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Due Process and the Subpoena Power in Federal Environmental, Health, and Safety Whistleblower Proceedings

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Articles

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> The parties recognize and recite that . . . the Court has stated its understanding that the Secretary of Labor has disavowed the existence of subpoena power under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851. Each party has acted in good faith to persuade non-parties (or lawful representative on their behalf) to appear voluntarily for depositions and at trial, but witnesses with relevant knowledge have declined to appear voluntarily. In view of the unwillingness of these witnesses to appear voluntarily and the lack of subpoena power to compel their attendance at depositions or trial, complainant hereby withdraws his complaint and asks that this proceeding be dismissed with prejudice . . . .[1]

SO ENDED THE nuclear whistleblower case brought by Douglas Harrison. In any other discrimination proceeding, in any other forum, his case would go forward, evidence would be gathered, witnesses would be heard, and a decision would be rendered. However, because Mr. Harrison alleged his employer discriminated against him on the basis of health and safety whistleblowing activity, instead of race, gender, or financial whistleblowing, his case was over before it started.

The employee protection provisions of various federal environmental, health, and safety acts[2]—the statutory basis for whistleblower claims—are

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1. Harrison v. Stone & Webster Eng'g Corp., 96-ERA-19 (ALJ Aug. 7, 1996) <http://www.oalj.dol.gov>. Each of the whistleblower cases cited in this article can be found at this website.

2. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2622 (1994); Federal Water Pollution Act, 33 U.S.C. § 1367 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (1994); En-

heard by the U.S. Department of Labor's Office of Administrative Law Judges ("OALJ"). These claims might include those brought, for example, by truckers against a private shipping company that requires drivers to carry overweight loads; scientists employed by a state air quality management board that tells the scientists to ignore violations; or nuclear technicians who, for safety reasons, object to power plant procedures. Whistleblower suits may be brought against public or private entities.[3]

Whistleblower claims constitute only a portion of the OALJ bailiwick. The OALJ conducts hearings under some fifty federal laws.[4] Under many of these laws, such as the Longshore and Harbor Workers' Compensation Act,[5] Congress has specifically granted the subpoena power to the OALJ.[6] However, the subpoena power is conspicuously absent in various health and safety whistleblower acts.[7]

This Article argues that the subpoena power is a due process right vested in whistleblower litigants and, therefore, congressional grants are unnecessary. First, this Article outlines the default rule against ALJ subpoena power in whistleblower proceedings and of the precedents regarding ALJ's subpoena power. This Article then analyzes the subpoena power in whistleblower cases, emphasizing courts' considerations in finding a procedure mandated by due process, and concludes that subpoenas are a due process right of whistleblower litigants. The due process analysis is organized in the order typically employed by the U.S. Supreme Court. First, a property interest is identified, and the competing interests are explained and weighed. Next, the risks of erroneous deprivation and the value of the subpoena power is explored. This is followed by a review of the few available cases on due process and subpoenas. Finally, this Article presents a brief history of the subpoena power and its applicability to administrative proceedings.

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ergy Reorganization Act (ERA) of 1974, 42 U.S.C. § 5851 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6971 (1994); Clean Air Act (CAA), 42 U.S.C. § 7622 (1994); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. § 9610 (1994); Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 (1994). This Article, when using the term "whistleblower," refers to those individuals protected under these acts. There are, of course, different types of whistleblowers subject to other statutory protections, who may bring their cases in other fora.

3. For example, under the Clean Air Act, "persons" may violate the whistleblower provision. *See* 42 U.S.C. §§ 7602(e), 7622 (1994). A "person" may be "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States." *Id.*

4. For a chart of currently active cases and the laws under which they are heard, see *Guide to Case Types* (visited Mar. 29, 1998) <http://www.oalj.dol.gov/types.htm>.

5. 33 U.S.C. §§ 901–950 (1994).

6. *See id.* § 927(a).

7. *See* discussion *infra* Part I.

I. A Typical Example of a Whistleblower Statute

The employee protection provision of the Clean Air Act ("CAA") is typical of a whistleblower statute.[8] This provision provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment"[9] because that employee commenced a proceeding under the Act,[10] testified in such a proceeding,[11] or "*assisted or participated . . . in any manner* in such a proceeding or in any other action to carry out the purposes of this chapter."[12]

Whistleblower suits under the CAA are similar to Title VII[13] discrimination suits[14] in that a complainant under the CAA must make a *prima facie* case. The complainant must show that: (1) he or she was discriminated against with respect to compensation, terms, conditions, or privileges of employment; (2) he or she had engaged in "protected activity"; and (3) the employer had knowledge that the employee engaged in protected activity.[15] As a fourth element, the complainant must present sufficient evidence to justify an inference that the respondent's (employer's) adverse action was motivated by a retaliatory intent against the complainant.[16] However, cases are rarely decided on the *prima facie* showing. Usually, a complainant must prove by a preponderance of the evidence that the employer's adverse action was motivated, at least in part, by the complainant's engaging in protected activity.[17] Once an administrative law judge ("ALJ") issues a recommended decision in a whistleblower proceeding, any party may peti-

8. *See* 42 U.S.C. § 7622.

9. *Id.*

10. *See id.* § 7622(a)(1).

11. *See id.* § 7622(a)(2).

12. *Id.* § 7622(a)(3) (emphasis added). The end of this subsection provides broad protection, eliminating the need for any formal proceeding to have commenced. *See* Kansas Gas & Elec. Co. v. Brock, 780 F.2d 1505, 1512 (10th Cir. 1985). *But see* Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251–1385 (1994); Solid Waste Disposal Act, 42 U.S.C. §§ 6901–6992 (1994); CERCLA, 42 U.S.C. §§ 9601–9675 (1994). None of these acts contain similarly broad language.

13. 42 U.S.C. §§ 2000e–2000f (1994).

14. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

15. *See* Carroll v. United States Dept. of Labor, 78 F.3d 352, 356 (8th Cir. 1996); *see also* 42 U.S.C. § 5851(b)(3)(A) (1994). This section holds that in cases arising under the Energy Reorganization Act, a *prima facie* case must include a showing that protected activity was a "contributing factor" to the adverse action taken by the employer. *See id.* To overcome this showing, an employer must demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the complainant's protected activity. *See* 42 U.S.C. § 5851(b)(3)(D) (1994).

16. *See Carroll*, 78 F.3d at 356.

17. *See id.*; *see also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (holding that the plaintiff in a Title VII case always has "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated").

tion for review by the Administrative Review Board ("ARB").[18] An aggrieved party may appeal the ARB's decision to the appropriate court of appeals.[19]

II. The Default Against the Subpoena Power

The issue of subpoena availability only recently has come to the fore in whistleblower proceedings. In *Malpass v. General Electric Co.*,[20] the Secretary of Labor put ALJs on notice that they did not have subpoena power in most whistleblower matters.[21] *Malpass* was brought under the Energy Reorganization Act[22] ("ERA"). The Secretary noted that the Administrative Procedure Act permitted ALJs to "'issue subpoenas authorized by law,'"[23] but that the ERA itself contained no such authorization.[24] The Secretary explained that he did not believe he could "assume powers not delegated to him by Congress simply by incorporating provisions, such as the Federal Rules of Civil Procedure, in departmental regulations."[25] Although *Malpass* was decided under the ERA, that law is substantially similar to other whistleblower statutes, none of which grant subpoena power.[26] Accordingly, subpoenas are now generally unavailable in whistleblower pro-

18. *See* Procedures for the Handling of Discrimination Complaints Under Federal Employee Protection Statutes, 63 Fed. Reg. 6614, 6624 (1998) (to be codified at 29 C.F.R. pt. 24.8) [hereinafter Procedures]. This law applies to all whisteblower acts except the STAA. The STAA regulations are codified at 29 C.F.R. pt. 19 (1997).

19. *See, e.g.*, 42 U.S.C. § 7622(c) (1994) (allowing any person aggrieved by a Board's order the right to have that order reviewed by the appropriate U.S. court of appeals).

20. 85-ERA-38 (Sec'y Mar. 1, 1994) <http://www.oalj.dol.gov>.

21. *See id.* at 11; *see also* Immanuel v. United States Dept. of Labor, No. 97-1987, 1998 WL 129932, at *5 (4th Cir. Mar. 24, 1998).

22. 42 U.S.C. §§ 5801–5878a(a) (1994).

23. *Malpass*, 85-ERA-38, at 11 (quoting 5 U.S.C. § 556(c)(2) (1994)). Of course, this may contemplate a subpoena that is constitutionally required. *See* 5 U.S.C. § 555(d) (1994) ("Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.").

24. *See Malpass*, 85-ERA-38, at 11.

25. *Id.*

26. *See* The Water Pollution Control Act, 33 U.S.C. § 1369(a)(1) (1994) (granting subpoena power in limited circumstances not applicable in Department of Labor proceedings); *see also Immanuel*, 1998 WL 129932. In an unpublished decision, the Fourth Circuit recently held that the Water Pollution Control Act does not contain authorization for ALJ issuance of subpoenas. *See id.* at *5. In *Immanuel*, the complainant sought subpoenas to compel the appearance of other employees of the respondent. *See id.* at *4. As noted by the court, a Department of Labor regulation, 29 C.F.R. § 18.29(a), provides that witnesses within a party's control may be compelled to appear without a subpoena. *See id.* at *6. The court held that the ALJ erred by failing to compel the witnesses to appear in accordance with the regulation. *See id.* at *6. Accordingly, the court did not address the complainant's due process argument regarding subpoenas. *See id.* at *6 n.2.

ceedings.[27] This came as a surprise to many ALJs who assumed they had subpoena power pursuant to the regulations governing practice and procedure.[28] The subpoena rule clearly states that subpoenas "authorized by statute or law" may be issued[29]—a fundamental element that was perhaps overlooked or presumed. Administrative Law Judges were also puzzled because the OALJ frequently used the subpoena power when adjudicating claims under other acts.[30]

In the United States, the subpoena power is viewed as a judicial power granted to the judiciary in Article III of the U.S. Constitution.[31] Therefore, courts initially disapproved Congress's granting the subpoena power to the agencies. In *In re Pacific Railway Commission*,[32] the court held that the commission could not compel testimony because it was created by Congress and not a judicial body.[33] This remained the position of the courts for

27. ALJs have, nonetheless, issued subpoenas on due process grounds—the same basis for subpoena power that this Article asserts. *See* Hill v. Tennessee Valley Auth., 87-ERA-23, at 3–4 (ALJ Apr. 17, 1990) <http://www.oalj.dol.gov> (stating that because section 210 of the ERA implicitly grants subpoena power to the Secretary to afford a constitutionally adequate hearing, it follows that section 556 of the APA grants the same power to ALJs); Young v. Philadelphia Elec. Co., 87-ERA-36, at 2–4 (ALJ Sept. 15, 1987) <http://www.oalj.dol.gov> (basing subpoena power on legislative history indicating that DOL proceedings were meant to operate in the same fashion as the National Labor Management Act and the Federal Coal Mine Safety and Health Act, both of which provide subpoena power).

28. *See* 29 C.F.R. § 18.24 (1997). The leading treatise on whistleblower litigation proceedings at the Department of Labor also assumes that this regulation itself gives ALJs subpoena power. *See* STEPHEN M. KOHN, THE WHISTLEBLOWER LITIGATION HANDBOOK: ENVIRONMENTAL, HEALTH AND SAFETY CLAIMS 16 (1990) ("All discovery requests should be accompanied by an official Department of Labor subpoena. . . . When requesting subpoenas, state the name of the case and the number of subpoenas needed." (citing 29 C.F.R. § 18.24)).

29. 29 C.F.R. § 18.24.

30. *See* 33 U.S.C. § 927(a) (1994).

31. *See* Universal Airline v. Eastern Air Lines, 188 F.2d 993, 999 (D.C. Cir. 1951) (stating the subpoena power "is a necessary and essential part of the 'judicial Power' vested by the Constitution in 'one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish'" (quoting U.S. CONST. art III, § 1)); *see also* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2195, at 78–88 (McNaughton rev. 1961). Wigmore stated:

> Inherently and primarily, the power [to compel testimony] belongs to the judiciary, because the application of the law to facts in litigation requires a finding of the facts, and the finding cannot be made without investigation, and the necessity of investigation imports the power to compel answers and make disclosures of every sort. . . . The power of the judiciary is frequently described in a statute or court rule, but no question of inherent power can ordinarily arise.

Id. at 78 (citations omitted).

32. 32 F. 241 (N.D. Cal. 1887).

33. The court wrote:

> [The] production of the private books and papers of a party otherwise than in the course of judicial proceedings, or a direct suit for that purpose . . . [i]s the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial pro-

seven years,[34] until the Supreme Court decided *ICC v. Brimson*[35] in 1894. In *Brimson*, the Court determined that because the Constitution granted Congress power over interstate commerce, and since Congress had the power to create an agency to further this charge, it could grant necessary adjunct powers to enforce the laws it passed.[36] With *Brimson*, the subpoena power ceased to be a strictly judicial power even though enforcement has remained a judicial prerogative. It is now widely accepted that administrative agencies have the power to issue subpoenas only to the extent that power is granted by Congress. Also, the courts will enforce agency subpoenas only when a court finds "that the investigation is authorized by Congress, and is for a purpose Congress can order."[37]

Since *Brimson*, Congress has liberally granted the subpoena power to the agencies it has created.[38] This generosity has not been total; subpoenas have been omitted from some statutory schemes. A glaring example is the absence of the subpoena power in the federal environmental, health, and safety whistleblower proceedings.

III. Procedural Due Process and the Subpoena Power

Congress has never been required to provide all the accouterments of a "strictly judicial" proceeding in administrative hearings.[39] However, a legislative scheme with insufficient procedural protections may violate the Due Process Clause of the Fifth Amendment.[40] This section of the Article ap-

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cess, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.

Id. at 251.

34. *See, e.g., In re* McLean, 37 F. 648 (E.D.N.Y. 1888).

35. 154 U.S. 447 (1894).

36. *See id.* at 470–74.

An adjudication that [C]ongress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control.

Id. at 474.

37. Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 209 (1946).

38. *See, e.g.*, 15 U.S.C. § 79r(c) (1994) (granting subpoena power to the Securities and Exchange Commission); 29 U.S.C. § 161(1) (1994) (granting subpoena power to the National Labor Relations Board); 49 U.S.C. § 1113(a) (1994) (granting subpoena power to the National Transportation Safety Board).

39. *See* Londoner v. Denver, 210 U.S. 373, 386 (1908) ("Many requirements essential in strictly judicial proceedings may be dispensed with in [sic] proceedings of this nature.").

40. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855) (defining due process as "a restraint on the legislative as well as on the executive and judicial powers of the government," and prohibiting Congress from making "any process 'due process of law,' by its mere will").

plies the Supreme Court's procedural due process test to whistleblower litigation and concludes that these proceedings must include the subpoena power in order to comport with the Due Process Clause.

The Supreme Court's relevant procedural due process jurisprudence boils down to two principles. First, if a party possesses a legally recognizable liberty or property interest, he or she is entitled to certain procedural protections. Second, the procedures to which the party is entitled depend upon the circumstances of the governmental action being taken.[41] The general term, "circumstances," employed in *Cafeteria & Restaurant Workers Local 473 v. McElroy*[42] has been subject to exigesis by the Court in its seminal procedural due process case, *Mathews v. Eldridge*,[43] and its progeny, *Connecticut v. Doehr*.[44]

A. The Existence of a Property Interest

Before a court can consider whether any procedures are mandated by due process, it must first determine if the party seeking the procedural protections has a property interest deserving of additional safeguards.[45] The property interests protected by the Due Process Clause are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[46] Of course, federal law may also provide the property interest, as evidenced in welfare cases.[47]

The property interest created by the whistleblower statutes is unlike those presented in most procedural due process cases. The typical example of a property interest is a government job, a cash entitlement, or an in-kind entitlement.[48] These interests involve the transfer of value from the government to the individual. However, the property interest does not need to be a

41. *See* Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

42. *Id.*

43. 424 U.S. 319 (1976).

44. 501 U.S. 1 (1991).

45. *See* Board of Regents v. Roth, 408 U.S. 564, 576 (1972).

46. *Id.* at 577.

47. *See Mathews*, 424 U.S. 319; Richardson v. Perales, 402 U.S. 389 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

48. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (finding state employment to be a property interest); *Mathews*, 424 U.S. 319 (finding Social Security disability benefits to be a property interest); Perry v. Sindermann, 408 U.S. 593 (1972) (finding employment at state university to be a property interest); *Goldberg*, 397 U.S. 254 (finding Aid to Families with Dependent Children ("AFDC") benefits to be a property interest).

transfer of value; an employee's property interest can be the cause of action itself.

In *Logan v. Zimmerman Brush Co.*,[49] the Supreme Court recognized that "a cause of action is a species of property."[50] In *Logan*, the petitioner filed a grievance with an Illinois administrative agency, alleging disability discrimination by his employer.[51] Under Illinois law, the agency was required to hold a hearing within 120 days, but the hearing was scheduled five days too late.[52] The Illinois Supreme Court held that the agency could not exercise jurisdiction over the claim because the agency's action was untimely.[53] The agency could not, therefore, hear the petitioner's case.[54] The Supreme Court reversed, holding that the "state-created right to redress discrimination"[55] was a property interest and that the limitations period on agency action deprived the petitioner of that property interest without due process.[56]

The difficulty in whistleblower proceedings is that unlike the petitioner in *Logan*, a whistleblower is not denied access to the cause of action itself. Therefore, if the cause of action is the property interest, there may be no deprivation in a whistleblower case because the suit may proceed without the subpoena power. In *Arnett v. Kennedy*[57] a plurality wrote "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[58] This seems particularly true in a case where a cause of action is the property interest at issue. In *Cleveland Board of Education v. Loudermill*,[59] however, the Court disclaimed the "bitter with the sweet" approach, stating that "[t]he categories of substance and procedure are distinct."[60] The Court abstracted from the statutory scheme the property interest contained within it. In the context of

49. 455 U.S. 422 (1982). *Logan* was *not* a whistleblower claim case.
50. *Id.* at 428.
51. *See id.* at 426.
52. *See id.*
53. *See id.* at 427.
54. *See id.*
55. *Id.* at 431.
56. *See id.* at 432.
57. 416 U.S. 134 (1974).
58. *Id.* at 153–54.
59. 470 U.S. 532 (1985).
60. *Id.* at 541. One way out of this difficult problem is suggested by Professor Van Alstyne. He suggests we "treat *freedom from arbitrary adjudicative procedures* as a substantive element of one's liberty," and notes that the idea "of liberty . . . may easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means." William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977). This approach would relieve courts from the problem of determin-

the whistleblower cause of action, the abstracted property interest is the *goal* of the cause of action—freedom from discrimination.

In *Loudermill*, the Court did not consider the state job to be the property interest at issue. Rather, the property interest was the right not to be discharged except for cause.[61] Similarly, the whistleblower's property interest is not his or her job, it is the right not to be discharged or discriminated against for engaging in activities encouraged by the act—a right that may be asserted against public or private entities.[62] The employer's converse right is the right to discharge or discriminate for reasons unrelated to those prohibited by the statute.[63] As required by *Board of Regents v. Roth*,[64] whistleblower statutes "secure certain benefits" to whistleblowers.[65] More concretely, the employee's property right may be described as the newly mediated employment contract between the parties.

In *Brock v. Roadway Express, Inc.*,[66] a case brought under the employee protection provisions of the Surface Transportation Assistance Act[67] ("STAA"), the Court accepted the Secretary of Labor's statement that the right to discharge an employee for cause, derived from the collective bargaining agreement between the employer and the employees' union,[68] constituted a property interest that implicated due process protections.[69] This is important to whistleblower proceedings, because in all of them, the employer possesses some right of discharge. The right will be either "for cause" or "at will" and springs from either a contractual agreement or a common law "fall-back." Hence, an employer seeking the right to a subpoena will have leapt the first due process hurdle. While the *Brock* Court did not explicitly address the existence of a property right inhering in the employee, it took seriously the employee's interest in continued employment and weighed it at the "private interests" stage of the *Mathews* equation.[70]

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ing the scope of a property interest—that is, what is integral to the legislatively created interest—and what exists separately in the constitutionally determined realm of procedure.

61. *See Loudermill*, 470 U.S. at 538–39.

62. *See supra* note 3 and accompanying text.

63. *See* 42 U.S.C. § 7622(a)–(f) (1994).

64. 408 U.S. 564 (1972).

65. *Id.* at 577.

66. 481 U.S. 252 (1987).

67. 49 U.S.C. § 2305 (1982).

68. *See Brock*, 481 U.S. at 261 n.2.

69. *See id.*

70. *See id.* at 263.

B. Interest Balancing

To determine if due process requires the subpoena power in whistleblower proceedings, *Mathews* and *Doehr* require a balancing of:

> [T]he private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[71]

Doehr involved a private party seeking a prejudgment remedy against another private party and adjusted the third consideration of *Mathews* to include the interest of the party seeking the remedy.[72] The analysis of due process and the subpoena power requires similar considerations to those enumerated in *Mathews* and *Doehr*, but should include yet another consideration—the interest of the subpoenaed party.

1. Interests of the Parties: Employer, Employee, and Subpoenaed Party

The employer has a significant financial interest in a whistleblower proceeding because of the potentially harsh consequences of an adverse finding. An employer who has been found to have violated a whistleblower statute: (1) must reinstate the complainant with back pay; (2) may be required to pay other compensatory damages including emotional distress and reputation damages; and (3) on the complainant's request, must pay attorney's fees and costs.[73] Exemplary damages may be awarded in cases arising under the Safe Drinking Water Act[74] and the Toxic Substances Control Act.[75] As well, exemplary damages may be awarded under some of the Acts if the employer does not comply with an order and the Secretary brings an enforcement proceeding in district court.[76] In addition to its financial interest, the employer also has a substantial interest in "controlling the makeup of its work force."[77]

On the other hand, the employee has an interest in maintaining his source of income and ensuring his future employability.[78] The employee also has a non-pecuniary interest in freedom from discrimination or retalia-

71. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
72. *See* Connecticut v. Doehr, 501 U.S. 1, 11 (1991).
73. *See, e.g.*, 42 U.S.C. § 7622(b)(2)(B) (1994).
74. 42 U.S.C. § 300j-9(h)(ii)(A)(IV) (1994).
75. 15 U.S.C. § 2622(b)(2)(B)(IV) (1994).
76. *See, e.g.*, 42 U.S.C. § 7622(d) (1994).
77. *Brock*, 481 U.S. at 263.
78. *See id.*

tory actions in the work place. These interests are significant and weigh in favor of substantial procedural safeguards.

The interest of the subpoenaed party, however, seems entitled to comparatively little weight. While being haled into court is inconvenient and may lead to difficult business or personal relations with a party to the action, this possibility is a fact of modern life. Federal courts, state courts, and many administrative agencies already possess the subpoena power, and an individual may be compelled to testify in any of these fora. The possibility of a third party being haled into court should whistleblower proceedings provide the subpoena power is not a strong counterbalance to the interest of the parties needing testimony and does not encroach significantly on the rights of the third party.[79]

2. Governmental Interest

The government has two complementing and a third, competing, interest in these proceedings. First, as noted by the Court in *Brock*, the government has a substantial interest in "promoting . . . safety and protecting employees from retaliatory discharge."[80] Second, in other whistleblower acts, there are strong governmental interests in environmental protection and public health. Granting the subpoena power furthers both of these interests. However, the third governmental interest is efficiency, which may be compromised by a duty to enforce subpoenas.

In other words, if subpoenas are made available to whistleblower litigants, the government will have to expend time and resources to enforce the subpoenas. Typically, even if a party has access to agency subpoenas, the party cannot bring enforcement proceedings unless granted that power by statute.[81] Without enforcement power, the party must apply to the agency issuing the subpoena to seek enforcement through an *ex rel.* proceeding.[82] In such a proceeding, an agency brings suit in district court to enforce an agency order on behalf of the party. If the agency refuses the party's appli-

79. The foreseeability of being subpoenaed reduces any concern that subpoenas would too greatly burden the pool of potentially subpoenaed parties. The Supreme Court explained this in the analogous context of personal jurisdiction:

> [T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some assurance as to where that conduct will and will not render them liable to suit.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (citations omitted).

80. *Brock*, 481 U.S. at 262.

81. *See* Wilmot v. Doyle, 403 F.2d 811, 815–16 (9th Cir. 1968).

82. *See* Ex-Cell-O Corp. v. Little, 268 F. Supp. 755, 758 (S.D. Ind. 1966).

cation, the party's only recourse is to petition to set aside the agency's final order.[83]

Whistleblower statutes generally permit the parties or the Secretary of Labor to enforce the Secretary's dispositive orders.[84] Arguably, this procedure could also be followed to enforce other orders issued by the Secretary, including subpoenas. In all likelihood, however, the need to resort to enforcement proceedings would be minimal.

3. The Risk of Erroneous Deprivation and the Value of Additional Safeguards

The risk of erroneous deprivation of a litigant's property interest and the value of additional safeguards is the major factor when considering the subpoena as a due process requirement, and perhaps the most important due process consideration generally.[85] The Supreme Court has stated "some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision."[86] A subpoena may provide the only opportunity for a litigant to introduce certain types of evidence, and, therefore, to "present his side of the case."

a. Proof, Credibility, and Hearsay

In *Goldberg v. Kelly*,[87] the Supreme Court granted John Kelly a right to a hearing prior to the termination of his welfare benefits. Although the Court was careful not to spell out the precise outlines of the hearing to be provided, it did spell out some of the procedures it thought necessary to meet the demands of "rudimentary due process."[88] At its most general, the Court described the right it granted as "'the opportunity to be heard.'"[89] The Court further qualified this right by requiring the hearing to be both "'at a meaningful time and in a meaningful manner.'"[90] Relevant to the purpose of this Article, the Court assumed that part of this meaningful manner would be to give the party "an effective opportunity to defend by con-

83. *See Wilmot*, 403 F.2d at 815.

84. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7622(d)–(e) (1994) (permitting the Secretary or the parties to seek enforcement of the Secretary's orders in whistleblower actions for violations of emission standards).

85. *See* Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979) ("[T]he quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error.").

86. *Loudermill*, 470 U.S. at 543.

87. 397 U.S. 254 (1970).

88. *Id.* at 267.

89. *Id.* (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

90. *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

fronting any adverse witnesses and by presenting his own arguments and evidence orally."[91]

The *Goldberg* Court acknowledged that the ability to confront adverse witnesses is a basic due process requirement in certain situations; this appears to remain good law.[92] While it is true that *Mathews* denied a pretermination hearing on disability benefits, foreclosing any opportunity to confront witnesses, it acknowledged due process would require the opportunity in certain circumstances.[93] The Court characterized the evidence used to deny benefits in a disability proceeding as "easily documented."[94] In *Mathews*, the relevant inquiry—the presence or absence of a medically determinable disability—could be satisfied by written medical reports.[95] Accordingly, a pre-termination hearing was not required.[96] The Court considered this different from a welfare determination, in which "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process."[97] The Court noted that credibility determinations could come up in disability proceedings, but concluded that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[98]

In general, whistleblower cases depend on the credibility of the evidence, as do most legal proceedings. As noted earlier, to make out his *prima facie* case under a whistleblower statute, a complainant must show that: (1) he was discriminated against with respect to compensation, terms, conditions, or privileges of employment; (2) he had engaged in "protected activity"; (3) the employer had knowledge that the employee engaged in protected activity; and (4) an inference is raised that the discrimination was motivated, at least in part, because the employee engaged in protected activity.[99] There are many instances in which the parties may prove these elements without a subpoena. In those cases, the necessary quantum of proof will be within the control of the complainant and respondent. An ALJ may compel the production of documents and the appearance of witnesses

91. *Id.* at 268.

92. *See Loudermill*, 470 U.S. at 545.

93. *See Mathews*, 424 U.S. at 343–44.

94. *See id.* at 343.

95. *See id.* at 344–45.

96. *See id.* at 349.

97. *Id.* at 343–44; *see also Loudermill*, 470 U.S. at 553 (Brennan, J., concurring in part, dissenting in part) ("When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker.").

98. *Mathews*, 424 U.S. at 344.

99. *See* Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1162 (9th Cir. 1989).

within the control of the parties.[100] The ability of the parties to make their cases is aided, as well, by the application of the so-called "adverse inference rule."[101]

The key question in any whistleblower proceeding is "what motivated the employer in the actions it took against the employee?" Without engaging in a parade of horribles, the evidence necessary in many cases will not be so easily available. To answer the "key" question, witnesses must testify. Yet, without subpoenas, entire categories of witnesses and document custodians cannot be obligated to appear. These include: (1) former employees of the alleged discriminator; (2) other employers of the putative whistleblower; (3) environmental agencies contacted by the employee as part of her "protected activity"; and, generally, (4) third-parties who are aware of the events at issue but are not agents of either party.

Of course, the aggrieved employee will testify, and so, perhaps may an officer of the company. However, because no one must testify, the employee may be placed at a disadvantage. The employer has something perhaps more powerful than a subpoena with which to coerce the testimony (or silence) of its employees and contractors—the power of the purse.

The employer may also be disadvantaged. Impeachment witnesses may be unavailable and the employee's testimony may contain significant hearsay. In corroboration of his testimony, the employee can offer the affidavit of a friend or former co-worker. Since hearsay is admissible in most whistleblower proceedings (except the STAA), the testimony and the affidavit may be considered for its substance.[102]

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100. *See* 29 C.F.R. § 18.29(a)(3) (1997); *see also supra* note 28.

101. *See* 29 C.F.R. § 18.6(d)(2) (1997). The "adverse inference rule" states:

> If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, . . . or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unneccessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following: (i) *Infer* that the admission, testimony, documents or other evidence would have been *adverse* to the noncomplying party . . . .

Id. (emphasis added). Thus, even without a subpoena, an ALJ may require agents of the parties to appear or not appear at the principal's peril. *See* UAW v. NLRB, 459 F.2d 1329, 1338 (D.C. Cir. 1972) ("If evidence within the party's control would in fact strengthen his case, he can be expected to introduce it even if it is not subpoenaed. Conversely, if such evidence is not introduced, it may be inferred that the evidence is unfavorable to the party suppressing it.").

102. *See* Procedures, 63 Fed. Reg. 6614, 6623 (1998) (to be codified at 29 C.F.R. § 24.6(e)(1)) (providing that "[f]ormal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied"). *But see* 29 C.F.R. § 1978.100(b) (1997) (incorporating 29 C.F.R. § 18.802 (1997)).

The admissibility of hearsay, without a corresponding ability to compel testimony, may be the strongest argument for a due process requirement that the subpoena power be allowed in whistleblower proceedings.[103] The Ninth Circuit, in *Calhoun v. Bailar*,[104] noted that, in administrative proceedings not bound by hearsay rules, the admission of hearsay must, nonetheless, be guided by "indicia of reliability" and be "fundamentally fair."[105] The court listed a number of factors administrative bodies should consider when making this determination, including "whether or not the declarant is available to testify and, if so, whether or not the party objecting to the hearsay statements subpoenaes [sic] the declarant, or whether the declarant is unavailable and no other evidence is available."[106] In the absence of the subpoena power, a regime of automatic unavailability is imposed and the administrative body must admit and rely upon evidence that may not have an important indication of reliability.

In *Richardson v. Perales*,[107] the Supreme Court recognized the importance of subpoenas in providing due process in administrative proceedings. The Court upheld the use of medical reports in Social Security proceedings, despite their hearsay nature.[108] As the *Mathews* Court would five years later, the Court accepted a certain inherent reliability in medical reports.[109] Throughout its opinion, however, the Court noted that the claimant in the matter never subpoenaed the declarants whose hearsay he found objectionable.[110] This fact is part of the holding of the case, which states that evidence, "despite its hearsay character and an absence of cross-examination . . . may constitute substantial evidence . . . when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician."[111] The Court noted that the claimant was precluded from com-

103. It appears that the admissibility of hearsay in many administrative settings is not designed to eliminate the right to confrontation, but to streamline the process. *See* 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 4b, at 107–27 (Tiller rev. 1983). For instance, if hearsay were not admissible in Social Security or Workers' Compensation proceedings, the doctors' reports—which make up the bulk of the relevant evidence—could be excluded. Should live testimony be required, subpoenas are typically available. *See, e.g.*, 42 U.S.C. § 405(d) (1994).

104. 626 F.2d 145 (9th Cir. 1980).

105. *Id.* at 148.

106. *Id.* at 149 (citations omitted).

107. 402 U.S. 389 (1971).

108. *See id.* at 407.

109. *See id.* at 405 ("Courts have recognized the reliability and probative worth of written medical reports . . . and have admitted them as an exception to the hearsay rule.").

110. *See id.* at 397, 402, 404–05.

111. *Id.* at 402.

plaining that he had been denied the right to confrontation since he had not exercised his subpoena right.[112]

The import of *Richardson* is not that since the Social Security Administration has the subpoena power, so should the Department of Labor. Rather, it is that the reliability of hearsay in administrative proceedings is ensured by the rights of confrontation and cross-examination. It is also the recognition that those fundamental procedural rights are made possible by the subpoena power. Further, *Richardson* supports the principle that the allowance of hearsay in administrative proceedings is not intended to eliminate the need for reliability, but to reduce the stifling formalities that have accreted in courtrooms over the centuries.[113]

An alternative contention might be that employing the Due Process Clause to eliminate the admissibility of hearsay would be a less intrusive way of providing due process rather than permitting subpoenas. However, to reach the "rudimentary due process" requirement of confronting witnesses, there is no reason a court should distinguish between a statutorily provided procedure (allowance of hearsay) and the legislative failure to provide a procedure (subpoenas). The admissibility of hearsay is contained in the Administrative Procedure Act, just as subpoenas are not, except "when authorized by law."[114] The problem of erroneous deprivation seems more logically solved by increasing, rather than decreasing, the amount of available evidence.[115]

Even in the absence of hearsay problems, subpoenas can be vital. As noted above, entire witness classes may be unreachable without them. Testimony that may swing the outcome of a case can go unheard. Evidence provided may be skeletal, reduced to a "he said, she said" level. This not only compromises the "meaningful" nature of the hearing, it hampers the pubic interest in arriving at an accurate result—one in which whistleblowers are protected, but employers are not forced to bear the ex-

112. *See id.* at 405.

113. For a compelling explanation of why informal proceedings can sometimes provide a more accurate and equitable result than a trial-type proceeding, see 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 13 (2d ed. 1979). *But see* Muellner v. Mars, Inc., 714 F. Supp 351, 357 (N.D. Ill. 1989) (quoting Department of Transp. v. Coe, 445 N.E.2d 506, 510 (Ill. App. Ct. 1983) ("'The truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law.'")).

114. 5 U.S.C. § 556(c)(2) (1994); *see also* discussion *supra* Part I.

115. Some may believe there is no inchoate due process right to subpoena because of the many attendant procedures required by the subpoena power (e.g., a procedure to quash). But it is not too difficult to fashion a set of constitutionally reasonable procedures to carry out the subpoena. In *Goldberg*, the Supreme Court granted the right to a hearing in benefit suspension proceedings—generally a right with a far greater number of attendant procedures than the right to subpoena. *See Goldberg*, 397 U.S. at 264.

pense of compensating a non-whistleblower. It hardly seems "meaningful" or "effective," given the nature of and stakes of whistleblower cases, to be able to introduce into evidence only corroborating affidavits, without testimonial corroboration. Similarly, it does not seem "meaningful" or "effective" to have a decision entered against a complainant based on only the other party's statements, without testimonial impeachment. A stark example is provided in the *Harrison* case quoted at the beginning of this Article, in which the complainant withdrew his claim because of his inability to obtain testimony.[116] Presumably, he concluded that his case could not be effectively presented in the absence of subpoenaed non-party evidence.

b. Finality

It must be remembered that the cases that address the issue of what kind of hearing was due have all involved what were essentially preliminary hearings, subject to later, *de novo*, review in either an administrative or judicial forum. *Brock*, *Loudermill*, *Mathews*, *Goldberg*, and *Doehr* involved initial determinations where there was opportunity for further development of the record.[117] The interest involved was always an interim interest and the risk of error was subject to later correction. In a whistleblower proceeding, the ALJ is the final creator of the record and may be the final fact-finder. The ALJ issues a recommended decision[118] that may be reviewed by the ARB on a party's petition, but is otherwise final.[119] The ARB reviews the ALJ decision to determine if it is "supported by the evidence in the record," "in accordance with law," and is otherwise "proper."[120] Significantly, in STAA proceedings, the ARB decision must be "based on the record and the decision and order of the administrative law judge."[121] New regulations for the other whistleblower acts no longer include this type of language.[122] Even in the absence of this language, however, the ARB's task is described as "review,"[123] not to create a new record. The ARB does not

116. *See* Harrison v. Stone & Webster Eng'g Corp., 96-ERA-19, at 2–3 (ALJ Aug. 7, 1996) <http://www.oalj.dol.gov>; *see also supra* note 1 and accompanying text.

117. *See Brock*, 481 U.S. at 258; *Loudermill*, 470 U.S. at 536; *Mathews*, 424 U.S. at 323–27; *Goldberg*, 397 U.S. at 258.

118. *See* Procedures, 63 Fed. Reg. 6614, 6623–24 (1998) (to be codified at 29 C.F.R. § 24.7). This law applies to all whisteblower acts except the STAA.

119. *See* Procedures, 63 Fed. Reg. at 6624 (to be codified at 29 C.F.R. § 24.7(d)). This law also applies to all whisteblower acts except the STAA.

120. Jaenisch v. Chicago Bridge & Iron Co., 81-ERA-5 (Sec'y June 25, 1981) <http://www.oalj.dol.gov>, *rev'd on other grounds*, 697 F.2d 291 (2d Cir. 1982).

121. 29 C.F.R. § 1978.109(c) (1997).

122. *See* 29 C.F.R. § 24.6(b) (1997).

123. *See* Procedures, 63 Fed. Reg. at 6624 (to be codified at 29 C.F.R. § 24.8). This law also applies to all whisteblower acts except the STAA.

conduct a hearing of any sort or consider any additional evidence. Once the ARB issues its final decision and order, the parties may appeal to the appropriate U.S. Court of Appeals.[124] The court of appeals reviews the decision, pursuant to the Administrative Procedure Act, to determine if it is supported by "substantial evidence," or if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[125] Substantial evidence review is a relatively low standard of review. Substantial evidence is defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[126] The court does not ask whether the Secretary of Labor made the decision the court would have made were it to undertake *de novo* review, but rather, whether its conclusion was reasonable.[127] In short, the ALJ decision may be the Department's final decision, and, even if it is not, the record closes at the ALJ level.

The Supreme Court addressed procedural due process in a whistleblower context in *Brock v. Roadway Express*,[128] a case involving the employee protection provision of the Surface Transportation Assistance Act. In *Brock*, the employer questioned the constitutionality of a provision of the STAA permitting preliminary reinstatement of employees who instituted whistleblower actions.[129]

Especially relevant is the plurality's discussion in *Brock* regarding rights of confrontation and cross-examination and the partial dissents of Justices Brennan and Stevens. The plurality[130] determined that such rights were not necessary at the preliminary reinstatement stage of the whistleblower proceeding.[131] However, the plurality assumed that such protections were available at a later stage in the proceeding: "[f]inal assessments of the credibility of supporting witnesses are appropriately reserved for the ALJ, before whom an opportunity for complete cross-examination of opposing witnesses is provided."[132] In their partial dissents, Justices Bren-

124. *See, e.g.*, 42 U.S.C. § 7622(c) (1994).

125. 5 U.S.C. § 706(2) (1994); *see also* Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1162 (9th Cir. 1989).

126. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

127. *See* Lockert v. United States Dept. of Labor, 867 F.2d 513, 520 (9th Cir. 1989).

128. 481 U.S. 252 (1987).

129. *See id.* at 257.

130. The plurality opinion was signed by Justices Marshall, Blackmun, Powell, and O'Connor. *See id.* at 253.

131. *See id.* at 266.

132. *Id.*

nan and Stevens felt that even at a preliminary stage, cross-examination and confrontation should be permitted.[133]

It should be noted that hearsay is not admissible in STAA whistleblower proceedings.[134] Accordingly, the plurality's assessment of "complete cross-examination of opposing witnesses" is accurate under the STAA.[135] If the statute at issue was one of the other whistleblower provisions however, the completeness of the cross-examination would be in doubt since an "opposing witness" in these cases may be a hearsay declarant. Final assessments of issues, such as whether a protected activity took place or whether a personnel action was retaliatory, may be made without the "complete cross-examination" envisioned by the Court. Indeed, the emphasis on cross-examination by six justices seems to mandate the availability of subpoenas in these proceedings. Without the ability to subpoena an important witness, cross-examination of that witness may be foreclosed.

The evidence upon which the final determination is made is developed entirely in a forum that cannot provide subpoenas to the litigants before it. The ALJ, the ARB, the court of appeals, and perhaps the Supreme Court, all look at a record that may lack evidence that could be dispositive of the case. Witnesses may remain unimpeached and events may remain uncorroborated or unrecounted. Not only are the parties fighting with their hands tied behind their backs, the scorers must determine a winner based solely on footwork.

The balancing called for by *Mathews* favors the provision of the subpoena power in whistleblower proceedings. The employer and employee interests are strong, as is the government interest in public safety and environmental protection. On the other hand, the government's interest in efficiency and the subpoenaed parties' interests appear less important. The risk of erroneous deprivation when evidence is unobtained and statements go without cross-examination is great and is not subject to subsequent correction. To provide subpoenas would rectify this inordinate risk, making them a valuable additional safeguard in these proceedings.

C. Cases Addressing the Non-Statutory Right to Subpoena Witnesses

There are other non-whistleblower federal, state, and local statutes that provide some type of hearing system without the subpoena power.[136] While

133. *See id.* at 269–70 (Brennan, J., concurring in part, dissenting in part); *id.* at 276 (Stevens, J., dissenting in part).

134. *See* 29 C.F.R. § 1978.100(b) (1997) (incorporating 29 C.F.R. § 18.802 (1997)).

135. *Brock*, 481 U.S. at 266.

136. *See* discussion *supra* Part I.

no case has yet found the absence of the subpoena power under these statutes to constitute a due process violation, courts have infrequently addressed the issue. The great majority of the cases addressing the issue acknowledge that there is no *per se* rule and that, even if no subpoena right existed in the case at bar, the right to subpoenas may arise in the appropriate case. Even Judge Friendly, whose purpose in *Some Kind of Hearing*[137] appears to have been to keep the development of procedural due process rights in check, acknowledged that any right to compulsory process should be decided on a case-by-case basis and that "no general rule is appropriate."[138]

For instance, in *Prebble v. Brodrick*,[139] the plaintiff, a college professor, brought suit against a public university on the grounds that his due process rights were violated in his dismissal proceedings.[140] One of his contentions was that due process was violated by his inability to subpoena witnesses.[141] The Tenth Circuit found no due process violation, but noted that "[w]here such information from persons not produced at the hearing concerns an important issue in dispute, these objections might well be valid."[142] In *Prebble*, however, the plaintiff had admitted the relevant facts pertaining to the key issue.[143] The court further noted, in a footnote, "[w]e do not, of course, decide that other procedural rights may not be of critical importance in similar cases, e.g., cross-examination of a crucial witness."[144]

Judge Posner has noted that the subpoena power possessed by Chicago traffic hearing officers "provides an adequate safety valve for those cases, if any (there may be none), in which fair consideration of the respondent's defense would require, as a constitutional imperative, the recognition of a right of confrontation."[145] This may be interpreted as approving the subpoena power as a means of ensuring the satisfaction of the due process right of confrontation that sometimes exists.[146]

137. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

138. *Id.* at 1282–83.

139. 535 F.2d 605 (10th Cir. 1976).

140. *See id.* at 607.

141. *See id.* at 614 n.8.

142. *Id.* at 616.

143. *See id.*

144. *Id.* at 616 n.10.

145. Van Harken v. City of Chicago, 103 F.3d 1346, 1352 (7th Cir. 1997).

146. Judge Posner asserted that the existence of any right to cross-examination "may not have much life left after *Mathews*." *Id.* at 1352. There is nothing in *Mathews*, however, that amounts to a blanket disapproval of the right to confrontation in an administrative context. The Court merely weighed the interests at issue in the case before it and determined that, there, cross-examination was not necessary. *See Mathews*, 424 U.S. at 349. While Judge Posner may believe that the Court engaged in a more general weighing of the value of confrontation, the *Mathews* Court should be

The Fifth Circuit, in *United States v. Batson*,[147] determined, without significant discussion, that the lack of subpoena power was not a due process violation "[o]n this record."[148] The case involved a hearing before the Agricultural Stabilization and Conservation Service that regarded fraud and overpayment of agricultural subsidies.[149] The court quoted the district court's finding that there was "no evidence in the record of any attempt by the defendants to obtain the voluntary testimony of any witnesses."[150] The result may have differed had the defendant attempted and failed to obtain voluntary testimony.

In *Basciano v. Herkimer*,[151] the Second Circuit found that an accident-disability-retirement-benefits system that did not afford the subpoena power satisfied due process requirements.[152] Like *Mathews*, however, this conclusion was based largely on the belief that medical determinations may be made on a paper record: "[w]hile questions of credibility and veracity often are best resolved in a trial-type hearing, we believe that evidence relevant to a medical determination can be presented as effectively in writing as orally."[153]

Cases decided before the 1970s boom of procedural due process cases came to similar conclusions. In a case that assesses whether the discretionary nature of discovery depositions in NLRB proceedings denied an employer a "full and fair hearing,"[154] the Ninth Circuit noted, *inter alia*, that "no showing is made of denial of subpoena power to compel attendance of witness or lack of opportunity to present rebuttal evidence."[155] This appears to imply that if subpoenas *were* denied, a full and fair hearing might have been compromised. While noting that the NLRB has the subpoena power,[156] and that the court's language may simply refer to the fact that issuance of subpoenas by the Board is mandatory upon request, rather than discretionary, the subpoena reference appears to be part of the court's determination of whether a "full and fair hearing" was provided. In other words, the court appeared to weigh subpoena availability as a factor in determining whether the hearing comported with due process.

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taken at its word when it concluded that the balancing of interests is to be performed on a case-by-case basis.

147. 782 F.2d 1307 (5th Cir. 1986).
148. *Id.* at 1315.
149. *See id.* at 1309–10.
150. *Id.*
151. 605 F.2d 605 (2d Cir. 1978).
152. *See id.* at 611.
153. *Id.* at 610–11.
154. Electromec Design & Dev. Co. v. NLRB, 409 F.2d 631 (9th Cir. 1969).
155. *Id.* at 635.
156. *See* 29 U.S.C. § 161(1) (1994).

In *Jordan v. American Eagle Fire Insurance Co.*,[157] the court inquired whether a rate-setting procedure was a "quasi-judicial hearing." The court noted "[i]f we were compelled to read into this statute a requirement for a hearing . . . we would also have to read into it the powers and requirements ancillary to such a hearing; including oaths, subpoenas, findings, conclusions, and a record of the proceeding."[158] The court also noted that it did "not say that the necessary powers will not be implied where a quasi-judicial hearing is clearly required."[159]

In 1912, however, the Supreme Court, in *Low Wah Suey v. Backus*,[160] found no requirement of compulsory process in an Immigration and Naturalization Service proceeding.[161] This is important because issues of credibility and veracity may be at issue in such cases. The case may have been decided differently in the post-*Goldberg* era when the ability to confront adverse witnesses was held to be a basic due process requirement.[162] Moreover, the Court noted that the petitioner did not proffer the nature or character of testimony that might have been received.[163]

The preceding cases indicate that while courts are wary of finding that due process requires the subpoena power, they nonetheless recognize the possibility of such a requirement. The factors discussed by the courts—including the necessity of credibility determination, the importance of particular evidence, and the right of confrontation—are also factors in whistleblower proceedings. Therefore, if the language of these cases is applied in a whistleblower context, the courts would likely require subpoenas in these proceedings.

IV. Historical Support

Due process jurisprudence, both substantive and procedural, has long looked to the empirical past to find the normative present.[164] In *Connecticut*

157. 169 F.2d 281 (D.C. Cir. 1948).

158. *Id.* at 287.

159. *Id.*

160. 225 U.S. 460 (1912).

161. *See id.* at 470–71.

162. *See supra* note 91 and accompanying text.

163. *See Backus*, 225 U.S. at 470.

164. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Palko v. Connecticut, 302 U.S. 319 (1937). See the long line of personal jurisdiction cases, beginning with *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), and continuing through *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). In jurisdiction cases, the Court regularly refers to "traditional notions of fair play and substantial justice." *Milliken*, 311 U.S. at 463. Admittedly, the Court rarely has given historical substance to its nebulous incantation. *See Asahi*, 480 U.S. at 113–14. Nonetheless, its references suggest that the guide to proper practice lies somewhere in the past.

v. Doehr,[165] the Court explicitly acknowledged the importance of comparing current practice to historical antecedents.[166] The Court found support for its conclusion that a prejudgment attachment violated due process because the procedure was "unknown at common law."[167] The Court "checked its math" against the calculations done by history.

The idea of examination of rights available at common law to determine the metes and bounds of due process was championed by Edward Rubin in 1984.[168] Rubin suggested that the content of "minimum procedures" could be derived from common law "archetypes."[169] This is something the Court has done in the past, using the "civil trial archetype,"[170] most notably in *Goldberg*.[171] The application of *Mathews* balancing, therefore, begins with a choice of the procedural protection to be balanced, which is not conjured from the imagination, but adopted from past practice.[172] The *Mathews* framework does not eliminate the need for reference to judicial forms of procedure, it merely creates a methodology for evaluating them in a particular setting.

In the context of determining due process rights, it is the history of the litigants within the fora, not the history of the particular adjudicative fora itself, that is important in establishing the outlines of due process. In other words, what procedures were historically available to the litigants in proceedings (whether within an administrative agency or in a common law court) to secure their rights? In this regard, the following discussion of Arti-

165. 501 U.S. 1 (1991).

166. *See id.* at 16, 23.

167. *Id.* at 16. Similarly, in *Fuentes*, the Court addressed the propriety of a prejudgment seizure under Florida and Pennsylvania laws. *See Fuentes*, 407 U.S. at 80. The Court's primary focus was a balancing of the hardships involved in prejudgment seizure, but the analysis also included historical comparison. *See id.* In assessing the modern statutes at issue, the Court noted that when prejudgment seizures were allowed at common law, available procedures provided notice and an opportunity to be heard. *See id.* at 80–81.

168. *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044 (1984).

169. *Id.* at 1179; *see also Brock*, 481 U.S. at 273 (Stevens, J., dissenting in part) (referring to "the traditions of due process").

170. Rubin, *supra* note 168, at 1148.

171. *See Goldberg*, 397 U.S. at 267–71 (listing the required trial-type procedures).

172. *See, e.g.*, Pennzoil Co. v. United States Dept. of Energy, 680 F.2d 156, 179 n.44 (Temp. Emer. Ct. App. 1982)). The court in *Pennzoil* quoted Plato, who stated:

> [T]hey summon to their aid visible forms, and discourse about them, though their thoughts are busy not with these forms, but with their originals, and though they discourse not with a view to the particular square and diameter which they draw, but with a view to the absolute square and the absolute diameter, and so on. For while they employ by way of images those figures and diagrams aforesaid, which again have their shadows and images in water, they are really endeavouring to behold those abstractions which a person can only see with the eye of thought.

Id. (quoting PLATO, THE REPUBLIC 233 (J. Davies & D. Vaughan trans., 1895).

cle I and III courts is really just a means of comparing the expectations of litigants and assessing whether litigants' rights should change because of the forum in which they find themselves.

Whistleblower suits are a type of employment discrimination litigation, with similar elements and remedies as other such suits.[173] Of course, the history of employment discrimination litigants is a brief one, but it is a history that has included access (at some point in the proceedings) to common law courts (with Article III judges) and the procedures available in them. While Congress placed whistleblower suits within DOL jurisdiction (with Article I or "administrative" judges), it did not alter the nature of the underlying interests at issue. In comparing the nature of Article I courts to the rest of Article I actors and Article III courts, it is clear that the appropriate comparison is to the courts. The attributes of Article I courts are largely those of their Article III models. While Article I judges do not enjoy life tenure, their agency can remove them only after good cause is established before the Merit Systems Protection Board, after opportunity for a hearing.[174] Article I judges are prohibited from *ex parte* contacts.[175] They must act impartially.[176] Perhaps the most telling example of the difference between the administrative adjudicator and the rest of the agency structure is that the adjudicator may "not be responsible to [or be supervised by] an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."[177] These provisions result in an independent adjudicator who may rule *against* an agency determination. Wigmore states:

> Inherently and primarily, the power [to compel testimony] belongs to the judiciary, because the application of the law to facts in litigation requires a finding of the facts, and the finding cannot be made without investigation, and the necessity of investigation imports the power to compel answers and make disclosures of every sort.[178]

Administrative adjudicators, too, must apply law to facts in order to determine the rights of litigants. The administrative adjudicator's actions are not preliminary or advisory, but determinative of the litigation. Accordingly, while administrative adjudication is paid for by agency budgets, it has more in common with Article III courts than other Article I agencies.

Thus, the history of the availability of subpoenas to common law courts may assist in the evaluation of whether due process requires compul-

173. *See supra* notes 13–16 and accompanying text.
174. *See* 5 U.S.C. § 7521(a) (1994).
175. *See* 5 U.S.C. § 554(d)(1) (1994).
176. *See* 5 U.S.C. § 556(b) (1994).
177. 5 U.S.C. § 554(d)(2) (1994).
178. 8 WIGMORE, *supra* note 31, § 2195, at 78.

sory process. The procedural due process cases make clear that the placement of a cause of action in an administrative setting does not necessarily abrogate the protections that would be available in the common law courts. While balancing is used to determine if the process is due, the process itself is uniformly adopted from past practice. Administrative proceedings must be able to deviate from established judicial practice to the extent that there are supportable reasons for deviation. In *Mathews*, for instance, because of the costs associated with providing an evidentiary hearing and because the relevant evidence is documentary, different procedures were permissible.[179] The starting point is always traditional procedure, perhaps because it is the raw material with which the courts are familiar.

A. Subpoena History in English Common Law

The substantive due process inquiry has long been whether a right is "implicit in the concept of ordered liberty."[180] Similarly, the procedural due process cases that grant hearing rights do so, *sub silentio*, because it is outside our conception of ordered liberty to take liberty or property without such a hearing. This is why the Supreme Court grants hearing rights instead of, say, a right to trial by ordeal.[181]

In the thirteenth century, trial by jury replaced trials by battle and the various forms of ordeal.[182] The jurors included in these early panels were selected from the community in which the incident that gave rise to the trial occurred.[183] These jurors were expected either to have personal knowledge of the incident, or to investigate themselves to determine the pertinent facts.[184] At this early stage in the development of trials, witnesses were unnecessary, or at least, unused.[185]

A problem arose in this scheme of dispute resolution—no rules governed jury fact-gathering, and litigants insinuated themselves into the process, bringing pressure to bear on the jurors and their sources.[186] In response, the courts developed the crime of maintenance, defined as "up-

179. *See Mathews*, 424 U.S. at 343–47.

180. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

181. A trial by "ordeal" was one in which "the Almighty was appealed to through brutal physical abuse and torture." Peter G. Keane, *The Jury—Some Thoughts, Historical and Personal*, 47 HASTINGS L.J. 1249, 1249–50 (1996). These ordeals would include hot iron, boiling water, the cursed morsel, or tossing a bound defendant into the river. *See id.* at 1250 & n.6.

182. *See* 1 WILLIAM. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 341 (7th ed. 1956).

183. *See id.*

184. *See* Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 43 (1989).

185. *See id.* at 43.

186. *See id.*

holding [a litigant] . . . by word, action, writing, countenance, or deed."[187] In other words, it was illegal for a person to go to a jury with information or to be a witness. The courts at this time apparently believed that any voluntary testimony was interested, biased testimony. The possibility of being penalized for offering testimony understandably chilled the participation of witnesses.[188]

The reluctance of witnesses to testify created an obvious problem for the determination of facts, which was resolved in the fourteenth century by John of Waltham, the chancery clerk, who developed the subpoena ("under penalty").[189] With the passage of the Statute of Elizabeth in 1562, the common law courts were explicitly invested with the subpoena power.[190] The Statute of Elizabeth assessed a ten-pound penalty for failure to appear after being subpoenaed.[191] Since the witness so summoned was compelled to appear, he would no longer face the possibility of a maintenance action.[192]

Thereafter, witness testimony became increasingly common until it became the primary source of information for the jury.[193] English common law followed colonists to the new world and was applied in American courts after the Revolution.[194] Moreover, the Supreme Court has recognized an inherent right of a common law court to issue subpoenas, stating: " 'The right to resort to means competent to compel the production of written, as well as oral, testimony, seems essential to the very existence and constitution of a Court of Common Law.' "[195]

B. Subpoena History in the Constitution

An argument may be made that the Fifth Amendment does not mandate the right to subpoena. Applying the principle of *expressio unius est*

187. 3 HOLDSWORTH, *supra* note 182, at 398 (3d ed. 1923).

188. *See* 9 HOLDSWORTH, *supra* note 182, at 182 (1926).

189. *See* 8 WIGMORE, *supra* note 31, § 2190, at 65 n.19.

190. *See* 5 Eliz., ch. 9, § 12 (1562) (Eng.); *see also* 9 HOLDSWORTH, *supra* note 182, at 185; 8 WIGMORE, *supra* note 31, § 2190, at 65 n.17.

191. *See* 8 WIGMORE, *supra* note 31, § 2190, at 65 n.17.

192. *See id.* § 2190, at 65.

193. *See id.*

194. *See* Patterson v. Winn, 30 U.S. (5 Pet.) 233 (1831), referring to, *inter alia*, 13 Eliz., ch. 6 (1570) (Eng.). Justice Story wrote "[t]hese statutes being passed before the emigration of our ancestors, and being applicable to our situation and in amendment of the law, constitute a part of our common law." *Id.*

195. American Lithographic Co. v. Werckmeister, 221 U.S. 603, 609 (1911) (quoting Amey v. Long, 103 Eng. Rep. 653, 658 (K.B. 1808); *see also* Universal Airline v. Eastern Air Lines, 188 F.2d 993, 999 (D.C. Cir. 1951) (stating the subpoena power "is a necessary and essential part of the 'judicial Power' "); *In re* Trombetta v. Van Amringe, 280 N.Y.S. 480 (N.Y. Sup. Ct. 1935) (finding that a magistrate, without statutory authority to issue a subpoena *duces tecum* in a preliminary hearing, nonetheless had an inherent power to do so).

exclusio alterius (the inclusion of one thing demonstrating the intended exclusion of another), one can read the Sixth Amendment's guarantee of a compulsory process in criminal cases as demonstrating that subpoenas were not envisioned in the due process guarantee of the Fifth Amendment. It is, of course, a modern truism that the strictest procedural safeguards are, and should be, found in criminal prosecutions. Therefore, it may be said, if subpoenas are guaranteed to criminal defendants, they must be part of the expanded procedure to which they are typically entitled.[196]

The history of compulsory process belies this interpretation. In fact, laws such as the Sixth Amendment were intended simply "to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed . . . by parties in civil cases."[197] Subpoenas, then, are not unique to the Sixth Amendment, nor are they a privileged form of procedural safeguard. They should be seen for what they are: a standard procedural device available generally to parties.

In *Doehr*, the Supreme Court noted that its own historical practice supported its analysis that due process protections were required.[198] Similarly, historical practice supports the power of litigants to receive subpoenas in whistle blower proceedings. If due process is sometimes defined as "implicit in the concept of ordered liberty,"[199] and if this concept is often conceived in a historical sense, i.e., asking whether the founding fathers expected this to be provided, then access to subpoenas is certainly required by due process.

At the time of the nation's founding, there was no distinction between Article III and Article I courts. There were simply courts and they possessed the subpoena power. The Article I Department of Labor court provides essentially the same function as any other court; it permits the resolution of particular disputes between private parties. By establishing a state forum for the resolution of disputes between private parties with binding legal effect on those parties (i.e., an Article I court), Congress has created a body in the precise image of the courts known to the founding fathers. Those courts had employed subpoenas for some 200 years and continue to do so today in the form of Article III courts. Historically, final fact-

196. *See, e.g.*, 2 DAVIS, *supra* note 113, § 10.6, at 327 ("In the full panoply of a criminal trial, other [procedural rights] that might be added include a jury trial, a right to appeal to a higher authority, [and] a right to subpena witnesses and evidence . . . ." (numbering omitted)). *See also* Washington v. Texas, 388 U.S. 14, 19 (1967) (holding compulsory process is "a fundamental element of due process of law" in criminal cases).

197. 8 WIGMORE, *supra* note 31, § 2191, at 68; *see also* State v. Dehler, 102 N.W.2d 696, 704 (Minn. 1960).

198. *See* Connecticut v. Doehr, 501 U.S. 1, 11 (1991).

199. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

finders have had the subpoena power. Thus, in this regard, the history of administrative courts is the history of common law courts.

While subpoena history has frequently been conceived as the history of a court's *power* to issue subpoenas, it should also be conceived as the history of a litigant's *right* to subpoenas. Indeed, even when compulsory process was seen primarily as an issue of court power, trial procedures were recognized as personal rights.[200] In the post-*Goldberg* era, it is apparent that the procedures developed by courts over generations were not intended to aggrandize or protect the courts themselves, but were instead tools developed to protect the parties pursuing claims within those courts.

Conclusion

The opportunity to present evidence and cross-examine in whistleblower proceedings is seriously compromised by the absence of the subpoena power. In other cases in which the Supreme Court has addressed procedural inadequacies, the parties have had a later opportunity to develop their cases. In whistleblower cases, the parties' only opportunity is before the ALJ. In administrative proceedings in which hearsay is admissible, subpoenas are typically available as a safeguard against the potential unreliability of the hearsay. This is not so in whistleblower proceedings. Without subpoenas, the risk of error is unacceptably high and the full and fair nature of the hearing is questionable. Historically, in fora that determine the respective rights of private parties, the subpoena power is available to permit accurate fact-finding. There is no reason that parties to whistleblower proceedings should get any less.

200. *See* Osgood v. Nelson, 5 L.R.-E. & I. App. 636, 646 (H.L. 1872) (holding that courts must ensure that proceedings are "conducted in a proper manner," which includes accused persons being able to call and cross examine witnesses).