding recoupment can be improved, and the courts can be leveraged as a tool of change. Consistently, when catastrophe strikes veterans, aid has been inadequate. When help does arrive, often it's decades too late to be effective, and those individuals who fought for America have already suffered through a life defined by a country that neglected them. It occurred when Revolutionary War veterans were denied promised pensions for 25 years.<sup>126</sup> Again, when Civil War veterans were expected to pull themselves out of crippling poverty and service-connected

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<sup>120</sup> See Restore Veterans' Compensation Act of 2023, H.R. 3489, 118th Cong. § 2(a)(1) (2023).

<sup>121</sup> See *id.* § 2(a)(2).

<sup>122</sup> See *id.* § 2(a)(3).

<sup>123</sup> See Francisco Tutella, *Political polarization May Slow Legislation, Make Higher-Stakes Laws Likelier*, PENN STATE UNIV. (Jan. 26, 2024), [<https://perma.cc/LRJ9-UMAU>].

<sup>124</sup> See THE HERITAGE FOUND., *HOW TO STOP ACTIVIST JUDGES*, [<https://perma.cc/V6UL-9UKC>].

<sup>125</sup> See PEW RSCH. CTR., *HOW CROSS-BRANCH COLLABORATION HELPS STATES STRENGTHEN EVIDENCE-BASED POLICYMAKING* (Mar. 10, 2022), [<https://perma.cc/HGG2-A945>]. While this article primarily discusses collaboration between the Executive and Legislative Branches, it lends support for inter-branch collaboration as a whole. See *id.*

<sup>126</sup> See *supra* note 14 and accompanying text.

opioid addiction.<sup>127</sup> Then the bureaucratic exploitation after World War I and II, the willful disregard of the risks presented from exposing Vietnam servicemen to Agent Orange, and the snail pace with which new presumptions are considered accepted.<sup>128</sup> This cycle cannot be permitted to continue by turning a blind eye to recoupment, and the effort to protect veterans must make full use of all the tools at their disposal, both judicial and legislative. Most critically of all, the Judiciary and legislature cannot remain indolent by waiting for the other to act first but should seize the opportunity to create a multi-branch effort at protecting veterans' benefits.

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<sup>127</sup> See *supra* notes 16–17 and accompanying text.

<sup>128</sup> See *supra* notes 21–29, 34–37 and accompanying text.