PART I: FOUNDATIONAL CONCEPTS
APPLICABLE TO FEDERAL NONTAX DEBT COLLECTION

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A. APPROPRIATIONS LAW AND THE AFFIRMATIVE DUTY TO COLLECT

I. INTRODUCTION

This section provides a background on how appropriations principles underlie the federal debt collection process and give rise to an affirmative duty to collect. This section also provides an overview of federal common law and constitutional principles that govern federal debt collection, many of which have been codified and expanded upon in statutory law. An understanding of these principles is essential to the practice of federal debt collection law. Finally, this section lays out the history of federal debt collection law.

II. THE RIGHTS AND RESPONSIBILITIES OF AGENCIES COLLECTING DEBTS

A. Appropriations Principles

Appropriations law finds its origins in the United States Constitution, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. CONST. art. I, § 9, cl. 7. In other words, "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)); *see also Reeside v. Walker*, 52 U.S. 272, 291 (1851). Congress' power to make appropriations derives from the Constitution's Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper" for carrying out the powers vested in the government of the United States. U.S. CONST. art. I, § 8, cl.18. Federal law further mandates that appropriations "be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). Thus, unless specifically authorized by statute, an agency cannot use funds for a purpose other than that which Congress specified in legislation. *Id.* Furthermore, under the Constitution's Property Clause, only Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. In interpreting this clause, the Supreme Court has explained that "[s]ubordinate officers of the United States are without [the] power [to release or otherwise dispose of the rights and property of the United States], save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294-95 (1941); *see also United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 538 (1840); *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) ("It seems clear that no officer or agent of the Government is clothed with authority to disburse money belonging in the public treasury without authority to do so.").

In the absence of statutory authority, the principles set forth in the Appropriations and Property Clauses generally require that agencies establish their debts, affirmatively collect their debts, not forgive or waive debts, and charge interest on unpaid debts. *See* U.S. CONST. art. I, § 9, cl. 7 and art. IV, § 3, cl. 2. The term "property" includes the "right" to collect a debt owed to the United States. *See Royal Indemnity Co.*, 313 U.S. at 294-95 (unless Congress gives statutory authorization to forgive debt, an agent of the Government does not have the power to extinguish the right to payment that was constitutionally reserved to Congress). Failing to exercise this

right or waiving this right is akin to disposing of the government's property. *See id.* Only Congress can determine how the government's money should be spent and when the government's property may be disposed. *Id.* Given these constitutional principles, agencies have a duty to attempt to collect their debts.

B. Rights and Responsibilities of Agencies in the Debt Collection Process

In addition to a constitutional duty to collect debts, agencies possess a statutory duty to pursue collection of debts. 31 U.S.C. § 3711(a)(1); *Lawrence v. Commodity Futures Trading Comm'n*, 759 F.2d 767, 772 (9th Cir. 1985) (federal debt collection laws "express a Congressional mandate that agencies play a more active role in the collection of delinquent claims than merely referring them to the Department of Justice"). Collection action must be "undertaken promptly with follow-up action taken as necessary." 31 CFR § 901.1(a).

Agencies are required to maximize recoveries efficiently and cost-effectively. *See* 31 U.S.C. § 3711(a)(3); 31 CFR § 901.10. They are required to "service and collect debts . . . in a manner that best protects the value of the assets." OMB Circ. No. A-129, *Policies for Federal Credit Programs and Non-Tax Receivables*, § IV (revised Jan. 2013). Agencies must weigh the costs of their collection efforts against expected recoveries. 31 U.S.C. § 3711(a)(3); 31 CFR § 901.10. Agencies should use data on the costs of their debt collection efforts and corresponding recovery rates to compare the cost effectiveness of alternative collection techniques. 31 CFR § 901.10. Moreover, where possible, agencies must cooperate with one another in their debt collection efforts. *Id*. § 901.1(c). While agencies are required to pursue debts, the law does not require the duplication of collection activities previously undertaken. *See id*. § 901.1(a).

III. THE COMMON LAW RIGHT TO COLLECT DEBTS

A. The Federal Government's Right to Collect

In addition to the legislatively mandated duty to collect debt, federal agencies have a common law right to collect debt. This is well-recognized in the improper payment context. *See United States v. Lahey Clinic Hosp., Inc.,* 399 F.3d 1, 15 (1st Cir. 2005) ("[I]n the context of recovery of overpayments, the Government has broad power to recover monies wrongly paid from the Treasury, even absent any express statutory authorization to sue."). Federal courts have long recognized that "[t]he Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid." *United States v. Wurts*, 303 U.S. 414, 415 (1938); *see also Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d 269, 275 (7th Cir. 1991) (an agency "has statutory and common law authority" to collect debts, including overpayments); *LTV Educ. Sys., Inc. v. Bell*, 862 F.2d 1168, 1175 (5th Cir. 1989) ("It is well established that the government, without the aid of a statute, may recover money it mistakenly, erroneously, or illegally paid from a party that received the funds without right."); *Collins v. Donovan,* 661 F.2d 705, 708 (8th Cir. 1981) ("The government has a recognized common law right to recover overpayments."); *Bank One v. United States*, 62 Fed. Cl. 474, 481 (2003) ("The government's right to recover payments made by mistake is rooted both in the Constitution of the United States and in the Anti-Deficiency Act, and is well established in case law. This money belongs to the people and taxpayers of the United States."); *Fansteel Metallurgical Corp.*, 172 F. Supp. at

270 (observing that when a payment of public money is erroneously or illegally made it is in direct violation of the Property Clause and that it is the duty of the Government to sue for a refund).

(1) Evolution of Case Law

The Supreme Court has long recognized that Congress may delegate its authority to compromise or waive a debt through statutes. *See, e.g.*, *Royal Indem. Co.*, 313 U.S. at 294; *United States v. Burchard,* 125 U.S. 176, 180-81 (1888); *Hart v. United States*, 95 U.S. 316, 318 (1877); *Gratiot*, 39 U.S. at 537-38. Without statutory authorization from Congress, however, a debt cannot be extinguished. *See Royal Indem. Co.*, 313 U.S. at 294. While federal agencies cannot dispose of a debt without statutory authority, they do have common law authority to bring suits to enforce contracts, recover overpayments, and otherwise protect Government property. *See United States v. Bank of Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841) ("The right to sue is independent of statute . . . .").

Early cases affirming the Government's right to recover debts involved erroneous or unauthorized government expenditures. *See, e.g.*, *United States v. Burchard,* 125 U.S. 176, 180-81 (1888) (the Government has the right to recover mistaken overpayment to naval officer); *Hart*, 95 U.S. at 318 (the Government has the right to recover unpaid alcohol tariff because the officer had no authority to dispense with the tariff requirement). Due to the constitutional requirement that federal officers spend federal funds only with statutory authorization, courts found that, unlike principals in the private sector, the United States could not be financially bound by the decisions of its agents acting without authority. *See Whiteside v. United States*, 93 U.S. 247, 256-57 (1876); 51 Comp. Gen. 162 (1971) ("[T]he Government is bound only by acts of its agents which are within the scope of their delegated authority." (internal citations omitted)). As a result, "when a payment is erroneously or illegally made it is in direct violation of [the Property Clause] of the Constitution" and, as such, "it is not only lawful but the duty of the Government to sue for a refund thereof, and no statute is necessary to authorize the United States to sue in such a case." *Fansteel Metallurgical Corp.*, 172 F. Supp. at 270 (internal citation omitted). Moreover, the Government's right and affirmative duty to pursue debt collection is not forfeited by the passage of time. *Id.* at 271. The only temporal limit on the Government's ability to collect such claims occurs when "Congress has clearly manifested its intention to raise a statutory barrier." *Old Republic Ins. Co. v. Fed. Crop Ins. Corp*., 746 F. Supp. 767, 770 (N.D. Ill. 1990) (citing *Wurts*, 303 U.S. at 415), *aff'd*, 947 F.2d 269 (7th Cir. 1991); *see also Bechtel v. Pension Benefit Guar. Corp*., 781 F.2d 906, 907 (D.C. Cir. 1985) (citing *Wurts*, 303 U.S. at 416 and holding that the Pension Benefit Guaranty Corporation may recoup overpayments to pension plan participants in excess of statutory limits under the Employee Retirement Income Security Act of 1974).

Early case law also supports the Government's right to recover all debts, not just those debts resulting from erroneous or unauthorized payments. *Meredith v. United States*, 38 U.S. 486, 493-94 (1839) (observing longstanding precedent that action of debt lies in favor of the government against an importer to recover unpaid duties, whether by accident, mistake, or fraud); *United States v. Lyman*, 26 F. Cas. 1024, 1030 (C.C.D. Ma. 1818) ("By the common law, an action of debt is the general remedy for the recovery of all sums certain, whether the legal

liability arise from contract, or be created by a statute. And the remedy as well lies for the government itself, as for a citizen."). While Congress may abridge the Government's right to sue, no act of Congress is necessary for the Government to maintain the right to pursue debt collection efforts. *Wurts*, 303 U.S. at 415-416; *see also Johnson v. All-State Constr., Inc.*, 329 F.3d 848, 853-54 (Fed. Cir. 2003) (affirming precedent holding that the government's right of setoff can be defeated only by explicit language); *Cecile Indus. Inc. v. Cheney*, 995 F.2d 1052, 1056 (Fed. Cir. 1993) (holding that the Debt Collection Act of 1982 did not abrogate the government's longstanding common law right to offset contractual debts). The common law right of the United States to recover debts extends to debts owed by states and localities. *See United States v. Texas*, 507 U.S. 529, 536 (1993) (upholding the government's common law right to recover prejudgment interest including on debts owed by states and localities). The United States can bring debt collection actions in both state and federal courts. *See Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1851) ("Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws.").

(2) Right to Charge Interest

As a general rule, federal agencies cannot extend credit on interest-free terms unless Congress authorizes such terms. *See* U.S. CONST. art. I, § 9, cl. 7; 31 U.S.C. § 3717; *Matter of Farmers Home Admin. — Rural Housing Loans,* 65 Comp. Gen. 423 (1986). Because of the time value of money, failure to charge interest on a debt would be an improper disposition of federal funds. *See, e.g.*, *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages . . . thereby achieving full compensation for the injury those damages are intended to redress."); *Motion Picture Ass'n v. Oman,* 969 F.2d 1154, 1157 (D.C. Cir. 1992) ("[I]nterest compensates for the time value of money, and thus is often necessary for full compensation."); *In re Continental Ill. Sec. Litig.,* 962 F.2d 566, 571 (7th Cir. 1992) ("The cost of delay in receiving money . . . is the loss of the time value of money, and interest is the standard form of compensation for that loss."). As such, there is a common law right to charge interest, at least where contractual debts are concerned. *West Virginia*, 479 U.S. at 310 (noting the "longstanding rule that parties owing debts to the Federal government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money"); *McGrath v. Mfrs. Trust Co.*, 338 U.S. 241, 248 (1949) (noting that in the absence of an express statutory provision, "interest sometimes has been allowed in favor of the Government . . . when the Government's position has been primarily that of a creditor collecting from a debtor"); *Royal Indem. Co.*, 313 U.S. at 295-296 ("A suit upon a contractual obligation to pay money at a fixed or ascertainable time is a suit to recover damage for its breach, including both the principal amount and interest by way of damage for delay in payment of the principal, after the due date."); *Billings v. United States*, 232 U.S. 261, 286 (1914) ("If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account."); *Young v. Godbe*, 82 U.S. (Wall) 562, 565 (1873) ("If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment."); *United States v. United Drill & Tool Corp.*, 183 F.2d 998, 1000 (D.C. Cir. 1950) (allowing interest on a debt arising from an overpayment on a contract, but stating in dicta that "if the obligation is not

in the nature of an obligation to pay money, as, for example, if a statute imposes a penalty, interest is not allowed . . . [because] there is no debtor-creditor relationship").

B. Federal vs. State Common Law

The common law authority to bring suit to recover federal debt is derived from federal judge-made law, rather than state law. *See Bd. of Cnty. Comm'rs v. United States*, 308 U.S. 343, 350 (1939). This ensures that state law will not abrogate the rights of the United States. *Id.* ("Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."). The Supreme Court sought to ensure national uniformity by creating rules based on federal judge-made law, instead of state laws that can vary widely. *United States v. Standard Oil Co.*, 332 U.S. 301, 310-11 (1947). In *Standard Oil Co.*, the Court applied federal judge-made law rather than state law because the issue concerned an inherently federal matter. *Id.* The Court held:

> The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

Id. at 311. Similarly, in *Clearfield Trust Co. v. United States*, the Court applied federal, rather than state law, to promote a uniform rule governing the issuance of commercial paper, an inherently federal matter. 18 U.S. 363, 367 (1943). The Court reasoned that the application of state law "would subject the rights and duties of the United States to exceptional uncertainty," and "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." *Id.*; *see also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

Just as with other state laws, the United States is not bound by state statutes of limitation, regardless of where it files suit or takes other action. *United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 307 (1960); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Bd. of Cnty. Comm'rs*, 308 U.S. at 350-51; *Stanley v. Schwalby*, 147 U.S. 508, 514-15 (1893). Sovereign immunity generally protects the United States from the defenses of laches or state statutes of limitation, unless immunity is expressly waived by federal statute. *Bd. of Cnty. Comm'rs*, 308 U.S. at 350-51 ("state notions of laches and state statutes of limitations have no applicability to suits by the Government"); *Lee v. Spellings*, 447 F.3d 1087, 1089-90 (8th Cir. 2006) (holding that the United States retained its right to collect through administrative offset and the defense of laches "may not be asserted against the government"). Of course, if federal law specifies a statute of limitations, the federal statute of limitations would apply. *See John Hancock Mut. Life Ins. Co.*, 364 U.S. at 308; *Summerlin*, 310 U.S. 416-17; *Bd. of Cnty. Comm'rs*, 308 U.S. at 351; *Schwalby*, 147 U.S. at 514-15. But, if federal law is silent as to a limitation of time, then no statute of limitation applies. *See id.*

C. Impact of Federal Statutes on the Common Law Right to Collect Debt.

In most contexts, the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (DCA) and other debt collection statutes do not abrogate federal agencies' common law authority. "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *Texas*, 507 U.S. at 534. The common law right of agencies to recover debts is limited only insofar as Congress has enacted a statutory limitation. *Wurts*, 303 U.S. at 415-16. Courts require a high level of specificity in statutes to override common law debt collection principles, generally favoring long-established and familiar common law principles. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783-84 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *see also Texas*, 507 U.S. at 534.

In *United States v. Texas*, for example, the Supreme Court found that the DCA did not abolish the federal government's common law right to charge pre-judgment interest on obligations owed by states. *Texas*, 507 U.S. at 539. The DCA required federal agencies to charge interest on debts, but specifically exempted debts owed by states from this requirement. *Id.* at 529. Under federal common law, however, it was clear that federal agencies could charge interest on debts owed by states. *Id.* at 533. The exemption of debts owed by states from the DCA mandate did not alter this common law right.[1]

With respect to administrative offset, Congress made clear that the DCA did not abrogate common law offset. 31 U.S.C. § 3716(d) ("Nothing in this section is intended to prohibit the use of any other administrative offset authority existing under statute or common law."); *see also Agility Pub. Warehousing Co. K.S.C.P. v. United States*, 969 F.3d 1355, 1364 (Fed. Cir. 2020) (stating that Congress enacted the DCA to supplement the common law right of offset); *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562,1567 (Fed. Cir. 1993) ("[T]he Debt Collection Act was intended to supplement, and not displace, the government's pre-existing offset rights under the common law."); *Cecile Indus., Inc. v. Cheney*, 995 F.2d 1052, 1054-55 (Fed. Cir. 1993) (stating that the United States has the right to assert an offset under both the common law and the DCA).

IV. HISTORY OF FEDERAL DEBT COLLECTION LAW

A. Debt Collection Law Prior to 1966

Before 1966, the Federal Government did not have a uniform policy regarding debt collection. *See* S. Rep. No. 89-1331, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2532, 2533 (stating that the bill to enact the Federal Claims Collection Act of 1966 was one of four bills that "have the common purpose of providing for a more fair and equitable treatment of private individuals and claimants when they deal with the Government"). With few exceptions, agencies' authority "to

[1] Subsequently, the DCA was amended by the Debt Collection Improvement Act of 1996 (DCIA) to require the charging of interest on federal nontax debts owed by states. *See* 31 U.S.C. 3717(a)(1) (prescribing interest payable by "persons" to the Federal Government) and Pub. L. No. 104-134, § 31001(d), 110 Stat. 1321 (1996) (amending the definition of "person" under 31 U.S.C. 3717(a)(1) to no longer exclude "State governments").

deal adequately and realistically with claims of the United States" was restricted by existing law. *Id.* Most agencies lacked the authority to compromise their claims or to terminate or suspend debt collection efforts on uncollectable claims. *Id*. And, when agencies were unable to collect, they could do little more than refer the claim to the General Accounting Office (now known as the Government Accountability Office (GAO)), which also lacked the authority to compromise claims. *Id*. at 3. Only when the claim was referred to the Department of Justice (DOJ) could a debt be compromised. *Id*.

Without sufficient statutory powers, debt collection efforts languished. *See id.* at 1-3 ("[T]he present limitations of authority have the inevitable effect of forcing the referral to the Justice Department for collection of thousands of claims that could, with a little flexibility in authority, have been compromised by the agency while the claim was fresh, before substantial interest began to accumulate, and at a time when the debtor could pay."). It is the "inflexibility in the law" that prompted the Federal Claims Collection Act of 1966 (FCCA). *See id*. at 3.

B. Federal Claims Collection Act of 1966

Through the FCCA, Congress sought to establish a standardized, governmentwide debt collection system. *See generally id.*; *see also* FCCA, Pub. L. No. 89-508, 80 Stat. 308 (1966). The FCCA was designed to provide agencies with greater authority and flexibility to recover delinquent debts and to increase "the effectiveness of the GAO in its collection activities." S. Rep. No. 89-1331, at 2; *see also Lawrence v. Commodity Futures Trading Comm'n*, 759 2.d 767, 772 (9th Cir. 1985) ("The legislative history of the FCCA expressly reflects Congress' stated preference for the handling of agency claims by the agency involved."). The FCCA's intended "beneficial consequences" were described by the Attorney General as follows:

> Uncollectible claims of the Government could be disposed of by agency action without resort to litigation . . . . The removal from the courts of litigation which is essentially unnecessary, should enable the courts and the Department of Justice to devote more time to other pressing matters and should permit claims of the United States to be satisfied more expeditiously.

S. Rep. No. 89-1331, at 8 (1966) (quoting Letter from Attorney General to the Vice President (March 10, 1966)). Because agencies are more likely to be familiar with the types of debts owed to them, Congress reasoned that agencies should be given the legal authority and flexibility to handle these claims on their own. *Id.* at 5. Thus, the FCCA authorized agencies, when appropriate, to compromise claims and to suspend or terminate collection efforts on claims up to a certain amount. FCCA § 3.

C. Debt Collection Act of 1982

Sixteen years after the enactment of the FCCA, Congress enacted the Debt Collection Act of 1982 (DCA) to "increase the efficiency of governmentwide efforts to collect debts owed to the United States and to provide additional procedures for the collection of debts owed to the United States." Pub. L. No. 97-365, 96 Stat. 1749 (1982). Among other debt collection remedies, the DCA authorized the reporting of delinquent debts to credit bureaus (§ 3), offset of federal employee salaries (§ 5), administrative offset (§ 10), the charging of interest and penalties on delinquent debts (§ 11), and the use of private collection contractors (§ 13). *Id.* §§ 3, 5, 10, 11, 13.

D. Deficit Reduction Act of 1984

The Deficit Reduction Act of 1984 was enacted "to provide for tax reform, and for deficit reduction." Pub. L. No. 98-369, 98 Stat. 494 (1984). It authorized agencies to collect delinquent debts through the offset of federal tax refunds. *Id*. § 2653. Collections increased dramatically through use of this new authority, eventually leading to its expanded use. *See* S. Rep. No. 102-420, at 4-5 (1992), *reprinted in* 1992 U.S.C.C.A.N. 4304, 4307-08.

E. Debt Collection Improvement Act of 1996

The Debt Collection Improvement Act of 1996 (DCIA) further improved the federal debt collection process by emphasizing the dual considerations of maximizing collections while minimizing costs. *See* Pub. L. No. 104-134, § 31001(b), 110 Stat. 1321 (1996). Congress described seven purposes for the legislation:

> (1) To maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools.
> (2) To minimize the costs of debt collection by consolidating related functions and activities and utilizing interagency teams.
> (3) To reduce losses arising from debt management activities by requiring proper screening of potential borrowers, aggressive monitoring of all accounts, and sharing of information within and among Federal agencies.
> (4) To ensure that the public is fully informed of the Federal Government's debt collection policies and that debtors are cognizant of their financial obligations to repay amounts owed to the Federal Government.
> (5) To ensure that debtors have all appropriate due process rights, including the ability to verify, challenge, and compromise claims, and access to administrative appeals procedures which are both reasonable and protect the interests of the United States.
> (6) To encourage agencies, when appropriate, to sell delinquent debt, particularly debts with underlying collateral.

> (7) To rely on the experience and expertise of private sector professionals to provide debt collection services to Federal agencies.

Id. at § 31001(b). The DCIA added new debt collection authorities, strengthened existing debt collection authorities, mandated use of previously discretionary authorities, and centralized governmentwide delinquent debt collection activity at the U.S. Department of the Treasury (Treasury). *See generally id.*

For example, the DCIA required agencies to submit delinquent debts to Treasury for offset, required Treasury (and other disbursing officials) to offset federal payments to collect submitted debts, and authorized Treasury to charge agencies a fee for this purpose. *Id.* at § 31001(d) (codified at 31 U.S.C. § 3716(c)). The DCIA also added state and local governments to the coverage of administrative offset, thereby allowing federal agencies to offset payments to state and local governments to collect delinquent debts owed by state and local governments. *Id.* at § 31001(d)(1).[2] And, it required agencies to match their debt records against federal employee records for the purpose of salary offset. *Id.* at § 31001(h) (codified at 5 U.S.C. § 5514(a)). The DCIA also made clear that "[n]othing in [its administrative offset provisions] is intended to prohibit the use of any other administrative offset authority existing under statute or common law." *Id.* at § 31001(d)(2) (codified at 31 U.S.C. § 3716(d)). Thus, the DCIA provided agencies with additional offset authority, without detracting from the authority present under common law or other statutory authorities. *Id.*; *see also HSH Nordbank AG v. United States*, 121 Fed. Cl. 332, 344 (2015) (observing that the DCIA does not displace the government's long-standing common law right to offset contract debts against contract payments due to the debtor). The DCIA also required federal agencies to obtain a taxpayer identification number (TIN) from any person who is in a relationship with the agency that may give rise to a receivable, DCIA, § 31001(i) (codified at 31 U.S.C. § 7701(c)), and to include a payee's TIN on the payment instructions to a federal disbursing official, *id.* § 31001(y) (codified at 31 U.S.C. § 3325(d)). Obtaining TIN information from potential debtors and payees is critical, as a TIN is used to match debtor and payee information in Treasury's centralized governmentwide offset program (known as the Treasury Offset Program), and it helps agencies locate additional information about debtors.

Just as the DCIA centralized agencies' offset activity at Treasury, it also centralized at Treasury the servicing of delinquent debts. *Id.* § 31001(m) (codified at 31 U.S.C. § 3711(g)). It required agencies to transfer to Treasury, subject to certain exceptions, debts delinquent for 180 days and authorized Treasury to use all available collection tools to collect the debt. *Id.*

The DCIA also generally required agencies to bar delinquent nontax debtors from obtaining federal financial assistance in the form of a loan, loan insurance, or loan guarantee, *id.* § 31001(j) (codified at 31 U.S.C. § 3720B); mandated the reporting of delinquent consumer debt to credit bureaus, *id.* § 31001(k) (codified at 31 U.S.C. § 3711(e)(1)); authorized agencies to pull consumer credit reports, *id.* § 31001(m) (codified at 31 U.S.C. § 3711(h)), and required Treasury to issue rules for agencies to publicly disseminate delinquent debtors' names, *id.* § 31001(r) (codified at 31 U.S.C. § 3720E). Moreover, the DCIA authorized agencies to garnish debtors' wages without a court order. *Id.* § 31001(o) (codified at 31 U.S.C. § 3720D).

[2] *See supra* note 1.

F. Post-DCIA

In 2008, Congress eliminated the ten-year limitation that had previously applied to the collection of debts by administrative offset under 31 U.S.C. § 3716. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14219, 122 Stat. 1651, 2244–45 (2008) (codified at 31 U.S.C. § 3716(e)). And, in 2014, Congress modified 31 U.S.C. § 3716(c)(6) to require agencies to notify Treasury of any debts 120 days delinquent for offset purposes, shortening the time period by 60 days. Digital Accountability and Transparency Act of 2014, Pub. L. No. 113-101, § 5, 128 Stat. 1146 (2014). The efficient and equitable management of the Government's receivables continues to garner attention from policy makers.

B. DUE PROCESS

I. INTRODUCTION

This section summarizes the constitutional due process requirements for collecting federal nontax debts owed to the United States. Because federal debt collection affects a person's property rights, the due process guarantee in the Fifth Amendment to the U.S. Constitution is generally implicated by agencies' collection efforts. Statutes and regulations further define what process is due.

A. Overview of Procedural Due Process

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.[3] The purpose of due process is to prevent governmental abuse of power. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (stating that the Due Process Clauses of the Fifth and Fourteenth Amendments were intended to prevent government from abusing its power); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."). The Due Process Clause encompasses both a substantive and a procedural component. *See Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The substantive component of the Due Process Clause "bars certain, arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Id.* at 125 (internal quotation marks omitted). Procedural due process prohibits the government from depriving an individual of life, liberty, or property without a fair procedure. *See id*. Procedural due process rights are relevant to federal debt collection action and are the focus of this section.[4]

Generally, procedural due process requires adequate notice and a meaningful opportunity to be heard before a right or interest is forfeited. *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). It does not, however, guarantee a legally correct outcome. *See Mackey v. Montrym*, 443 U.S. 1, 13 (1979) ("[T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or 'liberty' interest be so comprehensive as to preclude any possibility of error."). Rather, it seeks to put procedures in place to minimize the risk of error. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12-13 (1979) ("The function of legal

[3] The Fifth Amendment imposes requirements on the Federal Government, while the Fourteenth Amendment imposes requirements on states. *See Pub. Utils. Comm'n of Dist. of Columbia v. Pollak*, 343 U.S. 451, 461 (1952). Because the Supreme Court treats due process requirements under the Fifth and Fourteenth Amendment as equivalent, precedent addressing both amendments is relevant. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (identifying the identical language in the two amendments and setting out a single standard).

[4] Federal debt collection procedures will likely not implicate substantive due process limitations absent extraordinary circumstances. For example, while making a tenant pay a landlord's debt to have water service restored violated substantive due process, requiring an inmate to pay restitution from his prison account or threatening to arrest a debtor over a $400 debt, did not violate substantive due process. *Pilchen v. City of Auburn*, 728 F. Supp. 2d 192, 204 (N.D.N.Y. 2010) (holding that it is unconstitutional to require a tenant to pay a landlord's bill to have water service); *Parrish v. Mallinger*, 133 F.3d 612, 614-15 (8th Cir. 1998) (holding that it is constitutional to deduct restitution debt from a prison account); *Smithies v. Bialoglowy*, No. 3:01CV1511, 2001 U.S. Dist. LEXIS 22959, at *3 (D. Conn. Dec. 19, 2001) (holding that police officer's threat of arrest over a $400 debt was not unconstitutional).

process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."). As such, the minimum level of required procedure varies according to the private interests at stake, the risk of error, and the Government's interest. *See Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Mackey*, 443 U.S. at 1. Supreme Court cases have held that, because the required procedure varies according to these factors, procedural due process is a "flexible concept." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985); *see also Zinermon*, 494 U.S. at 127 ("Due process . . . is a flexible concept that varies with the particular situation."); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (noting that procedural due process varies with the demands of the situation); *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (holding that due process "varies according to specific factual contexts").

Because the Due Process Clause does not guarantee an error-free decision-making process, a deprivation resulting from a good faith error, instead of deliberate action, will not constitute a due process violation. *See Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (holding that due process protections are not triggered by lack of due care by prison officials); *see also Rivera v. Illinois*, 556 U.S. 148, 154 (2009) (holding that a judge's good faith error in applying state law was not a due process violation); *Davidson v. Cannon,* 474 U.S. 344, 347-48 (1986) ("The guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials."); *Games v. Cavazos*, 737 F. Supp. 1368, 1380-81 (D. Del. 1990) (holding that a negligent failure by the Department of Education and a guarantee agency to provide student borrower with pre-deprivation review because of a miscommunication between agencies was not a due process violation).

B. Constitutional v. Statutory Due Process

The Constitution sets the floor for due process; statutes or regulations can only supplement constitutional requirements. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978). Agencies should take care to distinguish constitutional requirements from statutory and regulatory requirements. While federal agencies often receive deference for interpreting statutes and regulations within the authorities Congress delegated to them, they are unlikely to receive similar deference when interpreting the Constitution. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (agency interpretation that raised a serious constitutional question was not entitled to deference when alternative interpretation did not raise constitutional issues).

C. When Due Process Rights are Implicated

(1) Governmental Action

The Due Process Clause of the Fifth Amendment applies to federal government action. Federal government action includes both actions by federal employees taken in their official capacities and those taken by private parties acting under federal control or authority. *See Edmonson v. Leesville Concrete C*o., Inc., 500 U.S. 614, 619-20 (1991) ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints."); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) ("To constitute state action, 'the deprivation must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor."); *see also Warren v. Gov't Nat'l Mortg. Assoc.*, 611 F.2d 1229, 1232 (8th Cir. 1980) ("The standard for finding federal government action under the fifth amendment is the same as that for finding state action under the fourteenth amendment.").

Private persons engaged by federal agencies to collect debts, for example, may be subject to constitutional due process requirements. *See Edmonson*, 500 U.S. at 620 (attributing the activities of private participants to the Government when those participants are acting with the authority of the Government); *Lugar*, 457 U.S. at 932-33 (stating that "constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the [government] act jointly with a creditor in securing the property in dispute."); *Dennis v. Sparks,* 449 U.S. 24, 27 n.4 (1980) (due process rights are implicated by willful participants in joint action with the Government). In other words, a governmental agency does not escape its due process responsibilities by contracting with a private party and requiring the private party to take collection action on its behalf. Because the mere referral of a debt to a private contractor does not implicate a property interest, a federal agency need not provide a debtor with due process prior to referring a debt to a private contractor for collection purposes. *See McClelland v. Massinga,* 786 F.2d 1205, 1215-16 (4th Cir. 1986) (analyzing procedures of tax refund intercept program and not discussing the transfer itself as a due process issue). However, a debtor must be given due process before the private contractor initiates an involuntary collection action on the Government's behalf.

Actions by private persons taken independently of the Government will not implicate a person's due process rights. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (holding that the sale of an evicted tenant's belongings by a private storage company pursuant to the New York Uniform Commercial Code was not a state action for the purposes of the Due Process Clause). Similarly, mere governmental regulation does not make the activities of the regulated persons attributable to the Government or subject to due process requirements. *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (finding that the mere fact that nursing homes are subject to extensive state regulation does not by itself convert their actions into that of the state for the purposes of the Fourteenth Amendment).

(2) Deprivation of Property

A person's due process rights are only implicated when there is a deprivation of life, liberty, or property. *See* U.S. Const. amend. V. If there is no deprivation of life, liberty, or property, there is no constitutional due process violation. *Zinermon*, 494 U.S. at 126 (1990) (identifying deprivation as part of the requirement for a due process violation). Debt collection by the United States may implicate the property interests of debtors. To establish a procedural due process claim, a debtor must allege both that there was a deprivation of a protected property interest and that the deprivation occurred without due process of law. *Id.* at 25.

a) Property Interests

The Supreme Court has broadly defined the property interests protected by procedural due process. The definition of property "extend[s] well beyond actual ownership of real estate, chattels, or money" and includes certain other rights and entitlements. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-572 (1972) (finding that, in the context of public employment, people may have a property interest in their continued employment, such as with tenured positions or unexpired contract positions); *see also Atkins v. Parker*, 472 U.S. 115, 128 (1985) (finding food stamp benefits to be a form of property); *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) (observing that welfare entitlements may be regarded more like "property" than "gratuity"); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338 (1969) (analyzing property interest in earned wages subject to garnishment).

While the Due Process Clause protects a range of property interests, it "does not protect everything that might be described as a 'benefit.'" *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (finding no property interest in police enforcement of a restraining order). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* (quoting *Roth*, 408 U.S. at 577 (internal quotation marks omitted)); *see also Roth*, 408 U.S. at 570 (stating that "the range of interests protected by procedural due process is not infinite").

Debt collection procedures that merely cause a person to be "stigmatized" are unlikely to raise due process concerns. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (holding that reputation alone, apart from some more tangible interests such as employment, is neither "liberty" nor "property" by itself sufficient to invoke the procedural protection of the due process clause). Government action that goes beyond reputational harm and impacts a recognizable property or liberty interest, however, will implicate due process rights. *See id.* at 701-02 (distinguishing damage to reputation only from reputational damage combined with a deprivation of a recognizable property interest like losing government employment); *DiBlasio v. Novello,* 344 F.3d 292, 302 (2d Cir. 2003) (a "stigma-plus" claim requires showing an "injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus)").

b) Deprivation

To establish a deprivation under the Due Process Clause, a plaintiff must demonstrate a cognizable injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A threat of legal action is not an injury that will implicate due process rights. *See, e.g.*, *Hornbeck-Denton v. Meyers*, 361 F. App'x 684, 688 (6th Cir. 2010). In the debt collection context, voluntary surrenders of property, such as voluntary payments made in response to demand letters or collection calls, generally do not implicate due process rights. *See Garcia v. City of Albuquerque,* 232 F.3d 760, 770 (10th Cir. 2000) (holding that voluntary resignation was not a deprivation of property); *Gradisher v. Cnty. Of Muskegon,* 255 F. Supp. 2d 720, 728 (W.D. Mich. 2003) (finding that plaintiffs could not establish a deprivation of their property interest where they voluntarily paid a municipality fee imposed for bad check violations).

Voluntary surrenders of property, however, may implicate due process rights if they were made in response to false or misleading statements by the Government. *See Herrada v. City of Detroit*, 275 F.3d 553, 559 (6th Cir. 2001) (analyzing plaintiff's allegation that her payment of a fine in response to an allegedly false and misleading parking citation and overdue notice constituted a deprivation of property without due process of law). Similarly, due process rights will generally be implicated by the use of nonconsensual collection tools, such as administrative offset or administrative wage garnishment. *See, e.g.*, *Sniadach*, 395 U.S. at 341-42 (prejudgment garnishment of wages without a hearing violated due process); *Schwarm v. Craighead*, 552 F. Supp. 2d 1056, 1083-84 (E.D. Ca. 2008) (distinguishing cases of garnishment from voluntary payment made in response to a letter offering the option of (1) enrolling in a program and paying the check amount plus fees, or (2) not enrolling in the program and facing the possibility of a criminal proceeding).

Before an agency transfers a debt to Treasury for collection, the agency with statutory authority over the debt is responsible for ensuring that due process requirements are met. *See* 31 CFR § 285.5(c)(6) (implementing 31 U.S.C. § 3716(c)); *id* § 285.12(i) (implementing 31 U.S.C. § 3711(g)); *Johnson v. U.S. Dep't of Treasury*, 300 F. App'x 860, 862-63 (11th Cir. 2008). The transfer of a debt to Treasury (or to a private collection contractor) itself, however, does not implicate due process. Due process is not implicated until and unless an adverse action is taken.

(3) Rulemaking

Agency rulemaking exists to fill in details left open by an Act of Congress. *See North Carolina ex rel. Cooper v. Tenn. Valley Auth*., 615 F.3d 291, 305 (4th Cir. 2010). When a federal agency undertakes a "rulemaking proceeding in its purest form," procedural due process limitations are rarely implicated. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542 n.16 (1978); s*ee also Atkins v. Parker*, 472 U.S. 115, 126 (1985) (distinguishing "individual adverse actions" from "mass changes" to food stamp benefits pursuant to legislation); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people it is

impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.").

(4) Statutes of Limitation and Laches

The removal of a statute limiting the time in which a particular debt collection action may take place does not violate a debtor's due process rights. *United States v. Hodges*, 999 F.2d 341, 342 (8th Cir. 1993) (citing *Campbell v. Holt*, 115 U.S. 620 (1885)); *Starks v. S. E. Rykoff & Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982) ("The shelter of a statute of limitations has never been regarded as a fundamental right, and the lapse of a statute of limitations does not endow a citizen with a vested property right in immunity from suit."). This is because the removal of the limitations period "does not deprive a debtor of property." *Hodges*, 999 F.2d at 342. Federal debts generally do not expire. In other words, while a particular debt collection tool may have a statute of limitation, the underlying right to collect the debt does not have a time limitation. The elimination of a statute of limitations, however, could theoretically have due process implications if it creates "special hardships or oppressive effects." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 315-16 (1945); *Lee v. Spellings*, 447 F.3d 1087, 1089 (8th Cir. 2006) (finding no special hardship or oppressive effects in plaintiff's case by the elimination of the statute of limitations for student loan collections).

Where no statute of limitation exists, the federal government's claim will generally not become stale. *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest."); *Guar. Tr. Co. v. United States*, 304 U.S. 126, 132, 58 S. Ct. 785, 788 (1938) (observing that the rule that the laches defense is inapplicable against the government "rests on the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers"); *Savoury v. U.S. Atty. Gen.*, 449 F.3d 1307, 1320 (11th Cir. 2006) ("[L]aches cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protect the public interest."); *Hatchett v. United States*, 330 F.3d 875, 887 (6th Cir. 2003) ("there is no precedent holding that the Government is subject to its own laches in tax collection actions"); *United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991) (rejecting plaintiff's laches defense in a student loan collection case).

II. PROCEDURAL DUE PROCESS REQUIREMENTS

A. Overview

Procedural due process has two basic components: notification and an opportunity to be heard. *Fuentes*, 407 U.S. at 81. As the Supreme Court explained, "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Id.* (quoting *Baldwin v. Hale*, 68 U.S. 233, 233 (1863)). The notice and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

B. Notice

Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)); *see also Jones v. Flowers*, 547 U.S. 220, 229 (2006). Because the Due Process Clause guarantees fair, but not perfect, procedures, federal agencies must make reasonable efforts to provide notice but do not have to prove actual notice. *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (stating that "the [government] *must attempt to provide* actual notice, not . . . *provide actual notice*" and that "reasonable" not "heroic" efforts are required to notify the person of the pending action). Due process rights, including the right to a notice, may be waived as long as the right was "intentionally and knowingly relinquished." *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989).

(1) Content

a) Information

As a general principle, the notice should inform persons "of the pendency of the action and afford them an opportunity to present their objections." *Mullane,* 339 U.S. at 314. The notice should also inform the affected persons not only that they have an opportunity to contest the allegation(s) and/or the proposed action(s), but also how to contest them. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1977); *Games v. Cavazos*, 737 F. Supp. 1368, 1376-79 (D. Del. 1990) (notice in a tax refund intercept case was adequate where notice informed recipients that they had a right to review and instructed them how to contact the agency). The notice should be written clearly, in plain English but, generally, even poorly drafted notices can suffice. As one court observed in holding that a state's pre-offset notices comported with due process:

> I do find that certain paragraphs of the notices at issue are written in that all too familiar style of "computerese." By that, I mean that the style of presentation is cold, impersonal, and staccato—even as individual sentences sometimes "run-on" cramming too much information into one unit of expression. I suggest that carefully rewriting the most convoluted paragraphs in "plain English" could only result in better communication and would make everyone's job a little easier. Moreover, the style appears to violate the cardinal rule of good writing: know your reader. Still, while offending good taste, common sense, and undoubtedly the elements of style as set forth by William Strunk, Jr. and E.B. White, when viewed as a whole I do not believe that the current notice offends the elements of due process.

Knisley v. Bowman, 656 F. Supp. 1540, 1554 (W.D. Mich. 1987) (finding that a pre-offset notice under a state-administered tax refund intercept program did not violate due process) (internal citation omitted).

The level of detail that the agency must provide about the proposed adverse action depends on the circumstances, including the information available to the agency at the time and the common understanding of the person receiving the notice. *See Mullane*, 339 U.S. at 314-15 (notice is constitutionally adequate when the "practicalities and peculiarities of the case . . . are reasonably met"); *Blanca Tel. Co. v. FCC*, 991 F.3d 1097, 1117 (10th Cir. 2021) (stating that the agency is not required to publish an easily digestible, abridged version of its rules because "the requirements of due process are understood through the lens of parties with special knowledge"). In the debt collection context, the notice should generally advise the debtor of the nature and amount of the debt, including the basis for the debt, an explanation of how interest, penalties, and administrative costs are charged, the date by which payment should be made to avoid late charges (if relevant) and enforced collection, an explanation of the agency's intent to enforce collection if the debtor fails to pay, and an explanation of how the debtor can exercise the opportunity to dispute the existence or amount of the debt or any of the proposed collection actions. While an agency should provide sufficient detail in its notices, an agency should also be cautious about using overly specific language that might restrict the actions an agency can take without having to provide additional notification. It is therefore advisable for agencies to draft their notices to be broad enough to cover any actions the agency might want to take in the foreseeable future.

"The Supreme Court has never required that pre-hearing notices contain a list of potential defenses or explain available hearing procedures in intricate detail." *Anderson v. White*, 888 F.2d 985, 989 (3d Cir. 1989) (stating that common "defenses should be evident to the recipient" of the due process notice and, for the notices at issue, the defenses were so evident). Nevertheless, some courts have observed that providing common defenses (such as, "I don't owe the debt" or "I don't owe that much") is better practice and may be required to help unsophisticated individuals understand that the threatened action specified in the notice is not a *fait accompli*. *See, e.g.*, *Anderson*, 888 F.2d at 989; *Wagner v. Duffy,* 700 F. Supp. 935, 943 (N.D. Ill. 1988) (finding that due process requires that the tax refund intercept notice provide the debtor with a list of common defenses); *Knisley,* 656 F. Supp. at 1554 (stating that, in the context of tax refund offset, while "due process does not require a list of all possible defenses, the better practice may be to list a number of those most frequently asserted"); *Nelson v. Regan,* 560 F. Supp. 1101, 1107 (D. Conn. 1983) (finding that the notice did not satisfy due process because it failed to list "the possible defenses an individual might have to the interception of tax refunds or the availability of regular procedures in which to challenge the offset"), *aff'd*, 731 F.2d 105 (2d Cir.), *cert. denied*, 469 U.S. 853, 105 S. Ct. 175 (1984); *but see Sibley v. Diversified Collection Servs.*, 1997 U.S. Dist. LEXIS 23583, at *20 (N.D. Tex. June 10, 1997) (holding that the failure of the administrative wage garnishment notice to include a list of defenses did not render it unconstitutional); *Games v. Cavazos*, 737 F. Supp. 1368, 1376 (D. Del. 1990) (in a case involving the offset of student loans, the court held that "considerations of due process do not require that the 65-day letter contain a non-exhaustive list of defenses"); *Kandlbinder v. Reagen,* 713 F. Supp. 337, 340 (W.D. Mo. 1989) (explaining that a list of possible defenses could fail to meet the debtor's specific situation and result in misleading the debtor); *McClelland v. Massinga,* 600 F.

Supp. 558, 566 (D. Md. 1984) (stating that tax refund intercept notice need not include a list of potential defenses), *rev'd on other grounds*, 786 F.2d 1205 (4th Cir. 1986). Agencies should consider whether listing possible defenses would protect the agency from due process challenges and would result in more equitable results for their debtor populations.

b) Mass Notice

A personalized notice is not necessary if mass notice is appropriate. Mass notice may be appropriate when all persons to be notified are similarly situated. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) (holding that when Congress changed food stamp program benefits, a notice containing only the substance of the amendment, and not a calculation of its impact on the person, was sufficient because "[a]ll citizens are presumptively charged with knowledge of the law"); *North Laramie Land Co. v. Hoffman,* 268 U.S. 276, 283 (1925) ("All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them . . . ."); *Texaco, Inc. v. Short,* 454 U.S. 516, 532 (1982) ("It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property."). In most circumstances, even when debtors are similarly situated, providing a debtor with, at a minimum, specific details about the amount and type of the debt that any agency proposes to collect from the debtor is advisable.

c) Language

While it may be good policy to do so, due process generally does not require that agencies provide a translation of a notice when communicating with non-English speakers. *See Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999) (finding that it is well-established that due process allows notices of hearing to be sent in English to non-English speakers, if the notice would put a reasonable recipient on notice that follow-up is required). Translations are not required in either the Social Security benefit or in the criminal forfeiture context. *See Toure v. United States*, 24 F.3d 444, 446 (2d Cir.1994) (finding no violation where an English-language notice regarding administrative forfeiture of seized currency was sent to French-speaking inmate because the notice would put a reasonable person on notice that it was important and, if necessary, should be translated); *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983) (holding that due process does not require the Social Security Administration to provide notices in Spanish). Translation does not appear to be required even in the immigration context where agencies could reasonably assume that a sizable number of recipients do not speak English fluently. *See, e.g.*, *Singh v. Holder*, 749 F.3d 622, 626 (7th Cir. 2014) ("In the immigration context, personal service in English to a non-English-speaker typically satisfies due process because it puts the alien on notice that further inquiry is needed, leaving the alien to seek help from someone who can overcome the language barrier."); *Ojeda-Calderon v. Holder*, 726 F.3d 669, 675 (5th Cir. 2013) (holding due process allows a notice of hearing to be given solely in English if notice would put a reasonable recipient on notice that further inquiry is required). Nevertheless, agencies should determine whether their communications should be offered in languages other than or in

addition to English. *See, e.g.*, EXECUTIVE ORDER NO. 13166, IMPROVING ACCESS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY (Aug. 11, 2000) (generally requiring agencies to develop and implement a system to provide services so that individuals with limited English proficiency can have meaningful access to those services).

(2) Delivery

The means of delivering the notice must be reasonably designed to reach the debtor. *See Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972). In the debt collection context, this generally means delivery of the notice to the debtor's last known address.

a) Last Known Address

Notice by mail to a person's last known address is the traditional method for notice under the Due Process clause. *See Dusenbery*, 534 U.S. at 169 (finding that certified mail is a "method our cases have recognized as adequate for known addressees when we have found notice by publication insufficient"); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988) ("[M]ail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983) (requiring, in cases where mortagee is known, publication to be supplemented by "notice mailed to mortagee's last known available address"). The law generally does not require additional efforts by the agency beyond using the last known address, absent unique circumstances. *See e.g.*, *Gyorgy v. Commissioner*, 779 F.3d 466, 473-74 (7th Cir. 2015) (finding that taxpayer's failure to receive due process notice mailed to his last known address did not render the notices invalid, especially in light of his failure to update his address with the Internal Revenue Service); *Omegbu v. United States Dep't of Treasury*, 118 F. App'x 989, 991 (7th Cir. 2004) (holding that notice of proposed offset by mail to the debtor's last known address complied with the constitutional requirements to provide notice reasonably calculated to apprise debtor of the offset and to provide debtor an opportunity to present his objections); *Federal Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984) (there is a strong presumption that a notice properly addressed was received by addressee and, in the context of certified mail, clear and convincing evidence is required to rebut this presumption); *Tyson v. DOL*, 2021 U.S. Dist. LEXIS 234186, at *27 (D.D.C. Dec. 7, 2021) (finding that the debtor's failure to receive the notice was immaterial); *Nelson v. Diversified Collection Servs. Inc.*, 961 F. Supp. 863, 869 (D. Md. 1997) (upholding sufficiency of a wage garnishment notice sent to debtor's last known address). See Section d, below, for a discussion of unique circumstances that may require additional efforts.

b) Electronic Notification

Notice by email or other electronic means may satisfy due process if it is the best way to reach a person and may be appropriate even where other means of delivery would be better calculated to reach the person. *See Hanrahan*, 409 U.S. at 40 (stating that notice must be reasonably calculated under the circumstances); *Dusenbery*, 534 U.S. at 170

(noting that procedures must be fair and reasonable, but "heroic" efforts are not required). As one court has aptly noted,

> Courts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.

New England Merchs. Nat'l Bank v. Iran Power Generation and Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980). In some circumstances, email may also be sufficient where delivery to a physical address has failed. *See, e.g.*, *Craigslist, Inc. v. Doe*, No. 09-4739, 2011 U.S. Dist. LEXIS 53123, at *3 (N.D. Cal. Apr. 25, 2011) (finding that email was sufficient where, although there was third-party discovery and other investigations, there had been ten failed service attempts without obtaining the correct physical address); *Chanel, Inc. v. Xu*, 2010 U.S. Dist. LEXIS 6734, at *4 (W.D. Tenn. Jan. 27, 2010) (permitting service of process by email where physical address was deemed invalid, and emails were not returned as "undeliverable").

c) Publication

Notice by publication will rarely be appropriate for delinquent debt collection and generally should be used only as a last resort and only to the extent permitted by applicable privacy laws. *See Mullane*, 339 U.S. at 320 ("Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests."); *Combs v. Doe*, No. 10-01120, 2010 U.S. Dist. LEXIS 113441 (N.D. Cal. Oct. 15, 2010) (stating that notice by publication should generally be used only as a "last resort"). In the case of missing or unknown persons, the agency should attempt to find a mailing address. *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962). If a mailing address is not "easily ascertainable" then publication may be a constitutionally sufficient means of notice. *Id.* (finding that an address would be "easily ascertainable" if it could be found in the city's records); *Mullane*, 339 U.S. at 317 (finding publication notice sufficient for only those beneficiaries "whose interests or whereabouts could not with due diligence be ascertained"); *Acevedo v. First Union Nat'l Bank*, 476 F.3d 861, 866 (11th Cir. 2007) (holding that publication notice was sufficient when the Federal Deposit Insurance Corporation did not know the identities of the holders of cashier's checks issued by a failed bank).

d) Unique Circumstances

Due process often demands context-specific procedures. In some special circumstances, mailed notice to the individual's last known address might not satisfy due process. For example, if the agency knows a person is incarcerated, the agency may be required to mail notice to the jail instead of the person's home address. *See Hanrahan*, 409 U.S. at 40 (in a forfeiture action, notice mailed to interested party's home address was inadequate where government knew party was incarcerated awaiting trial). Similarly, if the agency knows the person to be incompetent, notice should be delivered to that person's guardian or trustee, if one has been appointed. *See Covey v. Town of Somers*, 351 U.S. 141, 146-47 (1956) (in foreclosure action, notice by publication, mailing, and posting was inadequate where individual was known by the town to be mentally incompetent and without the protection of a guardian).

Whether an agency must take additional steps when notice is returned as undeliverable depends on the circumstances. While the Supreme Court has held in the context of a tax sale of real property that "the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so," such steps may not be required for less drastic actions. *Flowers*, 547 U.S. at 225, 230 (observing that a sender of an undeliverable letter "will ordinarily attempt to resend it, if it is practicable to do so" and that "[t]his is especially true when . . . the subject matter . . . concerns such an important and irreversible prospect as the loss of a house"). The Court suggested that "reasonable steps" could include resending the notice by regular mail so that a signature is not required for delivery, posting the notice on the property's front door, or addressing the mail to "occupant" to increase the chance that the letter is opened and read. *Id.* at 222. However, the Court also noted that a search of the local phone book and government records was not required because "[s]uch an open-ended search imposes burdens on the State significantly greater than the several relatively easy options outlined above." *Id.*

An agency may not have to take additional steps if it only has general information that a particular means of notice is less effective. For example, notice sent by mail to an inmate at a prison facility is constitutionally sufficient even if the agency is aware that mail often gets lost in the prison mail system. *See Dusenbery*, 534 U.S. at 172 (holding that mail to a penitentiary was "clearly acceptable" despite knowledge that the prison mail system was not as reliable as the general mail system).

(3) Waiver of Right to Notice

The right to notice can be waived. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Davis Oil Co. v. Mills*, 873 F.2d 774, 787 (5th Cir. 1989). However, there is a presumption against finding that the right to notice has been waived. *See Glasser v. United States*, 315 U.S. 60, 70-71 (1942). For a waiver to be effective, it must be intentional and the person must know the right or privilege that she is giving up. *See Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *see also Scott v. Danaher*, 343 F. Supp. 1272, 1274-75 (N.D. Ill. 1972) (failure of state garnishment statute to provide a means of determining whether debtor has

executed a voluntary and understanding waiver of right to notice and hearing violates due process).

A person generally does not waive the right to notice through the failure to act. *See Flowers*, 547 U.S. at 232 ("[A] party's ability to take steps to safeguard its own interests does not relieve the State of its constitutional obligation." (quoting *Mennonite*, 462 U.S. at 799)). A debtor's failure to keep her address updated, even when required by statute, for example, does not negate the agency's obligation to provide reasonable notice under the circumstances, which is generally satisfied by sending notice to the last known address. *See Mennonite*, 462 U.S. at 795; *see also Hanrahan*, 409 U.S. at 39-40 (holding that the state did not provide constitutionally sufficient notice when it mailed notice to the address of record, despite the Illinois law that required each vehicle owner to register his address, because state was aware that the vehicle owner was not at that address). In some situations, however, a person's failure to act may result in a constructive waiver. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982) ("failure to follow [certain procedural] rules may well result in a curtailment of [legal] rights" and "the failure to enter a timely objection to personal jurisdiction constitutes . . . a waiver of the objection").

(4) Timing of Notification

a) Pre-Deprivation

Generally, a person should be given notice of the debt and the proposed actions to collect the debt prior to any adverse debt collection action. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (restating "the general rule that individuals must receive notice . . . before the Government deprives them of property"); *see also Fuentes*, 407 U.S. at 80; *Mullane*, 339 U.S. at 313. The timing of the notice must give the person sufficient time to address the issues raised in the notice. *See Lindsey v. Normet*, 405 U.S. 56, 64-65 (1972) (holding that giving a tenant six days for trial preparation is sufficient where the tenant can be expected to know material facts including the terms of the lease and payment of rent); *Goldberg*, 397 U.S. at 268 (requiring that notice provide an "effective opportunity to defend"); *Eguia v. Tompkins*, 756 F.2d 1130, 1139-40 (5th Cir. 1985) (requiring pre-deprivation opportunity to respond prior to the withholding of a county employee's paycheck to pay uncollected fees).

b) Post-Deprivation

When the government "must act quickly, or where it would be impractical to provide pre-deprivation process, post-deprivation process satisfies the requirements of the Due Process Clause." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *see also James Daniel Good Real Prop*., 510 U.S. at 53 (holding that the government may dispense with "predeprivation notice and hearing . . . only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event'" (quoting *Fuentes*, 407 U.S. at 82)); *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 37 (U.S. 1990) (explaining that "a State need not provide predeprivation process for the exaction of taxes" because such a requirement "might

threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult"); *United States v. $8,850*, 461 U.S. 555, 562, n.12 (1983) (an example of an "extraordinary situation" permitting post-deprivation due process is the seizure of items subject to forfeiture because requiring a pre-seizure hearing "would make customs processing entirely unworkable" and "frustrate the statutory purpose"); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974) (holding that the seizure of the yacht without prior notice pursuant to Puerto Rican statute was appropriate because the seizure was necessary to secure the important Government interest in preventing the "continued illicit use of the property"); *Fuentes*, 407 U.S. at 91-92 (noting that the Supreme Court has "allowed outright seizure without opportunity for a prior hearing only in cases where there has been an "important governmental or general public interest;" there has been a "special need for very prompt action;" and the seizure has been under the "strict control" of a government official responsible for administering a "narrowly drawn statute"); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931) (in the context of collecting tax debt, finding that "[d]elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.").

The post-deprivation offset notice provision in 31 CFR § 901.3(b)(4)(iii)(C) comports with due process requirements because it applies only "when there is insufficient time before payment would be made to the debtor/payee to allow for prior notice and an opportunity for review," and therefore is used only in cases where prompt action is necessary to secure the important governmental interest of collecting federal debt.

c) Stale Notice

Notice, even if sent far in advance of the threatened deprivation, is unlikely to ever become so stale that it is no longer effective. Nevertheless, if a considerable amount of time has passed since the agency's notice, the agency should assess whether relying on the previously sent notice would be reasonable under the circumstances. *See Dusenbery*, 534 U.S. at 167-68 (observing that the Court has regularly turned to a reasonableness standard in cases challenging the adequacy of the method used to give notice). A new notice may not be required where the person is aware of the proceedings and has already had a reasonable opportunity to be heard. *See Schneider v. San Bernardino County*, No. 92-55991, 1994 U.S. App. LEXIS 22119, at * 6 (9th Cir. Aug. 15, 1994) (rejecting plaintiffs' argument that an eviction notice sent in March had become stale at the time of the plaintiffs' July eviction where plaintiffs were aware of the proceedings and had sufficient opportunity to have their claims heard). In the context of debt collection, notice should be re-sent, where possible, if there is a material change in the amount owed or the action to be taken. *See Roth v. United States*, No. 02-820, 2003 U.S. Dist. LEXIS 12931, at *2 (D. Minn. July 22, 2003).

C. Opportunity to be Heard

(1) General Standard

Like the requirement for notice, the opportunity to be heard must be provided "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). To determine if a plaintiff has been afforded the constitutionally required "opportunity to be heard," courts use a balancing test. *Mathews*, 424 U.S. at 335. The test recognizes that the benefits of additional procedure may not justify the additional costs. *Id.* Under the *Mathews* balancing test, courts balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. This is a flexible, context-specific standard. *Id.*

(2) Material Facts

Due process does not require a hearing if there is no disputed issue of material fact to resolve. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (stating that due process does not entitle a person to a hearing to establish a fact that is not material to the State's statutory scheme); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 621 (1973) (explaining that Congress did not intend, and due process does not require, the agency to provide an applicant seeking approval of a new drug application a hearing when the applicant has not tendered any evidence that meets the statutory standards for approval of the drug); *Gaddy v. U.S. Dep't of Educ.*, No. 08-CV-573, 2010 WL 1049576, at *4 (E.D.N.Y. Mar. 22, 2010) (noting that even if the court was inclined to grant a hearing to plaintiff who "slept on his rights" by failing to respond to the agency's written notice of intent to garnish his wages, plaintiff "has raised no issue of material fact—such as the actual existence or amount of his debt—which might serve as the basis for such a hearing"). Similarly, agencies are not required to provide an opportunity to hear frivolous claims. *See Burnett v. Comm'r of Internal Revenue*, 227 F. App'x 342, 345 (5th Cir. 2007) (affirming a Tax Court penalty for a plaintiff making frivolous claims and noting that the opportunity to be heard was provided for non-frivolous claims only); *Ralidis v. United States*, 169 F. App'x 390, 391 (5th Cir. 2006) (finding no due process violation where the agency offered a meeting to discuss non-frivolous arguments).

(3) Decisionmaker

To satisfy due process requirements, the decisionmaker must be someone who is capable of fairly judging the case based on the evidence. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975)

("a biased decisionmaker [is] constitutionally unacceptable"); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities."); *see also Aetna Life Ins. Co. v. Lavole*, 475 U.S. 813, 824 (1986) (litigant is deprived of due process where the judge who hears his case has a "direct, personal, substantial, and pecuniary" interest in the decision). A plaintiff alleging bias must overcome the presumption of "honesty and integrity in those serving as adjudicators." *See Withrow,* 421 U.S. at 55 (state administrators are presumed to be "[people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances"). This presumption of impartiality is strong and, to rebut it, there should be evidence that the adjudicator's mind was "irrevocably closed." *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948).

A decisionmaker can be an agency employee or an administrative law judge (ALJ). *See Parham v. J.R.*, 442 U.S. 584, 607 (1979) (noting that due process does not "require that the neutral and detached trier of fact be law trained or a judicial or administrative officer"); *Withrow*, 421 U.S. at 54 (noting that members of the state medical examining board could be neutral decisionmakers); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (allowing adjudication by Social Security examiner); *Cement Inst.*, 333 U.S. at 702 (allowing the agency's Commissioners to adjudicate proceedings).

While not strictly required to meet due process standards, it is generally best practice that the reviewing official not be the same person who made the original decision. *See Withrow*, 421 U.S. at 58 (finding that, while "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation," it also does not "preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high"); *Cement Inst.*, 333 U.S. at 702-703 (holding that agency commissioners were not disqualified by bias simply because the commissioners had previously expressed an opinion that certain conduct was unlawful); *see also* 5 U.S.C.§ 554(d)(2) ("[A]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision . . . .").

(4) Document Production

To provide a meaningful opportunity to be heard, "the evidence used to prove the Government's case must be disclosed to the individual." *See Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."). However, because there is no constitutional right to pretrial discovery in administrative proceedings, the agency generally is not required to provide every potentially relevant document. *See Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) (holding that there was no right to discovery in the Environmental Protection Agency's administrative hearing); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 741 (8th Cir. 1999) (noting that due process requires administrative hearings to be fundamentally fair, but that pretrial discovery is not a prerequisite for fairness). Similarly, agencies generally need not disclose confidential

documents. *See Rasheed-Bey v. Duckworth*, 969 F.2d 357, 362 (7th Cir. 1992) (prisoner's due process rights were not violated when prison officials withheld a confidential case file in his disciplinary hearing where prisoner had sufficient notice of the facts underlying his charges).

(5) Record-Based Decision

Though required procedures vary based on the nature of the case, the decisionmaker should generally maintain a record, make decisions based on the evidence presented in the record, and issue a timely decision. *See Goldberg*, 397 U.S. at 271 (stating that the decisionmaker's "conclusion must rest solely on the legal rules and evidence adduced at the hearing"); *Woldmeskel v. INS*, 257 F.3d 1185, 1192 (10th Cir. 2001) (stating that agencies cannot base their decision primarily on facts not contained in the record without providing notice and an opportunity to contest inferences drawn from those facts); *see also* 5 U.S.C. § 556(d) ("A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."); *but see Llana-Castellon v. INS*, 16 F.3d 1093, 1096 (10th Cir. 1994) (stating that the decisionmaker can also use technical or scientific facts from their expertise). The decision generally should be in writing and should state the reasons for the decision and the evidence but does not need to provide a full opinion or formal findings of fact or conclusions of law. *Goldberg*, 397 U.S. at 271.

(6) Type of Opportunity to be Heard

The opportunity to be heard means the "opportunity to present reasons, either in person or in writing, why proposed action should not be taken." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *see also Craft*, 436 U.S. at 16 n.17) ("[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal." (quoting *Londoner v. Denver*, 210 U.S. 373, 386 (1908)). These rights, however, are not boundless. *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) ("discovery, like all matters of procedure, has ultimate and necessary boundaries" (internal citation omitted)); *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (holding that a student is entitled to present his side of the story before being suspended, but that this right to be heard does not require that a student have "the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of events").

The precise form of hearing constitutionally required will depend on balancing the factors set forth by the *Mathews* Court: (1) the private interest affected; (2) the risk of erroneous deprivation, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, which may include the fiscal and administrative burdens that additional procedures would impose. *Mathews*, 424 U.S. at 335. Accordingly, the formality and procedural requirements of hearings are not uniform, *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), and can "take many forms, including a formal, trial-type proceeding" and "a paper hearing, without any opportunity for oral exchange," *Gray*

Panthers v. Schweiker, 652 F.2d 146, 148 n.3 (D.C. Cir. 1981) (internal quotation marks omitted).

a) Administrative Reviews

In the debt collection context, the agency can resolve most disputes through an informal review of the file. As one court stated, "[t]he opportunity for informal consultation with designated personnel empowered to correct a mistaken determination constitutes a 'due process hearing' in appropriate circumstances." *Craft*, 436 U.S. at 16 n.17 (citing *Goss v. Lopez*, 419 U.S. 565, 581-584 (1975)); *see also Gray Panthers*, 652 F.2d at 148 n.3.

b) Paper Hearings

Paper hearings or reviews are generally sufficient for debt collection cases. The material facts in dispute in these cases can frequently be determined from written materials. Moreover, the process of determining whether a payment is overdue is generally not complex. *See Connecticut v. Doehr,* 501 U.S. 1, 14 (1991) (observing that the existence of debts and delinquent payments are generally uncomplicated matters and lend themselves to documentary proof); *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979) (requests for reconsideration of social security benefit overpayment determinations involve relatively straightforward matters of computation for which written review is adequate); *Mathews*, 424 U.S. at 340-46 (evidentiary hearing was not required prior to the termination of Social Security disability benefits because written submissions were sufficiently probative); *Duranceau v. Wallace,* 743 F.2d 709, 712 (9th Cir. 1984) (observing that the risk of erroneous deprivation is less in in the context of child support garnishment than in cases where the deprivation depends on complex factual determinations). Although "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard," *Mathews*, 424 U.S. at 348, the prohibitive cost of providing pre-termination oral hearings is a frequent theme in opinions addressing this issue. *See Buttrey v. United States*, 690 F.2d 1170, 1183 (5th Cir. 1982) (holding that due process did not entitle permit applicant for a dredge and fill permit to trial type hearing where additional procedures would be prohibitively expensive and would not reduce the risk of error); *Zurak v. Regan*, 550 F.2d 86, 96 (2d Cir. 1977) (discussing the "significant additional financial and administrative burdens necessarily involved in providing in-person hearings to all conditional release applicants"); *Schwarm v. Craighead*, 552 F. Supp. 2d at 1086 (in a bad check diversion program, not requiring a hearing, extensive investigation, or personalized collection letters for every case because it would result in prohibitive costs); *Gradisher*, 255 F. Supp. 2d at 731, *aff'd*, 108 F. App'x 388 (6th Cir. 2004) (not requiring a full hearing before initiating collection action for dishonored check violation because of the increased costs and administrative burdens to the County and the limited benefit to the plaintiff).

c) Oral Hearings

An oral hearing is required where the case cannot be fairly resolved based on the written record, such as when credibility determinations are at issue. *See Goldberg*, 397 U.S. at 269 (indicating that in the context of terminating welfare benefits, oral hearing was required because written submissions may not be a realistic option for the recipients "who lack the educational attainment necessary to write effectively" and because "written submissions do not afford the flexibility of oral presentations"); *but see Califano*, 442 U.S. at 696 (holding that the agency is not required to sort through all reconsideration requests so that a hearing can be provide in the rare cases that involve credibility). Accordingly, the Federal Claims Collection Standards only require a reasonable opportunity for an oral hearing when the debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence. 31 CFR § 901.3(e).

Where an oral hearing is required, the agency may conduct the hearing over a video or telephone conference so long as the hearing affords the opportunity to be heard in a meaningful manner. *See Veliz v. Holder*, 375 F. App'x 148, 149-50 (2d Cir. 2010) (allowing a video conference instead of an in-person hearing for an asylum hearing); *Sanford v. Comm'r of Internal Revenue*, 283 F. App'x 780, 783 (11th Cir. 2008) (holding that a telephone hearing did not violate due process); *O'Meara v. Waters,* 464 F. Supp. 2d 474, 480 (D. Md. 2006) (finding the Internal Revenue Service's process of offering telephonic hearings constitutional); *Casey v. O'Bannon*, 536 F. Supp. 350, 355 (E.D. Pa. 1982) (allowing telephonic hearings to be provided to applicants for public assistance who found traveling to regional centers onerous).

d) Full Evidentiary Hearings

Even where an oral hearing is required, constitutional due process generally does not require a full evidentiary hearing with the formality of a standard trial. *See Mathews*, 424 U.S. at 348 (arguing that the judicial model of an evidentiary hearing is neither required nor the most effective method of decisionmaking in all circumstances); *Nelson*, 961 F. Supp. at 870 (distinguishing termination of welfare benefits, which requires a full evidentiary hearing, from wage garnishments, where less formal proceedings suffice). The requisite level of formality will depend on the nature of the case. *See Mathews*, 424 U.S. at 342-48; *Dixon v. Love*, 431 U.S. 105, 113 (1977) (noting that, ordinarily, "something less" than an evidentiary hearing is required before an agency can take adverse administrative action); *Goldberg*, 397 U.S. at 254 (holding that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process"). In an evidentiary hearing, the person generally has the right to be represented and assisted by counsel, but the agency is not required to pay for the attorney. *See Goldberg*, 397 U.S. at 270-71.

e) Post-Deprivation Review

In certain circumstances, the opportunity to be heard may be postponed until after the deprivation. *See Mathews*, 424 U.S. at 339. For example, post-deprivation hearings are likely warranted when there is a high risk that the Government could not otherwise collect the debt. *See, e.g.*, *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 37 (1990) ("Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls . . . and by making the ultimate collection . . . more difficult."). However, the post-deprivation hearing should be held soon after the deprivation. *See Ross v. Duggan*, 402 F.3d 575, 584 (6th Cir. 2004) ("[*P*]*re-seizure* hearings are ***not constitutionally mandated***, as long as interested persons receive notice and a timely ***post-seizure*** opportunity to be heard prior to forfeiture."). In cases where informal review or paper hearings may not be constitutionally sufficient, additional post-deprivation review can sometimes constitute a sufficient opportunity to be heard. *See Mathews*, 424 U.S. at 338-39 (emphasizing that pre-deprivation written opportunity to contest termination of disability benefits was paired with the post-deprivation opportunity to appeal through an evidentiary hearing before an administrative law judge as well as the opportunity for judicial review).

f) Judicial Review

The Administrative Procedure Act provides for judicial review of final agency determinations. *See* 5 U.S.C. §§ 702, 704.

(7) Waiver of Opportunity to be Heard

The opportunity to be heard consists of a guaranteed chance to be heard; there is no requirement that the debtor in fact be heard. *See Boddie*, 401 U.S. at 378-79 (stating that the hearing required by due process is subject to waiver). If a person fails to comply with "reasonable procedural or evidentiary rule[s]," that person is not guaranteed a further opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982); *Grandison v. Smith*, 779 F.2d 637, 641-42 (11th Cir. 1986) (failure to request a hearing under established procedures following fair notice and an effective opportunity to respond constitutes a waiver); *cf. Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 908 (6th Cir. 2006) (finding that appellant's lengthy and unexcused delay in filing a motion to vacate the final judgment constituted a waiver of the right to object and an irrevocable renunciation of that right). If a statute guarantees the opportunity to be heard upon request and that request is not made, the debtor has had his opportunity to be heard. *See Nelson*, 961 F. Supp. at 870 (in an administrative wage garnishment case, finding "[t]he fact that the statute only provides hearings upon request does not make the procedure insufficient").

III. CONSEQUENCES OF VIOLATING DUE PROCESS

In the debt collection context, if a court finds that an agency action was taken in violation of due process, the court may compel the agency to provide the debtor with the process to which the debtor was entitled. *See Marcello v. Regan*, 574 F. Supp. 586, 598-99 (D.R.I. 1983); *Atwater v. Roudebush*, 452 F. Supp. 622, 634 (N.D. Ill. 1976). Federal agencies generally will not be required to return any funds collected in violation of due process, unless it is later determined that the funds should not have been taken. *See Marcello*, 574 F. Supp. at 598-99 (requiring that persons whose tax refunds had been intercepted without due process receive additional notice, but not requiring those funds to be returned unless further process showed that the interception was unwarranted); *see also Moseanko v. Yeutter*, 944 F.2d 418, 420 (8th Cir. 1991) (stating that funds collected by offset do not have to be immediately returned when the hearing procedure under a new regulation would provide the plaintiffs with a sufficient opportunity to be heard); *Smith v. Onondaga Cnty. Support Collection Unit*, 619 F. Supp. 825, 831 (N.D.N.Y. 1985) (ordering "proper notice and opportunity to be heard" as a remedy for plaintiffs that did not receive adequate notice and hearing prior to tax refund interception); *Eguia v. Tompkins*, 756 F.2d 1130, 1139-40 (5th Cir. 1985) (concluding that a post-deprivation hearing remedied prior due process problems); *but see Roudebush*, 452 F. Supp. at 634 (indicating that the court would be willing to hear motions by the plaintiff for restitutionary and injunctive relief until the required administrative hearing is held). Generally, debtors will not be entitled to damages for due process violations because the Due Process Clause does not require the payment of money damages. *Murray v. United States*, 817 F.2d 1580 (Fed. Cir. 1987).

In some cases, injunctive relief may include not only a requirement that the agency provide procedural due process, but that it also return funds collected in violation of the debtor's due process. However, in the federal debt collection context, a requirement to make a payment to the debtor returning funds collected in violation of the debtor's due process will often be futile if the debt is still outstanding, because the Government is generally required under applicable statutes and common law to offset any unexempted payments, including any payment representing the return of funds.