

Illusory Due Process: The Broken Student Loan Hearing System

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Student loan collection hearings should be the primary gateway to relief for borrowers in default, but the system is profoundly broken. The author presents case examples, available data, and responses from industry surveys to describe how student loan collection hearings offer no more than an illusion of due process. The later sections present reform proposals to improve the existing hearing system, including eliminating private contractor outsourcing and increasing government accountability and oversight. Recognizing that it is counterproductive to try to fix the hearing process without tackling systemic issues, the final section includes a summary of broad reform measures aimed at ending the current debt-fueled federal student aid system.

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INTRODUCTION

There are currently about forty-three million federal student loan borrowers with outstanding federal student loan debt of \$1.5 trillion.¹ A shocking number of these borrowers are struggling with repayment, with many sinking into default.² Although student loan debt burdens impact all sectors of society, low-income borrowers and borrowers of color suffer disproportionately.³ Other groups

1. Teddy Nykiel, *2019 Student Loan Debt Statistics*, NERDWALLET (Dec. 20, 2019), <https://www.nerdwallet.com/article/loans/student-loans/student-loan-debt> [https://perma.cc/D4LF-WYHS]; Scott Jaschik, *Outstanding Student Loan Portfolio Now Tops \$1.5 Trillion*, INSIDE HIGHER ED (Jan. 6, 2020), <https://www.insidehighered.com/quicktakes/2020/01/06/outstanding-student-loan-portfolio-now-tops-15-trillion> [https://perma.cc/L3KU-RKPY].

2. According to a 2019 study, one-quarter of all student loan borrowers defaulted over a twenty-year period, including about half of all African American borrowers and a third of Latinx borrowers. LAURA SULLIVAN, TATJANA MESCHEDE, THOMAS SHAPIRO & FERNANDA ESCOBAR, INST. ON ASSETS & SOC. POL’Y, *STALLING DREAMS: HOW STUDENT DEBT IS DISRUPTING LIFE CHANCES AND WIDENING THE RACIAL WEALTH GAP* (2019), <https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf> [https://perma.cc/N56X-KEF3].

3. For example, African American students are far more likely to borrow than their white peers (seventy-eight percent vs. fifty-seven percent) and to default on those loans (forty-nine percent vs. twenty-one percent). Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2017, 9:00 AM), <https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/> [https://perma.cc/Y3AU-9BWE].

particularly burdened by student loan default include veterans, first-generation college students, students without traditional high school diplomas, and students with disabilities.⁴

This Article focuses on struggling borrowers and their experiences seeking relief through the student loan collection hearing process. These hearings, in theory, allow borrowers facing collection to raise claims and defenses, including challenges to loan enforceability. The hearings should be the primary gateway to relief for borrowers in default. Instead, as described in this Article, the hearings offer no more than an illusion of due process.

By allowing the broken hearing system to continue, the government has effectively eliminated an essential pathway to relief for borrowers facing default. This hits borrowers particularly hard because of the broad and long-lasting consequences of default. Our current federal student loan system is extraordinarily punitive, more so than other federal and private debt collection programs.⁵ The government can garnish a borrower's wages without a judgment, seize tax refunds (even earned income tax credits), and portions of federal payments such as Social Security, all without a statute of limitations.⁶ In addition to facing collection, students in default lose the ability to restart their educations through new federal loans or grants and may even have their academic transcripts withheld.⁷ These policies prevent individuals from getting a fresh start and hammer students who do not succeed the first time around.⁸ These financial burdens of debt inhibit our country's ability to achieve its higher education goals but so do the psychological burdens. Borrowers can end up carrying student debt burdens throughout their lives, impacting not only their own futures but next generations as well.⁹

It should not be surprising that the government generally uses its powerful extrajudicial collection tools rather than expending the time and resources to sue a borrower in court.¹⁰ From July through September 2018, the Department of

Students who identify as American Indian or Alaska Native and Hispanic or Latino students also default in rates higher than national averages. Colleen Campbell, *The Forgotten Faces of Student Loan Default*, CTR. FOR AM. PROGRESS (Oct. 16, 2018, 9:45 AM), <https://www.americanprogress.org/issues/education-postsecondary/news/2018/10/16/459394/forgotten-faces-student-loan-default/> [<https://perma.cc/R4XM-HCJC>].

4. Campbell, *supra* note 3.

5. See Deanne Loonin & Julie Margetta Morgan, *Aiming Higher: Looking Beyond Completion to Restore the Promise of Higher Education*, 48 J.L. & EDUC. 423, 435 (2019).

6. DEANNE LOONIN, ABBY SHAFROTH & PERSIS YU, STUDENT LOAN LAW § 8.5.3 (Nat'l Consumer Law Ctr. ed., 6th ed. 2019); 20 U.S.C. § 1095a (eliminating the statute of limitations).

7. THE INST. FOR COLL. ACCESS & SUCCESS, THE SELF-DEFEATING CONSEQUENCES OF STUDENT LOAN DEFAULT 2 (2018), https://ticas.org/wp-content/uploads/legacy-files/pub_files/ticas_default_issue_brief.pdf [<https://perma.cc/78RS-GF9T>].

8. Loonin & Morgan, *supra* note 5, at 447.

9. See, e.g., Adam Harris, *The Lifelong Cost of Getting a For-Profit Education*, ATLANTIC (Aug. 29, 2018), <https://www.theatlantic.com/education/archive/2018/08/for-profit-college-students-are-saddled-with-debt-they-cant-pay-back/568834/> [<https://perma.cc/W6QE-WMXX>].

10. The Department of Education does, however, sue in some cases. These cases are disproportionately concentrated in areas that are home to communities of color. MARGARET MATTES

Education's (the Department) collection agencies seized almost \$230 million in wages from borrowers in default.¹¹ This was about nine percent of all collections.¹² Most borrowers in garnishment persist in that status for at least five to ten years.¹³

In theory, most struggling borrowers should be able to find some relief through an array of programs ranging from affordable and flexible repayment plans to discharges for disability or school-related fraud.¹⁴ The school-related fraud discharge category includes a right to "borrower defense," an assertion that the loan is void or unenforceable because of school misconduct.¹⁵

Borrowers generally must affirmatively apply for these various relief programs.

This Article highlights the importance of student loan collection hearings as a pathway to relief for borrowers and the range of ways in which the program is broken. Part II describes the legal framework of the student loan collection hearing system. Part III presents the reality of the borrower hearing experience and how the government offers no more than an illusion of due process. Part IV summarizes the doctrine of inherently governmental functions and how it developed to address the risks of privatization of critical government functions. This Part also discusses the prevalence of private contractor involvement in the student loan collection hearing system, concluding that these hearing functions should be classified as inherently governmental functions. This is followed by a discussion in Part V of the problems with government administration of the hearing process and lack of accountability. The last two sections present reform proposals starting with ways to improve the existing system in Part VI. Recognizing that it is counterproductive to try to fix the hearing process without tackling systemic issues, the final section includes a

& PERSIS YU, NAT'L CONSUMER L. CTR., INEQUITABLE JUDGMENTS: EXAMINING RACE AND FEDERAL STUDENT LOAN COLLECTION LAWSUITS (2019), https://www.nclc.org/images/pdf/student_loans/report-inequitable-judgments-april2019.pdf [<https://perma.cc/9ZRV-PX5G>].

11. The Department publishes recovery rates for each collection agency, broken into categories for total collection, consolidation, rehabilitation, voluntary payments, and garnishment. There is not a separate category for non-garnishment involuntary collection. *Default Rates*, FED. STUDENT AID, <https://studentaid.gov/data-center/student/default> [<https://perma.cc/Z3UF-S383>] (last visited Oct. 3, 2020). There is also publicly available data by type of collection, including offset, for the now defunct guaranteed loan program (also known as "FFEL"). For the 2019 fiscal year through June, FFEL garnishment comprised nearly 7% of total FFEL loan collections, amounting to close to \$380 million seized from borrowers. Treasury offsets comprised 6.2% of FFEL loan collections, equaling just over \$340 million. *FFEL Program Lender and Guaranty Agency Reports*, FED. STUDENT AID, <https://studentaid.gov/data-center/lender-guaranty> [<https://perma.cc/G4S6-3LY7>] (last visited Oct. 3, 2020) (June 2019 results).

12. *Id.*

13. AnnaMaria Andriotis, *Student Debt Takes a Bite Out of More Paychecks*, WALL ST. J. (June 13, 2014, 6:52 PM), <https://www.wsj.com/articles/student-debt-takes-a-bite-out-of-more-paychecks-1402699974> [<https://perma.cc/D2VE-EFVD>].

14. See generally LOONIN, SHAFROTH & YU, *supra* note 6.

15. 20 U.S.C. § 1087e(h); 34 C.F.R. § 685.222 (2020) (setting forth borrower defenses to Direct Loans). For information about borrower defenses for FFEL loans, see LOONIN, SHAFROTH & YU, *supra* note 6, § 10.6.4.3.

summary of broad reform measures aimed at ending the current debt-fueled federal student aid system.

I. LEGAL FRAMEWORK OF THE STUDENT LOAN COLLECTION HEARING PROCESS

The statutory authority for student loan collection hearings differs depending on the type of loan and type of collection action. Since 2010, the government originates nearly all federal loans through the Direct Loan program.¹⁶ However, there are still a large percentage of outstanding loans from the older guaranteed loan program, also known as the Federal Family Education Loan program or FFEL.¹⁷

Before submitting a debt to the Department of Treasury for tax or benefits offset, the Department of Education must certify that the debt is legally enforceable.¹⁸ For FFEL loans, the Department delegates to guaranty agencies the authority to initiate tax offsets for loans still held by the guaranty agency.¹⁹

With respect to garnishment, the government can seize up to fifteen percent of a defaulted borrower's disposable pay.²⁰ The FFEL process largely mirrors the Direct Loan process with a few important exceptions. For example, the garnishment authority for FFEL is in the Higher Education Act (HEA).²¹ In contrast, the government authority for garnishment of Direct Loans is derived from the Debt Collection Improvement Act (DCIA).²²

For both the Direct Loan and FFEL programs, the statute and regulations describe notice requirements, deadlines for borrower hearing requests, and minimal criteria for hearing officers. There is also informal guidance on the hearing process, not all of which is publicly available.²³

There are deadlines for requesting hearings. For tax offset, in order to have the borrower's objections to tax offset considered, the borrower must file a request

16. In the Direct Loan program, the government, through the Department of Education, directly originates student loans.

17. As of January 2020, the Direct Loan portfolio represented eighty-two percent of the federal student loan total, with FFEL at seventeen percent. Jaschik, *supra* note 1.

18. 31 U.S.C. § 3720A(b); 31 C.F.R. § 285.2(d)(1)(i) (2020); 31 C.F.R. § 285.5(b), (d)(5) (2020). "Legally enforceable" means there has been a final agency determination that the debt, in the amount stated, is due, and there are no legal bars to collection by offset. 31 C.F.R. § 285.5(b).

19. 31 U.S.C. § 3720A(a). Guaranty agencies are state or private nonprofit organizations that had agreements with the Department of Education to administer a loan guarantee program under the Higher Education Act. 34 C.F.R. § 682.200 (2020) (containing FFEL program definitions).

20. 31 U.S.C. § 3720D(b)(1).

21. 20 U.S.C. § 1095a.

22. 31 U.S.C. § 3720D.

23. The Department provides instructions to collection agencies, including for offset and garnishment, in a handbook that is not publicly available. A redacted version from May 2016, obtained through a National Consumer Law Center (NCLC) Freedom of Information Act (FOIA) request, is posted online. FED. STUDENT AID, U.S. DEPT OF EDUC., PCA PROCEDURES MANUAL FOR PRIVATE COLLECTION AGENCIES CONTRACTED BY FEDERAL STUDENT AID (2016) [hereinafter PCA HANDBOOK], <https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/pca-manual.pdf> [<https://perma.cc/86BN-UKBC>].

for review by the later of sixty-five days after the date of the notice or fifteen days after the borrower's loan file is provided if the borrower exercises the right to request the loan file.²⁴ The timely request for a hearing stops the offset until the hearing—and any further requests for review—have been exhausted.²⁵ The government is not required to do so but has discretion to provide hearings for borrowers requesting them after these deadlines have expired.²⁶ There are similar rules and authority for federal benefits offset with a few variations. For example, borrowers facing benefits offsets have fewer days to request hearings.²⁷

The timing rules are slightly different for garnishment. If the borrower requests a hearing on or before the thirtieth day after the mailing date of the notice of garnishment, the garnishment should not proceed until after the hearing.²⁸ Borrowers can still request hearings after that date—and regulations provide that the Department must still provide a hearing following an untimely request—but garnishment may proceed pending a hearing decision.²⁹

Unlike offset, there are rules regarding deadlines for issuance of garnishment decisions.³⁰ The Department is required to issue a written decision no later than sixty days after receiving the request for hearing.³¹ If this deadline is not met, the Department must not issue a garnishment order until a hearing is held and decision rendered.³²

Borrowers may request oral hearings for both offset and garnishment but must submit the reasons why a review based only on the written submission would be insufficient.³³ For Department-held loans, the Department has discretion whether to grant an oral hearing.³⁴ In contrast, the FFEL garnishment regulations provide the borrower with the option of choosing an oral or written hearing.³⁵

24. 34 C.F.R. § 30.33(d)(1) (2020).

25. 31 U.S.C. § 3720A(b).

26. 34 C.F.R. § 30.24(c) (2020).

27. *Id.* § 30.24(a)(1).

28. 31 U.S.C. § 3720D(c)(1). The statute provides fifteen days, but the regulations state thirty. 34 C.F.R. § 34.11(a)(1) (2020). The Department's website also states a deadline of thirty days. *If You Default on Your Federal Student Loan, the Loan May Be Placed with a Collection Agency, Which Will Then Contact You to Obtain Payment*, FED. STUDENT AID [hereinafter *Collections*], <https://studentaid.gov/manage-loans/default/collections> [<https://perma.cc/EZY6-43PV>] (last visited Oct. 3, 2020). Hereafter, the citations to garnishment are all for the Direct Loan program.

29. 31 U.S.C. § 3720D(c)(2); 34 C.F.R. § 34.11(c).

30. For offset, the regulations for oral hearings do not include a deadline for decisions, but the regulations provide that the government must avoid unreasonable delays in the proceedings. 34 C.F.R. § 30.26(c)(2) (2020).

31. 34 C.F.R. § 34.16(a) (2020).

32. *Id.* § 34.16(b).

33. 34 C.F.R. § 30.25(b) (2020) (addressing offset); 34 C.F.R. § 34.9(a) (2020) (addressing garnishment).

34. 34 C.F.R. § 34.9 (addressing garnishment); 34 C.F.R. § 30.25 (addressing offset).

35. 34 C.F.R. § 682.410(b)(9)(i)(E)(2) (2020).

Borrowers may request hearings and raise claims or defenses regarding the existence, amount, enforceability, or past-due status of the debt.³⁶ For garnishment, borrowers may also raise a defense if they have been continuously employed less than twelve months after involuntary separation from employment.³⁷ The request for hearing forms list these claims and defenses, including the various statutory discharges such as closed school, false certification, and borrower defense.³⁸

Borrowers may also provide evidence at a hearing to prove that continued collection would cause a financial hardship. A successful hardship claim does not discharge or cancel the debt, but instead results in a temporary suspension of collection. The garnishment regulations specifically include a right to raise hardship to reduce or suspend collection.³⁹ The Department has developed an administrative wage garnishment calculator for its contractors to use in making hardship determinations.⁴⁰ In contrast, review based on financial hardship is not explicitly granted in the offset regulations. However, the Department and guaranty agencies have discretion to consider hardship claims for borrowers facing offset.⁴¹

II. THE REALITY OF STUDENT LOAN COLLECTION HEARINGS

A. Hearing Volume and Outcomes

This Section and the following sections present findings from the limited public information that is available about hearings, including information from various Freedom of Information Act (FOIA) requests, a survey of industry

36. 31 U.S.C. § 3720A(b)(2) (stating the agency must give an opportunity for borrowers facing offset to present evidence that debt is not past due or not legally enforceable); 34 C.F.R. § 30.22(b)(3)(ii) (2020) (addressing review of existence or amount of debt); 34 C.F.R. § 30.33(b)(3)(ii) (2020) (addressing review of existence, amount, enforceability, or past due status for tax offsets); 31 U.S.C. § 3720D(b)(5) (stating that the agency must give borrowers facing garnishment an opportunity for a hearing concerning the existence or amount of the debt); 34 C.F.R. § 34.6(c)(1) (2020) (addressing garnishment hearings on existence, amount, or current enforceability).

37. 31 U.S.C. § 3720D(b)(6); 34 C.F.R. § 34.6(c)(3).

38. The Department does not include these forms in its online library. *Repayment Forms*, FED. STUDENT AID, https://studentaid.gov/app/formLibrary.action?_ga=2.205759639.542323583.1532996021-1879680736.1424704777 [<https://perma.cc/XQS7-V3L7>] (last visited Oct. 3, 2020). Recent hearing forms, however, are available on the National Consumer Law Center's Student Loan Borrower Assistance website, *Federal Student Loan Forms*, STUDENT LOAN BORROWER ASSISTANCE, <https://www.studentloanborrowerassistance.org/resources/important-forms/> [<https://perma.cc/G6XV-MMEG>] (last visited Oct. 3, 2020), and in the PCA Procedures Manual, PCA HANDBOOK, *supra* note 23.

39. 34 C.F.R. §§ 34.24–34.25 (2020).

40. PCA HANDBOOK, *supra* note 23, at 7.0 app. A (Administrative Wage Garnishment (AWG) Hardship Calculator Supplemental Instructions).

41. *Loan Servicing and Collection - Frequently Asked Questions*, FED. STUDENT AID TOP-Q1, <https://ifap.ed.gov/loan-servicing-and-collection-frequently-asked-questions#TOP-Q1> [<https://perma.cc/TUF9-D6P2>] (last visited Oct. 3, 2020). The Department has also posted a Social Security offset package for borrowers. FED. STUDENT AID, U.S. DEP'T OF EDUC., REQUEST TO STOP OR REDUCE OFFSET OF SOCIAL SECURITY BENEFITS, <https://ifap.ed.gov/sites/default/files/attachments/2019-09/ReqStopReduceOffsetSocSecBenefits.pdf> [<https://perma.cc/9LCM-Y3DW>] (last visited Oct. 3, 2020).

participants, and advocates' experiences representing borrowers. The responses to the industry survey demonstrate how difficult it is to accurately track the actual borrower experience. Most of the companies responding to the industry survey either did not track hearing volume and outcome information at all or did not make the information public.⁴²

There is, however, some information from a redacted version of the Department's 2013 contract with the debt management and collections system contractor Maximus.⁴³ The contract states that Maximus should expect 17,000 garnishment hearings annually and nearly 6,000 annual offset hearings.⁴⁴ In a separate 2015 FOIA response, the Department reported a total of 45,017 garnishment hearings during the time period from January 2012 through May 2015, or approximately 1,097 each month.⁴⁵ This is less than the 17,000 annual hearings the Department set as an expectation for Maximus in the 2013 contract.⁴⁶

The Department has published data showing hearing volume from earlier years for FFEL garnishments. In calendar year 2011, the Department estimated that there were 84,293 FFEL program borrowers whose loans were held by state guaranty agencies and for which the guaranty agency initiated administrative wage garnishment.⁴⁷ The number was 159,912 for nonprofit guaranty agencies.⁴⁸ For both types of guaranty agencies, the Department estimated that ten percent of

42. The author sent a list of questions about student loan collection hearings to an industry contact in 2016. This contact distributed the questions to servicing and collection companies that all had some involvement with the hearing process. The industry contact collected the responses and sent them to the author. The responses were color coded by the type of agency/company, but without identifying the names of the companies. E-mail from author to industry contact (May 31, 2016, 11:45 EST) [hereinafter Industry Survey] (on file with author). The author separately contacted a private servicer/collector with the same list of questions. A total of five companies responded, including four from the industry contact and the one that the author contacted separately. The companies responding to the industry survey included one large and one small state-based guaranty agency, one large and one small nonprofit guaranty agency, and one private servicer/collector. The company that the author contacted separately reviewed its 2016 responses in 2019 and stated that they were still accurate. The industry contact, also in 2019, checked back with a number of agencies administering FFEL hearings and reported to the author that the agencies did not believe that there were changes since the 2016 responses. All respondents requested anonymity. A redacted set of responses with no company identification information is on file with the author.

43. The NCLC obtained a redacted copy of the Department's debt management and collections system contract with Maximus. FOIA Request No. 18-001-49 F [hereinafter Maximus Contract]. The Department's response is dated November 8, 2018. Letter from Dep't of Educ., to Nat'l Consumer L. Ctr. (Nov. 8, 2018) (on file with NCLC).

44. Maximus Contract, *supra* note 43, at 23 app. 3 (DMCS Volumes).

45. Letter from Larry Schwartztol, Am. C.L. Union, and Persis Yu, Nat'l Consumer L. Ctr., to U.S. Dep't of Educ., Request Under Freedom of Information Act (May 7, 2015) [hereinafter ACLU & NCLC], https://www.aclu.org/sites/default/files/field_document/2015.05.07_aclu_nclc_foia_to_dept_ed.pdf [<https://perma.cc/5G27-DW3Y>]. In the final response to the FOIA request, the Department provided data through September 2015, adjusting the total number of hearings to 47,484 (or approximately 1,055 each month).

46. Maximus Contract, *supra* note 43.

47. Administrative Wage Garnishment (AWG)—Use of Third-Party Contractors, 78 Fed. Reg. 65768, 65794–95 (Nov. 1, 2013).

48. *Id.*

borrowers for which garnishment was initiated would request hearings.⁴⁹ One of the industry respondents in the industry survey estimated a lower percentage, stating that about five percent of its student loan customers receive hearing notices request hearings.⁵⁰

The low hearing request rate is cause for concern because hearings are of little value if borrowers do not know about them or request them.⁵¹ Any deterrent effect on future bad acts is also unlikely with such low usage rates.⁵²

Only one of the agencies in our survey provided some data on garnishment hearing volume and outcomes. This large state-based guaranty agency provided information for calendar year 2015 regarding garnishment hearings. According to the agency's response, of 4,710 hearings requested, most (eighty-six percent, or 4,042) were cancelled and no garnishment occurred.⁵³ The agency did not state the reason for cancellation in these cases.⁵⁴ Further, the agency stated only that the garnishment was cancelled, not the underlying debt. This indicates that there was no final discharge of the loan in these cases and presumably the borrowers remained in default.⁵⁵ Of the 4,710 hearings requested, hearings were held in only about fourteen percent of the cases (668 hearings).⁵⁶ Of the 668 hearings, about thirty-nine percent resulted in full garnishment orders and thirty-four percent in partial garnishment orders. In twenty-six percent of cases where hearings were held, the agency and borrower agreed to a settlement and no garnishment occurred.⁵⁷ These settlements may have cancelled the debt, but the agency was not clear about this and did not respond to further inquiry.⁵⁸ In general, this agency did not track by substantive defense raised.

In a 2015 FOIA response, the Department provided data on objections borrowers raised in hearing requests.⁵⁹ However, the Department acknowledged numerous problems with the data including overlap between different categories, leading to double counting of some results.⁶⁰ It is nearly impossible to determine from the responses whether the Department considered substantive defenses when

49. *Id.*

50. Industry Survey, *supra* note 42.

51. Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. ON POVERTY L. & POL'Y 13, 50–51 (2005).

52. *Id.*

53. Industry Survey, *supra* note 42.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. ACLU & NCLC, *supra* note 45.

60. *Id.* In the FOIA response, the Department also explained that the “offset request for review decision” field was never populated for the population analyzed. Letter from Dep't of Educ. to Am. C.L. Union and Nat'l Consumer L. Ctr. (2015) (on file with NCLC). The Department used a work-around to discern offset data by decision type, acknowledging the incompleteness of this work-around because not all hearings had a decision tag, and in some cases the tags were ambiguous. *Id.*

hearings did occur. The Department reported a total of 45,017 garnishment hearings during the time period from January 2012 through May 2015.⁶¹ In about eleven percent of these cases (or 5,106), the garnishment was denied, although this does not mean that the loan itself was cancelled. In about 5.5% of the cases (or 2,516), the Department stated that there was a favorable decision on grounds other than hardship.⁶² This is apparently not a discharge decision because the Department notes that these accounts were removed from garnishment but also that the government will “need to reinstate in the future.”⁶³ About fifty-two percent of the cases resulted in an unfavorable decision for the borrower and full garnishment continued. Only a small percentage of cases resulted in a reduction in the amount or rate of garnishment. About twenty-five percent (or 11,288) resulted in a full, but temporary, hardship suspension.⁶⁴

B. Private Contractor Role

For years, the Department has hired private contractors for a wide range of student aid services, including loan servicing, origination and collection.⁶⁵ This appears to be the case with collection hearings as well because the Department outsources some key aspects of the hearing process largely to Maximus, the Department’s current default services contractor. Founded in 1975, Maximus has a long history of administering public benefits programs for the government, having secured the nation’s first privatized welfare contract in 1987 in Los Angeles.⁶⁶ In 2013, the Department announced a default management contract with Maximus valued at about \$143.3 million with eight one-year option periods, amounting to a

61. In the final response to the FOIA request, the Department provided data through September 2015, adjusting the total number of hearings to 47,484. Letter from Dep’t of Educ., *supra* note 60.

62. *Id.*

63. Industry Survey, *supra* note 42.

64. *See infra* Section II.D.

65. In addition to the contract with Maximus, for example, the Department awarded a five-year contract in 2019 to Accenture Federal Services for a new web portal and other customer services. Andrew Kreighbaum, *Contract Awarded for New Student Borrower Website*, INSIDE HIGHER ED (Feb. 22, 2019), <https://www.insidehighered.com/quicktakes/2019/02/22/contract-awarded-new-student-borrower-website> [<https://perma.cc/GD2U-XAA9>]. The Accenture contract could be worth as much as \$577 million over eight years. *Id.* The Department has also hired third-party private debt collectors for many years. The current list is available online. *Collections*, *supra* note 28.

66. Tracie McMillan, *How One Company Is Making Millions Off Trump’s War on the Poor*, MOTHER JONES (Jan./Feb. 2019), <https://www.motherjones.com/politics/2018/12/how-one-company-is-making-millions-off-trumps-war-on-the-poor/> [<https://perma.cc/MS7U-72ST>].

total estimated contract value of \$848.4 million if all options are exercised.⁶⁷ Maximus took over the contract from ACS/Xerox.⁶⁸

A redacted version of the Maximus contract obtained through a FOIA request indicates that the Department relies heavily on Maximus to prepare and issue draft decisions for Department-held loans. The Department requires Maximus to complete a draft offset hearing response no later than October 31 of the year the pre-offset notice is mailed.⁶⁹ The Department also requires Maximus to complete a draft garnishment hearing response no later than fifty-three calendar days from the postmark date for the hearing request.⁷⁰ It is not clear who writes the final decisions. The Department also tasks Maximus with escalating for Department review internal correspondence of any garnishment hearing that appears to be overdue, defined as a hearing request that has been at the collection agency for more than thirty days, or more than seven days since the last update.⁷¹ This instruction contemplates that Maximus could be “working” the request.

The Department’s collection agency handbook also shows how private contractors, in this case third-party collection agencies, are involved in the hearing process.⁷² The Department instructs collectors to determine the type of objection in the hearing request, use the garnishment hardship calculator for objections due to hardship, and send this information to Default Resolution Group for internal review and forward to Maximus.⁷³ The Department instructs the collection agencies to check the system to see if the hearing request was received and processed by Maximus.⁷⁴ Private contractors are involved in the FFEL hearing system as well, although in these cases, the FFEL regulations limit the extent to which collection agencies can participate in the garnishment process.⁷⁵

67. Press Release, Maximus, U.S. Department of Education, Office of Federal Student Aid, Awards Maximus a Contract to Help Administer the Defaulted Student Loan Debt Program (Oct. 1, 2013), <https://investor.maximus.com/news/news-details/2013/US-Department-of-Education-Office-of-Federal-Student-Aid-Awards-MAXIMUS-a-Contract-to-Help-Administer-the-Defaulted-Student-Loan-Debt-Program/default.aspx> [https://perma.cc/7WL3-AGDU]. The contract number is ED-FSA-13-C-0021. Maximus is described on the Federal Student Aid website as the loan servicer for defaulted federal student loans over 360 days delinquent. *Student Loan Delinquency and Default*, FED. STUDENT AID, <https://studentaid.gov/manage-loans/default> [https://perma.cc/MA7U-S8G2] (last visited Oct. 3, 2020).

68. The Department’s Inspector General cited the Department and ACS for a wide range of problems and deficiencies with the debt collection management system. OFF. OF INSPECTOR GEN., U.S. DEP’T. OF EDUC., ED-OIG/A04N004, REVIEW OF DEBT COLLECTION SYSTEM 2 (DMCS2) IMPLEMENTATION (2015).

69. Maximus Contract, *supra* note 43, at 230 (amendment modification No. 0032, Jan. 6, 2016). For a discussion of problems with Maximus at the Department and other agencies, see *infra* Part III.

70. *Id.* at 233.

71. *Id.*

72. PCA HANDBOOK, *supra* note 23, 81–118 (covering garnishment); *id.* at 160–64 (covering treasury offset).

73. *Id.* at 100.

74. *Id.* at 98.

75. 34 C.F.R. § 682.410(b)(9)(i)(I) (2020); see also *Loan Servicing and Collection - Frequently Asked Questions*, *supra* note 41, at LR-Q9, <https://ifap.ed.gov/loan-servicing-and-collection->

C. Hearing Officials

Despite extensive private contractor involvement in administering hearings, it does not appear that Maximus or other private contractor employees serve as hearing officers for Department-held loans. Further, it is not clear who does.

For Direct Loans, the hearing officer may be any “qualified employee” of the Department whom the Department designates.⁷⁶ The Department does not provide a definition of “qualified employee” and does not explicitly state that the hearing officer must be independent or neutral. The Department’s collection agency handbook states that hearing officials are Department employees and contracted employees that serve as impartial adjudicators.⁷⁷ For FFEL hearings, the Department prohibits collection personnel from conducting hearings and requires that hearing officers must be independent not only of the guarantor but also of the collector.⁷⁸

The private companies responding to the industry survey reported hiring private attorneys in most cases to conduct FFEL loan hearings.⁷⁹ A large state-based nonprofit guaranty agency said they use two independent attorneys to conduct hearings.⁸⁰ A small state-based nonprofit said they use one unaffiliated attorney. The private servicer stated that it used an individual attorney who is an administrative law judge.⁸¹ A mid-sized state agency uses hearing officers from the state Attorney General Division of Administrative Hearings.⁸²

D. Barriers to Raising Substantive Claims and the “Hardship Only” Focus

Borrowers may raise a claim of hardship through the hearing process. A hardship claim is distinct from substantive claims and defenses in that successful hardship claims lead to temporary suspensions or reductions of the amounts seized. Even if a borrower is successful in a hardship claim, the debt survives and the borrower remains in default. The Department usually reviews these decisions every six months and reinstates collection if the borrower can no longer prove hardship.⁸³ Hardship claims are easier in most cases for the government to consider in response to a request for hearing since these claims involve individualized financial evaluations rather than legal analysis of eligibility criteria or other issues related to substantive claims and defenses. Presumably, this is a key explanation for why the Department and its contractors often steer borrowers into “simple” hardship cases,

frequently-asked-questions#LR-Q9 [https://perma.cc/HCG8-JHXM] (stating that private collection employees “do not have authority to start or stop wage garnishments”).

76. 34 C.F.R. § 34.13(a)(2) (2020).

77. PCA HANDBOOK, *supra* note 23, at 82.

78. 34 C.F.R. § 682.410(b)(9)(I).

79. Industry Survey, *supra* note 42.

80. *Id.*

81. *Id.*

82. *Id.*

83. LOONIN, SHAFROTH & YU, *supra* note 6, § 9.3.2.3.4.

ignoring or rejecting substantive claims that challenge debt enforceability and related claims.

The private servicer/collector in our survey, for example, stated that the administrative law judge they employ for hearings only considers matters relating to garnishment, which they defined as evaluating whether the loan is eligible for wage garnishment and at what percentage.⁸⁴ An evaluation of the rate of garnishment is the same as a hardship determination because it involves considering the borrower's financial situation and then determining if the rate should be reduced or if garnishment should be temporarily suspended in cases of severe hardship. Hardship decisions are temporary decisions that are reviewed usually every six months.⁸⁵ This is a far cry from the comprehensive relief available through a successful discharge claim where the debt is eliminated.

Student loan counselors and advocates often perpetuate this inaccurate view of the hearing process as merely a financial evaluation. For example, one media account described a student loan hearing as “no more than a long form detailing your income, debt and expenses. The goal is to stop or reduce garnishment.”⁸⁶ The article quoted a student loan counselor explaining that “You hear the word ‘hearing’ and think, ‘Oh my god, I need an attorney!’ But it’s just a basic exchange of information.”⁸⁷

The experiences of one of the original Corinthian debt strikers illustrates problems with the “hardship or nothing” hearing approach.⁸⁸ This borrower was among the first to file a borrower defense claim in 2014. As collection continued, she filed multiple requests for a hearing to challenge wage garnishment, but she never got a hearing.⁸⁹ The letter she received from the collection agency handling

84. Industry Survey, *supra* note 42.

85. LOONIN, SHAFROTH & YU, *supra* note 6, § 9.3.2.3.4.

86. Kelsey Sheehy, *Student Loan Wage Garnishment: How Default Can Gut Your Paycheck*, NERDWALLET (Aug. 24, 2020), <https://www.nerdwallet.com/article/loans/student-loans/wage-garnishment-student-loan-default> [<https://perma.cc/EGK5-W76W>].

87. *Id.*

88. The Corinthian debt strikers organized through the Debt Collective, a membership organization offering services to empower people to dispute debts. *See* Michael Stratford, *Corinthian ‘Debt Strike,’* INSIDE HIGHER ED (Feb. 24, 2015), <https://www.insidehighered.com/news/2015/02/24/student-activists-call-%E2%80%98debt-strike%E2%80%99-against-federal-loans-they-incurred-embattled> [<https://perma.cc/K5GU-HFFU>] (sharing that Debt Collective stated that it was protesting the Department of Education’s support for Corinthian’s “predatory empire” that “pushed hundreds of thousands into a debt trap”). *See generally* DEBT COLLECTIVE, <https://debtcollective.org/> [<https://perma.cc/LE2N-FUAM>] (last visited Oct. 3, 2020).

89. The Debt Collective detailed the experiences of this borrower, Jessica Madison, in a March 31, 2019 letter to the House Education and Labor Committee. Letter from Thomas Gokey, Co-Founder and Organizer, Debt Collective, and Ann Larson, Co-Founder and Dir., Debt Collective, to Claire Viall and Kathy Valle, Educ. & Lab. Comm., U.S. House of Reps. (Mar. 31, 2019) [hereinafter 2019 Debt Collective Letter] (on file with author). For further descriptions of Ms. Madison’s fight for borrower defense relief, *see* Danielle Douglas-Gabriel, *Trump Changes Higher Ed with Rollback of Obama-Era Consumer Protections*, WASH. POST (July 9, 2017), https://www.washingtonpost.com/local/education/trump-changes-higher-ed-with-rollback-of-obama-era-consumer-protections/2017/07/09/89acd78a-59e3-11e7-9b7d-14576dc0f39d_story.html [<https://perma.cc/9U4T-H9M8>]; Vimal Patel, *Look Who’s*

the account showed that the agency either did not read or understand the request because they asserted she was requesting a hardship reduction or suspension when, in fact, she raised a substantive defense of unenforceability.⁹⁰ By January 2017, the Department approved the borrower defense application, but shockingly, the garnishments continued.⁹¹ The garnishment only stopped months later when a journalist contacted the Department and the collection agency about this specific case. Two days later, the garnishment stopped.⁹²

In a 2012 decision, a borrower requested a hearing, but the Department mistakenly scheduled the hearing for a borrower with a different name.⁹³ Because the borrower with the last name of Topping could not provide identification for a borrower named “Toppina,” he was prohibited from participating in the hearing.⁹⁴ The borrower subsequently contacted his congresswoman and together they requested an explanation from the Department.⁹⁵ The borrower then received a garnishment hearing decision stating that he did not have a financial hardship.⁹⁶ This decision ignored that he was raising a substantive defense, not hardship. Eventually the Department official admitted the hearing was held for the wrong reason and withdrew the garnishment order.⁹⁷

This practice of steering borrowers into hardship is likely related at least in part to confusion over whether the hearing officials should or can make decisions on substantive defenses, including requests for loan discharges. On one hand, the Department has stated that hearing officials are responsible for evaluating discharge and other loan enforceability claims. For example, in 2013, the Department stated specifically that if a borrower raises enforceability in a hearing, it is clear that the hearing official must determine whether the debt in question is enforceable and if so, in what amount.⁹⁸ The Department described this as more than a bookkeeping test.⁹⁹

The request for hearing forms clearly include boxes to check for substantive defenses including claims related to statutory discharges such as closed school and disability.¹⁰⁰ In response to litigation in 2018, the Department even changed the

Talking About Cancelling Debt: How a Fringe Idea Went Mainstream, CHRON. HIGHER EDUC., Jan. 23, 2020, at A8.

90. 2019 Debt Collective Letter, *supra* note 89.

91. *Id.*

92. *Id.* This borrower, Jessica Madison, eventually suffered serious health issues and died in October 2019. Patel, *supra* note 89.

93. Topping v. U.S. Dep’t of Educ., No. 2:09-CV-396-FTM-29, 2012 WL 397809 (M.D. Fla. Feb. 8, 2012), *aff’d*, 510 F. App’x 816 (11th Cir. 2013).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Student Assistance General Provisions, 78 Fed. Reg. 65768, 65782 (Nov. 1, 2013) (to be codified at 34 C.F.R. pts. 668, 674, 682, 685).

99. *Id.*

100. *See supra* note 38.

offset notice and request for hearing forms to include a specific reference to borrower defenses.¹⁰¹ The prior forms simply provided a space for borrowers to check and explain an assertion that the loan was not enforceable.¹⁰² In contrast, the revised form provides a separate space for a borrower to check and explain a defense to repayment of a debt, also known as a borrower defense, which is an assertion that the loan is void or unenforceable because of school misconduct.¹⁰³

On the other hand, the Department has stated that hearing officials are not qualified to evaluate at least some substantive claims, including critical claims about loan enforceability. During litigation in 2017, a Department official serving as the Supervisory Program and Management Analyst in the Department's Hearings and Interagency Appeals Branch (a subpart of Federal Student Aid, or FSA), testified that her department "does not, nor does it possess the necessary qualifications or authority to, review the merits of borrower defense claims submitted by borrowers."¹⁰⁴

Similarly, one of the companies in the industry survey acknowledged that it handles substantive discharge defenses by terminating the garnishment process and passing the application to the regular "discharge regulatory process."¹⁰⁵ The agency does not expect hearing officers to evaluate these substantive claims and defenses.¹⁰⁶

The other companies responding to the industry survey provided conflicting information about handling substantive defenses and discharges.¹⁰⁷ Although difficult to believe, one stated that a borrower has never raised a discharge issue on a hearing form.¹⁰⁸ Another said that if a borrower raises discharge, the agency ombudsman reviews and determines eligibility, and if eligibility is found, the discharge is processed.¹⁰⁹ This is distinct from the hearing process. The large nonprofit agency said that if the borrower has not previously raised the objection, the borrower is provided an application (if applicable) to provide other supporting documentation to determine enforceability.¹¹⁰ The documentation is reviewed prior

101. Defendant's Status Report at 2, *Williams v. DeVos*, No. CV 16-11949-LTS, 2019 WL7592345 (D. Mass. Aug. 8, 2019), ECF No. 101.

102. See Letter from John S. Brooks, Acting Dir., Default Div., Fed. Student Aid, U.S. Dep't of Educ., to Treasury Offset Coordinator (June 27, 2016), <https://library.nclc.org/sites/default/files/TOP-pkg.pdf> [<https://perma.cc/Z7UR-YLFF>] (enclosing an "Addendum to the Agreement Pursuant to Section 428(b) of the Higher Education Act of 1965, as amended, with a State or Private Non-profit Institution or Organization for Coverage of Its Student Loan Insurance Program under the Interest Benefits Provision of Section 428(a) of the Act," including a "Request for Review" form as Attachment E).

103. Defendant's Status Report, *supra* note 101, at Exhibit D.

104. Declaration of Myra Tyler at 8, *Dieffenbacher v. DeVos*, No. 17-cv-00342 (C.D. Cal. May 22, 2017), ECF No. 27-1.

105. Industry Survey, *supra* note 42.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

to scheduling a hearing.¹¹¹ If the borrower's defense is determined to be valid, garnishment activity is stopped and no hearing is scheduled.¹¹² If the documentation does not support the borrower's claim, a hearing is scheduled.

E. The Overall Broken Hearing Experience

The student loan collection hearing system is broken in several ways. One major problem is the Department's failure to consider evidence borrowers submit. It does not appear to matter if the borrower checks the box for discharge or provides extensive supporting documentation. The borrower may send extensive evidence to back up the defense only to find in many cases that the government does not bother to read the enclosed evidence or claims not to have received it. In other cases, the government pretends that it held a hearing and issues a decision that has nothing to do with the defense raised. Another barrier is the Department's ignoring requests for oral hearings and simply issuing written decisions.

In one case, for example, a borrower requested a hearing in response to a garnishment notice.¹¹³ She was eventually able to get a hearing with a judge who told her that the purpose of the hearing was just to inform her of the wage garnishment amount and the date it would start.¹¹⁴ The agency did not have copies of the original documents to prove the existence of the debt and default.¹¹⁵ The judge said he would abstain from making a decision and would give the agency time to figure out what had happened. Instead, about a month later, the judge rendered decision in favor of garnishment without reconvening the hearing.¹¹⁶

In another case, a for-profit school borrower objected to garnishment by asserting a borrower defense on the grounds of school fraud and other legal violations, supported by hundreds of pages of exhibits and legal argument.¹¹⁷

Despite requesting an in-person hearing, she received a "hearing decision" a few weeks later, which simply stated,

Your client objected that she believe [sic] that her loans are not an enforceable debts [sic]. . . . ECMC explained to you and your client why these loans were enforceable and they had addressed your concerns and enclosed copy of the borrower's promissory notes. Because ECMC holds the promissory note(s) and other and other [sic] records supporting the existence of this debt, the borrower has the burden to prove that the debt is not owed. . . . [T]he Department finds that the borrower [sic] student

111. *Id.*

112. *Id.*

113. Mark Kantrowitz, *The Horrors of Defaulting on Education Debt*, FASTWEB (May 28, 2015), <https://www.fastweb.com/financial-aid/articles/the-horrors-of-defaulting-on-education-debt> [https://perma.cc/2RL9-WLBR].

114. *Id.*

115. *Id.*

116. *Id.*

117. Complaint, *Dieffenbacher v. DeVos*, No. 17-cv-00342 (C.D. Cal. Feb. 23, 2017).

loan debt is still legally enforceable; therefore the borrower objection is denied.¹¹⁸

The Department halted garnishment only after the borrower filed a federal lawsuit and sought a temporary restraining order.¹¹⁹ After two years of litigation, the Department managed to evade judgment on the sufficiency of its process and the merits of the borrower defense when the borrower filed for personal bankruptcy.¹²⁰ Unprompted, the Department offered to discharge her loans under the “undue hardship” provision.¹²¹

In practice, the more information a borrower provides to support substantive claims and defenses, the more likely it is that the loan holder will not know what to do with the information or will lose it. For example, in one recent case with a borrower represented by Project on Predatory Student Lending attorneys in Boston, a client and former predatory school student raised unenforceability as a defense to both garnishment and offset. A nameless hearing official (or officials) issued a decision on garnishment and offset within a few weeks of each other. In both cases, the borrower and her attorneys sent a cover letter requesting a hearing, a request for hearing form signed by the client, and a copy of the borrower defense application with extensive evidence. Even though the client separately submitted a borrower defense application to the Department, the nameless hearing official “evaluating” the garnishment request for hearing stated that the agency had not received notification that this application had been submitted. Contrary to prior Department instructions, the official also stated that all borrower defense applications must be submitted in paper format. In contrast, the nameless hearing official signing the offset decision stated that the agency had received the borrower defense application and sent it to the Department for processing and in the meantime, the official denied the request to stop offset because the borrower did not object in a timely fashion. The borrower sent the same exact information in both cases and received completely contradictory results.

Despite the breakdown of this system, the Department continues to present administrative hearings as a way for borrowers to access relief. For example, in February 2020, the Department announced a new forgery discharge form and process intended to help borrowers raise defenses to repayment by disputing the authenticity of their signatures on loan agreements.¹²² The Department explained that borrowers have the right to present this evidence in court or in an administrative proceeding seeking to enforce the debt, such garnishment or

118. *Id.*

119. For more on the *Dieffenbacher v. DeVos* case, see *Dieffenbacher v. DeVos*, PROJECT ON PREDATORY STUDENT LENDING, <https://predatorystudentlending.org/cases/dieffenbacher-v-devos/> [<https://perma.cc/WJ94-GYWL>] (last visited Oct. 3, 2020).

120. *Id.*

121. *Id.*

122. Letter from Fed. Student Aid, U.S. Dep’t of Educ., New Form for Forgery Loan Discharge Process for ED-Held Loans (Feb. 12, 2020), <https://ifap.ed.gov/electronic-announcements/021220form4forgeryloandischargeprocess4edheldloans> [<https://perma.cc/W3HD-ZZXD>].

Treasury offset.¹²³ Presumably this is a reference to the broken student loan collection hearing process.

In other examples, some lawmakers and advocates are calling for a formal appeals process when the Department improperly denies rights such as public service loan forgiveness.¹²⁴ Here too, calling for a broken process as a solution to remedy improper and inaccurate denials of borrower rights is highly problematic and in any case not going to work. It is a recipe for failure if, as described above, borrowers attempt to utilize the system and find out that it is largely illusory.

III. THE RISKS OF PRIVATE OUTSOURCING AND THE INHERENTLY GOVERNMENTAL FUNCTION DOCTRINE

Agency capture and revolving door problems exist in nearly every government agency, but they can be particularly acute in the world of federal student loans given the complexity of the programs and the close working relationship between the Department and its contractors.¹²⁵ In a revealing 2013 email exchange on a debt collection industry web forum, one participant discussing how to enter the government student loan debt collection market stated that “[g]etting student loans on contingency takes political connections, period.”¹²⁶ Another added, “You have to be a huge player in the game and have some type of connection to even get a piece of the pie from government backed loans.”¹²⁷

It should not be a surprise that the same well-connected companies keep winning government contract competitions. These entrenched companies also tend to exploit every possible appeal and protest avenue if their business is threatened, delaying and in some cases halting government efforts to change or hire new contractors.¹²⁸

123. *Id.*

124. See, e.g., Stacy Cowley, *The Student Loan Appeal Process the Government Doesn't Tell You About*, N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/business/federal-student-loan-appeals.html> [<https://perma.cc/4WKQ-9FE9>].

125. See generally Martha Graybow, “*Revolving Door*” *Eyed in Student Loan Scandal*, BOSTON.COM (Apr. 19, 2007), http://archive.boston.com/news/education/higher/articles/2007/04/19/revolving_door_eyed_in_student_loan_scandal/?rss_id=Boston.com+%252F+News [<https://perma.cc/467Q-9D4U>]; Deanne Loonin & Julie Morgan, *Federal Student Aid: Can We Solve a Problem We Do Not Understand?*, 2018 Utah L. Rev. 897, 906–07 (2018). In their article, Loonin and Morgan explain that “agency capture” refers to the phenomenon of government agencies becoming susceptible to the influence and control of the corporate entities they are meant to regulate. The “revolving door” refers to the pattern of employees of regulated entities moving back and forth between public and private sector employment.

126. AmeripayC, Comment to *Looking to Move into Student Loan Collections*, INSIDE ARM (Aug. 30, 2013, 8:36 AM), <http://www.insidearm.com/forum/topic/looking-to-move-into-student-loan-collections/#post-130384> [<https://perma.cc/FKD7-FGGA>].

127. *Id.*

128. Colleen Campbell, *The Long Path to a New Student Loan Repayment System*, CTR. FOR AM. PROGRESS (Sept. 10, 2019, 5:00 AM), <https://www.americanprogress.org/issues/education-postsecondary/news/2019/09/10/474254/long-path-new-student-loan-repayment-system/> [<https://perma.cc/3Q7X-MP4W>].

In the hearing area, the Department appears to rely heavily on Maximus for hearing administration and related tasks.¹²⁹ This is a company that has a long track record of problems and sanctions related to federal and state contracts, mostly in the welfare and health benefits fields.¹³⁰ Beneficiary complaints are ubiquitous.¹³¹ In a December 2019 report, the Government Contractor Accountability Project described a litany of serious problems with Maximus's administration of Medicaid programs across the country.¹³² Among other problems at the Department of Education, Maximus was the debt management contractor in 2019 during a prolonged period of serious call center communication breakdowns.¹³³

Though Maximus generally operates under the public radar, as of September 2017 it had nearly \$2.5 billion in annual revenue and 20,400 employees around the world.¹³⁴ As one expert wrote, the company is so enmeshed in government public benefits programs that “they are almost becoming government.”¹³⁵

The inherently governmental function doctrine was developed to reduce or eliminate the risks of hiring private actors, such as Maximus, to administer and control key government functions.¹³⁶ As courts have noted, “the basic concept of democratic rule . . . is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.”¹³⁷ Private corporations exist primarily to maximize profits. When a corporation makes eligibility and related decisions for government programs, it is very difficult to safeguard against self-interest or conflicts of interest on the part of the corporation.¹³⁸ These are serious concerns given the long history

129. *See supra* Section II.B.

130. McMillan, *supra* note 66.

131. Dru Stevenson, *Privatization of Welfare Services: Delegation by Contract*, 45 ARIZ. L. REV. 83, 108 (2003).

132. GOV'T CONTRACTOR ACCOUNTABILITY PROJECT, MAXIMUM HARM: MAXIMUS'S MEDICAID MANAGEMENT FAILURES (2019), https://www.maximusaccountability.org/system/files/2019.11.07_maximumharmreport.pdf [<https://perma.cc/X8M5-6F8F>]; *see also* Becky Z. Dernbach, *This Is What Happens When You Let a For-Profit Company Run Public Benefits*, MOTHER JONES (Dec. 16, 2019), <https://www.motherjones.com/politics/2019/12/this-is-what-happens-when-you-let-a-for-profit-company-run-public-benefits/> [<https://perma.cc/9B9Y-8DMD>]; John Lasker, *Special Report - Profitus Maximus*, PULSE (Mar. 14, 2013), <https://www.chattanoogaopulse.com/features/profitus-maximus/> [<https://perma.cc/5C2N-VC4U>]; Jonas Persson & Mary Bottari, *Privatization Fail: The Troubled History of Maximus Inc.*, PR WATCH (Oct. 24, 2014, 9:36 AM), <https://www.prwatch.org/news/2014/10/12638/privatization-fail-troubled-history-maximus-inc> [<https://perma.cc/4E4E-SS8N>].

133. Danielle Douglas-Gabriel, *Staffing Shortage at Education Department's Loan Default Unit Frustrates Struggling Borrowers*, WASH. POST (Mar. 21, 2019, 11:01 AM), <https://www.washingtonpost.com/education/2019/03/21/staffing-shortage-education-departments-loan-default-units-frustrates-struggling-borrowers/> [<https://perma.cc/N8SG-DE37>].

134. McMillan, *supra* note 66.

135. *Id.*

136. *See generally* Thomas J. Laubacher, *Simplifying Inherently Governmental Functions: Creating a Principled Approach from Its Ad Hoc Beginnings*, 46 PUB. CONT. L.J. 791 (2017).

137. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997).

138. Stevenson, *supra* note 131, at 103–04.

in the United States of government partnerships with the private sector where the government enabled or ignored private sector practices that promoted discrimination and other illegal activities.¹³⁹

All three branches of the government have refined the definition of inherently governmental functions over time, including in the 1998 Federal Activities Inventory Reform Act (FAIR Act).¹⁴⁰ In 2011, the Obama administration established two tests for identifying these functions.¹⁴¹ The first examines the nature of the function.¹⁴² Under this test, functions that involve the exercise of sovereign powers are inherently governmental.¹⁴³ The policy letter describing these tests listed the functions meeting the definition, including representing the United States in an intergovernmental forum or body.¹⁴⁴ The second test examines the exercise of discretion in the function: “[I]f the exercise of . . . discretion commits the government to a course of action where two or more alternative courses of action exist, it is inherently governmental unless the decision-making is guided by specific ranges of acceptable discretion and is subject to meaningful oversight or final approval by agency officials.”¹⁴⁵ The letter does not establish what should be done if an agency violates the requirement not to contract out these functions.¹⁴⁶

Acting as a decision maker in a student loan collection hearing should meet one or both of these tests. A hearing officer is exercising discretion that commits the government not only to reductions in amounts collected but also binds the government to comprehensive relief options such as discharges. In general, deciding cases involves discretion when weighing evidence and applying the law. Hearing officials are deciding, among other issues, how government resources should be utilized. Although not a full judicial trial, these hearings should provide borrowers with substantial due process rights related to presentations of evidence, processes to request documents, standards for allowable claims and defenses, and burdens of proof.¹⁴⁷

There is substantial precedent that judicial and quasi-judicial functions such as administrative hearings fit within the inherently governmental function category.

139. *See generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

140. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 5(2)(A), 112 Stat. 2382, 2384 (codified at 31 U.S.C. § 501).

141. Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227 (Sept. 12, 2011).

142. Laubacher, *supra* note 136, at 811.

143. Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, 76 Fed. Reg. at 56, 227.

144. *Id.*

145. Laubacher, *supra* note 136, at 811 (quoting Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, 76 Fed. Reg. at 56,237).

146. Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, 76 Fed. Reg. at 56, 240 (explaining that agencies shall develop and maintain internal procedures to address the requirements of this guidance, and those procedures shall be reviewed by agency management no less than every two years).

147. *See supra* Part IV.

For example, in a 2000 ruling, a court drew a distinction between delegations of rulemaking authority to the private sector, which affect a general class, and delegations of adjudicative power, which determine the rights of an individual.¹⁴⁸ The former is more likely to survive judicial scrutiny when, for example, a legislature gives authority to voters to make rules through public referendums.¹⁴⁹ In contrast, according to the court, transferring judicial type decision-making “is what the Due Process Clause prohibits.”¹⁵⁰

Preliminary hearing activities, such as reviewing requests for hearings and transferring requests within the agency, are arguably also inherently governmental functions. In practice, nearly every aspect of the hearing process requires the type of discretion that should not be left to the private sector. Drafting a garnishment hearing response, for example, requires discretion regarding which claims to consider and the substance of the response. This is similar to the arguments for classifying administration of FOIA requests as inherently governmental functions.¹⁵¹ The steps involved in both areas are not easily divided into roles that require judgment and discretion and those that do not. The best course of action to ensure integrity of the process is to err on the side of prohibiting private company involvement.

Whether these preliminary hearing functions are considered inherently governmental may depend on the scope of discretion and the level of oversight. Courts considering how to draw these lines generally ask if the private delegate’s actions are subject to meaningful review by a government agency.¹⁵² It is not clear how much review would be sufficient to allow private outsourcing, especially since government oversight of private contractors, including at the Department, has historically been weak.¹⁵³ Further, if the purpose of the inherently governmental function doctrine is to require that these functions be completed by federal employees, the mere possibility of oversight does not satisfy that purpose.¹⁵⁴ Among other issues, this also leads to the question of why the government should outsource key functions if doing so tends to exacerbate existing problems and creates a need for even more oversight.¹⁵⁵ A GAO associate director testified in 1998 that when the governmental role in the delivery of services is reduced through privatization,

148. Stevenson, *supra* note 131, at 99 (discussing *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000)).

149. *Id.*

150. *Club Misty, Inc.*, 208 F.3d at 622.

151. Tiffany A. Stedman, *Outsourcing Openness: Problems with the Private Processing of Freedom of Information Act Requests*, 35 PUB. CONT. L.J. 133, 148–49 (2005).

152. *See, e.g.*, *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997) (reviewing nondelegation doctrine and sets out an eight-part test).

153. *See* Laubacher, *supra* note 136, at 818 (arguing that despite discussion of problems with lack of oversight of federal procurements, improvements have not happened).

154. Stedman, *supra* note 151, at 149.

155. *Id.* at 152.

the need for aggressive monitoring and oversight grows.¹⁵⁶ Further, oversight is necessary to evaluate compliance with the terms of the privatization agreement and in delivering the goods and services.¹⁵⁷

Despite the persuasive authority that hearing administrations should be inherently government functions, it does not appear that the Department has formally made this classification. The FAIR Act required agencies to create a list of activities performed by the agency that are not inherently governmental and submit that list to the Office of Management and Budget (OMB) and to the public.¹⁵⁸ As of early 2020, the latest FAIR inventory on the Department's website was from 2017.¹⁵⁹ This outdated inventory describes a general "collection" category classified as closely associated with inherently governmental functions.¹⁶⁰ The "closely associated" category is derived from the Obama administration 2011 policy memo which differentiated among functions closely associated with inherently governmental function (thus outsourceable in specific situations) and critical functions that must be performed by government employees.¹⁶¹

In response to a request for clarification, the designated Department official stated that the inventory is outdated because the Department had not yet received approval from the Office of Management and Budget to post the 2018 FAIR Act report.¹⁶² In response to the question of whether the Department classifies jobs related to collection hearings as inherently governmental functions, the official said that "it is difficult to answer your question accurately" because "there doesn't appear to be any categories to determine which jobs are related to administrative collection hearings."¹⁶³

156. *Id.* (citing *Competition for Commercial Activities in the Federal Government: Hearing Before the Subcomm. on Oversight of Gov't Mgmt. Restructuring & the Dist. of Columbia*, 105th Cong. (1998) (statement of J. Christopher Mihm, Acting Associate Director, Federal Management Workforce Issues, U.S. General Accounting Office)).

157. *Id.*

158. Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, § 2(a)-(c)(1), 112 Stat. 2382 (codified at 31 U.S.C. § 501).

159. *U.S. Dep't of Education FAIR Act Inventory*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocfo/fair-act-inventory/index.html> [<https://perma.cc/Q5ET-Q6WU>] (last visited Oct. 3, 2020).

160. *Id.*

161. Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, 76 Fed. Reg. at 56,238 (stating that agencies subject to the FAIR Act must give special consideration to using federal employees to perform functions closely associated with inherently governmental functions).

162. E-mail from Vito Pietanza, Contracts Acquisition Innovation Advocate, U.S. Dep't of Educ., to the author (Jan. 21, 2020) (on file with author). Mr. Pietanza is listed on the Department's FAIR Act Inventory website as the contact for questions. *See U.S. Department of Education FAIR Act Inventory*, *supra* note 159.

163. E-mail from Vito Pietanza, *supra* note 162.

IV. LACK OF GOVERNMENT ACCOUNTABILITY AND BORROWER DUE PROCESS RIGHTS

The risks arising from privatization should not obscure the dismal public record of oversight in the federal student aid program. There is a long and unfortunate history of bureaucratic failures at the Department of Education.¹⁶⁴ The Department too often abdicates its duty to borrowers in order to cut costs or serve other constituencies, including private companies that lobby heavily for access and profitable contracts.¹⁶⁵ These problems stem from the conflict of interest inherent in the current structure of federal aid where the government is both the lender, school participation gatekeeper, and collector.¹⁶⁶ This is fueled by corruption, including a revolving door of industry interests in the government and other policymaking circles.¹⁶⁷

These concerns can be addressed in part through both expanded public and private oversight and enforcement of borrower rights, but a key problem is the lack of hearing-specific oversight requirements. For FFEL loans, the agreements guaranty agencies must sign to participate in the treasury offset program require the agencies to submit a final offset evaluation report to the Department and provide the Department with a sample of responses to borrower objections to offset for one percent of the cases.¹⁶⁸ In addition, guaranty agencies are supposed to provide the Department with the nature, total number, and disposition of borrower objections.¹⁶⁹ It is not clear if this is done and if so, whether the information is public, but it should be.

Historically lax federal government oversight underscores the importance of state and private enforcement actions. Constitutional due process cases should be a centerpiece of these enforcement actions, building on the fair hearing rights the Supreme Court set out in *Goldberg v. Kelly* and progeny.

The Supreme Court held in *Goldberg v. Kelly* that due process protections applied to welfare benefits because those benefits were a matter of statutory entitlement and that hearings must occur *before* termination of benefits.¹⁷⁰ The

164. See, e.g., Cory Turner, *Federal Watchdog Issues Scathing Report on Ed Department's Handling of Student Loans*, NPR (Feb. 14, 2019, 11:20 AM), <https://www.npr.org/2019/02/14/694477547/federal-watchdog-issues-scathing-report-on-ed-departments-handling-of-student-lo> [https://perma.cc/5TXX-T4A2].

165. *Id.*

166. Loonin & Morgan, *supra* note 125, at 911.

167. JULIE MARGETTA MORGAN, ROOSEVELT INST., WHO PAYS? HOW INDUSTRY INSIDERS RIG THE STUDENT LOAN SYSTEM—AND HOW TO STOP IT (2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Who-Pays-Insiders-Rig-Student-Loan-System-201806.pdf> [https://perma.cc/37RQ-NBXD].

168. Letter from John S. Brooks, *supra* note 102, at app. I § 7.4. Earlier versions of these agreements are available online. *Guaranty Agency*, MYEDDEBT.ED.GOV, <https://myedebt.ed.gov/partner/partnerGASupportTOPMenu.action> [https://perma.cc/K92N-WJXC] (last visited Oct. 3, 2020).

169. *Id.*

170. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

Court went on to spell out essential features for hearings, including provision of timely and adequate notice, a chance to argue the case orally, and full notice of decisions in writing.¹⁷¹ The influence of this decision carried beyond welfare to other government benefits programs.¹⁷² Six years after *Goldberg*, the Supreme Court set out a balancing test in *Mathews v. Eldridge* to determine what type of process is due in these cases.¹⁷³

Despite the strong protections set out in *Goldberg* and subsequent cases, student loan borrowers have been mostly unsuccessful in challenging student loan collection hearings on constitutional due process grounds.¹⁷⁴ Courts have held that borrowers just need an opportunity to be heard before a neutral decision maker but have not expressed much about how meaningful that opportunity should be.¹⁷⁵ In one case, the court stated that the individual's need for the portion of his wages subject to garnishment did not approach the public interest at stake in *Goldberg v. Kelly*.¹⁷⁶

Courts have also upheld the Department's process of conducting garnishment hearings mostly in writing rather than orally or in person, expressing sympathy with the pressure of dealing with the large volume of annual actions.¹⁷⁷ Even cases challenging the neutrality of the arbiter have sided with the government.¹⁷⁸ In at least a few cases, the Department has chosen to change practices, such as notice provisions, going forward even though the borrower's challenge on due process grounds failed.¹⁷⁹

Nonetheless, beyond due process claims, borrowers may bring other claims against state actors that are not available against private entities. This includes

171. *Id.* at 267–69.

172. Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1325 (2012).

173. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The test includes 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 substantive procedural safeguards; and third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

174. LOONIN, SHAFROTH & YU, *supra* note 6, § 14.2.6.

175. *Nelson v. Diversified Collection Servs., Inc.*, 961 F. Supp. 863, 870 (1997).

176. *Id.*

177. *Pageus v. U.S. Dep't of Educ.*, No. 1:07-cv-03167-JOF, 2010 WL 731590, at *5–6 (N.D. Ga. Feb. 25, 2010).

178. *Kelly v. Aman Collection Servs.*, No. 03-6091, 2007 WL 909547, at *11 (D. Minn. Mar. 23, 2007) (finding that nothing precluded Department of Education from designating an employee as hearing official).

179. LOONIN, SHAFROTH & YU, *supra* note 6, § 14.4.6.2. Borrowers may also be successful in cases where the Department fails to comply with the requirements for properly assigning debts to the Department of Treasury for collection. *See, e.g.*, *Ibrahim v. United States*, 112 Fed. Cl. 333 (2013) (denying government's motion to dismiss plaintiff's claim that tax offset was illegal and holding that Department of Education misapplied section 3720A when it used plaintiff's refund to satisfy debt of another); *Kipple v. United States*, 102 Fed. Cl. 773 (2012) (denying government's motion for summary judgment because questions remained about whether the school properly assigned student loan note to the Department of Education and whether the Department followed DCIA offset procedures).

§ 1983, which provides the statutory vehicle for remedying constitutional and federal statutory violations committed by state actors.¹⁸⁰ The government should also be liable for discriminatory practices in administration of the federal student loan program under the Equal Credit Opportunity Act and other antidiscrimination laws.¹⁸¹

V. REFORMING THE EXISTING COLLECTION HEARING SYSTEM

A. Procedural Justice and Transparency

The goal of reforming the existing student loan collection hearing process is to make procedural justice a reality for student loan borrowers. As professor and sociologist Rebecca Sandefur writes, “When people perceive that the decision process that led to an outcome was fair, incorporated their participation, treated them with respect, and was managed by an impartial adjudicator, they experience procedural justice.”¹⁸²

The first step to achieving procedural fairness is to require transparency about hearing volume, outcomes, and borrower experiences. A key argument for the utility of administrative hearings is to shine a light on patterns of administrative error.¹⁸³ This can only occur if borrowers know about the hearings and are able to access them and if the government and contractors provide key outcome information and data.

The FOIA process is one way to get this information, but it too is broken.¹⁸⁴ There are significant drawbacks to the current FOIA process, including that it puts the burden on the requester to know what documents or records the government has produced or possesses. It is time-consuming and can be expensive.¹⁸⁵ Further, its exemptions—particularly those for trade secrets and law enforcement—make it difficult to retrieve information that pertains to student loan servicing, debt collection, and other loan-related activities.¹⁸⁶

180. 42 U.S.C. § 1983.

181. JEREMIAH BATTLE, JR., CREDIT DISCRIMINATION § 2.2.5.6 (Nat’l Consumer L. Center ed., 7th ed. 2018). Senator Elizabeth Warren presented a plan to address racial disparities and predatory practices in the higher education system as part of her presidential campaign. The plan notes that the Department of Education is sitting on evidence of massive racial disparities in administration of the student loan program. Elizabeth Warren, *My Plan to Cancel Student Loan Debt on Day One of My Presidency*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/student-loan-debt-day-one> [<https://perma.cc/C7TQ-HKG3>] (last visited Oct. 3, 2020). Private contractors should also be liable for violations of anti-discrimination laws.

182. Rebecca L. Sandefur & Thomas M. Clarke, *Designing the Competition: A Future of Roles Beyond Lawyers? The Case of the USA*, 67 HASTINGS L.J. 1467, 1478 (2016).

183. Lens, *supra* note 51, at 35.

184. *See generally* Loonin & Morgan, *supra* note 125, at 910–17.

185. *Id.*

186. *Id.* at 913; *see also* N.Y. Legal Assistance Grp., Inc. v. U.S. Dep’t of Educ., No. 15 Civ. 3818 (LGS), 2017 WL 2973976, at *9 (S.D.N.Y. July 12, 2017) (finding that the collection agency handbook and certain disability discharge guidelines did not qualify as law enforcement documents under Exemption 7(E)).

There is a need to reform the FOIA process to shine the light on government activities and on private contractor practices as well. Even the government often faces roadblocks trying to access information about contractors' proprietary systems, which are owned and maintained by the companies.¹⁸⁷ When the Department requires information, it must put together a detailed request and, in some cases, pay for the extra work the contractor must perform.¹⁸⁸ Department resources to pursue this information have been limited.¹⁸⁹

In addition to greater transparency about government practices, the government must also be more transparent with borrowers by providing information about relief programs. The government and its contractors too often create barriers to program usage by failing to inform borrowers about relief programs and about how to access them.¹⁹⁰ In other cases, the government has created eligibility standards that are nearly impossible for borrowers to meet.¹⁹¹ Piven and Cloward's description of public welfare systems in the '60s rings disturbingly true today:

[P]ublic welfare systems try to keep their budgets down and their rolls low by failing to inform people of the rights available to them; by intimidating and shaming them to the degree that they are reluctant either to apply or to press claims, and by arbitrarily denying benefits to those who are eligible.¹⁹²

187. Campbell, *supra* note 128.

188. *Id.*

189. *Id.*

190. See Loonin & Morgan, *supra* note 125, at 904–05; Danielle Douglas-Gabriel, *GAO Study Says Confusing Terms of a Temporary Program for Student Loan Forgiveness Resulted in High Denial Rate*, WASH. POST (Sept. 5, 2019, 11:45 AM), <https://www.washingtonpost.com/education/2019/09/05/gao-study-says-confusing-terms-temporary-program-student-loan-forgiveness-resulted-high-denial-rate/> [https://perma.cc/8LJE-6ZJS]; Danielle Douglas-Gabriel, *Government Gets Tough on Student Loan Servicers, But Will It Be Effective?*, WASH. POST (July 20, 2016, 2:37 PM), <https://www.washingtonpost.com/news/grade-point/wp/2016/07/20/government-gets-tough-on-student-loan-servicers-but-will-it-be-effective/> [https://perma.cc/BYW4-57VK]. The Department may even build in low utilization rates in estimating program costs. For example, in a 2015 article, Department officials estimated the cost of loan discharges at the predatory school chain Corinthian based on a low six percent discharge program usage rate. Michael Stratford, *Corinthian Closes for Good*, INSIDE HIGHER ED (Apr. 27, 2015), <https://www.insidehighered.com/news/2015/04/27/corinthian-ends-operations-remaining-campuses-affecting-16000-students> [https://perma.cc/ANN6-96SG].

191. See, e.g., Press Release, The Project on Predatory Student Lending, Student Advocates Challenge DeVos's Borrower Defense Rule (Feb. 19, 2020), <https://predatorystudentlending.org/news/press-releases/student-advocates-challenge-devos-borrower-defense-rule-press-release/> [https://perma.cc/CM7S-4BZ8]. Borrowers that do learn about relief options can in some cases administratively appeal denials of their applications. This is distinct from the student loan collection hearing process discussed in this Article. Only borrowers facing the extraordinarily powerful array of government collection powers can use the student loan collection hearing process as a way to raise substantive claims and defenses and seek comprehensive relief. These collection hearings are supposed to be more like judicial proceedings with a number of mandatory due process requirements. The reconsideration right after discharge denials, in contrast, is generally a perfunctory written review. If denied at this reconsideration stage, borrowers are entitled to seek formal review in federal court.

192. Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, NATION (Mar. 8, 2010), <https://www.thenation.com/article/archive/weight-poor-strategy-end->

Challenging agency administrative processes not only expands access to individual relief but also may bolster the movement for systemic change discussed in Part VII.¹⁹³

B. Eliminating the Private Contractor Role and Holding Government Accountable

One way to eliminate the risks of privatization is to classify all aspects of the hearing process as inherently governmental, eliminating the private contractor role altogether.¹⁹⁴ The Department should do so formally through the FAIR process. If the Department fails to do so, Congress must.¹⁹⁵ In the past Congress has declared certain functions inherently governmental (or not) and removed funding from various programs that it felt did not accurately address inherently governmental functions.¹⁹⁶

Although it is preferable for government employees to administer all aspects of the hearing process, it might be possible for some of these functions to be performed privately if there were rigorous government oversight. This is a tremendous challenge given the Department's track record.¹⁹⁷

If private contractors remain in some capacity, the government must make the performance metrics public and ensure that the contracts compensate contractors for doing the right thing and complying with borrower rights provisions. The government should also include third-party beneficiary rights so that borrowers could force compliance with the terms of the contracts.¹⁹⁸

Private contractors in these situations must also be liable for abuses and legal violations that occur in their hearing-related capacities. In theory, private contractors should be liable for claims that government agencies can at times evade due to sovereign immunity. However, private contractors often attempt to avoid liability by arguing that they have derivative immunity. This is a legal area in some flux as the Supreme Court in recent years has hinted at possible immunity for contractors.¹⁹⁹ Courts and Congress must act to halt this growing movement toward private sector immunity and evasion of liability.

In addition to common law claims and rigorous government oversight, public enforcement agencies and individuals bringing private claims should consider other claims that are available against private entities that are not available against the

poverty/ [https://perma.cc/3VCM-PWRL] (providing a new introduction to the May 2, 1966 Nation article with the same title).

193. *Id.* (describing a view that a massive drive to recruit eligible individuals onto public assistance rolls would precipitate a financial and political crisis, forcing a federal solution to poverty).

194. *See supra* Part IV.

195. Laubacher, *supra* note 136, at 813–14.

196. *Id.*

197. *See supra* Part V.

198. Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 635 (2001).

199. *See generally* Jason Malone, *Derivative Immunity: The Impact of Campbell-Ewald Co. v. Gomez*, 50 CREIGHTON L. REV. 87 (2016).

government. This includes consumer protection laws such as the Fair Debt Collection Practices Act (FDCPA). The FDCPA exempts government officers or employees in the performance of official duties, but a majority of courts have held that this exemption does not apply to federal contractors.²⁰⁰

Eliminating the private contractor role will only be effective if the government competently fills the void. As discussed in Part V, this is a tremendous challenge given the inherent conflicts of interest at the Department, lax oversight, and corruption. Although not the topic of this Article, all proposals to restructure the federal aid program to eliminate the conflicts of interest and corruption should be on the table, including splitting up units within the Department of Education to separate the loan origination, school gatekeeping, and collection roles and/or considering enlisting other agencies, such as the Consumer Financial Protection Bureau, to assume the consumer protection role.²⁰¹

In addition, public and private enforcement agencies and advocates must step up and fight to put teeth back into constitutional due process rights for borrowers. As discussed in Part V, borrowers have generally been unsuccessful in challenging the current hearing process based on constitutional due process claims. This is due in part to outdated procedural due process jurisprudence.²⁰² Among other concerns, courts developed these doctrines at a time when private contractor involvement in the administration of public benefits programs was minimal and, according to some scholars, there were fewer incentives to terminate beneficiaries from these programs.²⁰³

C. Restructuring the Hearing Process

The government's current practice of using Department employees as hearing officials must end. These designated officials are employees of the agency that is also responsible for collecting funds. This should be considered contrary to the

200. 15 U.S.C. § 1692a (6)(C) (providing exemption for government officers or employees in the performance of official duties). For cases on Department of Education federal contractors, see, for example, *Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (holding that a guaranty agency is not exempt because it is not a government agency or employee). *See also* *Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F. Supp. 2d 1116, 1125 (N.D. Cal. 2010) (holding that the 2006 amendment to the FDCPA, which added a narrow exemption for private contractors operating bad check diversion programs, did not evince a general intent that private contractors operating pretrial diversion programs were never intended to be considered debt collectors); *Gradisher v. Check Enf't Unit*, 133 F. Supp. 2d 988, 992 (W.D. Mich. 2001) (holding that a private corporation hired by a county to collect on dishonored checks does not meet the government actor exemption as they are an independent contractor).

201. *See e.g.*, Michael Stratford, *CFPB Eyes 'Joint' Supervision of Student Loan Companies with Education Department*, POLITICO (Feb. 6, 2020, 6:57 PM), <https://subscriber.politicopro.com/article/2020/02/cfpb-eyes-joint-supervision-of-student-loan-companies-with-education-department-1876051> [<https://perma.cc/QP63-Y4J6>].

202. *See generally* Parkin, *supra* note 172.

203. *Id.* at 1339; Lens, *supra* note 51, at 13 (noting that much has changed about the welfare system since *Goldberg*, including that welfare is no longer considered an entitlement and it is generally temporary and work-based).

Goldberg court's holding that an impartial decision maker is essential for fair hearings.²⁰⁴ Further, the Department must provide the identities and backgrounds of the individuals they hire to act as hearing officials. These reforms will likely require new regulations and, in some instances, legislation, although some reforms can be implemented through affirmative executive action.

It is also important to look beyond the existing structure and consider less formal paths to justice. Formal hearings, with or without legal representation and even with neutral judges, may simply not be optimal for student loan borrowers.

To test this theory, it is essential to study and evaluate different types of adjudicatory programs at other government agencies. This should include an evaluation of the role of legal assistance. Legal assistance can make a huge difference in hearing outcomes. In immigration hearings, for example, more than eighty percent of children who appeared in court unrepresented were deported.²⁰⁵ As of 2014, for children who appeared in court with legal representation, only twelve percent were deported.²⁰⁶

Legal representation likely makes a difference for student loan borrowers requesting hearings as well. In some cases, a borrower presenting a request with a lawyer may persuade an agency to settle or at least drop the collection action.²⁰⁷ If the case goes to an actual hearing, the current hearing system makes it particularly difficult for borrowers without legal representation to succeed. Even though the hearings are not as formal as court trials, they require an ability to navigate a confusing system and understand an array of borrower rights. These barriers are often greatest for borrowers with language access issues or disabilities.

In the current framework, the mere presence of a lawyer is likely to lead to a better outcome for a borrower. But requiring every person to find a lawyer just to make sure courts follow the rules places the responsibility with the wrong party.²⁰⁸ Further, free and affordable civil legal services are severely underfunded. In a 2017 survey, the Legal Services Corporation found that about seventy-one percent of low-income households had experienced at least one civil legal problem in the previous year. Yet there was inadequate or no legal help for eighty-six percent of these problems. Those who sought help received only limited or no help more than half the time.²⁰⁹ While absolutely worth fighting for, the historical trend is going in

204. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (finding that an impartial decision maker is essential, but prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker).

205. Misyrlena Egkolfopoulou, *The Thousands of Children Who Go to Immigration Court Alone*, ATLANTIC (Aug. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/08/children-immigration-court/567490/> [<https://perma.cc/DC3H-RWYT>].

206. *Id.*

207. *See* Lens, *supra* note 51, at 48 (suggesting that the mere request for a hearing can act as a prod for parties to resolve their own disputes).

208. Rebecca L. Sandefur, *Access to What?*, 148 DÆDALUS 49, 52 (2019).

209. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, 6 (2017), <https://www.lsc.gov/sites/default/files/images/>

the opposite direction, toward steadily reduced funding for free and affordable legal services.

Limited legal representation is not necessarily fatal to hopes for procedural justice. Professor Rebecca Sandefur and others have written about ways to expand forums beyond traditional lawyer-based adversarial hearings, emphasizing that it is critical to first clarify the goals of the hearings.²¹⁰ For student loan hearings, the government must first affirm that the goals of the hearings are to increase access to justice, not to cut costs or ensure substantial collection rates.

In looking back at the history of fair hearings for public benefits recipients, some have argued that while *Goldberg* and subsequent decisions brought critical procedural rights to many government benefits recipients, courts and policymakers may have been too quick to adopt an adversarial hearing model rather than experimenting with more investigative or inquisitorial approaches.²¹¹ We should consider such experiments for student loan borrowers without in any way compromising borrower rights.

The resulting system could be multilayered with informal programs set up to resolve straightforward issues, reserving the more formal programs for complex issues or other cases that cannot be resolved informally. For example, if a borrower is truly seeking only to raise financial hardship as the basis to suspend or reduce collection, a neutral, nonprofit counseling or other type of agency could handle and make determinations about these individual financial issues. For the system to be effective, there must be robust funding for these services as well as training and oversight.

Some might argue that the current student loan ombudsman office could serve this role, but this is not an effective solution to meet procedural justice goals. The ombudsman website clearly states that they are not a borrower advocate nor intend to replace regular or formal channels of problem resolution within the Department or in federal court.²¹² Most importantly, the ombudsman is based within the Department's Federal Student Aid office, part of the very agency that is not only rife with internal conflicts of interest, but also creates most of the problems borrowers are seeking to resolve. It is unrealistic to expect the ombudsman to play the neutral role required to objectively evaluate borrower hardship and related claims or to have any power to affect more positive outcomes for borrowers.

TheJusticeGap-FullReport.pdf [https://perma.cc/JUC9-JZC2] (finding that about seventy-one percent of low income households had experienced at least one civil legal problem in the previous year and eighty-six percent of these problems received inadequate or no legal help, and those who sought help received only limited or no help more than half the time.).

210. Sandefur & Clarke, *supra* note 182, at 1474.

211. Parkin, *supra* note 172, at 1329.

212. *If You're In a Dispute About Your Federal Student Aid, Contact the Federal Student Aid Ombudsman Group as a Last Resort*, FED. STUDENT AID, <https://studentaid.gov/feedback-ombudsman/disputes/prepare> [https://perma.cc/5FLZ-UYPT] (last visited Oct. 3, 2020).

In addition to helping evaluate hardship claims, once a borrower requests a hearing, there could be a system short of a full hearing to require the government to present proof of the borrower's legal obligation to pay. Without such proof, the government would not be able to move forward. This might look like a system in New York where creditors are required to provide documentation of the amount claimed at the time of filing debt collection lawsuits.²¹³ This was a response to the typical situation in which creditors are allowed to file lawsuits without documentation of ownership of the debt. The program led to a dramatic drop in numbers of debt lawsuits.²¹⁴

In an example of a hybrid formal/informal hearing system, the Department of Agriculture's Rural Housing Service (RHS) loan program gives borrowers the option to request a complete three-stage review of adverse decisions made by agency personnel or servicers.²¹⁵ The appeal procedures include (1) an informal phone conference with the agency staff who made the decision, (2) mediation, and (3) an on-the-record in-person hearing before a hearing officer.²¹⁶

It may also be preferable to limit the scope of the student loan hearings so that the agencies route discharge decisions to specialized units at the Department. The officials would stay hearings pending discharge decisions. At least until there is widespread reform, this will help ensure that untrained, biased officials are not making substantive discharge and related decisions. To make this work effectively, there must be discharge decision deadlines created through legislation or regulation so that borrowers are not left in limbo for prolonged periods, as is currently the case.

It is also important to seriously consider that informal or alternative prehearing procedures may disadvantage low-income individuals.²¹⁷ This may be particularly the case if the informal hearings are mandatory with no way for an individual to choose a more formal process or if the informal processes are more like formal hearings in disguise.²¹⁸ This is an area crying out for more study and evaluation.

VI. SYSTEMIC CHANGE

"When a system is broken, the solution is systemic reform."—Rebecca Sandefur²¹⁹

There is an open question about how much to prioritize procedural rights to achieve a truly just student aid system. Improving process without tackling systemic issues is counterproductive and unlikely to succeed.

213. Sandefur & Clarke, *supra* note 182, at 53.

214. *Id.*

215. 7 C.F.R. § 11.3(a) (2020) (defining adverse decisions).

216. 7 C.F.R. §§ 11.5–10.

217. Parkin, *supra* note 172, at 1366 n.272; Lens, *supra* note 51, at 53.

218. Lens, *supra* note 51, at 53–54 (warning that alternative and less formal procedures may work against poorer and more disadvantaged individuals, who may lose procedural protections that compensate for their lack of power).

219. Sandefur & Clarke, *supra* note 182, at 52.

In reconsidering the prior due process reform movement, some critics believe that the push for benefits hearings ended up harming recipients by masking injustice without ultimately gaining much in terms of greater benefits.²²⁰ Critics also raise concerns about the lawyer-based, adversarial nature of the hearing process.²²¹

One lesson is to ensure that recipient voices are centered and empowered in the reform movement. For example, the mostly women of color who led welfare rights movement fought to change how people understood aid to the poor.²²² Current student debt organizing efforts along these lines focus on the right to education and eliminating the debt-based foundation of our federal student aid system.

This is essential, but there is still a question whether including borrower voices can truly disrupt the corruption in the current system. Former Department employee and whistleblower Jon Oberg has referred to the Department's revolving door and related corruption as "the iron triangle."²²³ According to Oberg,

An iron triangle at either the state or federal level is a lobbying association's dream, always sought and often achieved. One corner is the lobbying group; another is the staff of an elected official in the legislative branch with jurisdiction over the subject area; in the third corner are the officials in the executive branch who administer the relevant government programs. The goal is to get the lobbying association's own people in charge of all the corners. This is done by means of the "revolving door," through which like-minded people sympathetic to the lobby group fill and then rotate among the corner positions, moving from one to another as opportunities arise.²²⁴

Oberg and others call for a different approach to reforming federal student aid, focusing not on incompetence as the main culprit for the dismal administration, but on corruption.²²⁵

Challenging corruption and restructuring oversight should be coupled with reforms to eliminate the punitive collection powers and simplify the student aid

220. Parkin, *supra* note 172, at 1332.

221. Lucie E. White, Goldberg v. Kelly on the Paradox of Lawyering for the Poor, 56 BROOK. L. REV. 861, 872 (1990) (arguing that lawyer-engineered remedies do not challenge the lived experience of subordination); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1856 (2001) (citing critiques that the right to a fair hearing has become a "quintessential lawyer's process-based reform, easily routinized within the welfare bureaucracy, its pursuit sapping movement energy and gaining nothing of substance").

222. See generally Gene Demby, *The Mothers Who Fought To Radically Reimagine Welfare*, NPR (June 9, 2019, 9:49 AM), <https://www.npr.org/sections/codeswitch/2019/06/09/730684320/the-mothers-who-fought-to-radically-reimagine-welfare> [<https://perma.cc/2LKX-BHYC>].

223. Jon H. Oberg, *Iron Triangles, Part I*, THREE CAPITALS (Dec. 2017), <http://viewfromthreecapitals.blogspot.com/2017/12/pubad-101401.html> [<https://perma.cc/ZAY5-LDVT>].

224. *Id.*

225. Jon H. Oberg, *Corruption as a Cause of Student Loan Failures*, THREE CAPITALS (Sept. 2019), <http://viewfromthreecapitals.blogspot.com/2019/09/corruption-as-cause-student-loan.html> [<https://perma.cc/4FYK-5MDB>].

programs. This should include ending default through automatic payment or other simplification proposals, ending punitive collection powers such as Social Security offsets, and implementing safety net reform including restoration of student loan bankruptcy rights.

These measures are critical, but the most important reform is to move away from a student aid system based on debt. As long as loans are the centerpiece of federal aid, the punitive collection agenda will continue to overshadow all other government priorities.²²⁶ A comprehensive analysis is beyond the scope of this Article, but key components include broad debt cancellation, free public college programs, banning federal aid to for-profit schools, and providing resources and structure for rigorous government oversight.²²⁷

CONCLUSION

To build a case for real reform of federal student aid, we must, as professor of higher education policy and sociology Sara Goldrick-Rab argues, “stop counting who gets what dollars and think in terms of who gets what benefits . . . [This] is a public problem and needs to be treated like one.”²²⁸ Ultimately, this will only occur once there are few or possibly no borrowers in default needing to request collection hearings in the first place.

In the words of one borrower seeking defense to repayment relief after attending a fraudulent school:

Nobody can get a straight answer on the status of their loans, and the Department continues to collect when they're not supposed to. It crushes people. We're stuck. It's a really difficult place to be, to deal with that mentally and financially.

In a system that forces you to go to school, it's really discouraging to have this experience. It makes you not want to invest in this system that we've been told works for everybody.²²⁹

As this borrower attests, denying procedural justice can lead individuals to give up even trying to seek redress.

The illusion of a fair system can lead to more than a cynical citizenry. It threatens the very concept of citizenship. As Professor Danielle Allen explains, no one wants to feel subject to, and “at the mercy of, the will of powerful others, to

226. Loonin & Morgan, *supra* note 190, at 903–04.

227. *See generally* Loonin & Morgan, *supra* note 5.

228. Kanyakrit Vongkiatkajorn, *One Bold Way to Blow Up the College Debt Nightmare*, MOTHER JONES (Nov. 6, 2016), <https://www.motherjones.com/politics/2016/11/college-costs-financial-aid-sara-goldrick-rab/> [<https://perma.cc/LHW2-92YA>].

229. *My Student Loan Truth: Amanda's Everest Institute Story*, PROJECT ON PREDATORY STUDENT LENDING (Oct. 29, 2019), <https://predatorystudentlending.org/news/blog/amandas-everest-institute-story-corinthian-colleges/> [<https://perma.cc/7VX2-MHT9>].

whom they are invisible.”²³⁰ It is worse than nothing for so many borrowers to get a pretend chance to fight back. We can and must do better.

230. Danielle Allen, *The Road from Serfdom: How Americans Can Become Citizens Again*, ATLANTIC (Dec. 2019), <https://www.theatlantic.com/magazine/archive/2019/12/danielle-allen-american-citizens-serfdom/600778/> [https://perma.cc/Y2FM-YK2H].