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There but for the Grace of God Go I: The Right of Cross-Examination in Social Security Disability Hearings*

*Passmore v. Astrue*¹

I. INTRODUCTION

The need for due process and the desire to achieve efficiency is an ever-persistent tension in administrative law. With the amazing growth of the administrative state, striking the right balance has proven difficult.² The Supreme Court's jurisprudence in this area has attempted to guarantee due process while taking into consideration the practical difficulties of maintaining an administrative state.³

The right to cross-examine witnesses at trial is an embedded principle in Anglo-American law.⁴ Along with this right come practical difficulties, such as the costs and inconvenience of requiring the witness to be present at trial. In the administrative context, the question of whether social security claimants have the absolute right to cross-examine reporting physicians has been a matter of severe disagreement in the past thirty years and has resulted in circuits that are split over the question.

The Eighth Circuit directly addressed this issue in *Passmore v. Astrue* and joined the group of circuits that follow the "qualified right" approach, which maintains that a social security claimant does

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1. 533 F.3d 658 (8th Cir. 2008).

2. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

3. See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

4. See WIGMORE ON EVIDENCE §1367 (3d ed. 1940).

not have an absolute right to cross-examine reporting physicians.⁵ In doing so, however, the Eighth Circuit relied on long-held assumptions, and its judgment may warrant re-evaluation to ensure that the rights of social security claimants are best protected. The circuit split on this issue is reflective of competing values that are practically inevitable in light of the tension between efficiency and justice, and both approaches will be evaluated in terms of judicial reasoning and policy. The rise of the administrative state presents daunting challenges in terms of cost and administration, but this should not deter the courts from stepping in to ensure that the rights of citizens are protected. The growth, overwhelming complexity, and extensive reach of the administrative state should not deter scrutiny but provide all the more reason to fiercely scrutinize its procedures in light of the guarantees of the Due Process Clause of the Constitution.⁶

II. FACTS AND HOLDING

Eric Passmore slipped and fell in 1998, causing him multiple injuries,⁷ which he claimed resulted in an inability to engage in substantial gainful employment.⁸ This prompted him to apply for social security disability benefits and supplementary security income in July 2001.⁹ The Administrative Law Judge (ALJ) initially denied Passmore's application, and, upon appeal, the Appeals Council remanded so that the ALJ could obtain additional evidence regarding, *inter alia*, a consultative orthopedic examination of Passmore's back and the testimony of a qualified expert.¹⁰

Dr. Charles Ash, M.D., conducted an orthopedic examination of Passmore and submitted a report to the ALJ regarding Passmore's

5. *Passmore v. Astrue*, 533 F.3d 658, 665 (8th Cir. 2008).

6. U.S. CONST. amend. V.

7. *Passmore*, 533 F.3d at 659-60; Passmore alleged impairments including back problems, obesity, gastroesophageal reflux disease, diabetes, and anxiety. *Id.*

8. *Id.* at 659.

9. *Id.*

10. *Id.* at 660.

back impairment.¹¹ Passmore requested that the ALJ subpoena Dr. Ash for cross-examination at an upcoming hearing.¹² At the supplemental hearing, the ALJ denied the subpoena request for Dr. Ash, but instead offered Dr. Malcom Brahams, an orthopedic medical expert who had reviewed all of Passmore's medical records, including Dr. Ash's report, for cross-examination.¹³ Dr. Brahams testified that no medical findings supported Passmore's claims and that Passmore was able to perform light work.¹⁴ The ALJ then issued his finding that Passmore was not "disabled" under the Social Security Act.¹⁵ After the Appeals Council denied review, Passmore sought judicial review in the United States District Court for the Western District of Missouri.¹⁶

Passmore argued that the Eighth Circuit, in *Coffin v. Sullivan*,¹⁷ had affirmed that the Supreme Court established, in *Richardson v. Perales*,¹⁸ that due process affords social security claimants an absolute right to cross-examine individuals who submit reports.¹⁹ The district court agreed and held that the denial of Passmore's subpoena request constituted a violation of due process.²⁰ On appeal to the Eighth Circuit, the Commissioner of Social Security

11. *Id.* The report indicated that Passmore could "occasionally lift or carry twenty pounds, frequently lift or carry ten pounds, and occasionally climb, balance, stoop, kneel, crouch, and bend." *Id.*

12. *Id.* The reasons given for the subpoena request explicitly detailed the following issues:

the length of the examination, the medical records and film [Dr. Ash] reviewed, his financial relationship with the Social Security Administration ("SSA"), his hospital privileges, his current and past complaints to the Board of Healing Arts, his prior history of license revocation, the clarification of language used in the report, and the nature and scope of his current practice.

Id.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. 895 F.2d 1206 (8th Cir. 1990).

18. 402 U.S. 389 (1971).

19. *Passmore*, 533 F.3d at 662-63.

20. *Id.* at 660.

(Commissioner) countered that neither *Perales* nor *Coffin* provided that due process required an absolute right to cross-examine in the social security administrative context.²¹

The Eighth Circuit held that the Supreme Court's decision in *Perales*, referring to the right to subpoena a reporting physician for cross-examination, was not based on the Due Process Clause of the Fifth Amendment but instead stemmed from discretionary statutory regulations.²² Since the Supreme Court had not issued an opinion on the nature of the right in question, the Eighth Circuit concluded that due process does not afford social security claimants an absolute right to cross-examine individuals who submit a report.²³

III. LEGAL BACKGROUND

The Supreme Court's view on the demands of procedural due process, in relation to administrative law, has been in a state of flux as reach of the administrative state has expanded. The Court has recognized that to attempt to deracinate the administrative state from the lives of Americans would not only be catastrophic but also perhaps beyond the legitimate bounds of judicial behavior. In its attempt to analyze procedural due process in the administrative context, the Supreme Court has enunciated several criteria that should be considered.²⁴ However, before addressing these criteria, it is first necessary to consider whether the Supreme Court has answered the specific question directly in *Richardson v. Perales*:²⁵ do social security claimants have an absolute right to cross-examine reporting physicians in a social security disability hearing?

A. *The Supreme Court and Richardson v. Perales*

In *Richardson v. Perales*, the Supreme Court of the United States indirectly addressed the nature of the right to subpoena and cross-examine a witness in a social security disability hearing.²⁶ In doing

21. *Id.*

22. *Id.* at 661, 665.

23. *Id.*

24. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

25. *Richardson v. Perales*, 402 U.S. 389 (1971).

26. *Id.* at 402.

so, the Court's decision was nebulous as to whether the right to subpoena and cross-examine reporting physicians in the social security administrative context was derived from the Due Process Clause of the Fifth Amendment or rather was statutory in nature.²⁷

The case arose when Perales filed for disability benefits under the Social Security Act, claiming that he became disabled as a result of a back injury he received at work.²⁸ His claim was originally denied by the state social security agency, but Perales was able to submit additional medical reports and obtained a hearing before the medical examiner.²⁹ Perales formally objected to the introduction of several reports by state medical examiners on various grounds, including the absence of an opportunity for cross-examination.³⁰ The objections were overruled, and the ALJ determined that Perales was not entitled to disability insurance benefits because he did not qualify as "disabled" under the Social Security Act.³¹

Upon an adverse ruling by the Appeals Council, Perales initiated an action in the United States District Court for the Western District of Texas, which remanded for a new hearing before a new examiner due to the court's reluctance to accept unsworn written reports by medical experts as substantial evidence.³² On appeal from the district court, the Fifth Circuit noted that, since the claimant did not request subpoenas from the hearing examiner to cross-examine the reporting physicians, he was not in a position to complain that he had been denied his rights of confrontation and cross-examination.³³

27. The main issue addressed in *Perales* was

whether physicians' written reports of medical examinations they have made of a disability claimant may constitute 'substantial evidence' supportive of a finding of non-disability, within the s 205(g) standard [defining 'disability' under the Social Security Act], when the claimant objects to the admissibility of those reports and when the only live testimony is presented by his side and is contrary to the reports.

Id. at 390.

28. *Id.*

29. *Id.* at 393-95.

30. *Id.* at 395.

31. *Id.* at 395-97.

32. *Id.* at 397-98.

33. *Id.* at 398.

The Supreme Court essentially agreed with this portion of the Fifth Circuit's analysis,³⁴ but in its holding, and throughout its opinion, the Court left opaque the nature of the right that Mr. Perales had waived by failing to request a subpoena of his reporting physicians.³⁵ In a complex holding that one scholar has referred to as "a triumph of verbosity over clarity,"³⁶ the Court held that the evidence presented by Perales' medical examiner could constitute substantial evidence sufficient to deny disability, "*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.*"³⁷

Following *Perales*, the federal circuit courts of appeal that addressed this question split into two distinct camps, with one claiming the right to cross-examine as an absolute right stemming from the Due Process Clause and the other maintaining the right was statutory and qualified.

B. The Eighth Circuit

The Eighth Circuit seemed to have addressed the nature of the right to cross-examination in administrative hearings in *Coffin v. Sullivan*.³⁸ Coffin's attorney argued that the ALJ's use of post-hearing reports violated the claimant's due process rights.³⁹ The ALJ had sent letters to Coffin's attorney, giving him the opportunity to object or propose his own questions in an interrogatory to the medical examiner, but Coffin's attorney failed to respond and was subsequently sent a copy of the responses to the interrogatory and the opportunity to comment.⁴⁰ In addressing whether due process was satisfied, the court stated, "Due process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals

34. *Id.* at 405.

35. *See generally id.* at 398-410.

36. Victor G. Rosenblum, *The Right to Cross-Examine Physicians in Social Security Disability Cases*, 26 FLA. ST. U. L. REV. 1049, 1049 (1999).

37. *Perales*, 402 U.S. at 402 (emphasis added).

38. 895 F.2d 1206 (8th Cir. 1990).

39. *Id.* at 1211.

40. *Id.* at 1210-11.

who submit reports.”⁴¹ The court held that the procedures followed, namely, the opportunity to object to interrogatories, comment on the evidence, and submit additional evidence, did satisfy due process requirements.⁴² Because of Coffin’s inaction, he had essentially waived any right to cross-examine the reporting physician.⁴³

In light of its language, several circuits interpreted *Coffin*’s holding as supporting the proposition that the right to cross-examine reporting physicians was an absolute right compelled by due process guaranteed by the Fifth Amendment.⁴⁴ As it stood, the Eighth Circuit appeared to have adopted an approach that gave claimants an absolute right to cross-examine reporting physicians in order to satisfy procedural due process.

C. The Fifth Circuit and the Absolute Right Approach

The Fifth Circuit, in *Lidy v. Sullivan*, read the Supreme Court’s *Perales* decision as conferring an absolute right upon social security disability claimants to cross-examine reporting physicians.⁴⁵ In *Lidy*, the Secretary of the Department of Health and Human Services (Secretary) denied Lidy’s application for disability insurance benefits after relying on a report from Dr. Finney, an examining physician.⁴⁶ The ALJ had refused to subpoena Dr. Finney for cross-examination but allowed Lidy to submit a set of written interrogatories instead.⁴⁷ Lidy, among his arguments to the court, contended that the ALJ’s

41. *Id.* at 1212. The court supported this statement by citing to the now infamous holding in *Perales* and an Eighth Circuit decision, which “questioned the reliability of post-hearing reports when ‘it was not possible to either subpoena or cross-examine the interviewer because his identity was unknown.’” *Id.* (citing *Perales*, 402 U.S. at 402 and *McClees v. Sullivan*, 879 F.2d 451, 452 (8th Cir. 1989)); *Passmore v. Astrue*, 533 F.3d 658, 663 n.3 (8th Cir. 2008) (discussing *McClees*, 879 F.2d at 452).

42. *Coffin*, 895 F.2d at 1212.

43. *See id.*

44. The Second, Fifth, and Sixth Circuits interpreted *Coffin* as the Eighth Circuit’s adoption of the absolute right to cross-examine reporting physicians. *See Yancey v. Apfel*, 145 F.3d 106, 112 (2d Cir. 1998); *Flatford v. Chater*, 93 F.3d 1296, 1300 (6th Cir. 1996); *Lidy v. Sullivan*, 911 F.2d 1075, 1077 (5th Cir. 1990).

45. *Lidy*, 911 F.2d at 1077.

46. *Id.* at 1076.

47. *Id.*

refusal to allow cross-examination denied him his procedural due process rights.⁴⁸

Lidy argued that *Perales* recognized an absolute right to cross-examine a physician when a subpoena had been sought.⁴⁹ The Secretary contested this interpretation and contended that the right to subpoena was qualified and based upon a proper demonstration of need, as set out in 20 C.F.R. § 404.950(d)(1).⁵⁰ The Fifth Circuit disagreed with the Secretary's interpretation and declared that *Perales* stood for the proposition that, once a subpoena was requested by the claimant, the claimant had the absolute right to cross-examine an examining physician.⁵¹

In its decision, the court listed three specific reasons why it read *Perales* as conferring an absolute right to cross-examine a reporting physician. First, the Fifth Circuit looked at a particular phrase the Supreme Court used in *Perales*. The Supreme Court's decision included the phrase "the use of the subpoena and *consequent* cross-examination,"⁵² which seemed to suggest that the request of a subpoena to cross-examine a physician was an *ipso facto* showing that the cross-examination was reasonably necessary for the full presentation of the case.⁵³ Second, the court cited the Supreme

48. *Id.*

49. *Id.*

50. 20 C.F.R. § 404.950(d)(1) (2000) reads:

When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

This provision granting the ALJ discretionary authority to issue a subpoena for cross-examination to a social security claimant is identical to the guidelines in 20 C.F.R. § 416.1450(d)(1) granting this same discretion to an ALJ in a disability benefits case and identical to the language used in the relevant *Perales* statute 20 C.F.R. § 404.926. *See* *Passmore v. Astrue*, 533 F.3d 658, 662 n.1 (8th Cir. 2008).

51. *Lidy*, 911 F.2d at 1077.

52. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 410 (1971)) (emphasis added).

53. *Id.*

Court's holding in *Perales*, which declared that the claimant had not exercised his "right to subpoena," . . . thus implying that the entitlement to a subpoena is automatic."⁵⁴ Finally, the court cited opinions from the First,⁵⁵ Second,⁵⁶ Third,⁵⁷ and Eighth⁵⁸ Circuits as agreeing that *Perales* conferred an absolute right to subpoena and cross-examine a reporting physician and acknowledged that it did not wish to create a split among the circuits.⁵⁹ The Fifth Circuit may have been trying to avoid a split, but the circuits that subsequently addressed the issue were not so inclined.

D. The Sixth Circuit and the Qualified Right Approach

The Sixth Circuit considered the same issue in *Calvin v. Chater* and came to a much different conclusion than did the Fifth Circuit.⁶⁰ Chater's attorney submitted a request to the ALJ to subpoena an examining physician, but the ALJ denied the request because it alleged no important facts to be developed through cross-examination, which 20 C.F.R. § 416.1450(d)(2) requires to show the cross-examination is reasonably necessary for a full presentation of the case.⁶¹ The Sixth Circuit considered whether the right to subpoena and cross-examine a physician in a social security hearing

54. *Id.* (quoting *Perales*, 402 U.S. 389, 410 (1971)).

55. *See Figueroa v. Sec. of Health, Ed. & Welfare*, 585 F.2d 551, 554 (1st Cir. 1978) (referring to the claimant's "right to cross-examine" under *Perales* and administrative regulations).

56. *See Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984) (stating that "[u]se of such a post-hearing report violates a claimant's due process rights . . . a disability benefits claimant has a right to cross examine the author of an adverse report . . .").

57. *See Wallace v. Bowen*, 869 F.2d 187, 192 (3d Cir. 1988) (stating that "[w]e construe [*Perales*] as holding that an opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled . . .").

58. *See Coffin v. Sullivan*, 895 F.2d 1206, 1212 (8th Cir. 1990) (stating that "[d]ue process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals who submit reports."). *See supra* Part III.B.

59. *Lidy*, 911 F.2d at 1077.

60. 73 F.3d 87, 88 (6th Cir. 1996).

61. *Id.* at 89-90.

is absolute or qualified by statutory regulations and adopted § 416.1450(d)(2)'s requirements for the cross-examination request.⁶²

In its decision, the Sixth Circuit held that the right to subpoena and cross-examine reporting physicians in social security hearings was qualified.⁶³ The court reasoned that Congress had delegated to the Secretary "full" rule-making power under § 205(a) of the Social Security Act.⁶⁴ Acting pursuant to that authority, the Secretary promulgated 20 C.F.R. § 416.1450(d)(1), which gave the ALJ the discretion to issue subpoenas for cross-examination when he thought it "reasonably necessary for the full presentation of a case."⁶⁵ Further, section (d)(2) requires the requesting party to state the reasons why the subpoena is appropriate and the important facts that the party expects to solicit from the witness.⁶⁶ Considering this statutory framework, the court concluded that the "right" to subpoena was not absolute but qualified by statute, and its reading of *Perales* was not inconsistent with this interpretation.⁶⁷

The Sixth Circuit cited the *Perales* Court's conclusion that requiring reporting physicians to appear before administrative hearings when need had not been properly demonstrated by the subpoena request would be cost prohibitive and would constitute a

62. *Id.* at 90-93 (discussing 20 C.F.R. § 416.1450(d) (2008)).

63. *Id.* at 93.

64. *Id.* at 90 (citing 42 U.S.C. § 405(a) (2000) which provides,

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures . . . which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

65. *Id.*; 20 C.F.R. § 416.1450(d)(2) (2008) (stating that "[p]arties to a hearing who wish to subpoena documents or witnesses must . . . state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.") (emphasis added).

66. *Calvin*, 73 F.3d at 90; 20 C.F.R. § 416.1450(d)(2).

67. *Calvin*, 73 F.3d at 92 (stating that "[w]e do not read *Perales* as suggesting that the right to subpoena witnesses is 'absolute' in the sense that a party who requests a subpoena is automatically entitled to its issuance whether or not he has complied with the published rules governing such matters.").

substantial burden on both time and resources.⁶⁸ In *Perales*, the claimant never requested a subpoena to cross-examine a reporting physician.⁶⁹ Therefore, the Supreme Court did not have the opportunity or reason to comment on the requisite showing of need in the subpoena request or the due process implications of a refusal to issue a subpoena once requested. Nevertheless, the Sixth Circuit assumed that the *Perales* Court would have also denied Perales the right to cross-examine if his subpoena request had not complied with statutory guidelines, based upon the same rationale concerning the associated administrative burden.⁷⁰ The Sixth Circuit next addressed the Fifth Circuit's decision in *Lidy* and found little in the way of agreement.

The Sixth Circuit dismissed the Fifth Circuit's reading of the statement in *Perales* that use of the subpoena results in a "consequent cross-examination"⁷¹ as inappropriately concluding that a deficient request per statutory guidelines results in an automatic cross-examination.⁷² Pursuant to statutory guidance in the Administrative Procedure Act, the right to subpoena is qualified by the requirement that it be necessary "for a full and true disclosure of the facts."⁷³ A subpoena request that fails to meet this standard, therefore, runs afoul of the procedures set in place by the Secretary, and its denial does not constitute a denial of procedural due process, but rather procedural due process's fulfillment.

The Sixth Circuit also discounted the court's observation in *Lidy* that the *Perales* Court did not refer to the "right to request a subpoena" but "[the] right to subpoena the reporting physician."⁷⁴ In *Perales*, the Sixth Circuit noted, the Court was merely considering whether the ALJ's determination could be based on evidence that had not been subject to cross-examination, because the claimant had effectively waived his "right" by not making the request for a subpoena.⁷⁵ The Sixth Circuit essentially asserted that the Supreme

68. *Id.* at 92 (citing *Richardson v. Perales*, 402 U.S. 389, 406 (1971)).

69. *Richardson v. Perales*, 402 U.S. 389, 404 (1971).

70. *Calvin*, 73 F.3d at 92.

71. *Perales*, 402 U.S. at 410.

72. *Calvin*, 73 F.3d at 92-93.

73. *Id.* at 93 (citing 5 U.S.C. § 556(d)).

74. *Id.* (citing *Lidy v. Sullivan*, 911 F.2d 1075, 1077 (5th Cir. 1990)).

75. *Id.* at 92-93.

Court was less than precise in its wording due to the exact nature of the question being asked in *Perales* and that it was unlikely the Court was suggesting that the right was absolute without regard to the regulatory requirements.⁷⁶

The Sixth Circuit's reading of *Perales* supported the "qualified" approach to the right of cross-examination in social security hearings. Under this reading, the right to subpoena and cross-examine reporting physicians is qualified by the mandatory showing prior to the subpoena that the cross-examination is "reasonably necessary for the full presentation of a case."⁷⁷

IV. THE INSTANT DECISION

The Eighth Circuit addressed three main issues in *Passmore*: first, whether the Supreme Court's decision in *Perales* actually conferred an absolute right upon social security disability claimants to cross-examine reporting physicians; second, whether the Eighth Circuit in *Coffin* had recognized an absolute right to cross-examine; and third, if both of the previous questions were answered in the negative, whether the requirements of due process confer an absolute right on social security claimants to cross-examine reporting physicians.⁷⁸

A. The *Perales* Decision

The court first considered the Supreme Court's *Perales* decision and addressed whether the Court had actually held that the right to cross-examine reporting physicians was an absolute right.⁷⁹ The Eighth Circuit answered in the negative.⁸⁰ The court read *Perales* as being ambiguous as to whether the right to cross-examine reporting physicians was absolute or qualified per statute.⁸¹ According to the instant court, the Supreme Court never explicitly stated whether this right was one that emanated directly from the Due Process Clause of

76. *Id.* at 93.

77. 20 C.F.R. § 416.1450(d)(1) (2008).

78. *See Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008).

79. *Id.* at 660-62.

80. *Id.* at 661-62.

81. *Id.*

the Fifth Amendment or rather was conferred upon the claimant per statutory regulations.⁸²

The Eighth Circuit then inferred that the right was statutory.⁸³ The court referred to the *Perales* Court's reasoning that, even though the claimant argued he was denied his right to cross-examine, he had waived his right to confrontation and cross-examination because he did not follow the procedures set out in 20 C.F.R. § 404.926 to request subpoenas for reporting physicians.⁸⁴ Therefore, since the statute qualified the right to subpoena and cross-examine in situations where it was reasonably necessary for the full presentation of the case, the right to cross-examine was also qualified and could not be considered absolute.⁸⁵

Having concluded that *Perales* did not hold that the right to subpoena was absolute in social security administrative hearings, the Eighth Circuit then addressed the precedential value and meaning of *Coffin*, which had previously been interpreted by other circuit courts as adopting the "absolute" right theory of cross-examination in social security administrative hearings.⁸⁶

B. The Coffin Decision

The Eighth Circuit addressed whether *Coffin* did in fact hold that a social security claimant had an absolute right to cross-examine reporting experts.⁸⁷ The court in *Coffin*, citing *Perales*, said "[d]ue process requires that a claimant be given the opportunity to cross-examine and subpoena the individuals who submit reports."⁸⁸ As in its interpretation of *Perales*, the court in *Passmore* said this language was ambiguous because the phrase "opportunity to cross-examine" could refer to either the absolute right to cross-examine or a qualified right to cross-examine.⁸⁹ Therefore, because the *Coffin* court relied on *Perales*, which the Eighth Circuit had now concluded did not

82. *Id.* at 661.

83. *Id.*

84. *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 404-05 (1971)).

85. *Id.* at 661-62.

86. *See supra* note 44.

87. *Passmore*, 533 F.3d at 662-63.

88. *Coffin v. Sullivan*, 895 F.2d 1206, 1212 (8th Cir. 1990).

89. *Passmore*, 533 F.3d at 663.

establish an absolute right to cross-examine, and because *Coffin* was ambiguous in its meaning, the Eighth Circuit held that *Coffin* did not establish an absolute right to cross examine.⁹⁰

The court then added that, even if *Coffin* could be construed as supporting an absolute right to cross-examine,⁹¹ that support was merely dicta and not precedential.⁹² The issue in *Coffin* was whether the interrogatories submitted to the ALJ by a reporting expert violated due process when Coffin's attorney failed to object to the interrogatories, thereby effectively waiving the claimant's right to cross-examine the expert.⁹³ Therefore, any right Coffin may have had, be it absolute or qualified, was inconsequential to the holding, because the right had been waived.⁹⁴ Because the Eighth Circuit determined that neither *Perales* nor *Coffin* established that claimants have an absolute right to cross-examine, the court next had to determine for the first time whether due process demands such a right.⁹⁵

C. Due Process and Eldridge

The Eighth Circuit began its analysis with the assumption that procedural due process affords claimants in administrative hearings the right to a "full and fair hearing."⁹⁶ However, full courtroom procedures are not required, since social security hearings are deemed to be non-adversarial.⁹⁷ In order to determine whether procedures granted in the administrative context constitute a full and fair hearing in a non-adversarial setting, the Supreme Court, in *Mathews v. Eldridge*, recognized three factors that courts must balance to determine whether the safeguards in place satisfy the demands of the Due Process Clause or if additional procedures are

90. *Id.*

91. The court acknowledged that *Coffin* had been so construed. *Id.* at 662. See *supra* note 44.

92. *Passmore*, 533 F.3d at 663.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* (citing *Hepp v. Astrue*, 511 F.3d 798, 804 (8th Cir. 2008)).

97. *Id.* at 663-64.

necessary.⁹⁸ According to the *Eldridge* balancing test, the court must weigh

[f]irst, the private interest that will be affected by the official action; second, 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.⁹⁹

The Eighth Circuit found the Sixth Circuit's application of the *Eldridge* balancing test persuasive in *Flatford v. Chater*,¹⁰⁰ which also considered whether due process affords a social security claimant an absolute right to cross-examine.¹⁰¹ The Sixth Circuit in *Flatford* confronted a situation in which no cardiologist in the vicinity of Knoxville, Tennessee, would serve as a medical advisor to the Social Security Administration.¹⁰² In response, the ALJ sent interrogatories to a doctor who lived in another state, but the ALJ refused to subpoena the examining physician for a cross-examination, offering instead to serve him with further interrogatories.¹⁰³ *Flatford*, on appeal, argued that his right to cross-examine was absolute,¹⁰⁴ and the Sixth Circuit, applying the *Eldridge* balancing test, determined that due process did not require the absolute right to cross-examine.¹⁰⁵

The Eighth Circuit adopted the Sixth Circuit's analysis of the *Eldridge* balancing factors in *Flatford*.¹⁰⁶ The first prong, the claimant's private interest involved, is the claimant's "interest in a

98. *Id.* at 664.

99. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

100. 93 F.3d 1296 (6th Cir. 1996).

101. *Id.* at 1305-07.

102. *Id.* at 1297-98.

103. *Id.* at 1298.

104. *Id.* at 1299.

105. *Id.* at 1305-07.

106. *Passmore v. Astrue*, 533 F.3d 658, 665 (8th Cir. 2008).

fair determination of his qualification (or lack thereof) for social security disability benefits and a meaningful opportunity to present his case.”¹⁰⁷ Due to the non-adversarial nature of the social security adjudication, the cross-examination of every physician is less important than it would be if the hearing were in the traditional adversarial judicial context.¹⁰⁸

The second factor to consider was the risk of an erroneous deprivation of that interest and the probable value of additional procedural safeguards.¹⁰⁹ The Eighth Circuit concluded that, even though the substitute procedures differed in *Passmore* and *Flatford*, the Sixth Circuit’s analysis applied equally to both cases and was persuasive.¹¹⁰ In *Flatford*, the ALJ sent the reporting physician interrogatories in lieu of cross-examination.¹¹¹ In *Passmore*, Dr. Brahams testified in the place of the reporting physician, Dr. Ash.¹¹² Both were orthopedic medical experts and competent to testify in the case.¹¹³ *Passmore* was able to question the substitute physician, confronted evidence he thought was suspect, and was granted the opportunity to gather further clarification from his original examining physician through the use of interrogatories.¹¹⁴ The Eighth Circuit determined that, although cross-examination was denied, neither the procedure used in *Flatford* nor the procedure used in *Passmore* “created a greater risk of an erroneous deprivation of [the claimant’s] interest.”¹¹⁵

107. *Id.* at 664 (quoting *Flatford*, 93 F.3d at 1306). The Eighth Circuit opinion addresses the first question in any procedural due process claim of “whether the claimant has been deprived of a protected liberty or property interest” in a footnote. *Id.* at 664 n.4. The Eighth Circuit followed the Supreme Court’s lead in *Perales*, where the Court assumed *arguendo* that “due process applied to social security disability hearings without determining whether [the claimant] had a property interest.” *Id.* (citing *Richardson v. Perales*, 402 U.S. 389, 401-02 (1971)). The Second Circuit also adopted the Sixth Circuit’s reasoning in *Flatford* as persuasive. See *Yancey v. Apfel*, 145 F.3d 106, 112-13 (2d Cir. 1998).

108. *Passmore*, 533 F.3d at 664.

109. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

110. *Passmore*, 533 F.3d at 665.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

The final factor to consider was the fiscal and administrative burdens that alternative procedural safeguards would require.¹¹⁶ The Eighth Circuit agreed with the Sixth Circuit's analysis of the third prong of *Eldridge*, which takes into account the increased burdens on the government that come along with additional procedural protections.¹¹⁷ Both courts concluded that allowing the absolute right to cross-examine a reporting physician would be a "significant" burden on the government and the ability of the ALJ to exercise discretion in granting or denying cross-examination of participating physicians was necessary to the administrative scheme.¹¹⁸ Considering the three prongs of *Eldridge*, the Eighth Circuit followed the Sixth Circuit's lead and concluded that "due process does not afford social security claimants an absolute right to cross-examine individuals who submit a report."¹¹⁹

V. COMMENT

The Eighth Circuit's determination that *Perales* did not provide the absolute right to cross-examine reporting physicians is sound and persuasive. The main issue addressed in *Perales* was not the nature of the "right" to cross-examine, but whether the evidence submitted to deny *Perales*'s disability status was sufficient.¹²⁰ As such, the Supreme Court never directly considered the nature of the right to cross-examination other than to conclude that the claimant, by not requesting a subpoena, waived the right.¹²¹

In *Perales*, the Supreme Court's use of language implying an absolute right is sparse and unpersuasive. The Court may have been sloppy referring to the claimant's "right to cross-examine" since that "right" was not exercised as a result of the claimant's waiver. The Court's use of the phrase "subpoena and consequent cross-examination" without any qualifiers may have been assuming *arguendo* that the right was absolute, thereby granting the appellant

116. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

117. *Passmore*, 533 F.3d at 665.

118. *Id.*

119. *Id.* The Second Circuit adopted the Sixth Circuit's application of *Eldridge* as well in *Yancey v. Apfel*, 145 F.3d 106, 113 (2d Cir. 1998).

120. *Richardson v. Perales*, 402 U.S. 389, 390 (1971).

121. *Id.* at 404-05.

the strongest possible argument, which was itself not sufficient. Whatever the reasoning of the Court was in using the language it did, it is unlikely the Court would have enumerated such an absolute right so carelessly or haphazardly. Since the Supreme Court had not answered the question directly and the Eighth Circuit determined that it had not answered it either, it was now up to the Eighth Circuit to address the question anew.

The Eighth Circuit's adoption of the Sixth Circuit's analysis of the *Eldridge* factors in *Flatford*¹²² accords with the trend of courts towards balancing the needs of process and efficiency. However, some assumptions have been made and questions left unanswered that at least warrant some re-consideration of the *Eldridge* balancing factors as they concern the right to cross-examine reporting physicians in social security disability hearings.

The initial assumption in denying social security claimants the absolute right to cross-examine reporting physicians is that the hearings are non-adversarial.¹²³ In *Perales*, Justice Blackmun contended that social security hearings are essentially non-adversarial because the social security administration acts as an adjudicator, not an advocate or adversary, and this has been the view the courts have since maintained.¹²⁴ As a result of this non-adversarial nature, full courtroom procedures are not required.¹²⁵

Justice Douglas's dissent in *Perales* disagreed with this assumption of non-adversariality.¹²⁶ He admonished the Court, pointing out that grave injustices caused by a powerful federal bureaucracy are a matter of concern for all.¹²⁷ Douglas argued that the failure to provide for an opportunity to cross-examine reporting physicians was a primary defect in the social security system.¹²⁸ Douglas wrote,

122. *Flatford v. Chater*, 93 F.3d 1296 (6th Cir. 1996).

123. *Passmore*, 533 F.3d at 663-64.

124. *Perales*, 402 U.S. at 403; *Passmore*, 533 F.3d at 663-64.

125. *Hepp v. Astrue*, 511 F.3d 798, 804 (8th Cir. 2008).

126. *Perales*, 402 U.S. at 414.

127. *Id.* at 413. Justice Douglas described that the reaction of the common man to this federal bureaucracy was to say, "There but for the grace of God go I." *Id.*

128. *Id.* at 414.

The vice is in the procedure which allows [evidence] in without testing it by cross-examination. Those defending a claim look to defense-minded experts for their salvation. Those who press for recognition of a claim look to other experts. The problem of the law is to give advantage to neither, but to let trial by ordeal of cross-examination distill the truth.¹²⁹

The inherent assumption in Justice Douglas's argument is that the social security administrative hearing is nothing if not adversarial. Perales's counsel argued before the Court that the government's position, that the forum is non-adversarial, is not reflected in reality.¹³⁰ It is a system in which the ALJ gathers evidence, decides which evidence to allow, and seeks to build the government's case against the claimant.¹³¹ The ALJ, though not advocating for his or her own interests, is a part of the system and serves as the system's advocate.¹³²

Even if the system is considered non-adversarial, as Professor Rosenblum argues, the decision of whether to grant the right of cross-examination, because of the nature of the forum, rewards form over substance.¹³³ The Anglo-American jurisprudential system has long recognized that the virtue of cross-examination is not dependent on the nature of the forum but serves to enhance the credibility of the evidence solicited.¹³⁴ The function of cross-examination is to ensure

129. *Id.*

130. Rosenblum, *supra* note 36, at 1063.

131. *Id.*

132. Institutional bias is not a new concept and is a rather difficult one to prove. However, "there is technical literature that treats of the bureau's utility function, and it is habitual at a commonsense level to view organizations, if not as having goals of their own, at least as behaving *as if* they did." JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY AND DISABILITY CLAIMS 68-69 (1983). An organization tends to act to preserve itself and increase its wealth, status, and importance. *Id.* at 69. Finally, these high-level, abstract goals may be imposed to lower-level bureaucratic imperatives, which may affect the way ALJs perform and conduct their hearings. *Id.*

133. Rosenblum, *supra* note 36, at 1063.

134. Wigmore stated that

[f]or two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by

that the best and most accurate evidence is presented before the judge.¹³⁵ The mere fact that the system is deemed to be non-adversarial does not negate the function of cross-examination as a necessary device to ensure the best quality of evidence.

Arguments have been advanced contending that, since the evidence being contested is essentially the interpretation of objective medical evidence, the opportunity for the claimant to issue interrogatories and present his own physicians and reports eliminates the need for an absolute right to cross-examine.¹³⁶ There are three points that deserve consideration. First, the Supreme Court's holding in *Perales* may warrant some caution. The Court held in *Perales* that if the only evidence the Social Security Administration has against the claimant's contention of disability is one report by an examining physician, which is hearsay in character and in direct conflict with the claimant's medical evidence and testimony, then it can be considered substantial evidence to warrant a denial of benefits.¹³⁷ Such an arguably low threshold of evidence required for an adverse ruling should caution against allowing evidence to be submitted by reporting physicians without the crucible of cross-examination if the

cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

Id. (citing WIGMORE ON EVIDENCE §1367 (3d ed. 1940)).

135. In *Goldberg v. Kelly*, the Supreme Court also recognized the limit to the effectiveness of interrogatories in administrative proceedings. 397 U.S. 254, 269 (1970). The Court held that a welfare recipient had the right to be heard before the rescission of benefits because

written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.

Id.

136. *Flatford v. Chater*, 93 F.3d 1296, 1306 (6th Cir. 1996).

137. *Richardson v. Perales*, 402 U.S. 389, 402 (1971).

cross-examination is duly requested or found to be reasonably necessary by the ALJ on his own initiative.

Secondly, objective medical evidence does not always remain objective. Assuming the doctor is competent and performs the proper tests in the correct way, which can be a far-reaching assumption, the evidence must then be interpreted by the physician. Much clinical evidence consists not of strict tests that provide mere numerical data, but of subjective valuations that involve visual, verbal, and manual examinations.¹³⁸ Judgments resulting from these medical evaluations are informed by the physician's professional judgment and skill, and at times maybe even his biases, prejudices, or momentary (or chronic) incompetence.¹³⁹ To say that medical evidence is objective and, therefore, does not require cross-examination to ensure its quality is to deny the reality of both the medical profession and human experience generally. Providing an optional mechanism to ensure the reliability of evidence that consists of, in reality, subjective medical evaluations that can form the sole basis of the denial of benefits surely would not undermine the scheme of the Social Security Administration. The rationale behind administrative bureaucracy is to provide efficient mechanisms through which to dispense government services fairly and to eliminate the trappings and expenses of formal proceedings. Efficiency and the reduction of costs are a benefit to all. Accurate medical determinations are not a peripheral concern in this scheme but lie at the center of the reliability and legitimacy of the system as a whole. Brushing aside the traditional mechanism of cross-examination, on which our system of law has so long relied to ensure the quality of evidence, should not be done lightly and without thorough re-examination.

Third, in cases where the claimant is alleging some sort of fraud or bias, the court should be even more hesitant to deny cross-examination.¹⁴⁰ The *Perales* Court recognized that, in *Perales*'s situation, he was only questioning the doctor's professional judgment.¹⁴¹ There, "the specter of questionable credibility and

138. MASHAW, *supra* note 132, at 62.

139. *Id.*

140. *See Goldberg*, 397 U.S. at 269.

141. *Perales*, 402 U.S. at 407.

veracity [was] not present.”¹⁴² However, when this specter is present, the right to cross-examine is even more vital, as recognized in *Goldberg v. Kelly*.¹⁴³ In *Kelly*, the Court was considering the termination of AFDC¹⁴⁴ benefits without prior notice.¹⁴⁵ The Court reasoned that a principle that has stood firm in American jurisprudence is that, when the reasonableness of government action rests on fact-finding, the claimant must be given a meaningful opportunity to respond.¹⁴⁶ This opportunity to respond is even more vital when the evidence consists of reports or testimony that the claimant believes to be based on fraud, bias, intolerance, jealousy, or vindictiveness.¹⁴⁷ The Court further stated that the court system has remained dedicated to this proposition and has severely scrutinized limited due process rights even in the administrative law context.¹⁴⁸

Thus, the Supreme Court has recognized, where fraud or bias is being alleged, the heightened necessity for the opportunity to show that the evidence is untrue.¹⁴⁹ In *Passmore's* case, the reasons for his subpoena request suggest that he believed his examining physician, Dr. Ash, was biased in favor of the Social Security Administration.¹⁵⁰ While the claimant may offer his own evidence as to his medical condition, the ALJ has the discretion to determine which information he deems to be credible.¹⁵¹ Granting claimants the opportunity to cross-examine adverse reporting physicians may be necessary to ensure that the claimant has an effective mechanism through which he can confront adverse evidence that could, in fact, be a sufficient basis on which to deny benefits.¹⁵²

142. *Id.*

143. 397 U.S. at 269.

144. Aid to Families with Dependent Children.

145. *Kelly*, 397 U.S. at 255-56.

146. *Id.* at 269.

147. *Id.* at 270 (quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)).

148. *Id.*

149. *Id.*

150. *Passmore v. Astrue*, 533 F.3d 658, 660 (8th Cir. 2008).

151. *See Richardson v. Perales*, 402 U.S. 389, 402 (1971).

152. *See id.* One might argue that, if all a claimant must do to gain the right to cross-examine a reporting physician is allege bias, actually suspected or not, it would undermine the system. However, as with many areas of law, the discretion of attorneys and their code of professional ethics, presumably, would operate to limit this practice.

Granting an absolute right to cross-examine upon request does not necessarily entail a complete disregard for statutory regulations set forth by the Commissioner in 20 C.F.R. § 404.950. This regulation serves to provide a mechanism through which the claimant may be afforded an opportunity to cross-examine reporting physicians.¹⁵³ The procedural requirements of this regulation are not inconsistent with an absolute right to cross-examine. Section (d)(1) of the regulations grants the ALJ the power to issue subpoenas when reasonably necessary for the full presentation of the case, either on his own initiative or per request of the claimant.¹⁵⁴ It is not inconsistent to grant the ALJ discretion to initiate the subpoena process himself and then argue that, if the claimant satisfies section (d)(2),¹⁵⁵ the ALJ has either no discretion or limited discretion to issue the subpoena.¹⁵⁶ Essentially, satisfying the standards set out in (d)(2) would automatically make the subpoena reasonably necessary for the full presentation of the case. If the determination is done in this manner, the ability of claimants to cross-examine would still be limited to a showing of need, but the discretion and possible abuse or incompetence of the ALJ would be substantially curtailed.

The standards set forth in section (d)(2), which constitute the procedure through which the claimant must operate to initiate the subpoena process, warrant a quick comment.¹⁵⁷ Section (d)(2) provides that the claimant must “file a written request for the issuance of a subpoena with the administrative law judge . . . [and] state the important facts that the witness or document is expected to

153. 20 C.F.R. § 404.950(d) (2008).

154. 20 C.F.R. § 404.950(d)(1).

155. Section (d)(2) provides that the claimant must “file a written request for the issuance of a subpoena with the administrative law judge . . . [and] state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.” 20 C.F.R. § 404.950(d)(2).

156. Professor Rosenblum suggests that the shifting of the burden of proof in this matter would be sufficient. Rosenblum, *supra* note 36, at 1065. Currently in all the circuits, except the Fifth, the claimant has the burden to prove to the ALJ that the cross-examination is necessary. *See id.* at 1051-57. Professor Rosenblum argues that the better practice would be to give claimants the presumption of the right to cross-examine reporting physicians but allow the ALJ to suspend or deny cross-examination for good cause when the examination is “irrelevant, dysfunctional, or unduly repetitive.” *Id.* at 1065.

157. 20 C.F.R. § 404.950(d)(2).

prove; and indicate why these facts could not be proven without issuing a subpoena.”¹⁵⁸ The nature of cross-examination is such that requiring the claimant to allege with specificity the facts he expects to solicit is often an untenable and an unassailable hurdle. Roy Reardon argues, “Conducting an effective cross-examination always involves instantaneous interplay with the witness . . . [s]pontaneity is essential”¹⁵⁹ Many times it may be difficult or nearly impossible to accurately predict what evidence the claimant expects to solicit from the witness. Especially in cases in which fraud, bias, or incompetence is alleged, it may be even more difficult to predict what evidence may be gathered upon cross-examination. Requiring, beforehand, the information the claimant expects to solicit from a witness may serve to substantially obstruct the claimant’s ability to make a reasonable showing that cross-examination is necessary.

The final point to consider is the heightened administrative burden that would result as a consequence of an absolute right to cross-examination.¹⁶⁰ The Eighth Circuit accepted the Sixth Circuit’s contention that an absolute right to cross-examine would constitute a significant administrative burden without offering *any* empirical evidence.¹⁶¹ The Sixth Circuit assumed that almost every claimant in a social security hearing would like to cross-examine witnesses.¹⁶² This assumption, however, may not be warranted.

After the Fifth Circuit’s ruling in *Lidy*, which granted social security claimants an absolute right to cross-examine, the Social Security Administration acquiesced, and social security claimants in the Fifth Circuit since have enjoyed the absolute right to cross-examine reporting physicians.¹⁶³ One scholar selected random practitioners and asked them what they believed the consequences of the ruling had been.¹⁶⁴ Though the sample was not scientific,¹⁶⁵ its

158. *Id.*

159. Rosenblum, *supra* note 36, at 1063 (citing Roy L. Reardon, *Cross-Examination—“To Sin or Not to Sin,”* LITIG., Fall 1998, at 30, 30, available at Westlaw, 25 Litigation 30).

160. See *Flatford v. Chater*, 93 F.3d 1296, 1306 (6th Cir. 1996); see also *Passmore v. Astrue*, 533 F.3d 658, 664-65 (8th Cir. 2008).

161. *Passmore*, 533 F.3d at 665.

162. *Flatford*, 93 F.3d at 1306.

163. Rosenblum, *supra* note 36, at 1055-57.

164. See *id.* at 1058.

165. *Id.*

results are instructive. One ALJ responder reported that, since the ruling, subpoenas are issued for the reporting physician to be cross-examined in only ten to fifteen percent of all cases.¹⁶⁶ Another interviewee responded that she believed that, because the examining physicians were subject to cross-examination, they do better examinations and provide clearer reports in the first instance.¹⁶⁷ Yet another interviewee responded that he had only very rarely requested subpoenas and, when he did, the physicians resisted the subpoena.¹⁶⁸ As a result, the ALJ struck the report from the record and requested a new consultative examination.¹⁶⁹ These anecdotal accounts, though not scientifically drawn, call for greater inquiry. The Eighth Circuit, rather than assuming the significant burden that would result from an absolute right, should at the very least consider evidence to the contrary provided by the Fifth Circuit's direct experience in the matter.¹⁷⁰

VI. CONCLUSION

The balance between a fair hearing and an efficient hearing is a delicate one that is continuously being adjusted in order to ensure that due process is afforded to the citizens in our administrative state. The right to cross-examine reporting physicians in social security hearings is a small example of a much larger framework that must be scrutinized by the courts in an effort to maintain the balance between due process and efficiency. The Eighth Circuit, in *Passmore*, made a

166. *Id.* at 1059.

167. *Id.* at 1059-60.

168. *Id.* at 1060.

169. *Id.*

170. Rosenblum concludes that

[t]hese responses strongly suggest that the negative conjectures shared by the Second and Sixth Circuits [now including the Eighth Circuit as well] and the Solicitor General regarding the effects of allowing physician cross-examination as an absolute right should not be admitted as credible unless and until clear and convincing empirical support can be found in the record to validate them.

Id. at 1062.

policy determination that the right to cross-examine reporting physicians is qualified by statutory regulations and that this qualification does not do violence to due process. In so doing, the court relied on some common assumptions and possible misconceptions. Whether the Eighth Circuit's determination is the correct or preferable outcome is a subject of legitimate debate, but the difficulties that are inevitably associated with making adjustments to the administrative process should not prevent the courts from thoroughly considering all the issues.

BRADLEY S. DIXON