ADMINISTRATIVE CONFERENCE OF
THE UNITED STATES

Report for
RECOMMENDATION 87-9

OFFSET DISPUTE PROCEDURES UNDER THE DEBT COLLECTION ACT OF 1982

by

Martin B. White

August 1987

Introduction

The Debt Collection Act of 1982 (DCA)[1] was passed in response to concern over the vast amount of delinquent debt owed to the federal government and the poor record of many government agencies in collecting debts owed to them.[1a] The focus of Congress appears to have been the various mass loan and loan guarantee programs, most conspicuously the student loan programs, although the effects of the Act extend well beyond such programs.[1b] The Act included about a dozen provisions designed to facilitate the use of various collection techniques, in many instances by removing obstacles created by other federal statutes and caselaw. Among the provisions of the Act were ones designed to facilitate use of collection agencies,[1c] charging of interest and penalty fees,[1d] reporting of delinquent debtors to credit bureaus,[1e] and use of IRS information to locate debtors.[1f] According to some government collection officials, the primary significance of the statute was simply to signal Congressional interest in debt collection, and thereby to encourage agencies to give it more priority. According to these officials, the specifics of the Act are useful, but of less importance than the establishment of efficient, computerized collection systems with adequate resources and management.[1g]

While the thrust of the DCA was to enhance collection effort, Congress was also concerned about protecting the due process rights of debtors against whom the government was to take action. For example, in adopting provisions providing for collection by offset against salaries and other money owed by the federal government to government debtors, Congress provided for pre-offset opportunities for debtors to dispute the relevant debts.[1h] This report examines the implementation of the statutory offset disputes provisions, and some issues raised by this attempt to integrate due process protections with effective government debt collection.

I. Background on Offset Under the Debt Collection Act

The DCA provides for two forms of debt collection by offset -- salary offset and administrative offset.

Salary Offset

Salary offset refers to deductions from the pay of U.S. government employees to pay debts owed to the government. The amount deducted may not exceed 15% of disposable pay without the debtor's permission.[2] Use of salary offset to collect general debts owed to the government is new to the 1982 DCA -- previously only a limited class of debts could be collected by salary offset.[3] Salary offset is of greatest significance in connection with government programs which extend or guarantee credit to large numbers of ordinary individuals (as opposed to businesses), and thus to large numbers of government employees. The relative importance of salary offset as a collection device is increased in connection with programs involving no security or security of limited value.

It is likely that the agency which has made greatest use of salary offset is the Department of Education which, as a result of various student loan and loan guarantee programs, is owed unsecured debt by a vast number of individuals. Another agency which guarantees many loans to individuals is the Department of Housing and Urban Development (HUD). However, much HUD debt is secured by

first mortgages on real estate, and the agency apparently feels that use of salary offset is unnecessary in connection with such debt, because HUD can rely on the security.[4] The HUD Title I program, however, has been a major user of salary offset.[5] This program guarantees loans for rehabilitation and for mobile homes, and the relevant credit is typically secured either by second mortgages or security interests in mobile homes. These forms of security are often inadequate to cover the relevant debts.[6]

Several other government agencies extend or guarantee debt to numerous individuals, but had not yet made major use of salary offset as of late 1986. Examples include the Small Business Administration (in connection with disaster loans),[7] the Veterans Administration,[8] and the Farm Home Administration.[9] These agencies expected to make use of salary offset in the future.

Use of salary offset by agencies engaged in mass credit programs usually starts with a periodic computerized match of a list of debtors with a list of government employees. It apparently takes considerable additional checking concerning employment status, the validity of the debt, etc., to go from the list of computerized matches to a list of government employees against whom offset can actually be used.[10] A Department of Education match in 1981 identified 47,000 government employees with overdue student loans totalling $68 million. Amounts owed thus averaged between one and two thousand dollars. Notices of intent to offset were sent to 17,000 debtors. Of these, 15,000 made voluntary repayments totalling $10.6 million, while another $3.4 million was collected by means of actual offsets.[11] A 1984 match by the HUD Title I program identified about 5000 potential "hits," with about 1400 proving to be usable targets for salary offset notices.[12]

Salary offset is also sometimes used outside of large scale sweeps by agencies with mass consumer lending programs. For example, in one instance, the SBA attempted to offset the salary of a Commerce Department employee who cosigned a note for an SBA loan to a family business.[13] Another frequent use of salary offset is to collect overpayments by the government to its employees, e.g., as a result of mistakes in calculating pay, failure to use travel advances, etc. This use of salary offset was common long before the DCA, and the application of the DCA to ordinary pay adjustments is somewhat controversial. Some government agencies, along with the GAO, feel that the due process requirements of the DCA and the OPM salary offset regulations are overly burdensome when applied to routine pay adjustment. The armed services, which were particularly concerned, had a statute passed designed to relieve them of these procedural requirements. The GAO continues to feel that the procedures are overly burdensome for the civilian agencies as well.[14] Unfortunately, within the scope of this study it was not possible to get an empirical handle on the seriousness of this problem.

Administrative Offset

Administrative offset is defined as "withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government."[15] Unlike salary offset, administrative offset has long been used by the federal government to collect debts of all sorts. The government has asserted a common law right to use offset, just like private creditors, and this right has been upheld by the Supreme Court.[16] In addition,

numerous statutes relating to specific federal programs explicitly provide for offset as means to collect debts associated with the programs. The effect of the DCA provision on administrative offset was to add language to the 1966 Federal Claims Collection Act, giving a general statutory authorization for the use of offset, while imposing procedural protections on its use.[17]

Unlike salary offset, which is commonly used either for pay adjustment or in periodic, more or less systematic, sweeps by government agencies engaged in mass consumer lending programs, the use of administrative offset is extremely varied and often rather unsystematic. This is true because of the wide variety of circumstances in which a person or organization may both owe money to and be owed money by the government. A very common use of offset is in connection with government contract disputes.[18] Another common use is in connection with grant programs, particularly where a single recipient receives several different grants.[19] If money is owed in connection with one grant (e.g., because of misallocation of funds), it will often be withheld from a subsequent grant. This use of offset most commonly occurs where a single recipient receives periodic or multiple grants from the same program. In this situation, relevant officials will be aware of both the debt and the existence of a later grant from which money can be offset.

Where a person or organization owes money to the government in connection with one program and is owed money in connection with another program, offset is also possible. It is less likely to occur, however, because relevant officials are less likely to be aware of offset possibilities. This is particularly true if the two programs are administered by different agencies. The subjective impression obtained from interviews with government collection officials is that, with some exceptions, inter-program and inter-agency offset occurs on a sporadic basis, when someone notices an opportunity, but does not occur systematically.[20] However, use of inter-program offset may be more common in connection with debts arising out of government contracts. The Army maintains a so-called "Holdup List" of (not only Army) contractors who owe money to the government. Contract disbursement officers are supposed to withhold funds owed to businesses on the list.[21]

By its nature, salary offset is used against individuals. Dollar amounts involved are generally under $20,000 and often under $5000. By contrast, targets of administrative offset are often organizations. The amount of money involved can range up to millions of dollars, and will often be larger than the consumer type loans typically the subject of salary offset. One class of administrative offset transactions, however, involves debts owed by individual government employees and are likely to be more similar to salary offset cases. This class is administrative offset against federal retirement funds owed to retiring or retired federal employees.[22]

II. Some Procedural Concepts

Due process cases and scholarship have identified a number of possible dimensions along which adjudicatory procedures can vary.[23] In practice, the jurisprudence of informal administrative adjudication has tended to focus on whether an oral hearing is required or whether decisions can be made on a purely written record.[24] In the context of offset disputes, a focus on a somewhat different distinction seems useful, both for descriptive and evaluative purposes.

This is a distinction between two general approaches to administrative review of agency actions. For present purposes, we will call these approaches bureaucratic review and adjudicatory style review.[25] Although these concepts are not explicitly used in the DCA and associated procedural regulations, it appears that agencies generally use a form of bureaucratic review in connection with administrative offset cases and a simplified form of adjudicatory style review in salary offset cases.

The term bureaucratic review is used to refer to a process in which an agency unit, in effect, reconsiders its own original determination. The relevant decision maker might not be the individual who made the original determination but he or she will be someone involved with and knowledgable concerning the relevant agency program. In making a decision, the decision maker will have informal access to all relevant information available to the agency (along with information and arguments supplied by the debtor). Because the decision maker is part of the relevant bureaucracy, he or she will know how to obtain access to and use the relevant information without the need for an advocate to assemble and present material in the form of an explicit "case" and record. (However, it should be noted that in a well organized debt collection operation, whether in the public or private sector, all information concerning a particular debtor is kept in a single defined file. Moreover, under the DCA, a debtor subject to offset is entitled to see all information concerning the debt that is in the hands of the relevant agency.[26] Thus, in offset cases, the distinction between all information in the hands of an agency and a defined adjudicatory record may be fuzzy in practice.)

The term adjudicatory style review is not meant to refer to a formal adjudication, but rather to any decision process that fits conventional notions of adjudication in at least certain minimal respects. In particular, the decision maker is (at least de facto) independent of the agency unit that made the original determination. In addition, to obtain information, the decision maker relies on interested parties (in the offset context, the debtor and someone representing the agency in its role as debt collector) to each present a "case" on their behalf.

In terms of concepts sometimes used in the administrative due process literature, adjudicatory style, as opposed to bureaucratic, review is characterized by independence of the decision maker; adversarial, as opposed to investigatory, fact finding, and reliance on a defined, though perhaps informal, hearing record.[27]

Some of the practical differences between bureaucratic review and adjudicatory style review, even in the absence of formal oral hearings, can be seen in a Small Business Administration case dealing with an attempt by the SBA to use administrative offset against money due to be paid to a pair of delinquent SBA business debtors by the Agricultural Stabilization and Conservation Service.[28] The SBA, unlike most agencies, employs adjudicatory style review in administrative offset disputes, with cases decided by administrative judges at the SBA's Office of Hearings and Appeals.[29] In the case at issue, the debtors acknowledged the existence of the debt but argued that the SBA should be estopped from applying an administrative offset because it had not responded to a proposal by the debtor to restructure debts owed to the SBA and another creditor. The SBA District Counsel office handling the debt failed to answer the

debtors' contentions or to supply underlying loan documents. The judge therefore felt compelled to rule in favor of the debtors.

On the merits, the debtors' argument in this case seems colorable, but by no means a clear winner. From the perspective of typical notions of adjudication, however, this is an "easy case," remarkable only for the SBA District Counsel's apparent lack of diligence. In an ordinary adjudication, if a creditor fails to make its case, the debtor wins. The case might have looked different, however, within a bureaucratic review system. Instead of requiring a submission by the SBA counsel, the decision maker might have gained direct access to the agency's records concerning the debt, identified relevant documents, and on his or her initiative used the information to evaluate the debtors' contentions. In other cases, bureaucratic review might substantiate contentions inartfully made by debtors.

The distinction between bureaucratic review and adjudicatory style review is a rough one, and it is possible to imagine hybrids. For example, one could have an adversarial factfinding with a non-independent decision maker. (As will be discussed below, some agency offset hearing regulations appear to call for this in some circumstances.) However, to the extent the decision maker conscientiously bases the decision on the parties' presentations, this approach would seem closer to adjudicatory style review, although the decision maker's expertise/preconceptions would presumably play some role. Conversely, in principle, an independent decision maker might use investigatory fact finding. This is done in some administrative contexts, particularly in connection with benefits programs.[30] (In a sense, the ideal model of an independent decision maker using investigatory fact finding might be a special prosecutor.) However, for a variety of reasons, use of independent decision makers tends to be associated with adversary fact finding. Partly this is a matter of tradition, reinforced by the weight of traditional trial models and, to some extent, a sense that fairness implies adversary procedures. There are also more practical considerations. There are likely to be costs, or at least perceived costs, in terms of time, personnel, and disruption of routines and chains of command to giving independent outsiders direct access to information in the hands of agency debt collection units. Moreover, lack of expertise (including familiarity with informal bureaucratic routines) may limit the ability of independent decision makers to effectively take advantage of such access.

Finally, it should be noted that issues relating to the bureaucratic review/adjudicatory style review distinction obviously do not exhaust the range of procedural issues raised by the DCA. For example, within the context of adjudicative style review there are such traditional issues as the appropriate degree of formality of procedures, the need, if any, for oral hearings, etc.

III. DCA Dispute Procedures

A. Requirements of DCA

1. Salary Offset

The DCA requires the following procedures before debts can be collected by salary offset:

1. At least 30 days written notice covering

   a. the nature and amount of indebtedness

   b. the intention of the relevant agency to use salary offset

   c. an explanation of the debtor's procedural rights.[31]

2. An opportunity to inspect and copy government records relating to the debt.[32]

3. An opportunity to enter into agreement, under terms agreeable to the relevant agency, to establish a schedule for repayment of the debt.[33]

4. An opportunity for a "hearing" on the determination of the agency concerning the existence or amount of the debt and the repayment schedule.[34]

A salary offset hearing must be conducted by an administrative law judge or other person not under the control of the head of the creditor agency. Filing of a petition for a hearing stays the offset. Presumably, in order to avoid delay in collections, tight deadlines are provided. Petitions for hearings are to be filed within 15 days of receipt of notice of offset and the hearing official must issue a final decision not later than sixty days after the filing of the petition. The DCA is otherwise silent concerning hearing procedures for salary offset.[35]

2. Administrative Offset

The DCA provision on administrative offset specifies four procedural protections parallel to those in the case of salary offset, including rights to notice, an opportunity to inspect and copy agency records, an opportunity to make a written agreement to repay the debt, and an opportunity for review of the agency's original decision concerning the debt. (A fifth procedural protection may be implicit in statutory language stating that agencies may collect by administrative offset "After trying to collect a claim under [31 U.S.C.1 section 371] . . . ." Presumably this requires some dunning or other collection efforts before administrative offset may be used.)[36]

With respect to dispute procedures, the DCA language with respect to administrative offset differs from that with respect to salary offset in four potentially significant respects. First, the salary offset provision gives the debtor the right to a "hearing," while the administrative offset provision gives the debtor a right to "a review within the agency." Second, the administrative offset regulations contain no requirements concerning the person or persons who conduct the review, while the salary offset provision requires that the "hearing" be conducted by an ALJ or other person not under the control of the agency head. Third, the administrative offset provision does not explicitly specify that filing a petition for review stays the offset or other collection proceedings. (However, the provision does state that the opportunity for review, along with other procedural protections, must be provided "prior to collecting any claim through administrative offset.") Fourth, no time limits on review are specified.[37]

The meaning of the last three differences seems fairly clear. Does the distinction in language between "hearing" and "review within the agency" have any implications? Unfortunately, the legislative history apparently does not discuss this word choice. The literal meaning of the words is also of limited help, since, in contemporary legal usage, a hearing can refer to virtually any opportunity by a person affected by government action to present arguments and evidence to a decision maker.[38]

One interpretation of the DCA's language is that in the context of salary offsets Congress intended something like what we have called adjudicatory style review, while in the context of administrative offset it considered something like bureaucratic review acceptable. This interpretation is based on the distinction drawn in the statute with respect to the need for an independent decision maker combined with the adversarial connotations of the word "hearing" as contrasted with the more administrative sounding phrase "review within the agency." Moreover, the failure to specify time limitations in connection with administrative offset review is consistent with a review process under the control of the creditor agency -- which can expedite procedures to avoid delay in collection if it chooses to do so. It is also plausible that Congress intended more formal procedures in the context of salary offset. In the due process jurisprudence there is a tradition of special concern for takings that affect wages.[39] Moreover, federal employees' salaries have historically not been subject to garnishment for ordinary debts, so use of salary offset for general government debts was seen by some as a major encroachment, to be hedged with relatively stringent procedures.[40] By contrast, the federal government had long used administrative offset, often with no prior procedural protection at all.[41]

3. Government-wide Regulations

The government-wide regulation concerning salary offset is Part 550 of the Office of Personnel Management Pay Administration Standards,[42] while that dealing with administrative offset is section 102.3 of the Federal Claim Collection Standards (FCCS),[43] issued by the General Accounting Office and the Department of Justice. Both the OPM standards and the FCCS direct agencies to issue their own regulations implementing the DCA.[44] Neither attempts to give a comprehensive outline of dispute procedures that must be followed, giving individual agencies flexibility to adopt procedures they choose. However, both the OPM standards and the FCCS prescribe minimum procedural requirements on certain specific issues.

The OPM standards state generally that, "The form and content of hearings granted under this subpart will depend on the nature of the transactions giving rise to the debts included within each debt collection program."[45] They also call for written decisions.[46] Otherwise, agencies are directed to refer to the discussion of procedures in section 102.3(c) of the FCCS.[47] Thus, the same government-wide regulation applies to hearing procedures for "hearings" in connection with salary offset and "review within the agency" in connection with administrative offset.

Like much of the due process jurisprudence, section 102.3(c) focuses almost entirely on identifying circumstances in which the debtor is entitled

to an oral hearing. Based largely on the Supreme Court's decision in Califano v. Yamasaki,[48] which is discussed below,[49] the FCCS provide for an oral hearing where a decision to waive a debt "turns on an issue of credibility or veracity," or where an issue concerning the debt itself "cannot be resolved by review of the documentary evidence;" for example, when the validity of the debt "turns on an issue of credibility or veracity."[50] The regulation specifies that, "Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although the agency should always carefully document all significant matters discussed at the hearing."[51] This last sentence, in its reference to "matters discussed at the hearing" (emphasis added), seems to contemplate an adjudicatory style hearing at which adversary parties present their views, although it does not explicitly preclude an oral meeting with a debtor as part of a more investigatory mode of fact finding.

The FCCS also provide that, "In those cases where an oral hearing is not required . . ., the agency shall nevertheless accord the debtor a 'paper hearing,' that is, the agency will make its determination . . . based upon a review of the written record."[52] The provision does not specify whether "written record" refers to written submissions made to a designated decision maker, consistent with adjudicatory style review, or whether the phrase refers to all written information in the hands of the agency, consistent with the bureaucratic review model.

4. Agency Regulations

The OPM standards and the FCCS appear to contemplate that agency regulations will flesh out their provisions on dispute procedures, since the government-wide provisions offer specifics only on a few narrow points. In practice, many agency regulations have not laid out detailed procedures for disputes in offset cases. This is particularly true with respect to administrative offset. In some cases, agency regulations do little more than track the FCCS or OPM standards.[53] In some others, agency regulations usefully add to the government-wide requirements but still do not lay out a full procedural system.

There are a number of possible reasons for the failure of agencies to set out more detailed procedures. To the extent that some form of bureaucratic review was contemplated, adjudicatory procedural questions may have seemed irrelevant. Even with respect to adjudicatory style review, the FCCS clearly encourages informal procedure, and agencies may have felt that simple and undetailed regulations promoted this objective. Some agencies may have felt that more detailed procedures could be specified in documents not formally enacted as part of the CFR. Finally, offset dispute procedures may have lacked salience in some agencies. We will now examine the procedural regulations at selected agencies, focusing on a number of the major creditor agencies.

a. Department of Education

Salary Offset

Perhaps the most complete and elaborate offset dispute procedures are those the Department of Education has established for use in salary offset cases. The procedural regulations provide for a two-stage procedure, with the first stage apparently taking a bureaucratic review form. The second stage is an adjudicatory style proceeding, but is structured more as a review of the agency's decision at the first stage than as a de novo determination.

The Education regulations provide for two separate notices to the debtor prior to use of salary offset. The initial notice tells the debtor of the amount alleged to be owed, and of the intent of the Secretary of Education to offset 15 percent of the debtor's salary unless the debtor can demonstrate that this would produce extreme financial hardship.[54] The debtor can then request a copy of agency records relating to the debt and a reconsideration concerning the existence or amount of the debt or a reconsideration of the offset schedule based on financial hardship.[55] A debtor requesting reconsideration is to submit a statement with supporting documents. For hardship claims, the regulation specifies the types of financial information the debtor is supposed to supply.[56] If the appropriate information is supplied within 45 days, the Secretary (presumably agency personnel acting as the Secretary's designees) "reconsiders" the offset.[57] If the Secretary denies the debtor's request, the debtor is supplied with a statement of reasons for the decision, together with a second "formal notice."[58]

The formal notice again identifies the amount of the debt and the agency's intention to offset the debtor's salary. It also informs the debtor of a right to a "hearing" and of "applicable hearing procedures and requirements."[59] A debtor desiring a hearing must file a petition, and indicate whether he or she would like a hearing consisting solely of written submissions.[60] If the debtor does not request a paper hearing, an oral hearing is held.[61] Thus, any debtor who wants an oral hearing can have one. This is a broader right to an oral hearing than is required by the FCCS, which permits agencies to deny an oral hearing unless resolution of certain types of factual issues requires one. A debtor who petitions for a hearing is automatically sent a copy of agency records concerning the debt, if the debtor has not previously obtained them.[62] Prior to the hearing, the debtor must file a statement of reasons why the Secretary of Education's prior determination concerning the debt was "clearly erroneous" or why the offset would produce "extreme financial hardship." The statement must include a statement of facts and legal arguments on which the debtor relies, copies of documentary evidence not already in the hands of the agency, and a list of witnesses with a summary of their anticipated testimony. The Secretary of Education must submit similar information to the debtor. No other pre-hearing discovery is permitted.[63] Hearings for civilian federal employees are ordinarily held in Washington, D.C. or in one of ten major cities around the country where the Department has regional offices.[64]

As required by the DCA, the hearing is conducted by an official not under the supervision of the Secretary of Education.[65] The Department of Education apparently has no ALJ's and is making arrangements to borrow Veterans Administration employees to serve as hearing officials.[66] No record or transcript of the hearing is made and formal rules of evidence are not applied. Witnesses, however, are under oath and may be cross-examined. The debtor may be represented by a person of the debtor's choice.[67]

In addition to more purely procedural matters, the regulations attempt to specify the scope of review and burden of proof for the hearing official. If the debtor challenges the Secretary's offset schedule, "the hearing official shall uphold the Secretary's offset schedule unless the employee has demonstrated by clear and convincing evidence that the payments called for. . . will produce an extreme financial hardship. . . ."[68]

If the debtor challenges the Secretary's determination concerning the debt, "the hearing official shall issue a decision in favor of the Secretary's determination, unless the hearing official finds that the employee has demonstrated that the Secretary's determination was clearly erroneous based on information that was available to the Secretary before he issued the [formal notice which follows the Secretary's reconsideration and informs the debtor of his or her right to a hearing]."[69]

Thus, in cases involving either hardship claims or challenges to the debt, the debtor has the burden of proof, and must establish his or her position by more than just a preponderance of the evidence. Moreover, in a challenge to the debt, the debtor must show that the Secretary's determination was wrong based on the information that was available to the Secretary before the hearing itself.

The latter requirement is presumably designed to protect the integrity of the earlier bureaucratic review stage of the Department's dispute procedures. It encourages debtors to make their full case at the earlier stage and, if followed, limits the danger of the adjudicatory style hearing process becoming a duplicative substitute for the Secretary's "reconsideration."[70] Nevertheless, there would appear to be conceptual contradictions between providing an oral evidentiary hearing and limiting the scope of the hearing official's decision to an evaluation of an earlier agency determination made without the oral evidence. Much, if not all, of the reason for holding an oral evidentiary hearing is the assumption that oral evidence has qualities that make it particularly valuable for certain truth-finding purposes.[71] Certainly, this reason for oral hearings is implicit in the FCCS treatment of the subject.[72] However, it is difficult to see how the (real or supposed) special qualities of oral evidence can be taken advantage of in evaluating whether an earlier decision was clearly erroneous based on a body of written information not including the oral evidence itself.

Consider the following hypothetical: In the first stage of Education's procedures, a debtor asks the Secretary to reconsider a debt based on allegations of fraud by a vocational school that originated the loan. The written allegations are somewhat vague and are rejected by the agency. At a subsequent oral hearing, the debtor makes the same contentions, but is considerably more articulate orally than in writing. Moreover, on cross-examination the debtor displays a credible demeanor and responds with convincing circumstantial details. Finally, when the hearing official or the attorney for the agency raises certain technicalities of the law of fraud, the debtor responds by highlighting certain facts which the debtor had not previously known were relevant.

In this hypothetical, the oral hearing would have fulfilled three functions which are often alleged to be advantages of oral hearings.[73] The hearing would have offered an opportunity for a party who is more articulate orally than in writing to present his or her best case. It would have given the decision maker an opportunity to evaluate credibility. It would have given a party an opportunity to flexibly shape arguments to the concerns of the decision maker.

Yet it is not clear how the debtor's presentation to the decision maker could be used to show that the agency's decision was clearly erroneous based on the information available to it before the hearing. Thus, in this hypothetical case, the oral hearing could have no effect on the outcome under the Education regulations.

The use of oral evidence at the second stage hearing seems unnecessary and even irrelevant if the function of the hearing is essentially to review the quality of an earlier bureaucratic reconsideration.[74] Conversely, to the extent that the FCCS (and possibly due process) require consideration of oral evidence to evaluate credibility or other subjective issues, the scope of review provision of the Department of Education regulations may be overly restrictive.

The Department of Education regulations also provide some guidance with respect to the substantive standards the hearing official should apply. In cases concerning the validity of the debt, any previous judgment or other court determination against the debtor is deemed conclusive.[75] The hearing official is generally directed to refer to Federal statutes and regulations concerning the programs giving rise to the debt and to relevant state law.[76] The regulation goes out of its way to specify that lack of quality of education is not a defense to repayment of a student loan unless the lack of quality constitutes a legal defense to repayment and the relevant school directly made the loan to the student.[77] This last requirement is partially inconsistent with the FTC's anti-holder in due course trade regulation rule and the similar anti-holder in due course laws of some states.[78] Under the FTC rule, if a buyer (including a buyer of educational services) has a legal defense against a seller (including a proprietary school), and the purchase was financed by a loan from a lender other than the seller, but the lender has a business relationship with the seller, the legal defense is good against the lender and the lender's assignees.[79]

With respect to claims of "extreme financial hardship," the regulations attempt to translate this potentially subjective determination into a more objective financial test -- whether the proposed offset schedule prevents the debtor from meeting essential subsistance costs. These costs are further defined to include "only costs incurred for food, housing, clothing, transportation, and medical care."[80] This attempted standardization of the hardship test potentially reduces the need for oral hearings under the approach of the FCCS. However, the regulation does provide for the consideration of some relatively subjective issues; for example, "Whether these essential subsistance expenses have been minimized to the greatest extent possible," and "The extent to which the employee and his or her spouse and dependents can borrow money. . . ."[80a]

Administrative Offset

The Education procedural regulations for administrative offset are less elaborate than the agency's regulations for salary offset, and go beyond the FCCS in only limited respects.[80b] They specify that a debtor petitioning for review must supply certain information identifying the debt, "an explanation of the reasons the debtor believes that the [agency notice of offset, which includes a description of the nature and amount of the debt] inaccurately states any facts or conclusions relating to the debt, and copies of documents the debtor wishes the agency to consider.[80c] In cases where there is no oral hearing, the review procedure is described briefly as follows: ". . . the Secretary -- (1) Reviews the documents submitted by the debtor and other relevant evidence; and

(2) Notifies the debtor in writing of the Secretary's decision regarding the issues defined in the (offset) notice. . . and, if appropriate, the question of waiver of the debt."[81]

The regulations thus appear to describe a bureaucratic review process since review is conducted by designees of the Secretary of Education, who can look to "other relevant evidence," apparently without a defined hearing record being established. According to a Department of Education collection official, administrative offset reviews are typically conducted by agency program officials, who use all the information available to them in reaching a decision.[82]

If the debtor wants the review to be conducted as an oral hearing, the debtor must supply an explanation of why issues concerning the debt cannot be resolved through a review of documentary evidence, a list of witnesses, and a statement of the issues about which the witnesses will testify and of the reasons why each witness's testimony is necessary.[83]

The agency is to grant or deny a request for an oral hearing based on standards that essentially track the standards of the FCCS.[84] The hearing is conducted by an official designated by the Secretary of Education. The regulations specify that the oral hearing is not a formal evidentiary hearing governed by 5 U.S.C. 554 unless one is required by law in some particular circumstance; and that the debtor has a right to representation, and to present and cross-examine witnesses.[85] Otherwise, little is stated about procedures. The regulation does not make clear that the agency will present its own "case" at hearings, but the reference to cross-examination by the debtor seems to presume that the agency will be represented and present evidence. The hearing official is instructed to "Review the evidence presented at the hearing, the documents submitted by the debtor, and other relevant evidence."[86] The regulation does not make clear whether the "other relevant evidence" is confined to evidence presented at the hearing or whether the hearing official can pursue other information, in a more bureaucratic form of review.

b. HUD

Salary Offset

HUD's procedures for salary offset disputes are contained partly in HUD's interim salary offset regulations at 24 CFR sections 17.125--17.139 and partly in a Salary Offset Hearing Procedures manual which has not been formally published in the Federal Register but which is supplied to debtors who request review following receipt of HUD notices of intent to offset.[87] The petition must include a brief statement of the debtor's basis for disputing the debt or the offset percentage, and of the "facts, evidence and witnesses" supporting the debtor's position.[88] The hearing may be conducted by a HUD ALJ, an ALJ assigned by OPM, or a non-ALJ from some other agency.[89] In practice, all of HUD's salary offset hearings (about 34 over the course of a several year period) have been conducted by HUD's lone ALJ along with his other duties. The debtor may be represented by a person of his or her choice, while HUD is represented by a HUD attorney designated by the General Counsel.[90] The hearing manual also addresses a variety of minor procedural issues, including addresses for service of documents, disqualification of hearing officers to hear particular cases, and extensions of time for cause.

Strikingly, the regulations and hearing manual fail to explicitly distinguish between oral and paper hearings. There is no explicit recital of the FCCS standard for when an oral hearing is or is not required (or an alternative standard), and no provision calling for debtors to request an oral (or a paper) hearing. (There is a provision for summary judgment "without a hearing," but only "where there is no issue as to any material fact and one party is entitled to judgment as a matter of law.")[91] Generally speaking, the procedures in the hearing manual use language which assumes an oral hearing, without quite requiring one. For example, a discovery provision states that the hearing officer may require the parties to exchange a list of witnesses, with a summary of anticipated testimony, and undisclosed documents "each intends to introduce at the hearing."[92] Hearings are stenographically or mechanically reported. Witnesses are to testify under oath. Technical rules of evidence do not apply, but the hearing officer is to exclude evidence that is lacking in significant probative value or is merely repetitive or confusing. The hearing officer may allow arguments on admissibility using the Federal Rules of Evidence by analogy.[93]

Despite all the hearing manual provisions which appear to contemplate an oral hearing, the HUD ALJ has conducted all but one hearing on a purely paper record, and on several occasions, has denied a debtor's request for an oral hearing.[94]

In disputes concerning the debt, the hearing manual states that "The existence and amount of the debt must be proved by a preponderance of the evidence,"[95] which presumably puts the burden of proof on HUD, as creditor. In disputes over the offset schedule, the manual does not explicitly assign a burden of proof, but states that the hearing officer can modify the offset schedule if he or she finds "extreme financial hardship."[96] This, in practice, presumably places the burden of proof with respect to hardship on the debtor. The hearing manual includes a definition of extreme financial hardship, and the financial information to be considered, substantially identical to that in Department of Education regulations.[97] According to the HUD ALJ, the use of an objective, financial standard for hardship has contributed to his ability to reasonably decide hardship claims without the need for oral hearings.[98]

The hearing manual finally provides that the hearing officer is to issue a written decision, and that this decision constitutes final agency action, with no appeal within HUD.[99]

Administrative Offset

The HUD administrative offset dispute procedures generally follow the FCCS fairly closely, but provide some more detail on review procedures. The review is conducted by "the appropriate Deputy Assistant Secretary or designee."[100] According to a HUD attorney, the review is ordinarily conducted by a person knowledgable concerning the relevant program but not directly involved in the original decision concerning the debt.[101]

The HUD regulation provides that review can take two forms, "review of the record" and "hearing," meaning an oral hearing.[101a] In a review of the record, the reviewer "will review all material related to the debt which is in the possession of the Department" including material submitted by the debtor and "makes a determination based upon. . . this written record."[101b] This seems to

suggest a bureaucratic review approach, although, if taken literally, it precludes the reviewer from asking questions of agency debt collection personnel. This would bring the process closer to a decision based on a defined and circumscribed record, as in adjudicatory style review.

The standards for holding a "hearing" are taken directly from the FCCS standards for when an oral hearing is required.[101c] A brief set of hearing procedures are set forth.[101d] There are no formal rules of evidence but parties may object to clearly irrelevant material. The hearing official "records all significant matters discussed at the hearing," but there is no official transcript or record. The debtor may be represented by the person of his or her choice, while the agency is represented by the HUD General Counsel or his or her designee. An order of presentation of evidence is set forth, with the agency going first, followed by the debtor, followed by agency rebuttal or clarification. The HUD "hearing" is thus a form of hybrid procedure, with a non-independent decision maker but a largely adversary form of fact finding.

c. Department of Health and Human Services

HHS takes a unified approach to offset, with salary offset, administrative offset, and several forms of offset not within the scope of the DCA all handled by the same regulation.[102] However, in some instances where the DCA draws distinctions between salary and administrative offset, such distinctions are incorporated in the agency procedures.

In HHS terminology, all offset disputes are handled via a "hearing," but "hearing" is defined to mean "either a review of the record or an oral hearing." "A review of the record" is further defined to mean "a review of the documentary evidence by a designated hearing officer." An "oral hearing" is defined as "an informal conference before a designated hearing officer."[103] The designated hearing officer is appointed by the Secretary of HHS (presumably by a designee) "to review and issue a final decision on an employee's dispute of a debt." Following the requirements of the DCA, if the dispute concerns salary offset, the hearing officer cannot be a person under the supervision of the Secretary. Ordinarily, in salary offset cases the hearing officer is to be an independent contractor or an employee of another agency, with ALJ's being used only as a last resort.[104]

The hearing will normally be a "review of the record" unless "the hearing officer determines that a decision cannot be made without resolving an issue of credibility or veracity."[105]

No procedural details are set forth for "review of the record." Brief procedures are set forth for oral hearings,[106] with allowance for both the debtor and the agency to be represented by counsel and for informal examination and cross-examination of witnesses. Only a summary record of the hearing is made. The regulation provide that the hearing officer will "Limit review of the case to the particulars of the agency determination challenged by the debtor."[107] This provision raises questions with respect to debtors who wish to assert counter-claims, argue that an agency collection action is outside of the agency's statutory or Constitutional authority, or make other wider-ranging arguments.

d. Small Business Administration

Another agency which takes a largely unified approach to salary and administrative offset dispute procedures is the Small Business Administration. In both types of cases a notice along the lines of that required by the DCA is sent.[108] However, a special notice is sent in salary offset cases if there exists some statutory provision authorizing waiver of the debt. In such cases, the debtor is provided with notice of the conditions under which waiver will be granted, and an opportunity to request such a waiver. Such a request is decided by the creditor agency. (In some cases there may be a right to appeal the creditor agency's decision to the SBA's Office of Hearings and Appeals.)[109]

In administrative offset disputes and other salary offset cases, the relevant DCA "review" or "hearing" is conducted by the SBA's Office of Hearings and Appeals (OHA), following the general SBA procedures for that office.[110] Consistent with the DCA, salary offset cases are decided by the OHA Chief Administrative Law Judge while administrative offset cases are handled by so-called "administrative judges."[111] These administrative judges are appointed by the Administrator of the SBA but, because they are located in the agency's OHA,[112] they are likely in practice to be reasonably independent of SBA debt collectors.

The SBA's OHA handles many disputes other than offset cases, and its procedures are set forth in a comprehensive and detailed procedural regulation, which includes the full panoply of procedures necessary for an APA trial type hearing on a record. However, the OHA regulation provides that the level of formality will depend on the nature of the dispute and delegates to the ALJ or administrative judge the power to determine, in many respects, the procedures to be applied in a particular case.[113] Nevertheless, even informal OHA proceedings are very clearly a form of adjudicative style review -- the decision maker is at least somewhat independent of the rest of the SBA bureaucracy and the decision is to be based on information contained in a docket file constituting "the exclusive record for decision."[114] OHA judges can take official notice of facts not in the record in their decisions, but must give affected parties an opportunity for rebuttal, if desired.[115] There are also rules against ex parte communications with agency employees who perform an investigation or prosecutorial function in connection with the proceeding.[116]

Parties may request oral hearings and the judge may grant the request if an issue of material fact "cannot be resolved except by confrontation of witnesses."[117] Oral hearings are recorded verbatim. All "reliable information" is admissible, but evidence can be excluded if its probative value is outweighed by prejudice or confusion or if it is needlessly cumulative. Parties can cross-examine witnesses and may be represented by attorneys.[118] Under the OHA regulations, discovery is in the discretion of the judge; however, the agency's offset regulations, following the DCA, give debtors access to debt records in the hands of the agency.[119] In offset cases, the decision of the OHA judge is the final agency decision.[120]

IV. Constitutional Requirements

It seems clear that the due process clause of the Constitution would ordinarily apply to the use of offset by the federal government. The concept of offset is that a debt owed to the government is applied against money owed by the government. In some instances the money owed by the government is the equivalent of an ordinary business debt. The government may offset against payment owed to a government contractor or against money owed to a bank pursuant to a federal guarantee. Alternatively, the money may be coming to the private debtor pursuant to an entitlement or grant program. However, in offset cases the debtor will have met the requirements of the entitlement program or have been awarded the grant.[121] Thus, in most, if not all, offset cases the private debtor will have an objective, legally grounded expectation of getting the money which the government is attempting to offset. Under modern due process concepts, a person with a firm, legally based expectation of receiving money from the federal government has a "property" interest within the meaning of the Fifth Amendment due process clause.[122]

Assuming the existence of a taking of property, the current controlling case on the general subject of what process is due in administrative contexts is Mathews v. Eldridge.[123] This case is usually cited for the analytical framework it sets forth; however, the case's holding on the facts is also relevant for the evaluation of offset procedures. The case dealt with terminations of eligibility for Social Security disability benefits. The initial termination decision was made by a state agency based on information from the recipient together with other medical records. If the recipient disagreed, he or she was given an opportunity to review the evidence, to respond in writing, and to submit additional evidence. The state agency then made a final decision, which was reviewed by an examiner from the federal Social Security Administration. If approved by the examiner, this final decision could be the basis for terminating benefits. Additional review, including an evidentiary hearing, was available post-termination.[124] In Mathews, the Supreme Court approved the pre-termination procedures as being a constitutionally acceptable prelude to termination of benefits.[125]

Taken as a holding on the facts, Mathews has several implications. Like earlier cases, Mathews makes clear that a full trial type hearing is not needed prior to all deprivations of property. Moreover, the particular procedures upheld in Mathews appear to have been a form of what we have called bureaucratic review rather than adjudicatory style review, so Mathews implies that bureaucratic review fulfills due process requirements in at least some contexts. It should be noted, however, that the Mathews court focused its analysis on the question of whether oral hearings were necessary to make accurate decisions regarding disability determinations. The due process elements we have suggested are key characteristics distinguishing bureaucratic and adjudicatory style review -- independence of the decision maker and use of adversarial fact-finding, received little explicit attention. The outcome of the case, however, implies that the Supreme Court did not view them as a necessary requirement for due process in all cases.

In addition to its holding on the facts of the Social Security disability program, Mathews set forth a general framework for evaluating what procedures are required by due process in particular contexts. The case calls for a weighing of three factors: (1) the private interest affected by the government action; (2) the risk of an erroneous decision under existing procedures and the probable

value of additional procedural safeguards; and (3) the government's interest, including costs and administrative burdens of additional procedural safeguards.[126] Unfortunately, it is difficult to derive any general principles concerning offset procedures from the Mathews framework -- the factors assigned weight are likely to vary widely in different offset cases. For example, the private interest in an offset dispute is presumably the money owed by the government which is being offset.[127] This amount may vary from a few hundred dollars to tens of thousands of dollars in a typical salary offset case and up to several million dollars in an administrative offset case. Moreover, the due process cases do not treat all dollars owed by the government as equal, but take into account the needs of recipients.[128] Thus, the private interest in one thousand dollars in welfare payments to a poor person would count as a greater private interest than one thousand dollars owed to a large corporation. One thousand dollars in salary owed to a middle class civil servant or one thousand dollars in grant money owed to a community group with a tight budget would presumably fall in between, but the precise weighting is unclear. Similarly, the value and cost of additional procedures is likely to vary in different offset cases.

Several years after Mathews, the Supreme Court decided a due process case dealing with a form of administrative offset, albeit not under the DCA. Califano v. Yamasaki[129] dealt with the recoupment of Social Security overpayments by withholding future payments, pursuant to the Social Security Act. The practice of the Social Security Administration was to provide notice to recipients that the Social Security Administration had determined that an overpayment had been made. The recipient could then contest recoupment. The recipient could either argue that the Social Security Administration had made an erroneous determination or could request the Social Security Administration to forgive the debt pursuant to section 204(b) of the Social Security Act. Under section 204(b) and relevant regulations, the debt could be waived if the recipient was without fault and either needed the full future payment to pay for ordinary living expenses, or had detrimentally relied on the earlier overpayment.

Written requests for either reconsideration of the overpayment determination or waiver were referred to one of the Social Security Administration's regional offices for review before recoupment commenced. If the regional office rejected the request, recoupment would commence. The recipient would then have an opportunity for an on-the-record evidentiary hearing before a hearing examiner, but only after recoupment had commenced. While the decision does not go into detail about procedures, the pre-recoupment regional office review would appear to have been a form of what we have called bureaucratic review.[130]

In its holding, the court imposed differing procedural requirements, depending on the nature of the issues under review. For recipients who contended that no overpayment had been made at all, the regional office review procedure was constitutionally acceptable. Determination of proper payment levels was primarily a matter of computation based on more or less hard facts, in particular, recipient's earnings reports. Only rarely was credibility an issue, so oral hearings would not, in the generality of cases, reduce the risk of decisional error. Thus, under the Mathews framework, there was no call for an oral hearing.[131]

By contrast, the court held that recipients who admitted the existence of overpayments but requested waivers of their debts were entitled to pre-

recoupment oral hearings. The court reasoned that the legal standards for waiver -- absence of fault in accepting payments and detrimental reliance -- would frequently raise issues of recipient credibility and that such credibility could not be adequately judged based on written submissions. The court asserted that its holding with respect to waiver requests was an inference from the statutory standard for waivers, not a constitutional requirement.[132] However, given that the statute was silent as to any oral hearing requirement, it seems likely that the court's distinction between requests for reconsideration and requests for waiver reflects constitutional due process concerns to at least some degree. Viewed as a due process case, Califano is consistent with the suggestion that application of the Mathews analysis can require different procedures in different offset cases.

One further complication in applying Mathews and Califano to pre-offset procedures is that in both cases, the pre-benefit termination and pre-recoupment procedures were supplemented by a right to more elaborate hearings following the relevant taking.[133] The presence of these additional procedures presumably influences the acceptability of the earlier more summary procedures, but the weight they carry is not made clear in the cases.

V. Offset Disputes in Practice

The Departments of Education and HUD are the major creditor agencies that appear to have made the greatest use of salary offset to collect general debts owed to the government. The 1982 "match" by the Department of Education led to the sending of 17,000 salary offset notices to U.S. government employees who owed money on student loans. Of these, about 300 requested review prior to offset. This gives a percentage figure of about 1.75%. Fewer than 50 debtors requested oral hearings. As of the summer of 1987, none of these requests for review had been heard because Education did not have available ALJs or other independent hearing examiners as required by the DCA. (Education was arranging to borrow personnel from the Veterans Administration for this purpose.)[134]

Precise information on the nature of the issues involved in the student loan salary offset appeals is not available. However, the Education official responsible for debt collection has stated that, in connection with student loan tax refund offsets (a program established independently of the DCA), about half of the persons asking for review contended that they simply did not owe the alleged debt. They had never taken out a loan, or they had paid it in full, or their loan had been discharged in bankruptcy.[135] It is sometimes suggested, plausibly, that student loans would rarely give rise to more complex legal defenses. However, this may be less true in the case of private vocational schools, which have fairly often been accused of fraud or other unfair practices.[136] Department of Education regulations provide that fraud and similar violations of consumer protection laws can be a defense to payment.[137]

Based on its 1984 match, the HUD title I program sent salary offset notices to about 1400 federal employees and generated roughly 50 requests for review, for an appeal rate of about 3.5%.[138] The appeals were handled by HUD's lone administrative law judge, who had produced some 34 decisions as of the fall of 1986. Dollar amounts of debt at issue in cases decided by the HUD ALJ ranged from $300 to $16,000, and averaged around $6500.[139] However, since salary

offset is confined to 15% of disposable pay per pay period,[140] the time discounted dollar impact of the cases is smaller than is implied by the figures at the larger end of the range.

A review of a list of case issues prepared by the HUD Office of Administrative Law Judge indicates the following frequency of issues.[141] (Note that about 6 (of 34) cases involved more than one issue and are counted more than once in this breakdown.)

Petitioner failed to respond (no specific issues raised):	13 cases
Commercial/consumer law issues not related to warranties or repossession (e.g., Truth-in-Lending, forgery):	8
Claims of financial hardship:	5
Miscellaneous:	5
Defenses related to Uniform Commercial Code requirements for repossessions:	4
Defenses relating to responsibility of spouses for family debts, particularly following divorce:	4
Warranty related defenses	2

The listing of issues in cases decided by the ALJ is not completely representative of issues raised by HUD debtors requesting review because a number of debtor petitions were acceded to as obviously meritorious by the HUD general counsel's office, which represents HUD in salary offset hearings.[142] In connection with tax refund offsets, a HUD attorney estimated that a very high percentage (up to half) of requests for review prove to be clearly meritorious and are acceded to by the HUD general counsel. The reason why so many more requests for review are clearly meritorious in connection with tax refund offset than in connection with salary offset is unclear. A possible explanation is that the tax refund offset program involves considerably more debtors, and HUD collection officials may not be able to do as careful a job of avoiding errors.

Issues relating to repossession or warranties seem more likely to crop up in Title I loans than in other government lending programs since Title I loans are frequently used to purchase, and are secured by, mobile homes. Student loans, by contrast, are unsecured. It would appear that most of the other issues raised in the Title I cases could arise under other credit programs.

In only three cases did the ALJ grant debtors any relief. All involved commercial or consumer law defenses.[142a] In one case the entire debt was discharged, while the other two debtors had their debts reduced by several thousand dollars. It should be remembered, however, that several meritorious petitions were screened out by HUD attorneys and never reached the ALJ.

The HUD ALJ indicated in conversation with the consultant that he felt it necessary to hold an oral hearing in only one case, a case involving an allegation

of forgery, where he felt the debtor's credibility was inherently at issue. He noted that claims of financial hardship in theory also inherently raised issues of debtor credibility, but that in practice written submissions had provided adequate bases for decisions. In two written opinions, neither involving hardship claims, the HUD ALJ formally rejected debtor requests for oral hearings.[142b]

Out of the 32 cases on which information was available, 20 were handled by the debtor pro se. These included one of the three cases in which the debtor obtained some relief, and eleven out of thirteen cases in which the debtor requested review and then submitted no meaningful case.

Administrative Offset

Because of the widely varied and often unsystematic use of administrative offset, and because handling of disputes is decentralized and informal at most agencies, it was not possible within the scope of this study to obtain systematic information about disputes in administrative offset cases. We will, therefore, give some examples, and make a few inferences based on the contexts in which administrative offset is used.

At the Small Business Administration, unlike at most agencies, requests for review of administrative offset are decided by administrative judges of the agency's Office of Hearing and Appeals who issue written opinions, providing a convenient source of information. As of the fall of 1986, four such opinions had been issued. Three involved attempts by the SBA to offset debts owed on SBA business loans against monies due the relevant debtors from the Agricultural Stabilization and Conservation Service. In one case, the debtor filed a petition for review in accordance with the SBA's regulations, but failed to follow up with any evidence or argument.[143] In a second case, the debtor's petition for review questioned SBA's authority to offset because offset was not mentioned in the debtor's loan contract nor was it explained by an SBA representative, and the debtor submitted no further evidence or arguments. In these two cases the debtors lost.[144] In a third case, described previously, the debtor acknowledged the existence of a debt but argued that the SBA should be estopped from applying an offset because it had earlier failed to make any response to a request to cooperate in a debt restructuring plan which allegedly would have made repayment of the loan possible. The SBA lost because it failed to answer the estoppel argument or to document the precise amount of the debt.[145] In a fourth case, the debtor argued that he had unsuccessfully attempted to contact SBA officials about rescheduling his debt[146] and that he anticipated submitting a repayment plan. The debtor lost, with the administrative judge observing that in the three months since receiving notice of offset, no rescheduling plan had been submitted.[147]

In the SBA cases just recounted, the administrative offsets grew out of rather straightforward debts - businesses borrowed money, signed promissory notes, and failed to repay the SBA. Unlike salary offset, however, administrative offset is often used in connection with less straightforward forms of debt, with their attendant possibilities for disputes. As noted previously, offset is frequently used in connection with debts arising out of failures of government contractors to perform as promised and failures of government grantees to comply with the terms of grants. Another example is the administrative offsets described in American Bankers Association v. Bennett.[148] This case involved banks who, in the course of ordinary banking operations, had improperly paid out

money on federal government checks bearing forged or unauthorized endorsements. Under ordinary banking law, these banks were required to reimburse the U.S. Treasury. They often did so voluntarily but not always. The Treasury Department therefore requested the Department of Education to offset the amounts due against money owed to the banks pursuant to guarantees on defaulted student loans.[149] This offset program was enjoined by a U.S. District Court because of Education's failure to have proper regulations in place at the time of the offsets.[150] If it is resumed[151] it would obviously create potential legal and factual disputes concerning the existence of alleged forgeries and alterations and concerning the availability to banks of defenses under the Uniform Commercial Code or other banking law. In the Bennett case, the district court expressed concern that the Department of Education and the Treasury adopt procedural regulations which would make it possible for banks to meaningfully contest Treasury claims concerning particular checks.[152]

Administrative offset is often used in contexts where offset, and related disputes, are embedded in a broader dispute concerning the debt and thus in dispute resolution systems other than those established specifically in connection with DCA offsets. The major examples are the use of offset to collect debts arising out of the failure of government contractors and grant recipients to fulfill their obligations. The relevant contractor or recipient will often dispute the government's contention that they have violated contract or grant terms. Such disputes are covered by a well developed body of law and procedures for dealing with contract disputes[152a] and, depending on the agency, a more or less well developed system for handling grant disputes.[153] Administrative offset may be embedded in broader disputes in other situations as well. For example, the Department of Education was litigating claims in federal court against a private vocational school business owned by a conglomerate corporation. According to Education, the schools had violated student loan regulations and therefore were required to return loan guarantee payments previously received. To increase pressure for a favorable settlement in the court litigation, Education reportedly requested the Defense Department to offset Education's claim against money due the conglomerate on defense contracts. The conglomerate eventually went bankrupt, bringing the bankruptcy court system into play as well.[154]

VI. Policy Issues

A. Formality and Effectiveness of Procedures in Salary Offset Cases

The requirement for a "hearing" prior to use of salary offset and the further requirement of the use of ALJ's or other fully independent hearing officials potentially raises the spectre of overly formal and complex proceedings interfering with an efficient debt collection program. The sixty-day time limit established by the DCA was presumably the result of such fears. In any case, the limited experience to date suggests that in connection with major government credit programs, the salary offset dispute procedures do not pose serious problems for the collection system. (Whether the DCA procedures are overly burdensome in connection with routine pay adjustments is a different issue, on which this study did not produce sufficient information to make recommendations.) Experience at HUD and the Department of Education indicates that under 5% of persons receiving salary offset notices requested review. (By contrast, during the 1970's, an average of something like 20% of all claims for Social Security Disability Benefits were appealed.)[155] Experience at HUD

suggests that the resulting proceedings are themselves manageable. HUD's single ALJ was able to handle all the hearings resulting from a fairly large federal credit program along with his other duties. In only one case was an oral hearing held. To further warm the hearts of government debt collectors, in only three cases did debtors obtain relief from the hearing process. (As noted above, this last statement is slightly misleading, since several debtors obtained relief from the HUD general counsel's office with no hearing.)

With what techniques, and at what costs were these happy (from a collector's perspective) results achieved? First, it should be noted that none of the cases were "big cases" involving very complex legal and factual issues. On the other hand, many of the cases did require some substantive legal and factual analysis. For example, one not atypical case turned on the question of whether defects in a mobile home, and the debtor's actions in response to those defects, met the requirements for a "revocation of acceptance" under Uniform Commercial Code section 2-608 and relevant state caselaw.[156] In any case, the absence of "big cases" is likely to be typical of salary offset disputes, involving, as they do, what are essentially consumer loans.

One obvious contributor to the efficiency of the process was the HUD ALJ's eschewal of oral hearings in all but one case. Many of the cases involved factual allegations by the debtor, raising a question as to whether oral hearings should have been held to permit evaluation of credibility -- either because such hearings are required by the FCCS or simply as a matter of good practice. One technique that the HUD ALJ often used, which may have helped to avoid oral hearings, was to accept debtor factual allegations at face value. For example, in claims of financial hardship, the HUD ALJ sometimes made calculations using dollar figures supplied by debtors without questioning the veracity of those figures.[157] In another case, the HUD ALJ found the existence of a warranty in part based on a debtor's allegations concerning a salesperson's oral representation.[158] It is not clear that HUD collectors suffered in practice from the HUD ALJ's frequent acceptance of debtor allegations' face value. Even in a full trial type hearing it is likely that it would have been difficult or, at a minimum excessively costly, for the HUD general counsel to locate witnesses concerning old sales transactions or debtor finances, and thereby to participate in, much less win, swearing contests on such issues. The win-loss record in HUD salary offset hearings further suggests that HUD's interest as creditor is not being seriously impaired. It might be objected that experience so far reflects relatively short-run experience, and that failure to more vigorously test debtor statements would in the long run lead to widespread lying. There are some checks on this potential problem, however. Debtors in salary offset hearings are a dispersed group and are unlikely to learn much about other debtors' experiences. (Some attorneys may develop experience in the area but it seems unlikely to become a significant field of practice.) In addition, the HUD ALJ felt he could get some fairly good sense of debtor credibility from the way debtors' paper evidence and allegations hung together. While oral hearings might have increased the accuracy of credibility determinations, the HUD ALJ felt the additional cost was probably not worth the incremental improvement, in light of the modest dollar magnitude of the cases.[159]

To what extent does the use of purely paper proceedings, together with the DCA's tight 60-day time limit, affect the fairness and legal craftsmanship of the decision process? An ALJ with offset dispute responsibilities at one agency expressed concern that the time limit would make it difficult to handle cases

with any significant degree of legal complexity. A subjective impression from the HUD written decisions is that the HUD ALJ was able to do a reasonable job. The decisions generally read like good quality state court opinions in cases of less than first importance. In areas of law where the consultant has expertise, there are no obvious errors, and the decisions generally confront, to at least some degree, the legal and factual issues one would expect to arise in cases of the relevant sort. One technique which may have contributed to the ability of non-oral hearing procedures to adequately develop issues is that in many cases there were written rebuttals and surebuttals by the parties. In some cases there were direct requests for additional evidence by the ALJ. (Judges at the SBA Office of Hearings and Appeals have also requested parties to submit needed evidence in adjudicatory style non-oral offset hearings.)

B. Ability of Debtors to Participate Effectively in Salary Offset Hearings

The most disturbing aspect of the HUD salary offset dispute experience is that over a third of debtors requesting a hearing never submitted a case for themselves and, in effect, lost by default. (A similar problem was observed in several SBA administrative offset cases.)[160] This raises a question as to whether HUD's procedures (which are not atypical), simple as they are in practice, are beyond the capabilities of a significant number of debtors. To be more concrete, are a significant number of debtors unable to effectively put together and submit a case for themselves in writing?

There is reason to suspect that the visible HUD experience both overestimates and underestimates the problem. On the one hand, some or all of the defaults may have been non-meritorious cases. One would expect some number of debtors to request hearings in bad faith, or simply out of anger or frustration, and not follow through. On the other hand, the HUD information is confined to debtors who were sufficiently adept to request a hearing. Presumably, some number of debtors who failed to do so also had meritorious, or at least colorable, defenses to payment.

Assuming that some significant number of debtors with meritorious claims are unequipped to effectively participate in the salary offset dispute process as it has been established, can anything be done to improve the process in this respect? One possibility is a shift from an adjudicatory to a bureaucratic review model, which at least potentially puts less reliance on the ability of debtors to assemble and present a case. The appropriateness of bureaucratic review in offset disputes will be discussed in more detail below. Here, we will simply observe that the potential effectiveness of bureaucratic review in compensating for weaknesses of debtors as advocates is greatest where the issues raised by debtors involve facts that are in the hands of the agency. Thus, for example, to the extent that debtors allege simple errors on the part of government collectors (e.g., mistaken identity, failure to credit payments already made), bureaucratic review may have advantages. As noted previously, Department of Education and HUD experience with tax refund offsets suggests that many requests for review involve such claims of simple errors. On the other hand, the caseload of the HUD ALJ suggests that many debtors allege defenses based on facts not in the possession of the collecting agency. With respect to such defenses, a bureaucratic review process would still, in practice, depend heavily on the ability of debtors to assemble and present a case for themselves.

Another possible alternative would be to increase the use of oral hearings on the theory that some unrepresented debtors will be better able to present a case orally than in writing. For this purpose, something more like an informal conference than a trial-like hearing would seem appropriate. There are, however, severe practical limitations to this. Extensive use of oral hearings would obviously increase the resource demands of the dispute process. It might make it difficult to meet the 60-day time limits of the DCA and increase the chances that dispute handling would disrupt collections. It would also impose costs on debtors, since attending a hearing could require time off from work and possibly travel. (In the one oral hearing held by HUD, the Washington based ALJ personally drove to the debtor's location in New Jersey.[161] Such service could probably not be provided to debtors on a regular basis, however.) As a substitute for oral hearings, agencies might experiment with telephone hearings, or some sort of informal telephone "prehearing conference"[162] to identify issues a debtor may not have effectively presented in writing.

C. Choice of Adjudicatory Style or Bureaucratic Review as a General Approach to Deciding Offset Disputes

From a traditional lawyer's perspective, adjudicatory style review comports better with conventional notions of due process than does bureaucratic review. From this perspective, the latter suffers from at least two serious deficiencies. First and foremost, in bureaucratic review, an agency unit is, in effect, acting as a judge in its own case. In a well set up bureaucratic review system, an original determination is likely to be reviewed by different individuals from those who made it, but the reviewers will still be part of the same organization, with similar values, interests, and institutional ties.

A second disadvantage of bureaucratic review in terms of due process values is that, as usually conducted, it gives private parties less of a creative role in developing and presenting their case to decision makers than does adjudicatory style review. The extent to which this is true, of course, depends on the precise adjudicatory and bureaucratic procedures followed. Perhaps more importantly, scope for creative case development and presentation is an advantage primarily for well represented parties in cases of large enough magnitude to warrant a substantial investment in litigation.

In any case, bureaucratic review has a number of countervailing advantages likely to be of significance in government debt collection cases. First, bureaucratic review procedures are likely to be cost-efficient -- little in the way of special arrangements need be made to conduct a review. Bureaucratic review also has the potential to produce better informed decisions than those by an independent adjudicator. The bureaucratic reviewer would presumably have ready, informal access to all information available to the agency, along with expertise useful in identifying relevant information and interpreting it. For this reason, bureaucratic review has the potential to partially compensate for deficiencies in the ability of ordinary debtors (or in some instances agency debt collectors) to present effective cases for themselves in an adversary proceeding. (This would be primarily true, however, in cases where key facts were available, at least in implicit form, in agency records.)

The potential advantages of bureaucratic review, however, only materialize if such review can be carried out with a reasonable level of impartiality. Arguably, the debtor-creditor context inevitably creates an adversary stance

which makes impartiality difficult to achieve. There is, however, some reason to think that a reasonable level of impartiality may be achievable in at least some debt collection programs. Experience at the Department of Education and HUD suggests that in mass credit programs the percentage of debtors requesting offset review is small enough so that collection officials can "afford" to be fair, without having a major impact on collection goals.[163] This observation is consistent with a subjective impression obtained in interviews with several government collection officials.[164] These officials seemed to give little priority to the offset disputes issue, one way or another (as compared to the attention they gave to such things as setting up efficient computerized dunning systems), because offset disputes had only a limited impact on their "bottom line." However, perhaps for precisely this reason, these officials seemed willing to accommodate debtors with good legal defenses or other good reasons for not paying. A related factor is that in some government credit programs a commitment to the broad mission of the program (e.g., helping regional economic development, helping the poor improve their housing, etc.) creates a degree of understanding for debtors on the part of officials with responsibility for collections.[165] It seems possible that, overall, the likelihood of impartiality may be greater in mass, consumer type credit programs than in other contexts. This would be true because the dollar amount in any given dispute would be modest, making fairness "affordable." In addition, individual debtors may be more likely to evoke understanding than organizational debtors, although this will not always be true. For example, a student loan defaulter holding a well paying government job is a paradigm of an unsympathetic debtor. In addition, collection officials interviewed for this project mentioned several types of organizations likely to receive sympathetic treatment by some agency collectors.[166]

It seems likely that the relative merits of bureaucratic and adjudicatory style review will vary depending not only on the nature of the debtor, but also on the nature of the dispute. Empirical evidence does not appear to be available, but some intuitive judgments are possible. For one thing, adjudicatory style review may work better in disputes over larger debts because the money at stake will justify better case development by adversary parties than in smaller cases. One can also make a rough breakdown of offset disputes based on the nature of the debtors' contentions:

1. Claims of simple error by the government. This category includes contentions that a debt is not owed (or the full amount claimed by the government is not owed) for some reason that is conceptually simple, and, in principle, readily verifiable. Examples would include claims that a debt was already paid or discharged in bankruptcy, or claims of mistaken identity concerning the debtor.

2. Hardship and equity claims. This would include arguments that the government should waive all or part of a debt or the use of offset because of financial hardship to the debtor or because of some other fairness consideration.

3. Dilatory claims. This would include cases where the debtor has no real basis to dispute the debt or the use of offset, but requests review for delay purposes.

4. Substantive disputes. This would include instances in which there is some more or less complex legal or factual reason for contending that a debt is not owed that does not fall within category 1. For example, a debt might arise out of the government's determination that grant money was improperly spent, and the debtor might dispute this, based on accounting data or arguments concerning the meaning of the terms of the grant. Assertions of defenses to payment based on consumer protection or commercial law principles would be other examples.

Bureaucratic review, if conducted in good faith, would appear to be most satisfactory in cases alleging simple error. In many such cases, review of government collection records (or other objective and readily available sources such as bankruptcy decrees) would be an efficient method of evaluating such allegations. In addition, the relatively objective nature of the determinations to be made would minimize the effects of unconscious bias.

Again assuming good faith, bureaucratic review would appear to be a satisfactory way of dealing with claims of hardship and meritless, dilatory claims. This is particularly true to the extent that agency regulations have translated tests of hardship into objective economic criteria. On the other hand, bureaucratic review would not appear to have great advantages over adjudicatory style review with respect to these categories of claims. Proper disposition of hardship claims would be based primarily on information supplied by the debtor, not information in agency records, while dilatory claims would presumably reveal themselves primarily by the failure of the debtor to present a meaningful argument.[167]

Bureaucratic review intuitively seems least satisfactory relative to adjudicatory style review in connection with relatively complex substantive disputes. Such disputes, by their nature, are likely to require case development by debtors -- one can expect agency collection officials to recheck if payments were received or if a debtor's identity was confused, but not to construct a Truth-in-Lending counterclaim or a warranty defense on behalf of a debtor. The extent to which information needed to resolve substantive disputes is found in agency collection records is likely to vary. In many instances, material facts will probably not be in the hands of the agency; for example, if a HUD Title I debtor asserts a breach of warranty by a private home improvements contractor as a defense to payment of a bank loan later assigned to HUD pursuant to a guarantee. In other cases, the agency may have access to material facts but have a vested interest in a particular interpretation; for example, if an offset arises in connection with a contract or grant dispute. More generally, the greater role of judgment in evaluating complex disputes gives greater opportunity for unconscious bias to affect decisions than with respect to simple error claims. In sum, the role of the decision maker in a substantive offset dispute seems more like that of a judge than an administrator, making adjudicatory style procedures seem relatively more appropriate.

The upshot of the considerations just reviewed is perhaps paradoxical. Bureaucratic review would appear to function best in the context of salary offset, a context involving small debts, individual debtors, and a high percentage of simple error or hardship claims; while adjudicatory style review would appear to function best in the context of administrative offset, where debtors are usually organizations, dollar amounts at issue are often large, and disputes may

involve complex substantive issues. Yet agency regulations, with encouragement if not compulsion by the DCA,[168] have generally adopted adjudicatory style procedures in salary offset cases and bureaucratic review procedures in administrative offset cases. Should the general approach to offset review be reversed?

On balance, available information does not warrant such a recommendation, but only a recommendation that limited elements of bureaucratic review be added to existing salary offset procedures. In part, this is simply a counsel of caution -- there is still only limited experience with any existing DCA procedures, and this consultant was able to obtain particularly little information on experience with administrative offset procedures. However, a number of more positive assertions can be made.

With respect to salary offset, the sensitivity of offsetting individuals' wages suggests preserving the DCA requirement for an independent decision maker and other minimal adjudicatory elements in order to enhance the legitimacy of the offset dispute process.[169] In addition, at HUD at least, the existing system has so far produced reasonable quality decisions, without being too costly or interfering excessively with overall collections.

The apparent difficulty of some debtors in participating in adjudicatory proceedings, however, suggests supplementing such procedures with a "bureaucratic" component. At some point or points in the dispute process, an agency official should take some initiative to evaluate whether a complaining debtor has a good case. A number of such actions could be taken without incurring excessive costs or substantially delaying or disrupting collections. Examples might include thoroughly and sympathetically evaluating agency records to see if they support inartfully presented debtor contentions, and telephoning debtors who have requested offset review and not followed up with a written case on their behalf.

Such informal mechanisms of bureaucratic review are already implicit in the collection and offset system. For example, prior to offset, debtors are often subjected to telephone collection efforts. Agency collection manuals direct telephone debt collectors to inquire as to why debtors have not paid.[170] To the extent that agencies seriously evaluate debtor contentions that a debt is not due, a review component is built into the collection process. Somewhat similarly, it was mentioned previously that at HUD attorneys representing the agency in offset proceedings will sometimes determine that debtor contentions are clearly meritorious and agree not to proceed with offsets. Conceivably, this informal review function could be expanded, and might include some telephone consultation with debtors or other inquiries. Agency collectors, and litigators, however, cannot be expected to be completely impartial,[171] so it is possible that some debtor outreach/informal claim investigation activity should be carried out by the independent hearing officials mandated by the DCA, or by personnel attached to them. Such outreach might be as limited as telephone or similar follow-up when debtors appear to be having trouble dealing with the adjudicatory process; for example, when an unrepresented debtor submits a complaint letter requesting review, but does not follow through within the regular hearing procedures. Clearly, these suggestions for change are marginal, but marginal adjustments are quite probably all that is called for.

These suggestions for informal use of elements of bureaucratic review procedures may be compared with the Department of Education's offset review procedures as described above.[172] The Department provides for a first review stage using bureaucratic review procedures and a second stage using more adjudicatory style procedures. While constituting a thoughtful approach, the Department's procedures are not fully responsive to the concerns raised here. First, the bureaucratic review elements are not focused on the problems of debtors who have limited capabilities for participating in adjudicatory procedures.[173] Second, as discussed above, the limited substantive scope of the Department's second stage procedures does not give debtors the full potential advantages of an adjudicatory style proceeding.

We now turn to the question of whether agencies using bureaucratic review procedures for administrative offset disputes should shift to more adjudicatory style procedures. A major reason for not making such a recommendation is that the use of administrative offset is often embedded in larger disputes between government agencies and debtors; for example, in connection with grants or contracts.[173a] This has two implications. First, the larger dispute context will often carry with it its own opportunities for review, e.g., through the agency grant or contract dispute process, providing at least a partial substitute for adjudicatory style review in the narrow context of the offset attempt.[174] At the same time, adding an additional adjudicatory style proceeding could complicate what might already be a complex litigation/negotiation situation and unduly interfere with the ability of the government to use offset as part of its overall collection strategy.[175]

D. Res Judicata and Collateral Estoppel Effect of Decisions in Offset Disputes

An attempt to collect a debt by salary or administrative offset may not be the end of the government's collection effort. This could be true if the offset attempt is unsuccessful or if the amount offset simply doesn't cover the entire debt. The government might then continue informal dunning efforts, or go to court to obtain and execute a judgment against the debtor. In some instances, a new opportunity for offset may arise, for example, if a new debt by the government to the debtor is generated.

What should be the effect of a decision under the DCA offset dispute procedures on subsequent collection activities and associated administrative or court proceedings? Issues of this sort were addressed by the Comptroller General in a letter opinion concerning J. Michael Tabor,[176] an employee of the Department of Energy who was originally based in Dallas. He received over $30,000 in travel and subsistance reimbursements for an 18-month temporary duty stint in Washington, D.C., where he ultimately remained permanently. In a 1983 decision, the Comptroller General determined that the 18-month stint was not truly temporary duty and that Tabor was obligated to return the $30,000. The Department of Energy attempted to collect the debt through salary offset, but at a pre-offset hearing a Department of Energy administrative judge determined that the debt was not established. The Department of Energy then requested an opinion from the Comptroller General as to whether the debt could be removed from the books and whether the Department was relieved of responsibility for recoupment of the funds. The Comptroller General acknowledged that the administrative judge's decision precluded collection by salary offset, but felt that it did not extinguish the debt. The Comptroller General

gave two primary reasons for its decision.[177] One is tied to the specifics of the case. The administrative judge confined the scope of the offset hearing to three issues specifically mentioned in the Comptroller General's 1983 decision and the Department of Energy's pre-offset notice to Tabor. As a result, according to the Comptroller General, the administrative judge failed to address several reasons why Tabor's duty was not temporary and the debt was proper.[178]

The more general reason given by the Comptroller General was that the legislative history of the DCA "shows that Congress intended salary offset to be one among many [debt collection] tools. . . . While the [salary offset] hearing was designed to afford due process in connection with a proposed salary offset, there is no indication in the [statutory] language. . . or in the legislative history of the 1982 Act that the hearing would have consequences outside of the specific context of salary offset."[179]

On the other hand, the DCA does not specifically state that decisions in salary and administrative offset reviews are not to have broader impact. It therefore seems useful to examine the issue from the perspective of general principles of administrative res judicata and collateral estoppel.

It is well established that res judicata and collateral estoppel principles can apply to administrative decisions, but courts often state that such application should be more flexible than with respect to court judgments.[180] The primary requirement is that the administrative proceeding, "entail the essential elements of adjudication,"[181] and afford a "full and fair" opportunity for parties to litigate.[182] Application of these principles by courts varies, with some courts seemingly requiring procedures close to those of a traditional trial and others granting preclusive effect to quite informal proceedings.[183] In addition, court decisions and the Restatement 2d of Judgments suggest that a variety of additional policy considerations should further limit preclusive effects of administrative decisions in some circumstances.[184]

The issue of the scope of the effect of offset dispute decisions can be divided into three distinct, though related, questions:

1. To what extent should the decision be viewed as res judicata, in other words an authoritative legal decision which is binding on the agency and debtor and which precludes relitigation in subsequent court or administrative proceedings?

2. To the extent that decisions do not have a res judicata effect, should determinations with respect to particular issues have a collateral estoppel effect in any subsequent court or administrative proceedings with respect to the relevant debt?

3. To the extent that decisions do not have a res judicata effect, should agencies nevertheless conform their behavior to the determinations made in the offset dispute proceeding? For example, suppose in an offset dispute the decision maker decides that the offset is improper because the underlying debt is invalid. Should the creditor agency not only refrain from offset but also from all other collection activities?

Res Judicata Effect

Clearly, offset dispute decisions, once final, should have res judicata effect with respect to the offset attempt giving rise to the dispute. Otherwise, the statutory procedures would be meaningless. Should, however, offset dispute decisions be treated as legally binding with respect to (a) all future handling of the relevant debt, or (b) future attempts at offset in connection with the debt?

The answer to (a) should probably be no, for several reasons. In some instances, the offset decision by its own terms may be confined to issues relating to the propriety of the particular offset and address the validity of the underlying debt. More broadly, as the Comptroller General noted, the statutory provisions on review prior to offset are tied specifically to the statutory provisions on offset themselves.[185] This consideration seems the more compelling since in the case of some debts, for example those connected with contracts and grants, statutes or regulations provide for other administrative proceedings to determine the validity of the debt.[186] Another consideration is that offset dispute proceedings are clearly intended to be simple and expeditious. The comment to section 83 of the Restatement 2d of Judgments suggests that the provision of expeditious proceedings implies an intent that the stakes in such proceedings be limited to the narrow issue at hand.[187]

Offset dispute decisions should be considered res judicata with respect to later offset attempts. Except in the case of very small debts, salary offsets inevitably involve a continuing deduction from a stream of future paychecks.[188] It therefore seems appropriate to view future salary deductions as inherently implicated in any salary offset dispute, and to treat the result of the dispute proceeding as res judicata with respect to future salary offsets for the same debt.

Administrative offsets pose a more difficult question since it is sometimes reasonable to view separate offsets with respect to the same debt as distinct occurrences. Suppose debtor X owes $1 million to agency A. In 1987 X becomes entitled to a $100,000 payment from agency B, and agency A attempts to offset the money. Then, in 1989, X becomes entitled to a $50,000 payment from agency C. At the time of its 1987 decision to collect by offset, agency A may not have known about the 1989 payment; indeed, X's entitlement to it may not have yet come into being.

Despite this possibility, it seems appropriate to treat the initial offset dispute decision as res judicata with respect to subsequent administrative offsets. The debtor suffers no deprivation in terms of procedural quality, since the effect of res judicata would be simply to deprive the debtor of a second chance at the same procedures provided in connection with the initial offset. Res judicata status would increase the stakes at issue in the initial dispute proceeding, but the stakes would still be relatively limited, since they would be confined to potential future offsets.

Most importantly, the policies favoring finality of decision and non-duplication of procedures seem particularly strong in connection with repeated offset attempts. It seems highly desirable in efficiency terms for agencies to be able to complete the DCA offset despite procedures and, assuming that the claim has been established as valid, proceed to offset against payments when and where possible, without having to repeat the same procedures for each offset

opportunity. Conversely, a debtor who has successfully disproved a claim in connection with one offset attempt should not have to fear future offset attempts.

This position appears consistent with the DCA offset provisions. 31 U.S.C. Section 3716(a) states that administrative offset can occur "only after giving the debtor. . . review. . . of the decision of the agency related to the claim." The use of the word "after," and the reference to review of a decision "related to the claim," as opposed to the offset, seem consistent with allowing review to occur once, in connection with the establishment of the claim, as opposed to repeating review in connection with each offset attempt. Other language of section 3716(a) is similarly at worst ambiguous with respect to the recommended position. The notice requirement of section 3716(a)(1) refers to notice of ". . . the intention of the head of the agency to collect the claim by administrative offset. . . ." Conceivably this provision requires notice of intent to offset particular funds, but the language also seems consistent with giving notice of the agency's general intention to collect by offset when and where possible.

A related point is that agencies should be able to harness existing claim dispute procedures (for example those established in connection with government contracts and many grant programs) for purposes of compliance with the DCA. This position is taken by FCCS section 102.3(b)(2)(ii) which provides that,

> In cases where the procedural requirements. . . have previously been provided. . . in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, the agency is not required to duplicate those requirements before taking administrative offset.

In general, existing procedures are tied to the establishment of the claim, and not to a particular collection attempt.[189] Therefore, to use them as the "opportunity for review within the agency" for DCA purposes, it must be possible for the DCA "opportunity for review" to occur only once in connection with any one claim. Requiring DCA review to be repeated for each offset attempt would make it considerably more difficult, if not impossible, to integrate DCA offset procedures with other claim dispute resolution mechanisms.

Collateral Estoppel Effect in Subsequent Court or Administrative Proceedings

Suppose an agency attempts to collect a $10,000 debt by offset and the decision maker in a dispute proceeding decides there can be no offset because the debtor has a legal defense to payment. Assuming that the decision is binding only with respect to offset, the agency sues the debtor in court to attempt to collect. Can the debtor assert the earlier decision on the specific issue of the validity of the defense in the court proceeding, under the doctrine of collateral estoppel? Note that a similar issue could arise in reverse. If the government won with respect to the offset but nevertheless sued the debtor in court (e.g., because the offset amount was inadequate to pay the debt), would the debtor be precluded from relitigating the alleged defense to payment?

A variety of reasons militate against giving collateral estoppel effect to offset dispute decisions and, while no single one is definitive, taken as a whole they suggest giving no collateral estoppel effect. First, the reasons given above

for not treating the offset dispute decision as res judicata with respect to the debt are also relevant to the collateral estoppel issue. In addition, courts have generally been more willing to give collateral estoppel effect to administrative proceedings to the extent that the procedures followed are similar to those of courts, although how strictly courts apply this principle varies widely.[190] Procedures in offset disputes differ quite substantially from court procedures. This is particularly true with respect to the bureaucratic review procedures often used in administrative offset cases, but is also true of the relatively informal forms of adjudicatory style review typically used in connection with salary offset. A related point is that incentives for parties to fully litigate with respect to an offset (which may be for an amount smaller than the debt) will often be smaller than with respect to a subsequent proceeding on the entire debt.[191]

The factors militating against collateral estoppel will also be present with respect to subsequent administrative proceedings with respect to the debt, although the difference in procedural quality may be smaller, or, in some instances, nonexistent. With respect to subsequent offsets, the question of collateral estoppel should not arise if the results of offset dispute procedures are viewed as res judicata for all offsets in connection with the original claim. In any case, the arguments favoring res judicata with respect to future offsets would also apply to collateral estoppel.

Informal Collection Activities

It was suggested above that the res judicata effect of decisions in offset disputes should be confined to offsets. Therefore, a decision that a debt was not valid would not legally obligate agencies to refrain from subsequent collection activities. This conclusion is consistant with the position of the Comptroller General in the J. Michael Tabor case, described above.

Arguably, however, in many instances agencies should voluntarily abide by decisions in offset disputes concerning the validity or magnitude of underlying debts, and restrict their collection activities accordingly. The reasons for doing so are to maintain an appearance of fairness and avoid the need for (alleged) government debtors to repeatedly reargue their positions. These considerations seem most compelling with respect to private individuals. At the same time, debts owed by private individuals are likely to be relatively small, so the cost of acquiescing in offset dispute decisions is likely to be small. This suggests that government agencies should, except in unusual circumstances, conform to offset dispute decisions with respect to underlying debts where the debtor is an individual and the debt is relatively small. A similar policy should be followed with respect to non-individual debtors, but the presumption in favor of conforming to offset dispute decisions could appropriately be weaker. One circumstance in which the presumption in favor of conforming may be rebutted is where proceedings with respect to the validity of a debt other than an offset dispute proceeding either have occurred or are expected to occur. In such circumstances any expectation concerning the finality and exclusiveness of the offset dispute proceeding would be greatly reduced.

One difficulty with this proposed policy is that there is no general authority on the part of government agencies to waive debts owed to the government.[192] The Federal Claims Collection Act authorizes agencies to terminate collection efforts on debts up to $20,000, but only for specified

reasons, not including general fairness considerations.[193] On the other hand, agencies are presumably not required to collect debts that are not owed.[194] Agencies could perhaps adhere to the suggested policy consistently with the Claims Collection Act by adopting decisions in offset cases as the agency's determination with respect to the underlying debt, unless there is some other more authoritative determination with respect to the debt already in existence.

VII. Relationship of the DCA to Offsets in Government Procurement Contracts

As noted previously, perhaps the heaviest use of administrative offset to collect debts has been in connection with debts arising out of government contracts. This has been true since long before the adoption of the DCA. Disputes concerning government contracts for the procurement of goods and services are governed by the Contract Disputes Act (CDA) of 1978,[195] together with relevant provisions of the Federal Acquisition Regulation (FAR),[196] individual agency regulations,[197] and a body of specialized judicial and administrative case law.[198] While the CDA and FAR are not strictly incompatible with the provisions of the DCA and FCCS concerning offset procedures, the mesh between the two bodies of law is at best unclear.[199] The Justice Department and attorneys for the Department of Defense have taken the position that provisions of the DCA on administrative offset procedures do not apply at all to disputes covered by the CDA.[200] There has been litigation on the issue, but no definitive court decision. The Justice Department has also given consideration to introducing legislation to exclude government procurement contracts from the coverage of the DCA offset provisions.[201]

It is, in fact, possible to identify at least four possible classes of situations in which the issue of the interaction of the DCA and CDA can arise, although some classes are of greater practical significance than others. The classes are:

1. Inter-contract offset. Suppose a private party provides goods or services to the government pursuant to contract A. Suppose also that as a result of its work on contract A, the contractor allegedly owes money to the government. For example, the government might allege that damages are owed for a breach of warranty. The contractor later properly performs work pursuant to contract B, and submits an invoice for payment. The government attempts to collect the debt from contract A by offsetting against money owed on contract B.

2. Intra-contract withholding of payment. The government withholds full payment on a contract, alleging that the contractor failed to properly perform. It is questionable whether this should be considered an offset, but some contractors have argued that it is because the government is offsetting the amount of its alleged damage against the contract price.

3. Non-contract debt, contract offset. A private party incurs a debt to the government in a transaction not involving a procurement contract covered by the CDA. The government attempts to collect by offset against money due the party on a properly performed procurement contract. The LTV case, described above, is an example.[202]

4. Contract debt, non-contract offset. The government attempts to collect a debt arising out of a procurement contract by offsetting against a

payment due to the debtor for reasons not connected with a procurement contract.

Of the four classes of possible cases, cases 1 and 2 are by far the most common in practice. In addition, the government does not at present appear to be taking the position that cases 3 and 4 are excluded from the application of the DCA offset provisions. The discussion below will therefore focus primarily on cases 1 and 2, especially case 1, which is at the center of current controversy.

A. Current State of the Law

1. Application of DCA to Contract Disputes

Neither the DCA administrative offset provisions, nor the Federal Claims Collection Act generally, contain language specifically including or excluding coverage of debts arising out of government procurement contracts. There appears to be no explicit legislative history on the subject either. Thus, the basic case for applying the DCA to government contract debts is that the plain language of the DCA applies to debts in general, and there is no statutory basis for excluding contract debts. This position is reinforced by the fact that the DCA explicitly excludes certain classes of debts, suggesting an intent to cover debts not explicitly excluded.[203]

The core of the Justice Department's argument that the DCA offset provision does not apply to government contract disputes is that Congress enacted the 1978 Contract Disputes Act as a comprehensive procedural statute governing contract disputes. According to the Justice Department, the comprehensive nature of the CDA creates a strong presumption that later legislation was not intended to add to CDA procedures. Therefore, the silence of the DCA with respect to transactions covered by the CDA should be viewed as reflecting an intent that DCA procedural requirements not cover such transactions.[204]

There are, as of July of 1987, no court holdings on the application of the DCA to the use of offset in inter-contract offset cases (class 1 in the listing set forth above). There are, however, several decisions of the Armed Services Board of Contract Appeals (ASBCA) holding squarely that the DCA does apply to the use of offset in such cases.[205] The ASBCA relies primarily on the fact that the DCA by its terms applies to government claims across the board, and that it explicitly excludes some forms of offset, but not government contract offsets.[206]

The result has been different in cases involving withholding of payment within the confines of a single contract. Both the ASBCA[207] and the United States Claims Court[208] have distinguished intra-contract withholding from inter-contract offset, on the theory that intra-contract withholding does not involve an attempt by the government to collect a monetary debt within the meaning of the DCA. In the words of the Claims Court, "It is refusal to pay money which [the contractor] has not yet earned. . .; it is not recovery of money [the contractor] owes the government."[209]

While the analysis of intra-contract withholding by the ASBCA and Claims Court has been challenged by some,[210] distinguishing between inter- and intra-contract cases for DCA purposes seems sensible. On its face, inter-contract offset as a practice is essentially equivalent to forms of administrative offset

clearly covered by the DCA (e.g., offset against a subsidy payment to repay an unrelated defaulted loan). In both instances the government is withholding a payment to which a party is clearly entitled but for the party's default in a totally separate transaction. By contrast, in intra-contract withholding there is a connection between the contractor's right to payment (if any) and the government's basis for withholding.[211] The intra-contract case is therefore much less closely analogous to the forms of offset clearly covered by the DCA. Moreover, intra-contract withholding without the DCA procedures is consistent with ordinary commercial expectations. Dissatisfied buyers commonly withhold payment. In private transactions, at least, the law generally sanctions such withholding without the need for prior judicial approval, leaving the burden on the seller to sue for its money if it can persuade a court that it in fact performed as promised.[212]

2. Offset Procedures Under the CDA (assuming, arguendo, that the DCA does not apply)

Section 605(a) of the CDA provides that "All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."[213] A "contracting officer" is defined as "any person who, by appointment in accordance with applicable regulations, has the authority to enter into and administer contracts and make determinations and findings with respect thereto. . . ."[214] In general, with respect to any particular contract there will be a designated contracting officer (CO). (Often there are several with various allocations of responsibility.[215]) The CO acts as the representative of the government in the contract,[216] but also plays a quasi-judicial role with respect to contract claims, whether by the government or the contractor.[217]

A contractor who is unhappy with the decision of a CO may, at the contractor's option, appeal to an appropriate agency board of contract appeals (BCA) or sue the government in the United States Claims Court.[218] In either case, the contractor is entitled to a de novo decision.[219] The CDA gives to agency BCA's authority to take testimony under oath, provide for discovery proceedings, and subpoena witnesses and documents.[220] BCA members must be selected and appointed to serve in the same manner as administrative law judges.[221] Decisions of both BCA's and the Claims Court may be appealed to the United States Court of Appeals for the Federal Circuit.[222]

The CDA makes no mention of collection by offset, and the brief FAR provisions on offset do not spell out the relationship of offset to the CDA dispute provisions.[223] Case law, however, holds that an inter-contract offset must be based on a "claim" against the contractor, thus triggering the CDA requirement for a CO decision regarding the claim before offset can occur.[224] Offset can proceed based on the CO decision even if that decision is being challenged by the contractor in the Claims Court or agency BCA.[225] Thus, while the CDA establishes quite elaborate procedures for the ultimate resolution of contract disputes, the due process available before offset can occur is confined to that entering into the CO decision.

The CDA requires that CO decisions must be in writing, must state reasons for the decision, must inform contractors of their rights under the CDA, and need not include specific findings of fact.[226] No CO decision procedures are otherwise spelled out. The FAR requires the CO to "review" pertinent facts, "secure assistance from legal and other advisors," and "coordinate" with other appropriate government offices. (There are also some requirements concerning

the form and content of the written decision.)[227] Notably absent is an explicit mention of any participation by the contractor. The FAR does seem to contemplate (though not clearly mandate) that there will usually be negotiations and an attempt at settlement between the contractor and representatives of the government before a CO decision is sought.[228] Such negotiations would presumably often provide some degree of informal notice of and opportunity to respond to, government contentions. Moreover, the FAR provision on the content of the CO's decision requires, inter alia, a "statement of the factual areas of agreement and disagreement."[229] This requirement seems to presume that the CO will become familiar with the contractor's position by some mechanism, even though the nature of the mechanism is not spelled out.

Despite the silence, or, at least, ambiguity, of the CDA and FAR, case law appears to hold that the contractor must have some opportunity to present its position before a CO can properly issue a decision on a government claim under CDA Section 6(a).[230] The cases are somewhat cryptic, but clearly lenient, with respect to the form the opportunity must take.

For example, in Chandler Mfg. and Supply, the ASBCA stated that "the contractor must have had an opportunity to express its views or state its position with respect to claims or demands the Government is pursuing. . . ."[231] At the same time, the decision quotes with apparent approval language from a pre-CDA ASBCA decision to the effect that, "The cases do not require or even suggest that the contracting officer must afford the contractor an opportunity to present evidence or to argue the merits of its position at a hearing before a dispute can be said to exist and a decision issued."[232] In Chandler, the ASBCA held that the contractor had a sufficient opportunity to present its position because in the course of negotiations with the government it "was advised of defects and deficiencies in the performance of the pumps [which the contractor had overhauled] and it had an opportunity to comment in detail on each of these statements."[233]

It should be mentioned that there is a mechanism by which contractors can sometimes have offset (and other collection efforts) postponed until they have exhausted their rights under the CDA. FAR Section 32.613(d) provides that the government may agree to defer collection pending appeal. Deferment agreements are discretionary, but the responsible government officials are directed to take into account such considerations as "avoid(ing) possible overcollection" and balancing "the need for Government security against loss and undue hardship on the contractor."[234] By some accounts, the government was historically very free in granting deferred collection agreements, but has been less so in recent years.[235] Some members of the government contracts bar apparently hope that application of the DCA would act as a substitute for, or encourage greater use of, deferment agreements.[236]

B. Effect of DCA Requirements

What would be the affect of applying the DCA administrative offset requirements to government contract offsets. As noted previously, there are four main procedural requirements imposed by 31 U.S.C. Section 3176(a):

(1) Written notice of the type and amount of the claim, the intention of the head of the agency to collect the claim by administrative offset, and an explanataion of [the rights of the debtor under the DCA];

(2) an opportunity to inspect and copy the records of the agency related to the claim;

(3) an opportunity for a review within the agency of the decision of the agency related to the claim; and

(4) an opportunity to make a written agreement with the head of the agency to repay the amount of the claim.

We will begin by focusing on the effect of requirement 3, opportunity for a review within the agency, and then discuss the remaining requirements.

One possible interpretation of requirement (3) is that an additional opportunity for review in connection with an offset attempt would have to be added to the CDA procedures. However, as discussed previously, the language of the DCA would appear to permit existing procedures to be harnessed for DCA purposes, if they otherwise meet the requirements of the act.

Assuming that agencies can employ CDA procedures for DCA purposes, would the requirements for review within the agency require completion of the full range of CDA review procedures, including a decision by a BCA, before offset can occur?[237] The answer should be no. The DCA language does not specify any particular form of review, and, as argued above, probably contemplates a form of reasonably quick and informal bureaucratic review. By contrast, a BCA proceeding is a form of adjudicatory style review, and can involve fairly elaborate trial-like procedures.[238] BCA proceedings often take several years until a decision is reached.[239]

The method of complying with the DCA review requirement that would be least disruptive to existing procedures would be to treat the CO's decision on the claim as the "review within the agency." One possible objection is that the CO decision is highly un-independent, since the CO, in important respects, functions as the representative of the agency, and is required by the FAR to consult and coordinate with other agency officials.[240] However, the use of a non-independent decision maker who informally consults within the agency is consistent with a bureaucratic review procedure, and is therefore probably legitimate for DCA administrative offset purposes.

A more difficult question is whether the level of contractor participation in CO decisions is sufficient to permit such decisions to be considered an "opportunity for review" under the DCA. (The question is, of course, made more difficult by the ambiguity of the FAR and contract case law on the subject of contractor participation.) 31 U.S.C. Section 3176(a)(3) does not explicitly require debtor participation as part of a "review," but it seems highly likely that some opportunity for the debtor to present its position was contemplated, given the usual notions of "review" in our legal system. Moreover, the DCA requirements of notice and an opportunity to inspect and copy agency records are presumably for the purpose of enabling the debtor to effectively challenge government contentions as part of the "opportunity for review." Thus, the DCA pretty clearly requires some opportunities for the debtor to state its position, and present evidence and arguments on its behalf. As described previously, the FCCS requires agencies to grant at least a "paper hearing" to the debtor, and, in some cases, an informal oral hearing.[241]

To what extent do existing CDA procedures meet the DCA requirement for a pre-offset opportunity for review? The judgment of several government contracts experts interviewed for this report was that most of the time, but not all of the time, existing procedures probably give contractors a fairly good opportunity to present and defend their position prior to a CO decision on claims against them. This appears to be true for several reasons. First, as noted, the case law requires some opportunity for contractors to present their position. Second, and perhaps more important, the ordinary circumstances of contract disputes make it likely that the contractor will be told of government dissatisfaction and the basis for it, and that there will be discussions and negotiations before a CO decision on a claim materializes.

Assuming that the contractor understands that the government is planning to establish a claim, and that there will be a CO decision which could expose the contractor to offset or other collection efforts, and further assuming that there is an opportunity to present information and arguments, the informal opportunities to present the contractor's case that now commonly exist under the CDA should be considered an "opportunity for review" within the meaning of the DCA. However, because the FAR does not specifically require contractor participation in CO decisions, it is likely that in some number of cases, CO decisions on government claims are issued without procedures that amount to an opportunity for review of the government's position.

Assuming that the CDA CO decision can constitute an "opportunity for review" for DCA purposes, what effect would the other DCA requirements have on existing contract claim procedures? Contractors apparently usually get some notice of the basis for government claims before a CO decision, but the notice almost certainly does not comply with the specifics of 31 U.S.C. Section 3716(a)(1) which requires the notice to be in writing, to specify the intention of the agency to collect by offset, and to explain to the debtor the rights granted by the DCA.[242] Presumably, notice consistent with Section 3716(a)(1) could be given fairly easily, assuming that the notice of intent to collect by offset does not need to specify what particular payment is to be offset against.

Section 3716(a)(2) requires an "opportunity to inspect and copy the records of the agency related to the claim." It does not appear that contractors are regularly given such an opportunity prior to CO decisions,[243] although in the course of negotiations contractors may sometimes be given copies of or advised of the contents of, selected government records. (Records might also be obtained in some cases under the Freedom of Information Act).[244]

The requirement to produce records may be more burdensome for claims arising out of procurement contracts than for some other classes of claims. For example, the records relating to a defaulted debt might consist of as little as a packet of loan documents, together with a few pages of ledger cards or computer printouts recording payment history and collection efforts. By contrast, consider a hypothetical warranty claim for a piece of high tech military equipment. The total amount of documentation relating in some way to the contract is likely to be massive. Even if records required to be produced were confined to those specifically relating to the warranty claim, they might include numerous maintenance records and accident reports from a variety of locations, together with engineering studies, etc. Most government contract claims would probably involve less complicated records than this hypothetical, but would still involve more complicated records than a simple unpaid loan.

While record production burdens would probably be greater for procurement contract claims than for many other claims, it is not clear that they should be viewed as overly burdensome. Presumably, the government would have had to identify and pull together relevant documentation in order to establish the scope of its claim in the first place. In addition, the FAR requires the contracting officer to "review the facts pertinent to the claim," before issuing a decision.[245] Presumably this would require some assembly of relevant documents. Finally, under existing procedures the contractor will eventually have access to most relevant documentation since BCA and Claims Court procedures allow for discovery.[246]

The final DCA requirement is that the debtor be given "an opportunity to make a written agreement. . . to repay the amount of the claim." There is no precise equivalent in the CDA or FAR. However, existing contract procedures may often be at least roughly consistent with the DCA requirement. Several FAR provisions contemplate, though they do not appear to require, that there will be settlement negotiations as part of the process of collecting contract debts.[247]

Some contractor representatives have expressed the view (or at least the hope) that the DCA requirement concerning a written agreement to repay the claim could be interpreted as a directive to contracting agencies to make greater use of agreements to defer collection pending litigation of contract disputes.[248] However, it seems more likely that Congress had in mind written agreements in final settlement of a claim, as opposed to contingent agreements by a contractor to repay if and when it loses in litigation. Certainly the language of 31 U.S.C. Section 3716(a)(4) does not refer to contingent agreements to repay; and there is no legislative history, or context from other DCA provisions, suggesting that Congress had contingent deferred collection agreements in mind.

C. What is at Stake

For the ultimate resolution of a dispute over a claim, the CDA clearly gives contractors more elaborate procedural protections than does the DCA. The significance of the DCA, if any, concerns timing. DCA procedures must be completed before offset occurs, while the major CDA procedures — BCA or Claims Court proceedings — can occur after offset.

The effect of delay is mitigated to the extent that the party forced to wait for its money pending litigation can obtain interest. In general, the government can obtain interest on contract claims.[248a] In principle, a contractor should be able to obtain interest on money improperly withheld by the government; and FAR section 32.613(l) appears to provide for this.[249] There is, however, a procedural complication which may cause difficulties for some contractors. Several cases have held that under the language of the CDA, contractors can only obtain interest on claims they themselves bring against the government.[250] Under these cases, a contractor who successfully contests a claim brought by the government is entitled to the return of money improperly collected or withheld pursuant to the claim, but is not entitled to interest. The cases would appear to allow the contractor to obtain interest by following the CDA procedures for pursuing its own claim against the government for the improperly withheld money, in addition to contesting the government's claim,[251] but the law in this area could probably use some clarification.

Even assuming the contractor can ultimately obtain interest, the ability to offset prior to completion of litigation clearly gives the government an advantage for purposes of settlement negotiations. Offset before CDA procedures are completed can be a particularly serious problem for smaller contractors with potential cash flow problems. (Under the standards set forth in the FAR, these companies may be more likely to obtain deferred collection agreements, though it is not clear if this is occurring in practice.)

It appears from the discussion in the previous section that the government could comply with the DCA and still retain the timing advantages of existing offset procedures by simply modifying the CO decision process to comply with the DCA offset requirements. Moreover, it appears that the required modifications would be relatively modest. Why, then, has the government taken the position that the DCA offset provisions do not apply to procurement contracts?

In part the government position appears motivated by fears of "worst case" scenarios. Examples of such possibilities would include an interpretation of the DCA as requiring a separate offset dispute proceeding (or, worse yet, a separate proceeding with relatively formal procedures) in addition to all existing CDA proceedings, or an interpretation requiring completion of all CDA procedures, before offset can occur. Short of worst case possibilities, some government lawyers have expressed concern that efforts to draft DCA regulations in ways that did not seriously interfere with existing procedures would inevitably give rise to extensive litigation over the regulations. Finally, there is concern that even modest additions to existing procedures would add some burdens, and increase possibilities for delay and error.

D. A Suggested Approach

There are various approaches possible to meshing DCA offset procedures with CDA procedures in government contract cases. Whatever approach is adopted should be consistent with two general principles.

1. Before inter-contract offset can occur, the contractor should have notice of the government's claim and the basis for it and some opportunity to present its position, including informal presentation of arguments and evidence.

2. Measures to comply with 1 should disrupt existing use of offset and CDA procedures to the minimum extent possible.

Principle 1 is motivated in large part by a judgment that before the government takes a relatively coercive step like offset, there should be some check on the correctness of the basis for the action. Such concern is presumably the basis for the DCA offset provisions. It is likely that Congress did not focus on how the DCA procedures would apply to procurement contracts. However, even if the specifics of the DCA do not mesh well with the CDA, the broader principle of pre-offset review can appropriately be abstracted from the DCA and applied to all use of offset, including in contract cases.

This position is reenforced by the due process discussion, above, which suggests that government collection by offset probably involves a Fifth Amendment taking, requiring some degree of due process. Post - Matthews v. Eldridge law on what process is due is too unclear to confidently state that pre-offset review would necessarily be required, although at least some case law

outside the contracts area requires review prior to collection by offset.[252] More generally, the existence of a Fifth Amendment interest supports pre-offset review as a matter of policy even if it is not strictly required as a matter of law.

Principle 2 is motivated by several considerations. First, the CDA is in place as a comprehensive system for dealing with contract claims, and it seems undesirable to unnecessarily duplicate or disrupt CDA procedures. In addition, the opportunity to employ offset expeditiously is valuable to the government, both to deal with risks of contractor insolvency and to create incentives for good performance by contractors and satisfactory settlement of claims.

It is likely that the two principles set forth above could be achieved either within or outside the framework of the DCA. Without attempting to draft specifics, two such approaches will be sketched.

Assuming that the DCA were to be applied to procurement contracts, the two principles could be complied with by employing the CO decision as the "review within the agency" required by the DCA, but modestly beefing up the CO decision procedure to ensure it complied with the DCA requirements. Based on the discussion above, CO decision procedures could probably be modified in this way by means of agency regulations, most likely by amending the FAR. However, if this approach were used, certain additional steps could be taken to alleviate concerns of government attorneys that the DCA might ultimately be interpreted to require more time consuming and elaborate procedures before offset could occur. One possibility would be to amend either the DCA or the FCCS to state that a decision by a CO can constitute a "review within the agency" in an offset case involving a procurement contract. Amending only the FCCS would, of course, not have the same authority as amending the statute. It could nevertheless be expected to have some influence over a court interpreting the DCA.

An alternative approach to achieving the two principles would be to amend the DCA offset provisions to provide that they do not apply to offsets where the claim and the offset money both arise out of procurement contracts covered by the DCA. This, of course, would be the most decisive way of minimizing the risk of serious disruption of CDA procedures, but would leave the question of ensuring adequate pre-offset due process.

As noted previously, it is likely that existing CO decision practices provide de facto notice and opportunity to assert the contractor's position a high percentage of the time. However, such provision should be more systematic if CO decisions are to be the basis for inter-contract offset. Probably the best approach would be to amend the FAR to make clear that before a CO decision is issued, the contractor must be given reasonable notice of the government's position and a reasonable, though informal, opportunity to present information and arguments to the CO. It should be noted that some government contract experts feel that the FAR should spell out the requirements for CO decision procedures more fully as a matter of good practice, even apart from concerns about offset.[253]

There are some possible approaches to achieving principle 2 aside from amending the FAR. One would be for Congress, in amending the DCA to exclude procurement contracts, to specify that some pre-offset notice and informal opportunity for review must be granted within the CDA framework. As a

practical matter this would probably lead to amendment of the FAR to comply with the statutory requirement. Another approach would be for Congress to amend the DCA without imposing statutory procedural requirements, but specify in the legislative history that it was proceeding on the understanding that the CDA, as interpreted by relevant case law, required a pre-offset CO decision, including a meaningful opportunity by the contractor to present its position.

A satisfactory resolution of the issue of pre-offset procedures in contract cases could be achieved under either of the two general approaches outlined, and the ultimate practical result would be very similar. Of the two approaches, the second — excluding procurement contracts from the DCA and providing any needed procedural protections entirely within the CDA and FAR framework — is probably preferable. Doing so is most consistent with the existence of the CDA as a comprehensive system for handling government contract disputes. It is also analogous to the approach taken in the DCA to offsets under the Social Security Act. The DCA offset provisions do not apply to such offsets,[254] presumably in part because there already exist elaborate procedures for dealing with disputes concerning disability, welfare, and other payments under the Social Security Act.

The discussion so far has focused on inter-contract offsets (case 2 in the listing at the beginning of this section). What about the other possible scenarios for interaction of the DCA and CDA? Suggested approaches are as follows:

Case 1, intra-contract withholding. For reasons stated previously, such withholding should not be treated as offsets within the meaning of the DCA.

Case 3, offset of contract payments to pay a non-contract claim. Such cases should be covered by the DCA. Since the government's claim does not arise out of a procurement contract, the CDA would not apply to the government's initial establishment of its claim. Thus, the CDA would apparently impose no procedural preconditions on the offset. (Following offset of a contract payment, the contractor might bring its own CDA claim for nonpayment, but this would occur after the offset.)

Case 4, offset of non-contract payment to pay contract based claim. Such cases should probably be treated like inter-contract offset cases, since the relevant dispute will ordinarily deal with the claim, which will be subject to CDA procedures. Thus, the same issues of possible duplication, delay, etc., which arise in connection with inter-contract offsets arise here, and should be treated similarly.

It should finally be noted that issues of meshing different procedural schemes, analogous to those arising in connection with procurement contracts, can also arise in other areas of administration where offset is used, most notably in connection with government grants. Agency grant dispute procedures differ widely in nature and quality[255] and it was not possible to systematically explore the mesh between grant prrocedures and the CDA for purposes of this report. However, the great variation in grant dispute procedures suggests that grant offsets should remain covered by the DCA to ensure that minimal pre-offset procedural protections exist. At the same time, our discussion of the mesh between the CDA and DCA suggests that possibilities may exist in many instances for integrating or partially integrating DCA offset procedures and existing grant dispute procedures. FCCS Section 102.3(b(2)(ii) would appear to encourage such integration as well.

Recommendations

1. The framework for offset dispute resolution established by the DCA, FCCS, and OPM Pay Administration Standards, when suitably implemented, appears to make possible reasonably adequate evaluation of disputes without seriously impeding collection of general government debts. No major changes are needed.*

2. Agencies should take steps to enhance the accessibility of offset dispute procedures to debtors with limited ability to present a case in writing or otherwise cope with adjudicatory procedures. These steps may appropri ately be confined to measures that are inexpensive and do not significantly interfere with efficient collection activity. Examples might include follow-up telephone calls to debtors with vague or inadequate written submissions, review of agency records to see if they support debtor allegations, and use of telephone hearings. In connection with salary offset disputes, these steps should, to the extent feasible, be taken by independent hearing officials (or persons associated with them) as well as by collection staff. Experience should be monitored to see if measures to enhance accessibility of the dispute process in fact result in more debtors asserting meritorious defenses.

3. As a matter of law, the binding effect of offset dispute decisions should ordinarily be confined to agency use of offset. In addition, the collateral estoppel effect of determinations made in offset dispute proceedings should be limited.

   However, as a matter of policy, agencies should ordinarily conform their overall collection activities to determinations with respect to the underlying debt made in offset dispute proceedings. A presumption in favor of doing this should be particularly strong where the debtor is an individual and the size of the debt is small. The presumption should be weak where the offset dispute proceeding is only one of several procedural forums in which determinations with respect to the debt are being made.

   To permit implementation of this policy recommendation agencies (and possibly the GAO) may in some cases need to take administrative steps to adopt offset dispute determinations with respect to debts as the agencies' position with respect to them.

4. The procedures applicable to the use of administrative offset to collect claims arising out of government procurement contracts should be clarified. The procedures adopted should be consistent with two principles:

   a. Contractors should be entitled to notice of proposed government claims and the basis for them, and an opportunity to present their position and the basis for it, before offset can occur. The notice and opportunity to be heard could be highly informal, so long as they were meaningful.

* However, this study did not obtain sufficient information to permit a recommendation as to whether DCA procedures are appropriate for routine pay adjustments.

b. There should be minimum disruption or duplication of existing contract claim and collection procedures. In particular, the government should be able to proceed with offset based on the contracting officer's decision on a government claim pursuant to the Contract Disputes Act, provided that the contracting officer's decision complies with principle (a).

These two principles could be achieved in a variety of ways. The preferred approach would be to amend the Debt Collection Act provision on administrative offset to exclude government procurement contracts covered by the Contract Disputes Act, while at the same time amending the Federal Acquisition Regulation to make clear that contractors must be given informal notice and an opportunity to be heard before a contracting officer's decision on a claim can serve as the basis for offset.

Alternatively, regulations could be adopted to bring the procedures for decisions by contracting officers on government claims into conformity with the requirements of the Debt Collection Act for administrative offset procedures. If this were done, it might also be useful to amend the Federal Claims Collection Standards or the Debt Collection Act to make clear that a decision by a contracting officer under the Contract Disputes Act can serve as the pre-offset "opportunity for review" required by the Debt Collection Act.

Withholding of funds in connection with a single contract, where final payment has not yet occurred, should continue to be governed by existing law.

Footnotes

1. P.L. 37-365, October 25, 1982.

1a. S.R. 97-378.

1b. Id.

1c. DCA §13.

1d. DCA §11.

1e. DCA §2, 3.

1f. DCA §8.

1g. Interviews with collection officials at SBA, Department of Education, and HUD.

1h. DCA §5(a)(2), 10.

2. DCA §5, codified at 5 U.S.C. §5514.

3. See U.S. General Accounting Office, Principles of Federal Appropriations Law (First Edition, 1982) at 11-198, 199 (describing pre-DCA law).

4. U.S. General Accounting Office, Debt Collection, Billions Are Owed While Collection and Accounting Problems are Unresolved (May 1986) (hereinafter, GAO Debt Collection Report) at 86; interview with attorney from HUD office of general counsel.

5. Id.; interview with official of HUD Title I program.

6. Interview with official of HUD Title I program.

7. Interview with SBA collection official.

8. GAO Debt Collection Report at 107.

9. Id. at 96.

10. Interview with HUD attorney and Department of Education collection official.

11. GAO Debt Collection Report at 76.

12. Interviews with HUD attorney and Title I official.

13. Interview with SBA ALJ.

14. GAO Debt Collection Report at 48.

15. 31 U.S.C. §3701(a)(1).

16. E.g., United States v. Munsey Trust Co., 332 U.S. 234 (1947).

17. DCA §10, codified at 31 U.S.C. 3716.

18. 1 Riley, Federal Contracts, Grants & Assistance 75 (1983).

19. Interview with HHS collection official; U.S. House of Representatives, Committee on Government Operations, Failure of Federal Departments and Agencies to Collect Audit-Related Debts (House Report 97-727, August 12, 1982) at 11-12 (criticizing use of offset as standard method of collecting audit-related debts from grantees).

20. Interviews with HUD attorney and collection officials at Departments of Education, HHS, and Labor.

21. 1 Riley, supra note 18 at 77.

22. See 4 C.F.R. §102.4, Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

23. See e.g., Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chic. L. Rev. 739 (1976).

24. See, e.g., cases discussed infra at notes 123-133.

25. This categorization of procedures was inspired in part by Professor Mashaw's distinction between "administration" and "adjudication" as methods of decision making. See, e.g., J. Mashaw, Due Process in the Administrative State 224-238 (1985); J. Mashaw, Bureaucratic Justice 25-34 (1983) (parallel distinction between "bureaucratic rationality" and "moral judgment").

26. 5 U.S.C. §5514(a)(2)(B) (salary offset); 31 U.S.C. §3716(a)(2) (administrative offset).

27. See, Verkuil, supra note 23 at 752-756 (contrasting adversary and investigatory procedures), 760 (listing possible components of due process); J. Mashaw, Bureaucratic Justice 88-97 (1983) (contrasting adversary and investigatory procedures in relation to "process values").

28. Price v. SBA, U.S. SBA Office of Hearings and Appeals Docket No. DBT-86-07-28-05 (1986).

29. See the description of SBA procedures below at notes 111-120.

30. See, e.g., 1 K. Davis, Administrative Law Treatise 54 (1983); see generally, J. Mashaw, Bureaucratic Justice (1983).

31. 5 U.S.C. §5514(a)(2)(A).

32. 5 U.S.C. §5514(a)(2)(B).

33. 5 U.S.C. §5514(a)(2)(C).

34. 5 U.S.C. §5514(a)(2)(D).

35. 5 U.S.C. §5514(a)(2).

36. 31 U.S.C. §3716(a).

37. Id.

38. See, e.g., Edles, The Hearing Requirement in the 1980s, 31 Fed. Bar News & Journal 134.

39. Sniadach v. Family Finance Corp. 395 U.S. 337 (1969).

40. See Senate Report No. 97-378 at 11-12.

41. Supra note 3.

42. 5 CFR Part 550.

43. 4 CFR Parts 101-105.

44. 5 CFR §550.1104; 4 CFR §102.3(a).

45. 5 CFR §550.1104(g)(2).

46. 5 CFR §550.1104(g)(3).

47. 5 CFR §550.1104(g)(2).

48. See 49 Fed. Reg. 8889, 8891 (March 9, 1984), citing 442 U.S. 682 (1979).

49. Infra, text at note 129.

50. 5 CFR §102.3(c)(6). The FCCS also state that an agency need not provide for oral hearings on a case-by-case basis in collection systems where issues of credibility or veracity would rarely arise. 5 CFR §102.3(c)(2).

51. 5 CFR §102.3(c)(1).

52. 5 CFR §102.3(c)(3).

53. E.g., 22 C.F.R. §213.6 (Agency for International Development administrative offset regulations).

54. 34 CFR §31.4(a).

55. 34 CFR §31.4(b).

56. 34 CFR §31.4(b)(2),(3).

57. 34 CFR §31.4(d).

58. 34 CFR §31.4(e).

59. 34 CFR §31.5.

60. 34 CFR §31.6(a).

61. 34 CFR §31.6(b)(1).

62. 34 CFR §31.6(b)(2).

63. 34 CFR §31.6(c)-(f).

64. 34 CFR §31.7(b).

65. 34 CFR §31.9(a)(1).

66. Interview with Department of Education collection official.

67. 34 CFR §31.9(a)-(c); 34 CFR §31.10.

68. 34 CFR §31.9(e)(2)(i).

69. 34 CFR §31.9(e)(1)(i).

70. For a discussion of the danger of the later phase of a multi-phase review system displacing earlier phases, in the context of social security disability proceedings, see J. Mashaw, Bureaucratic Justice at 190.

71. Oral hearings may have other potential functions; for example, enhancing parties' sense of participation, or encouraging decision makers to empathize with persons affected by their decisions. Some of these effects may not require an oral evidentiary hearing, however. The case law appears to have emphasized the truth-finding value of oral evidence. See infra, text at notes 123-133.

72. See supra, text at note 50.

73. See generally, Goldberg v. Kelly 397 U.S. 254 (1970).

74. There might be occasional exceptions; for example, if there were a dispute about whether certain information was communicated to the Department.

75. 34 CFR §31.11(a)(1).

76. 34 CFR §31.11(b).

77. 34 CFR §31.11(a)(3).

78. 16 CFR Part 433; Hudak & Carter, The Erosion of the Holder in Due Course Doctrine: Historical Perspective and Development -- Part II, 9 U.C.C.L.J. 235 (1976).

79. Id.

80. 34 CFR §31.12.

80a. 34 CFR §31.12(3),(4).

80b. 34 CFR §30.20-30.31.

80c. 34 CFR §30.24.

81. 34 CFR §30.24(e).

82. Comment of Department of Education official at September 1986 meeting at ACUS.

83. 34 CFR §30.25(a),(b).

84. 34 CFR §30.25(c).

85. 34 CFR §30.26.

86. 34 CFR §30.26(c)(3).

87. Interview with HUD attorney.

88. Salary Offset Hearing Procedures (SOHP) §1.

89. SOHP §7(a).

90. SOHP §6.

91. SOHP §11.

92. SOHP §13.

93. SOHP, §15.

94. Conversation with HUD ALJ. See opinions in case nos. HUDALJ 85-20-OA; HUDALJ 85-1-OA.

95. SOHP §16.

96. SOHP §17(b).

97. SOHP §17(c),(d).

98. Conversation with HUD ALJ.

99. SOHP §18, 19.

100. 24 CFR §17.109.

101. Interview with HUD attorney.

101a. 24 CFR §17.108.

101b. 24 CFR §17.109(b).

101c. 24 CFR §17.108(a).

101d. 24 CFR §17.109.

102. 40 CFR §30.15(b),(c), 52 Fed. Reg. 267, Jan. 5, 1987.

103. 40 CFR §30.15(b)(2).

104. 40 CFR §30.15(b)(3).

105. 40 CFR §30.15(n)(1).

106. 40 CFR §30.15(n)(3).

107. 40 CFR §30.15(m)(3)(vi).

108. 13 CFR §140.4(b), 140.5(b).

109. 13 CFR §140.4(b)(2).

110. 13 CFR §140.4(b)(4)(C).

111. 13 CFR §140.4(b)(4)(D), 140.5(b)(4).

112. 13 CFR §134.2(a)(7).

113. 13 CFR §134.1(a),(c),(d).

114. 13 CFR §134.29.

115. 13 CFR §134.29(b).

116. 13 CFR §134.38.

117. 13 CFR §134.19(b).

118. 13 CFR §134.28.

119. 13 CFR §134.24.

120. 13 CFR §134.32(a)(3).

121. Otherwise, the recipient would not have a sufficiently clear interest in a payment for the payment to be a meaningful offset target.

122. See generally, Steinberg, Federal Grant Dispute Resolution, in 1 Administrative Conference of the United States Recommendations and Reports 137, 194 (1982) and sources cited therein. See Eguia v. Tompkins, 756 F.2d 1130, 1138 (1985) (offset by Texas County against final paycheck of justice of the peace); Atwater v. Roudebush, 452 F. Supp. 622, 626-627 (1976) (offset against back wages and retirement benefits of retiring federal employee); but cf. Wisdom v. Dept. of Housing and Urban Development, 713 F.2d 422, 425 (1983) (offset against retirement benefits of retiring federal employee; postdeprivation hearing adequate since relevant property was not available to employee at time of offset).

123. 424 U.S. 319 (1976).

124. 424 U.S. 319, 336-339.

125. 424 U.S. 319, 350.

126. 424 U.S. 319, 336.

127. To the extent that the need for a pre-offset hearing is the issue, it may be more accurate to say that the private interest is the use of the money.

128. 424 U.S. 319, 342.

129. 442 U.S. 682 (1979).

130. 442 U.S. 682, 684-688.

131. 442 U.S. 682, 697.

132. 442 U.S. 682, 697-698.

133. 424 U.S. 319, 339-340; 442 U.S. 682, 687-688.

134. Interview with Department of Education collection official; GAO Debt Collection Report at 76.

135. Comment of Department of Education collection official at Sept. 1986 meeting at ACUS.

136. See, e.g., U.S. v. Griffin, 707 F.2d 1477, 1478 (D.C. Cir. 1983) (allegations evoke school portrayed in Charles Dickens' Nicholas Nicolby).

137. 34 CFR §682.518, discussed at 707 F.2d 1477, 1481-1485.

138. Interviews with HUD attorney and Title I official.

139. Based on review of the written decisions.

140. 5 U.S.C. §5514(a)(1).

141. The grouping of cases by categories here was done by the consultant, not HUD.

142. Interview with HUD attorney.

142a. Dkt. Nos. HUDALJ 85-26-OA; HUDALJ 85-21-OA; HUDALJ 85-14-OA. In a fourth case, the debtor lost on those issues in dispute, but obtained some relief because the HUD representative concurred with the debtor's contention concerning calculation of interest. HUDALJ 85-21-OA.

142b. HUDALJ 85-1-OA; HUDALJ 85-20-OA.

143. Welch v. SBA, Dkt. No. DBT-86-1-7-1.

144. Hatle v. SBA, Dkt. No. DBT-86-08-15-06.

145. Price v. SBA, Dkt. No. DBT-86-07-28-05.

146. The petitioner stated that he attempted to contact an SBA loan officer during December 25-31, 1985, which strikes one as not the most propitious time period.

147. Kieser v. SBA, Dkt. No. DBT-86-1-14-2.

148. 618 F. Supp. 1528 (D.D.C. 1985), vacated per curium ____ F.2d ____ (D.C. Cir. 1986) (Civ. Action No. 84-01455).

149. 618 F. Supp. 1528, 1529-1530.

150. 618 F. Supp. 1528, 1533-1534.

151. The Department of Education has subsequently issued regulations leading the D.C. Circuit to vacate the District Court order and remand, supra note 148.

152. 618 F. Supp. 1528, 1534.

152a. See, e.g., Riley supra note 18.

153. See Steinberg supra note 122.

154. Based on interview with Department of Education collection official and LTV Education Systems v. Bennett (N.D. Tex CA 3-80-0125-R, 1986).

155. J. Mashaw, Bureaucratic Justice (1983) at 18.

156. HUDALJ 86-18-OA.

157. E.g., HUDALJ 86-05-OA; HUDALJ 86-06-OA; but cf. HUDALJ 86-17-OA (certain expenditures discounted because of failure of debtor to provide evidence were for necessities).

158. HUDALJ 85-26-OA.

159. Conversation with HUD ALJ.

160. SBA OHA Dkt. No. DBT-86-1-7-1; see also Dkt. No. DBT-86-08-15-06 (debtor submitted petition for review containing some general arguments, never followed up); Dkt. No. 86-04-04-03 (salary offset case).

161. Conversation with HUD ALJ.

162. Agencies have employed telephone prehearing conferences to at least some extent. See SBA OHA Dkt. No. DBT-85-11-25-2.

163. Supra, text at notes 134, 138.

164. Interviews with collection officials at HUD, SBA, Department of Education, all with responsibilities for mass consumer lending or credit guarantee programs.

165. A collection official at SBA indicated that in collecting business loans designed to promote regional economic development, efforts would be made to avoid driving companies out of business. An HHS collection official noted that officials of grant programs often failed to be aggressive in the use of offset against low budget community organizations and Indian tribes. A Department of Labor collection official noted that the black lung program was often less than enthusiastic about aggressively collecting mistaken payments made to impoverished, disabled miners. Cf. FCCS §102.3(a)(2) (". . . Agencies may also consider whether [administrative] offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. . . ."). Compare SBA, Consumer Collections -- DLH Loan Servicing (Standard Operating Procedure Section 50 No. 52, Sept. 10, 1985) at 7 ("Personnel charged with servicing disaster home loans should, throughout their activities, remember the circumstances under which these loans were made and pursue a course of action providing the maximum assistance to the disaster victims within the scope of existing disaster authority consistent with applicable laws, regulations, and procedures.") with Id. at 33 (" Attitude Adjustment. Before a telephone collector begins calling for the day, he should remind himself that his job is to collect money loaned to disaster victims at low interest rates and liberal terms. The taxpayers of this country expect the money to be repaid . . . we must psyche ourselves up so that we convey to the delinquent borrower that same expectation.").

166. Supra note 165.

167. Collection officials might develop expertise in identifying "deadbeats," but any such capacity is likely to raise issues of bias as well.

168. See supra, text at notes 31-48.

169. For evidence that adjudicatory style procedures enhance legitimacy, see Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chic. L. Rev. 739, 752-756 (1976).

170. SBA, Consumer Collections -- DLH Loan Servicing (Standard Operating Procedure Section 50 No. 52, Sept. 10, 1985) at 32-34; Department of Housing and Urban Development, Title I Collection Procedures (Handbook 4740.2, July 1983) at 2-7. See also id. at 3-13 (handling of disputed balances), 3-17 (reference to FTC anti-holder in due course rule as providing debtor with defense to payment); 3-18 (handling of forgery allegations).

171. As is to be expected, discussions of telephone contacts with debtors in agency collection manuals primarily focus on overcoming debtor objections and persuading debtors to pay. See sources cited supra at note 170.

172. Supra, text at notes 54-80a.

173. See, e.g., the discussion of the submissions required from petitioning debtors, supra, text at notes 55, 56.

173a. Thus, the qualified endorsement of bureaucratic review procedures in the text is made specifically with respect to pre-offset proceedings. Where a proceeding will determine whether a debt is owed at all, a different balance of interests may exist and bureaucratic review procedures may be less satisfactory.

174. See, e.g., Steinberg, supra note 122; G. Coburn, The Contract Disputes Act of 1978 (Practicing Law Institute 1982). Cf. Spectrum Leasing Corp. v. US, 764 F.2d 891 (1985) (discussing jurisdictional issues raised by attempt of contractor to assert DCA offset rights in contract dispute). Cf. FCCS §102.3(b)(2)(ii) which provides, "In cases where the procedural requirements specified [for administrative offset disputes]... have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance, the agency is not required to duplicate those requirements before taking administrative offset."

175. This problem would be mitigated but not necessarily eliminated by the FCCS provision quoted supra note 174.

176. No. B-211626, letter dated December 19, 1984.

177. The Comptroller General gave as a third reason for the decision the fact that Tabor's debt was established prior to the offset by a decision of the Comptroller General issued pursuant to the Comptroller General's statutory authority. Id. at 7.

178. Id. at 6.

179. Id. at 5-6.

180. See generally, 4 K. Davis, Administrative Law Treatise 49, 51-55 (2nd ed. 1983); Restatement of Judgments 2d §83; Perschbacher, Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings, 35 U. Fla. L. Rev. 422 (1983).

181. See Restatement 2d of Judgments §83(2).

182. Perschbacher, supra note 180, at 455-458 and sources cited therein.

183. Id.

184. See generally, supra note 180.

185. 5 U.S.C. §5514(a)(2) (salary offset); 3 U.S.C. §3716(a) (administrative offset).

186. See supra note 122. Cf. Restatement 2d of Judgments §83(4)(b) (No preclusive effect if incompatible with "legislative policy that... The tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question.").

187. Restatement of 2d Judgments §83 comment h.

188. The statutory provision speaks in terms of collection "in monthly installments," and also provides, "If the individual retires or resigns, or if his employment or period of active duty otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned." 5 U.S.C. §5514. This language clearly contemplates a continuing stream of salary deductions.

189. See generally A. Steinberg, supra note _____ at §53.03[3][c] (Grant appeals involving cost issues typically arise out of audits).

190. See sources cited, supra note 180.

191. Cf. Restatement 2d of Judgments §83. Illustration 13 (no preclusive effect of decision regarding disability in hypothetical case where initial decision is in expedited proceeding regarding $1000 insurance claim while subsequent proceeding concerns $25,000 pension).

192. GAO, supra note 3 at 11-183.

193. 31 U.S.C. §3711.

194. FCCS §104.3(d) provides that, "Collection action should be terminated immediately on a claim whenever it is determined that the claim is legally without merit."

195. 41 U.S.C. §§601-613.

196. 41 C.F.R. §1 et. seq.

197. E.g.,

198. See, e.g., R. Peacock, The Contract Disputes Act, Five Year Annotation (American Bar Association 1984).

199. See J. Cibinic & R. Nash, Administration of Government Contracts, 862-863 (2d ed. 1986) statutes and regulations "not well coordinated").

200. E.g., Avco Corp. v. U.S., 10 Cl. Ct. 665 (1986); Fairchild Republic Co. v. U.S., Appeal No. 86-1326, Brief for Appellee at 22-34 (hereinafter, Fairchild Brief) (Fed. Cir. Oct. 10, 1986).

201. Interview with Department of Justice official.

202. Supra, text at note 154.

203. 31 U.S.C. §3716(c)(2) provides that, "This section does not apply . . . when a statute explicitly provides for . . . using administrative offset to collect the claim or type of claim involved." See also 31 U.S.C. §3701(d) (excluding Social Security Act and tax claims from coverage of §3716).

204. Fairchild Brief, supra note 200 at 22-34.

205. DMJM/Norman Engineering Co., ASBCA No. 28,154, 84-1 BCA ¶17,226; IBM Corp., ASBCA Nos. 28,821, 29,106, 84-3 BCA ¶17,689.

206. 84-1 BCA ¶17,226 at 85,774-85,776.

207. E.g., A.J. Fowler Corp., ASBCA No. 28,965, 86-2 BCA ¶18,970; Fairchild Republic Co., 85-2 BCA ¶18,047 (1985), aff'd on reconsideration, 86-1 BCA ¶18,608 (1985).

208. Avco v. U.S. 10 Cl. Ct. 665 (1986).

209. 10 Cl. Ct. 665, 667.

210. See, e.g., Avco Corp. v. U.S., Plaintiff Avco's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment Cl. Ct. (April 30, 1986); Conversation with academic expert.

211. The directness of the connection varies. Often, there will be multiple payments scheduled under a single contract, and the government may withhold payment for properly performed work because it has discovered a deficiency in work already paid for. Even in such a case, however, the defective work and the withheld payment both fall within the framework of the same contract.

212. See, e.g., UCC §2-717 (buyers right to deduct damages from price of goods sold).

213. 41 U.S.C. §605(a).

214. 41 U.S.C. §601(3).

215. Interview with government contracts attorney. See, e.g., DoD supplement to FAR.

216. See FAR §1.602-2 ("Contracting officers are responsible for . . . ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.").

217. See J. Cibinic & R. Nash, supra note 199 at 944 (citing case law that CO has obligation to act as an "impartial, unbiased judge" in dealing with disputes).

218. 41 U.S.C. §606, 609.

219 41 U.S.C. §605(a).

220. 41 U.S.C. §610.

221. 41 U.S.C. §607(b)(1).

222. 41 U.S.C. §§607(g).

223. FAR §§32.610, 32.611.

224. See J. Cibinic & R. Nash, supra note 199 at 867.

225. 2 Federal Contract Management, A Manual for the Contract Professional (N. Steeger ed. 1984) at ¶13.07[1] [b].

226. 41 U.S.C. §605(a).

227. FAR §33.211(a).

228. See, e.g., FAR §33.211(a).

229. FAR §33.211(a)(4)(iii).

230. E.g., Space Age Engineering, Inc., ASBCA No. 26028, 82-1 BCA ¶15,766. It should be noted that in its opinion the ASBCA relied heavily, though not exclusively, on a 1st Cir. slip option in Woods Hole Oceanographic Institution vs. U.S., which was subsequently vacated on other grounds. In its published opinion in Woods Hole, the 1st Cir. expressly declined to rule one way or another on the issue of whether under the CDA a CO can issue a decision on a government claim without giving the contractor notice and an opportunity to be heard, which the court described as an "open question." 677 F.2d 149, 156 n. 8 (1st Cir. 1981).

231. ASBCA Nos. 27030, 27031, 82-2 BCA ¶15, 997 at 79,313.

232. Id.

233. Id.

234. FAR §32.613.

235. Interview with partner at major government contracts law firm. Appendix E §612 of the Defense Acquisition Regulation, a predecessor of the FAR, specified that deferred payment agreements should be freely granted. This language is not in the current FAR.

236. Interview with partner at major government contracts law firm.

237. See, J. Cibinic & R. Nash, supra note 199 at 864, which may suggest such an interpretation of the DCA.

238. See generally, Office of Federal Procurement Policy, Proposed Uniform Rules for Boards of Contract Appeals, 44 Fed. Reg. 5219 (Jan. 25, 1979).

239. See G. Coburn, The Contract Disputes Act of 1978, 56 (PLI 1982) ("Ordinarily, a fairly large case may be litigated in an agency board of contract appeals in less than two years . . . ."). According to a government contracts lawyer who was interviewed, cases now usually take over two years. The CDA does provide for a small claims ($10,000 or less) procedure with a time limit of 120 days possible;" and an accelerated procedure (for claims of $50,000 or less) with a time limit of 180 days. Both of these procedures are available at the sole election of the contractor. 41 U.S.C. §§607(b), 608.

240. FAR §§1.602-2, 33.211(a)(1).

241. Supra, text at note 52.

242. See, e.g., DMJM/Norman Engineering, ASBCA No. 28,154, 84-1 BCA ¶ 17,226 at 85,777-778; IBM Corp., ASBCA Nos. 28,821, 29,106, 84-3 BCA ¶ 17,689 at 88,207 (description of facts of cases with respect to DCA notice requirements).

243. Id.

244. See, J. Zengerle & J. McHale, Contracting With the Federal Government: Awards, Protests, and Disputes, 5-10 (Matthew Bender Business Law Monographs No. 16, 1985) (recommends use of FOIA as adjunct to or substitute for other forms of discovery in contract disputes). A private government contracts attorney who was interviewed expressed the view that FOIA is of limited value in contract disputes, in part because of use of FOIA exemptions.

245. FAR §32.211(a)(1).

246. J. Zengerle & J. McHale, supra note 244 at 5-9, 5-13.

247. FAR §32.608.

248. Interview with partner in major government contracts law firm.

248a. J. Cibinic & R. Nash, supra note 199 at 868-871.

249. See J. Cibinic & R. Nash, supra note 199 at 856.

250. E.g., Ruhnau-Evans-Ruhnau Associates v. U.S. 3 Cl.Ct. 217 (1983). See J. Cibinic & R. Nash, supra note 199 at 855.

251. See id.

252. See supra, note 122.

253. Interview with academic expert.

254. 31 U.S.C. §3701(d).

255. See, generally, A. Steinberg, Federal Grant Dispute & Resolution. A report for the Administrative Conference of the United States (1983).