# Articles

# DUE PROCESS IN BANKRUPTCY: ARE THE NEW AUTOMATIC DISMISSAL RULES CONSTITUTIONAL?

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## I. INTRODUCTION

Since its inception, the Bankruptcy Code[1] has required debtors to promptly file comprehensive schedules detailing their income, expenses, assets, and liabilities, along with heaps of personal and historical information. The bankruptcy courts were always allowed to dismiss a bankruptcy case when a debtor failed or refused to comply with the filing requirements.[2] Before 2005, however, bankruptcy judges had the discretion to relieve innocent and harmless mistakes and could never dismiss a case without first giving the debtor notice of and an opportunity to argue the matter at a hearing.

In 2005, Congress made substantial changes to the requirements for filing and maintaining a bankruptcy case. According to these changes,

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1. 11 U.S.C. § 101 *et seq.* [hereinafter, the Bankruptcy Code].

2. *See* 11 U.S.C. § 707 (1978) ("The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including (1) unreasonable delay by the debtor that is prejudicial to creditors; and (2) nonpayment of any fees and charges required under chapter 123 of title 28."). In 1984, Congress changed the "and" connecting subparagraphs (1) and (2) to an "or," and added the provisions allowing the court to dismiss a case for "substantial abuse" under Section 707(b). Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 312, 475 (1984). In 1986, Congress listed as an additional defined "cause" for dismissal "(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph 1 of section 521, but only on a motion by the United States Trustee." Bankruptcy Judges, U.S. Trustees, & Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 219 (1986). At all times, dismissal under Section 707 has been discretionary ("may dismiss"), and the court was required to give advance notice and an opportunity for a hearing.

debtors must file: (1) copies of their pay stubs (called "payment advices"), in addition to their schedules, for all income they received from employers during the sixty-day period before bankruptcy,[3] (2) a statement disclosing any anticipated increases in income or expenses after bankruptcy,[4] and (3) (almost all debtors) must complete before filing and file with the court a certificate from an approved debtor education course.[5] The new requirements affect cases filed after October 17, 2005.

In addition to requiring further disclosure, Congress enacted harsh measures to assure compliance with the Bankruptcy Code's filing requirements. In terms of due process, the most draconian provision is Bankruptcy Code § 521(i)(1), which states in relevant part:

> [I]f an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required by subsection (a)(1) within 45 days after the filing of the petition, the case shall be *automatically dismissed effective on the 46th day* after the date of the filing of the petition.[6]

In addition, the bankruptcy court must enter an order of dismissal not later than seven days after being requested to do so by any party in interest.[7]

Congress gave the bankruptcy courts almost no authority to avoid automatic dismissal, even for entirely innocent and harmless filing errors. There are only two very narrow statutory exceptions to the automatic dismissal rule. First, if a debtor is lucky enough to be aware of the filing deficiency, the debtor may file a motion requesting up to an additional forty-five days to comply with the filing requirement.[8] Second, the court may deny dismissal if the trustee is aware of the deficiency and files a motion within the forty-five day period to relieve the debtor of the filing obligation for cause.[9] Although some courts have attempted to interpret the exceptions otherwise, the statutory exceptions by their terms allow no relief for debtors/trustees who are not aware of the filing deficiency within the forty-five day period, no matter how innocent the debtor's mistake or harmless the debtor's error.[10]

Furthermore, there are no procedural protections in the statute to

3. 11 U.S.C. § 521(a)(1)(B)(iv) (2010).

4. *Id.* at § 521(a)(1)(B)(v)-(vi).

5. *Id.* at § 521(b)(1).

6. *Id.* at § 521(i)(1) (emphasis added).

7. *Id.* at § 521(i)(2). Effective December 1, 2009, the Bankruptcy Code was amended to change most time periods less than thirty days to multiples of seven. The method for computing time periods was also amended. *See* Statutory Time-Periods Technical Amendments Act of 2009, Pub. L. No. 111-16 (2009).

8. 11 U.S.C. § 521(i)(3) (2010).

9. *Id.* at § 521(i)(4).

10. *See infra* notes 76-77 and accompanying text concerning the "orders otherwise" language in 11 U.S.C. § 521(a)(1)(B).

assure that a court's dismissal is proper. Gone is the requirement for notice and a hearing before dismissal—the dismissal is to be "automatic" upon the mere lapse of time, and an order reflecting the dismissal must be entered within seven days after a creditor or other party in interest requests one.[11]

The harshness of the new rule was brought home to me when a Chapter 13 bankruptcy case that I was handling *pro bono* for a very sympathetic family was dismissed *sua sponte* by the bankruptcy court, without my advance knowledge or an opportunity for a hearing, due to my alleged failure to file the husband's pay stubs.[12] In fact, the husband had no pay stubs to file—he had been unemployed during the sixty-day period preceding bankruptcy. The case was wrongly dismissed based on a clerk's *ex parte* declaration to the court stating that no pay stubs had been filed. Before dismissing the case, the court made no attempt to determine whether the client had worked during the sixty-day period and thus had any pay stubs to file.[13] No one contacted me in advance of dismissal to determine whether the pay stubs existed or to inquire why they were not filed. The court provided no opportunity for a hearing before dismissal. My client's bankruptcy case was simply dismissed by the court's machinery without any care for the debtor's rights. It took a great deal of work to have the dismissal set aside, and during the hiatus, the debtor could have suffered irreparable damage through the loss of his home to foreclosure.[14] This article is an investigation into the constitutionality of the automatic dismissal rules.

11. 11 U.S.C. § 521(i)(2).

12. *In re* Thek, No. 10-60377-6-dd (Bankr. N.D.N.Y. 2010) (unpublished).

13. I do not mean to suggest that the problem was entirely the fault of the bankruptcy court in my case. The court in my district created a local form that is to be filed with the petition indicating whether the payment advice statements were being attached, or that there were no payment advice statements because the debtor did not work during the applicable time period. This local form was not required by any court rule—it was simply the court's unwritten custom to have the form filed with the petition. I had filed the form, indicating that the wife's payment advice statements were attached. I did not check a separate box further down on the form indicating that the husband did not work during the applicable sixty-day time period. My failure to check this box set in motion the court's mechanical procedure leading to the improper dismissal of my client's case, without notice or an opportunity for a hearing. The mistake could have been easily fixed, and the wrongful dismissal prevented, if the court had been required to give me notice and an opportunity for a hearing before the dismissal occurred.

14. My clients' Chapter 13 case was filed to prevent the loss of their home to a property tax foreclosure. Had the county reset the foreclosure sale during the time between the dismissal and reinstatement of my client's bankruptcy case, my clients very well could have lost their home over a very minor clerical mistake. As discussed below, the dismissal of a case is a very serious matter. While it is difficult to understand why Congress would want to require automatic dismissal, even in cases of excusable neglect and harmless error, that is clearly what Congress intended. The question addressed in this article is whether that decision by Congress is consistent with the United States Constitution.

Part II of this article reviews the operation of the new rules and some of the inconsistencies in the language.

Part III of this article reviews the courts' attempts over the past five years to make sense of and apply the automatic dismissal rules to real world cases. After more than 100 written decisions, the courts have brought little clarity to the confusing statute. Most courts have strictly enforced the statutory terms even when the result is fundamentally unfair.[15] Other courts have attempted to find loopholes and inconsistencies in the statutory language, of which there are many, to attempt to achieve a fair result for the parties, even when the fair result cannot be squared with the statutory language and its manifest purpose. In addition, because the automatic dismissal language, if taken literally, would expose almost all consumer bankruptcy court orders to uncertainty, the courts have relied on principles of res judicata to avoid untimely automatic dismissal requests.[16] The end result of the judiciary's efforts to interpret the language is greater confusion and inconsistency.

Part IV of this article challenges the automatic dismissal rules for the failure to provide debtors with procedural due process. Despite the courts'

15. *See infra* note 67 and accompanying text.

16. *In re* Lopez, No. 09-31511-C, 2009 Bankr. LEXIS 3029, at *9 (Bankr. W.D. Tex. Sept. 17, 2009) (recognizing that although a case may be automatically dismissed, until an order is entered, it continues, and the court's rulings will be binding under principles of res judicata); *In re* Ober, 390 B.R. 60, 64 (Bankr. W.D.N.Y. 2008) (preventing creditors, by res judicata, from arguing that the case was automatically dismissed after the plan confirmation order was entered); *In re* Gough, No. 07-00554, 2008 Bankr. LEXIS 47, at *3-4 (Bankr. D.D.C. Jan. 3, 2008) ("Section 521(i)(1) is not jurisdictional: if a plan is confirmed, that will be binding on all creditors and will be res judicata with respect to the issue of whether the case was required to be automatically dismissed."); Jean Braucher, *A Guide to Interpretation of the 2005 Bankruptcy Law*, 16 AM. BANKR. INST. L. REV. 349, 377 (2008) ("The better view is to require an order of dismissal for automatic dismissal to occur and to treat non-dismissal for failure to file required paperwork as res judicata after entry of a final order in the case.").

The Supreme Court's recent decision in *United Student Aid Funds, Inc. v. Espinosa* strengthens the res judicata argument. 130 S. Ct. 1367 (2010). The Court in *Espinosa* ruled that a court order confirming a Chapter 13 plan discharging student loans was valid and binding, even though the student loans were statutorily non-dischargeable. *Id.* at 1378-80. A bankruptcy court order is binding, even if wrong, if the court has an "arguable basis" for jurisdiction and did not violate the challenger's constitutional due process rights (such as by not giving the challenger required notice of the proceeding). *Id.* at 1377-78, 1380. The Court stated that "[g]iven the Code's clear and self-executing requirement for an undue hardship determination, the Bankruptcy Court's failure to find undue hardship before confirming Espinosa's plan was a legal error . . . . But the order remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal." *Id.* at 1380. Similarly, an "automatic dismissal" of the case would not change the fact that the court had original jurisdiction over the case. Therefore, absent a failure to provide due process by giving required notice of the proceedings to all parties, the judgments of the court issued after "automatic dismissal" would be binding unless timely challenged through direct appeal.

struggles with and obvious distaste for the statutory language, only two courts have considered whether the automatic dismissal rules enacted by Congress meet constitutional muster. I conclude that automatic dismissals without notice and an opportunity for a hearing are unconstitutional.

Part V of this article considers whether the Constitution provides debtors with substantive protection from automatic dismissals for innocent and harmless errors. Procedural due process only assures the debtor of a hearing before dismissal. While procedural due process would prevent judicial errors in cases like mine—where the debtor was in fact in compliance with the statutory requirements—a hearing would not provide a mechanism for avoiding the unfairness of mandatory dismissal for minor, innocent, and harmless clerical mistakes. Part IV of this article considers whether separation of powers or substantive due process principles could give the courts the power to relieve these innocent, harmless, and easily cured filing errors.

## II. THE NEW AUTOMATIC DISMISSAL RULES

When the Bankruptcy Code was first enacted in 1978, a bankruptcy debtor's primary obligations were to: (1) file lists of creditors and schedules of assets, liabilities, and current income and expenses; (2) cooperate with the trustee; and (3) turn over property of the bankruptcy estate to the trustee.[17] In 1984, Congress made minor changes to the statute, most significantly to require debtors to file (and perform) a statement of intention with respect to secured consumer debts.[18] These simple rules remained in effect until 2005.

The 1978 Bankruptcy Code contained no explicit rules for addressing a debtor's failure to comply with the filing requirements. Instead, filing deficiencies were handled under the bankruptcy court's broad power to dismiss cases (or under Chapter 13 to convert or dismiss cases) for "cause including [] unreasonable delay by the debtor that is prejudicial to creditors," but "only after notice and a hearing."[19] The courts had no power to dismiss bankruptcy cases *ex parte*—without notice and an opportunity for a hearing. In 1986, Congress specified that failure to file the required schedules within "fifteen days or such additional time as the court may allow after the filing of the petition" would constitute grounds for dismissal

17. Bankruptcy Reform Act of 1978, Pub L. No. 95-598 (1978) [hereinafter "Reform Act"], 11 U.S.C. § 521(a)(1)-(3) (1978), *reprinted in* COLLIER ON BANKR., App. Pt. 4 (MB 2010).

18. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (1984) [hereinafter "BAFJA"], § 305, *reprinted in* COLLIER ON BANKR., App. Pt. 6 (MB 2010).

19. Reform Act, 11 U.S.C. §§ 707(a), 1307(c) (1978).

"but only on a motion by the United States trustee."[20] This confirmed the role of the new United States Trustees to police the bankruptcy filing requirements. The 1984 Amendments added an additional itemized ground for dismissal, "substantial abuse,"[21] but retained both broad judicial discretion in deciding whether to dismiss cases for substantial abuse, and the requirement that the debtor be given notice of and an opportunity for a hearing before dismissal could occur.

In 2005, Congress made substantial changes to the liberal bankruptcy filing procedures that had been in effect since the enactment of the Bankruptcy Code. Initially, Congress replaced the old "substantial abuse" standard with a general "abuse" standard for dismissal, which would surely have been a change of little moment as long as the test was subject to the bankruptcy judge's discretion.[22] Congress also expanded the list of parties who could bring a motion for dismissal for abuse from only the court or the United States Trustee to any "party in interest,"[23] which would include creditors.

The most important substantive change was buried in pages of new rules added to the previously short and simple dismissal provision. Congress felt that bankruptcy was becoming the first rather than last resort of people who had financial problems.[24] Congress sought to remedy the problem by adding a complex, formula-based "means test" to qualify for Chapter 7 relief. The means test has two parts. Consumer debtors automatically qualify for Chapter 7 relief if they had less than the median gross income in the state for their family size during the six months preceding bankruptcy. Those who had above-median income during the six months before bankruptcy have to satisfy a very complicated formula-based test to qualify for Chapter 7 relief.[25] The new rules require the

20. Bankruptcy Judges, U.S. Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 (1986) § 219, *reprinted in* COLLIER ON BANKR., App. Pt. 7 (MB 2010).

21. BAFJA § 312 (adding 11 U.S.C. § 707(b)), § 229 (adding a similar provision in Chapter 13, 11 U.S.C. § 1307(d)(9)-(10) (1984)).

22. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [hereinafter "BAPCPA"], § 102(a)(2)(B)(i)(III), *reprinted in* COLLIER ON BANKR., App. Pt. 10(a) (MB 2010), codified at 11 U.S.C. § 707(b)(1) (2006).

23. BAPCPA § 102(a)(2)(B)(i)(I)-(II).

24. *See* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 488, 495, 565-67 (2005) (quoting, among others, Representative George Gekas's vocal support at House hearings for the view that, although "[h]istorically, bankruptcy was intended as a last resort . . . . [u]nfortunately, [it] has become a way for reckless spenders to escape their debts," and President Bush's remarks prior to and during the signing into law of the 2005 Amendments, indicating his estimation that they would provide a remedy for this problem).

25. The actual means test calculation for above-median debtors is relegated to this footnote because it is so unnecessarily convoluted. Above median debtors have to compute their pro forma "current monthly income" by taking their average monthly gross income during the six months before bankruptcy, 11 U.S.C. § 101(10A) (2010), and subtracting the

debtor's lawyer to police the means test by determining, after a reasonable investigation, that the petition is well grounded in fact and warranted.[26] The rules also expose the debtor's attorney to sanctions and dismissal expenses if it is later determined that the means test was not satisfied.[27] A multi-page official form was promptly developed that must be filed in every consumer Chapter 7 case to show compliance with the means test.[28]

The means test was also incorporated into the individual reorganization chapters of the Bankruptcy Code through the requirement that a debtor must pay all "projected disposable income" to unsecured creditors during the three-to-five-year plan period.[29] "Disposable income" means, in essence, means-test income (average gross income for six months before bankruptcy, less expenses allowed by the Internal Revenue Service for deferring collection and other expenses allowed by statute).[30] A similar means test form was developed, which must be filed in Chapter 11 and Chapter 13 consumer cases to establish the debtor's "disposable

monthly expenses allowed by the Internal Revenue Service for deferring income tax collections, 11 U.S.C. § 707(b)(2)(A)(ii)(I). Additional adjustments are allowed for actual expenses to care and support elderly individuals, for expenses to support chronically ill or disabled members of the debtor's household or immediate family, 11 U.S.C. § 707(b)(2)(A)(ii)(II), for bankruptcy administrative expenses, 11 U.S.C. § 707(b)(2)(A)(ii)(III), for dependents' school tuition up to $1,775 per child per year, 11 U.S.C. § 707(b)(2)(A)(ii)(IV), for actual higher energy costs, 11 U.S.C. § 707(b)(2)(A)(ii)(V), for child support or alimony, 11 U.S.C. § 707(b)(2)(A)(iv), and, most importantly, for secured debt payments, 11 U.S.C. § 707(b)(2)(A)(iii), that can be unlimited in amount. Once the debtor's average six-month prior income and allowed expenses are netted into a net income figure, the means test formula can be applied. The debtor flunks the means test, and the case must generally be dismissed, if the debtor's pro forma net monthly income for five years (multiplied by sixty) exceeds the lesser of (1) the greater of 25 percent of the debtor's non-priority unsecured debts, or $7,025, or (2) $11,725. 11 U.S.C. § 707(b)(2)(A)(i) (2010). The means test presumption can be rebutted only by making a detailed showing of special circumstances for which there is no reasonable alternative justifying additional expenses, such as a serious medical condition or a call to service in the armed forces. 11 U.S.C. § 707(b)(2)(B)(i). The bottom line is that the debtor cannot have pro forma net income exceeding $182.50 per month, and sometimes less, and still qualify for bankruptcy, based on the statutory income and expense components.

26. 11 U.S.C. § 707(b)(4)(C) (2010).

27. *Id.* at § 707(b)(4)(A)-(C).

28. The eight-page form for Chapter 7 cases is Official Form B22A (entitled "Chapter 7 Statement of Current Monthly Income and Means-Test Calculation").

29. *See* 11 U.S.C. § 1129(a)(15)(B) (2010) (providing that a court will confirm an individual debtor's plan over an unsecured claim holder's objection only where "the value to be distributed under the plan is *not less than the projected disposable income* of the debtor . . . .") (emphasis added); *see also id.* at § 1225(b)(1)(C) (providing that the value of property to be distributed over a three-year period is "*not less than the debtor's projected disposable income* for [that period].") (emphasis added); *id.* at § 1325(b)(1)(B) (providing that "the plan provides that *all the debtor's projected disposable income* to be received . . . will be applied to make payments . . . .") (emphasis added).

30. *Id.* at § 1325(b)(2).

income."[31] Adding further complication to an already complex mechanical scheme, the Supreme Court recently determined that Congress's use of the term "projected disposable income" rather than simply "disposable income" in the reorganization chapters allows for the adjustment of the mechanical, backward-looking means test income in light of materially changed circumstances as of the petition date, even though the mechanical means test income is to be presumptively projected forward in the absence of clear proof of changed circumstances.[32] This ruling adds judicial discretion, and also some uncertainty, to the mechanical test used in reorganization cases.

While Congress's new means test contains onerous computation and documentation requirements, Congress did not tinker with the original procedural rules for dismissing cases when a debtor does not satisfy the means test. The court may dismiss a case under the means test "only after notice and a hearing."[33] While the means test may require dismissal under certain factual circumstances, a debtor's procedural rights are protected by the "notice and hearing" requirement, and a debtor's substantive rights are protected by a fact-based determination of the financial standard established by Congress. The means test rules do not require automatic dismissal nor do they prevent the courts from allowing the correction of calculation or documentation errors.[34]

Congress also made substantial changes to a formerly sleepy section of the Bankruptcy Code labeled "Debtor's Duties"—§ 521. Prior to the 2005 Amendments, § 521 merely outlined the debtor's duty to: (1) file a list of creditors and schedules; cooperate with and turn over property of the estate and any books and records to the trustee; and (3) appear at any

31. The two-page form for Chapter 11 cases is Official Form B22B, and the eight-page form for Chapter 13 cases is Official Form B22C.

32. Hamilton v. Lanning, 130 S. Ct. 2464 (2010).

33. 11 U.S.C. § 707(a) (2010). *See also id.* at § 1112(b)(1) ([O]n request of a party in interest, *and after notice and a hearing*, . . . the court shall convert . . . or dismiss . . . .") (emphasis added); *id.* at § 1208(c) ("[O]n request of a party in interest, *and after notice and a hearing*, the court may dismiss . . . .") (emphasis added); *id.* at § 1307(c) ("[O]n request of a party in interest or the United States trustee *and after notice and a hearing*, the court may convert . . . or may dismiss . . . .") (emphasis added); *id.* at § 1307(e) ("Upon the failure of the debtor to file a tax return . . . on request of a party in interest or the United States trustee *and after notice and a hearing* . . . the court shall dismiss . . . or convert . . . .") (emphasis added).

34. The bankruptcy rules liberally allow amendments to petitions, lists, schedules and statements at any time before the case is closed. *See* FED. R. BANKR. P. 1009(a) ("General Right to Amend. A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. . . . [and o]n motion of a party in interest . . . the court may order [any amendment] . . . ."). The bankruptcy rules also allow the court to relieve a party from mistakes, inadvertence, surprise or excusable neglect. *See* FED. R. BANKR. P. 9024 (incorporating FED. R. CIV. P. 60(b)(1)).

discharge hearing scheduled by the court.[35] Any penalties for non-compliance were left to the general dismissal provisions, all of which, as previously discussed, protected the debtor's substantive and procedural due process rights by requiring notice and an opportunity for a hearing before dismissal, and by giving the courts discretion to allow harmless errors and clerical mistakes to be cured.[36]

Moreover, the court had the power to relieve the debtor of the requirement to file all but the list of creditors. The prefatory language of § 521(a)(1)(B) has always required the debtor to file the required documents "unless the court orders otherwise."[37]

Congress's changes to § 521 were substantial. First, Congress added further requirements: (1) certification that the debtor received notice concerning the different chapters of the Bankruptcy Code,[38] (2) the means test statement,[39] (3) a statement of "reasonably anticipated increase in income or expenditures" during the year following bankruptcy,[40] (4) a certificate showing completion of the pre-bankruptcy credit counseling requirement,[41] and, most importantly for this article (5) "copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor."[42]

The payment advice requirement raises important issues because compliance or non-compliance cannot be determined merely by looking at the docket sheet to see what has been filed. All of the other documents must be filed by *every* consumer debtor. Payment advice statements, on the other hand, must only be filed by debtors who were employed during the sixty days preceding bankruptcy, received payments from the employer, and received "payment advices or other evidence of payment" from the employer. For example, debtors who were unemployed or on vacation during all or part of the sixty-day period would not be required to file statements. In order to determine whether the debtor violated the provision, a determination must be made that the debtor received payment advices from employers, was obligated to file them, and failed to do so. This requires a factual determination that cannot be made from a cold review of the docket sheet.

35. 11 U.S.C. § 521 (1984).

36. *See supra* notes 33-35 (discussing a "[g]eneral [r]ight to [a]mend" any materials submitted to the court and referencing 11 U.S.C. § 707(a) indicating that "[t]he court may dismiss a case . . . *only after notice and a hearing* . . . .") (emphasis added).

37. 11 U.S.C. § 521(a)(1)(B).

38. *Id.* at § 521(a)(1)(B)(iii) (2010).

39. *Id.* at § 521(a)(1)(B)(v).

40. *Id.* at § 521(a)(1)(B)(vi).

41. *Id.* at § 521(b).

42. *Id.* at § 521(a)(1)(B)(iv).

The most troubling aspect of the amendments from a due process point of view is buried in subsection (i) of the statute:

> Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be AUTOMATICALLY DISMISSED effective on the 46th day after the date of the filing of the petition.[43]

The reference to paragraphs (2) and (4) appears to be in error—Congress almost certainly meant to reference paragraphs (3) and (4), which contain limited exceptions to the forty-five day rule. Paragraph (2) does not contain an exception to the rule. Rather, if the debtor has not complied with the filing duties under paragraph (1), paragraph (2) requires the court to enter an order of dismissal within five days after a party in interest requests one:

> (2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request.[44]

Paragraphs (3) and (4), on the other hand, contain exceptions to the general rule in paragraph (1). Paragraph (3) allows the court to grant up to an additional forty-five days for compliance if the debtor makes a request for an extension within the original forty-five day period:

> (3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.[45]

Paragraph (4) allows the court to refuse dismissal on the request of the trustee if the court determines that the debtor attempted in good faith to comply with the statute, and the best interests of creditors would be served by refusing dismissal. The statute creates great confusion concerning when the trustee's motion must be filed to be effective:

> Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if

43. *Id.* at § 521(i)(1) (2010) (emphasis added).
44. *Id.* at § 521(i)(2).
45. *Id.* at § 521(i)(3).

> the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.[46]

It is the cross reference to paragraph (2) in the quoted provision that creates the most confusion. Paragraph (2) by its terms only applies to a request for an order of dismissal after the forty-five day period has expired and the case has been automatically dismissed. If the trustee opposes a request for dismissal made under paragraph (2) and the court refuses dismissal, is the case reinstated by the court's denial? Is the automatic dismissal annulled? Does the case remain automatically dismissed sans court order? Sloppy drafting leaves these questions unresolved and subject to judicial interpretation. But this very limited exception, utilized in accordance with its terms only in one written opinion in the five years since enactment, has been used by some courts to undermine the clear language of the main rule requiring cases to be "automatically dismissed."[47]

The operative provision in the statute, subsection (1), gives the court no discretion but to dismiss when neither of the limited exceptions (debtor motion for extension of time up to forty-five days or trustee motion to excuse dismissal) applies. Nevertheless, as is discussed in the next section, some courts have found an additional exception in § 521(a)(1)(B), which requires the documents to be filed "unless the court orders otherwise." Some courts have retroactively forgiven the filing requirements after the case has been "automatically dismissed."[48] However, retroactively forgiving the filing requirements after the case has already been "automatically dismissed" is inconsistent with the purpose and intent of the statute, as the Supreme Court recently noted in dicta.[49] If the debtor does not know about a filing error during the forty-five day period, the case is "automatically dismissed," and an order must be entered to that effect within seven days after any party in interest requests it, subject only to the possibility of a trustee motion within the forty-five or seven-day period requesting that the case not be dismissed due to excusable neglect and in the best interests of creditors.[50]

Congress added many other provisions to § 521. There are provisions requiring the debtor to file proof that the debtor completed a pre-petition

46. *Id.* at § 521(i)(4).

47. *See infra* note 147 and accompanying text.

48. *See infra* note 113 and accompanying text.

49. *See infra* note 116 and accompanying text.

50. The statute fails to explain what happens to a case that has been "automatically dismissed" but for which the court may refuse to enter a dismissal order. Presumably, the case would continue and the dismissal would become moot by the court's later action under principles of res judicata. The statute is simply logically inconsistent under these circumstances.

credit counseling course,[51] to provide to the trustee (and upon request to a creditor) certain tax returns,[52] to provide identifying information to the trustee,[53] to file documents showing any interest in an Individual Retirement Account or State tuition program,[54] and to perform administrative obligations under any qualified ERISA plans in which the debtor is an administrator.[55] These rules do not mandate a specific remedy for violations and therefore do not raise the same due process concerns as the automatic dismissal rules.

However, another new provision raises similar due process concerns. The statute also requires the debtor to take prompt action with respect to personal property subject to a security interest, lease or bailment. The language is very poorly drafted and confusing, but it generally requires the debtor to promptly elect between surrendering the collateral and redeeming or reaffirming the debts, and provides for the automatic termination of the

51. 11 U.S.C. § 521(b) (2010). The debtor must file a certificate from an approved nonprofit budget and credit counseling agency showing that the debtor completed the new prepetition debtor education requirement contained in Section 109(h). *Id.* The statute also requires filing any debt repayment plan developed in the course. *Id.*

52. At least seven days before the first date set for the meeting of creditors, the debtor must provide the trustee with a copy of the debtor's federal income tax return for the most recent tax year, and upon request must provide a copy to any creditors who request it. 11 U.S.C. § 521(e)(2)(A)(i)-(ii). The statute provides for dismissal of the case if the debtor fails to provide the tax return unless "the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." *Id.* at § 521(e)(2)(B). Although the statute does not specify that notice and an opportunity for a hearing would be required before dismissal, the statute also does not provide for automatic dismissal. Because the debtor may avoid dismissal by showing justification, and because the statute requires the court to dismiss the case, I believe the statute implicitly requires notice and an opportunity for a hearing before dismissal.

Section 521(f) requires the debtor to file with the court any post-petition federal tax returns filed while the case is pending, any pre-petition federal tax returns that are filed late during the bankruptcy case covering the three tax years before the petition date, and any federal tax return amendments to these returns. *Id.* at § 521(f)(1)-(3). In addition, in Chapter 13 cases, the debtor must file an annual statement under penalty of perjury of income and expenses, by month. *Id.* at § 521(f)(4), (g)(1). The returns and Chapter 13 income and expense statements must be made available to all parties in interest, subject to certain privacy restrictions. *Id.* at § 521(g)(2).

Section 521(j) allows a taxing authority to request dismissal of the debtor's case if the debtor fails to timely file any tax returns that are due during the pendency of the case, but allows the debtor to avoid dismissal by filing the return within ninety days after the taxing authority's request. *Id.* at § 521(j).

53. The debtor must provide on request of the trustee or the United States Trustee a driver's license or other identifying information. *Id.* at § 521(h).

54. The debtor must file a record showing any interest in an Individual Retirement Account or state tuition program. *Id.* at § 521(c).

55. *Id.* at § 521(a)(7) (a debtor who is acting as an administrator under an ERISA retirement plan must continue to perform the plan administration functions).

automatic stay if the debtor fails to comply with the requirements.[56] The automatic termination of the automatic stay raises the same kinds of procedural due process problems discussed in Part III below because the statute withdraws a benefit without providing advance notice or an opportunity for a hearing.[57]

56. Section 521(a)(2) requires the debtor to file a statement of intention regarding the collateral within thirty days (or such additional time as the court may fix), and to actually surrender the collateral, or redeem or reaffirm the secured debts, within thirty days after the first date set for the meeting of creditors (or such additional time as is allowed by the court during that thirty day period). *Id.* at § 521(a)(2) (2010). Section 362(h)(1) provides for the automatic termination of the automatic stay if the debtor fails to file the statement or perform the act timely. *Id.* at § 362(h)(1). However, the trustee can request before the period expires that the stay not be terminated if the property would be of value to the estate. *Id.* at 362(h)(2). The automatic termination of the automatic stay is very harsh, and can result in a debtor losing valuable property because the debtor is not aware of these new technical requirements. *See, e.g.*, *In re* Carrillo, No. 6:09-bk-09152-ABB, 2010 Bankr. LEXIS 61 (Bankr. M.D. Fla. Jan. 8, 2010) (pro se debtor lost car in repossession due to failure to file statement of intention).

Section 521(a)(6) requires an individual debtor holding personal property secured by a purchase money security interest to "not retain possession of personal property" unless within forty-five days after the first meeting of creditors the debtor either enters into an agreement with the creditor or redeems the property. *Id.* at § 521(a)(6) (2010). If the debtor does not surrender, redeem, or enter into an agreement with the creditor within the forty-five day period, the automatic stay automatically terminates and the property is no longer property of the estate, unless the trustee moves within the forty-five day period to maintain the stay and the property of the estate, and the court determines that the property is of "consequential value or benefit to the estate." *Id.* at § 521(a) (flush language). If the trustee timely files a motion, the court may maintain the automatic stay but must order the debtor to turn over the property to the trustee, and must order the trustee to make adequate protection payments. *Id*.

Subsection 521(d) provides that a lessor or bailor can enforce a so-called "ipso-facto" clause in the contract or lease (under which the debtor is automatically in default as a result of the bankruptcy filing) if the lessor or bailor "holds a security interest" in the property, and the debtor has not complied with either § 521(a)(6) or § 362(h)(1) (or (2)). *Id.* at § 521(d). The reference to § 521(a)(6) is confusing because that section specifically refers to purchase money security interests, not leases or bailments. Section 362(h) contains similar rules to 521(a)(6) for leased property, providing for the automatic termination of the automatic stay if the debtor does not file a statement of intent to either surrender, redeem or reaffirm within thirty days, and then perform the stated intention within the next thirty days (although redemption should be inapplicable to leased property). *Id.* at § 362(h). However, the provision does not apply if the debtor offers to reaffirm, and the lessor refuses. *Id.* at § 362(h)(1)(B). There is also a provision similar to § 521(a)(6), under which the trustee can file a motion within the initial thirty day period to maintain the automatic stay. *Id.* at § 362(h)(2).

57. As is explained *infra* in Part III, by providing debtors with an automatic stay, Congress has created an entitlement. It cannot then automatically terminate the entitlement without giving advance notice and providing an opportunity for a hearing before termination, or under some circumstances at least an opportunity for a prompt post-deprivation hearing.

## III. THE CONFLICTING JUDICIAL RESPONSE TO THE AUTOMATIC DISMISSAL RULES

One bankruptcy judge summed up his views about automatic dismissal in a poem:

> I do not like dismissal automatic,
> It seems to me to be traumatic.
> ***
> How can any person know
> what the docket does not show?
> What is the clue on the 46th day?
> Is the case still here, or gone away?
> ***
> And if the case goes on as normal
> and debtor gets a discharge formal,
> what if a year later some fanatic
> claims the case was dismissed automatic?
> Was there a case, or wasn't there one?
> How do you undo what's been done?
> ***
> Before this problem gets too old
> it would be good if we were told:
> What does automatic dismissal mean?
> And by what means can it been seen?
> Are we only left to guess?
> Oh please Congress, fix this mess![58]

Federal courts are loath to dismiss cases as a sanction for even fairly serious transgressions. For example, the Court of Appeals for the Second Circuit recently overturned as an abuse of discretion a district court's decision to dismiss a case where the plaintiff destroyed key evidence in the case after being served with discovery requests, saying "dismissal is a drastic remedy . . . [that] should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions."[59]

Dismissal of a bankruptcy case (especially without advance notice) carries special risks. Upon dismissal, the automatic stay is terminated, allowing creditors to proceed to enforce their rights against the debtor's

58. *In re* Riddle, 344 B.R. 702, 703 (Bankr. S.D.Fla. 2006) (emphasis omitted).

59. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (citations and internal quotations omitted); *accord* Dahoda v. John Deere Co., 216 F. App'x 124 (2d Cir. 2007). *See also e.g.*, Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005) (holding that the dismissal of an action is a severe remedy befitting only extreme misconduct because it runs counter to the strong policy favoring the disposition of cases on the merits); Silvestri v. GMC, 271 F.3d 583, 593 (4th Cir. 2001) ("We agree . . . that dismissal is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of bad faith or other 'like action.'") (citations omitted).

property.[60] Moreover, if the debtor promptly files a new bankruptcy case, the automatic stay will only be in effect for thirty days.[61] To extend the automatic stay after the initial thirty-day period, the debtor must promptly file a motion to maintain the automatic stay, and establish to the court's satisfaction, after notice and a hearing, the good faith of the second case.[62] The debtor also must pay an additional filing fee, update and re-file all of the papers that previously were filed, and wait a new period before receiving a discharge. At best, re-filing the case is a waste of time, money, and judicial and party resources.

The idea of automatic dismissal is especially foreign to the practice of bankruptcy. It often has been said that bankruptcy courts are courts of equity, and they often have interpreted broadly their powers to do what is right and equitable.[63] The Federal Rules of Bankruptcy Procedure reflect that less formal and more practical ethos. For example, Rule 9005 incorporates the "harmless error" Rule 61 from the Federal Rules of Civil Procedure, which mandates the court "at every stage of the proceeding . . . [to] disregard all errors and defects that do not affect any party's substantive rights."[64] The Bankruptcy Rules also liberally allow amendments to pleadings and other filed documents[65] and even provide for relief from final judgments or orders as a result of "mistake, inadvertence, surprise or excusable neglect" on such terms as the court finds just.[66]

Because the concept of automatic dismissal for trivial filing errors is so antithetical to the bankruptcy courts' ethos, it is somewhat surprising that the courts' initial reaction to the automatic dismissal rules was acceptance. It did not matter that the debtors were honest and acting in good faith,[67] were acting *pro se* without the benefit of an attorney,[68]

60. 11 U.S.C. § 362(c)(2)(B) (2010).

61. *Id.* at § 362(c)(3)(A).

62. *Id.* at § 362(c)(3)(B).

63. *See, e.g.*, Granfinanciera v. Nordberg, 492 U.S. 33, 81 (1989) ("Indeed, we have stated that 'bankruptcy courts are inherently proceedings in equity.'"); SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940) ("A bankruptcy court is a court of equity, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act."); Pepper v. Litton, 308 U.S. 295, 304 (1939) ("[A] bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence." ); Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934) ("Courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity."); *In re* Beaty, 306 F.3d 914, 922 (9th Cir. 2002) ("[A] bankruptcy court is a court of equity and should invoke equitable principles and doctrines, refusing to do so only where their application would be inconsistent with the Bankruptcy Code.").

64. 11 U.S.C. § 9005.

65. *See* FED. R. BANKR. P. 1009(a) ("A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.").

66. FED. R. BANKR. P. 9024(b).

67. *In re* Ott, 343 B.R. 264, 268 (Bankr. D. Colo. 2006) (denying motion to reinstate

provided the documents to the trustee rather than the court due to a misunderstanding of the new rules,[69] made a simple mistake of filing an earlier year's payment advice statement for one two-week period,[70] could not timely obtain copies of the payment advices from an employer or find the missing statements,[71] did not realize a pay stub received exactly on the sixtieth day before bankruptcy had to be filed,[72] would face the loss of a home due to foreclosure,[73] or even that the debtor's attorney made a mistake by re-uploading to the court's computer system the file containing the old payment advices rather than the file containing the missing ones.[74]

due to filing errors, stating: "Here, this Court is presented with impecunious, but seemingly honest debtors, guided by responsible counsel, acting in good faith to attain the benefits of a Chapter 7 bankruptcy—and receive a fresh financial start. But, the language and intent of Congress is clear in 11 U.S.C. § 521(i): the Court has no discretion to remedy any mistake or error—large or small—by a debtor or debtor's counsel. This case must be dismissed."). *See also In re* Calhoun, 359 B.R. 738 (Bankr. E.D. Mo. 2007) (Debtor claims he sent his payment advices to the trustee by fax within the forty-five day period, and also delivered them to the trustee at the first meeting of creditors. Nevertheless, case properly dismissed because the advices were not timely filed with the court.); *In re* Bonner, 374 B.R. 62, 64 (Bankr. W.D. N.Y. 2007) (holding that although five of the six pay stubs were timely filed, the court nevertheless has no discretion but to dismiss case: "His unfortunate mistake does not by itself provide sufficient justification to waive the clear Congressional mandate in section 521(i)(1).").

68. *See, e.g.*, *In re* Vass, No. 08-16626-SSM, 2009 WL 909243, at *1 (Bankr. E.D. Va. Feb. 3, 2009) (dismissing pro se debtor's case for failing to file required documents: "Accordingly, the court, although sympathetic to the debtor's situation, has no discretion to allow the case to continue."); *In re* Kelly, No. 06-71019-JB, 2006 Bankr. LEXIS 3570 (Bankr. N.D. Ga. Nov. 27, 2006) (no discretion even for pro se debtor).

69. *In re* Conner, No. 06-40061-LMK, 2006 WL 1548620, at *1 (Bankr. N.D. Fla. May 16, 2006) ("[D]ue to a misunderstanding regarding the recent changes in the bankruptcy law, the income records were provided to the Trustee's Office, but were not filed with the Clerk's Office, and that no party would be prejudiced by the Court's granting the Motion. However, the Court has no discretion in this matter.").

70. *In re* Wilkinson, 346 B.R. 539, 545-46 (Bankr. D. Utah 2006) (Debtor thought she filed 60 days of pay stubs, but one of the stubs was from a year earlier. When error was discovered after forty-five day period at the time of plan confirmation, the court ordered case dismissed, and denied the debtor's motion to reinstate, saying: "The Court simply cannot do violence to a specific statutory scheme in the name of equity. . . . For better or worse, a harsh result is not the same as an absurd result, and it is not absurd to think that Congress intended harsh results when the dictates of the BAPCPA are not followed.").

71. See *In re* New, No. 07-75092, 2008 WL 7872884, at *1 (Bankr. N.D. Ga. Jan. 9, 2008) (Debtor claims couldn't find or obtain missing pay stubs. "Once such a section 541(i) motion is filed and if the facts support the motion, the court has no discretion to order otherwise."); *In re* Reyes, No. 05-80225, 2006 WL 4847230, at *2 (Bankr. D. Utah Feb. 21, 2006) (denying request to reinstate case because debtor was unable to obtain copies of payment advices from her employer within 45 day period).

72. *In re* Neil, No. 07-21107, 2007 WL 2915851 (Bankr. D. Utah Aug. 9, 2007).

73. *In re* Evans, No. 08-71204-CMS-7, 2009 WL 1651383 (Bankr. N.D. Ala. June 12, 2009).

74. *In re* Giacoma, No. 06-24662, 2007 WL 2916297 (Bankr. D. Utah Mar. 22, 2007). After receiving a deficiency notice from the court regarding some missing pay stubs, debtor

The courts consistently held that they had no power to avoid dismissal.[75] Then came the bad debtor cases.

### *A. The Bad Debtor Cases*

The courts promptly recognized a judicial exception to the automatic dismissal rules for debtors who were attempting to abuse the bankruptcy process by seeking the dismissal of their own case. In *In re Parker*,[76] the debtor sought to dismiss his own bankruptcy case because he did not complete the debtor education requirements before filing and did not file payment advice statements. The bankruptcy court denied dismissal, holding that the educational requirements are not listed under the automatic dismissal rules of § 521(i), that the debtor was estopped from seeking discretionary dismissal, and that it was not clear that the debtor received payment advices (he was self employed).[77] But the court also stated that it would "order otherwise" under § 521(a)(1)(B) if the payment advices were due:

> Section 521 does not set forth the time period within which the Court can "order otherwise," as BAPCPA does in numerous other sections. The statute would seem to permit the Court to excuse the filing requirements in a case at any time, before or

delivered the missing statements to the attorney, and attorney attempted to upload the documents to the court. *Id.* Unfortunately, the attorney uploaded the wrong scanned file. Court denied motion to reinstatement *nunc pro tunc*, claiming that the debtor's attorney had a duty to review the docket to make sure the right files were uploaded. *Id.* This case should concern lawyers who have dealt with the court's electronic filing system, because the court's system does not allow a filer to look at the selected file before uploading it.

75. *In re* Bopp, No. 10-00121, 2010 WL 2363626 (Bankr. D.D.C. June 7, 2010) (no discretion); *In re* Leviner, No. A09-87983-PWB, 2010 Bankr. LEXIS 457, at * 2 (Bankr. N.D. Ga. Jan. 14, 2010) ("Without deciding the issue of whether the Court can even vacate an order that is entered under § 521(i), the Court declines to grant the Debtor's motion because the Debtor has asserted no error of fact or law that warrants reconsideration of the order of dismissal."); *In re* Nuttall, No. 08-04092-8-JRL, 2008 Bankr. LEXIS 2658 (Bankr. E.D. N.C. Sept. 22, 2008) (dismissal for failing to file means test form, even though debtor not subject to means test); *In re* Scott, No. 08-21447, 2008 Bankr. LEXIS 2085, at *5 (Bankr. N.D. Ind. July 28, 2008) ("The Bankruptcy Court has no discretion to enlarge the time limitations in §521(i)(1), after the time limitations have expired, based on 'excusable neglect' on the part of the debtor or debtor's counsel."); *In re* Turner, 384 B.R. 852 (Bankr. D. Colo. 2008) (dismissal for failing to file means test form, even though debtor not subject to means test); *In re* Marinaccio-Amsden, 373 B.R. 806 (Bankr. W.D. N.Y. 2007) (no discretion); *In re* Young, No. 06-80397, 2006 WL 3524482 (Bankr. S.D. Tex. Dec. 6, 2006) (no discretion); *In re* Smith, 352 B.R. 729 (Bankr. W.D. N.Y. 2006) (no discretion); *In re* Williams, 339 B.R. 794 (Bankr. M.D. Fla. 2006) (no discretion); *In re* Fawson, 338 B.R. 505, 515 (Bankr. D. Utah 2006) (no discretion); *In re* Woodard, No. 05-06092-5-ATS, 2006 Bankr. LEXIS 4586 (Bankr. E.D. N.C. Feb. 9, 2006) (no discretion).

76. 351 B.R. 790 (Bankr. N.D. Ga. 2006).

77. *Id.* at 802.

after the 45-day period, under appropriate circumstances.[78]

The court also ruled that "automatic dismissal" should not be self-executing, essentially that "automatic dismissal" should not be "automatic," and instead should simply permit the court to enter an order of dismissal without notice and a hearing.

> What, then, is the meaning of "automatic dismissal?" . . . It seems logical, therefore, that "automatic dismissal" would not require notice and a hearing. Rather, it is a determination that the court can make with no notice to any party in interest and no hearing of any nature.[79]

In other words, the statutory requirement that "the case shall be automatically dismissed effective on the 46th day"[80] is neither mandatory, automatic, nor effective until the court enters an order. Most other courts readily accepted the *Parker* court's tortured reading of the statute to prevent debtors from abusing the bankruptcy process by seeking dismissals of their own cases.[81] While many courts disagreed with the reasoning of *Parker* when applied to third party dismissal requests,[82] I could find only

78. *Id.* at 801 (citations in footnote omitted).

79. *Id. Accord In re* Gough, No. 07-00554, 2008 Bankr. LEXIS 47, at *2-3 (Bankr. D.D.C. Jan. 3, 2008).

80. 11 U.S.C. § 521(i)(1) (2010).

81. *See, e.g.*, *In re* De Armas Cubas, No. 09-01933, 2009 Bankr. LEXIS 3383 (Bankr. P.R. Oct. 14, 2009) (granting motion by trustee to reconsider order refusing to reinstate case following mandatory dismissal under section 521(i)); *In re* Lopez, No. 09-31511-C, 2009 Bankr. LEXIS 3029 (Bankr. W.D. Tex. Sept. 17, 2009) (adopting *Spencer* theory that "automatic dismissal" is not automatic, and "'effective on the 46th day' simply marks the date on which the court is deprived of such discretion"); *In re* Spencer, 388 B.R. 418, 422-23 (Bankr. D.D.C. 2008) (The phrase "automatically dismissed" in § 521(i)(1) only means that the debtor is not permitted to defeat the motion by arguing that the failure to timely file the documents required by § 521(a)(1) constitutes insufficient cause for dismissal, and the 46th day is not the date on which the dismissal itself is effective, but rather, the date effective as of which the court is divested of the discretion to deny a request for dismissal.); *In re* Ackerman, 374 B.R. 65, 66 (Bankr. W.D. N.Y. 2007) (refusing dismissal by "ordering otherwise" even though trustee's request does not meet the requirements of § 521(i)(4)); *In re* Withers, No. 06-42098, 2007 Bankr. LEXIS 663 (Bankr. N.D. Cal. Feb. 26, 2007) (excusing after the forty-five day period the requirement to file schedules).

82. Cases dismissed effective 46th day: *In re* Calhoun, 359 B.R. 738, 741 (Bankr. E.D. Mo. 2007); Warren v. Wirum, 378 B.R. 640, 647 (N.D. Cal. 2007); *In re* Cloud, 356 B.R. 544 (Bankr. N.D. Okla. 2006); *In re* Dienberg, 348 B.R. 482, 483 (Bankr. N.D. Ind. 2006) (request for entry of order under § 521(i)(2) is merely a request for a comfort order). Automatic means automatic: *In re* Turner, 384 B.R. 852 (Bankr. D. Colo. 2008); *In re* Richardson, No. 07-42881, 2008 Bankr. LEXIS 229 (Bankr. E.D. Tex. Jan. 30, 2008); *In re* Hall, 368 B.R. 595 (Bankr. W.D. Tex. 2007); *In re* Calhoun, 359 B.R. 738, 741 (Bankr. E.D. Mo. 2007); *In re* Reyes, No. 06-32767, 2007 Bankr. LEXIS 358 (Bankr. E.D. Tenn. Jan. 31, 2007); *In re* Fawson, 338 B.R. 505, 510 (Bankr. D. Utah 2006); *In re* Rubio, No. 06-50065, 2006 Bankr. LEXIS 2846 (Bankr. S.D. Tex. Sept. 25, 2006); *In re* Winston, No. 07-24447-D-11, 2007 Bankr. LEXIS 2835 (Bankr. E.D. Cal. Aug. 16, 2007); *In re* Conner,

one court siding with the abusive debtor.[83] One judge recognized the theory advanced by *Parker* to be unsupportable, but nevertheless decided it was better to be labeled a judicial activist than to allow the debtor to abuse the bankruptcy system:

> Regardless [of mandatory statute], this court will not allow dishonest debtors to abuse the court system despite Congress' direction that courts "shall" dismiss bankruptcy cases when tax returns are not timely provided to the trustee. In fact, this is the first time in twenty-five years on the bench that the court has blatantly disregarded the strict language of a statute to achieve the outcome desired. This apparently makes the undersigned an activist judge in every sense of the word. So, this court chooses to deny the debtor's motion, and an appellate court is welcome to reverse and apply the law as written if they so choose.[84]

### *B. The Year-to-Date Payment Advice Exception*

The requirement to file payment advice statements is the second area to develop a major judicial exception to the statutory automatic dismissal rules. The recipe for this exception was written before the law went into effect in an important article by Harry J. Sommer, a prominent consumer bankruptcy attorney, and editor-in-chief of the preeminent bankruptcy treatise, *Collier on Bankruptcy*.[85] He wrote "[i]ndeed, a year-to-date figure on a current pay stub may be considered to be evidence of payment sufficient to satisfy the statute even without such a motion [requesting an extension of time]."[86]

This one sentence in Sommer's article has created a cottage industry in the bankruptcy courts.[87] The theory is that § 521(a) requires the filing of

No. 06-40061-LMK, 2006 Bankr. LEXIS 1224 (Bankr. N.D. Fla. May 16, 2006); *In re* Williams, 339 B.R. 794 (Bankr. M.D. Fla. 2006); *In re* Ott, 343 B.R. 264 (Bankr. D. Colo. 2006); *In re* Cloud, 356 B.R. 544, 545 (Bankr. N.D. Okla. 2006); *In re* Smith, 352 B.R. 729, 730 (Bankr. W.D. N.Y. 2006). A few courts simply held that the court had the inherent discretion to deny dismissal. *See, e.g.*, *In re* Brickey, 363 B.R. 59, 66 (Bankr. N.D. N.Y. 2007) (court has discretion to annul automatic dismissal); *In re* Walker, No. 06-10879, 2006 Bankr. LEXIS 4330 (Bankr. D. Md. July 20, 2006). *See also In re* Wassah, 417 B.R. 175 (Bankr E.D.N.Y. 2009) (noting that exercise of discretion to "order otherwise" after forty-five day period should only be applied in abusive debtor cases).

83. *In re* Hall, 368 B.R. 595 (Bankr. W.D. Tex. 2007).

84. *In re* Fileccia, No. 06-05111, 2007 Bankr. LEXIS 1924, at *11 (Bankr. M.D. Tenn. June 6, 2007).

85. Harry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 191 (2005).

86. *Id.* at 213.

87. *In re* Tay-Kwamya, 367 B.R. 422, 426-27 (Bankr. S.D.N.Y. 2007) (Debtor's declaration stating numbers that would be on missing pay stubs sufficient: "Henry J.

specific "documents," while the automatic dismissal rule of § 521(i) applies to "information." Therefore, dismissal should not be required if sufficient "information" is contained in other filed documents to disclose the substance of the information contained in missing documents required by § 521(a)(1). The vast majority[88] of courts readily accepted this theory to excuse missing payment advice statements as long as the year-to-date totals were on file.[89] Only when the last pay stub is missing, and therefore no year-to-date totals containing the missing information are available, will the courts dismiss. As long as the missing statement is a "donut hole"—one of the middle statements whose information can be gleaned from the year-to-date totals—dismissal can be denied. However, if the final pay stub is not filed, or does not contain year-to-date information, the case must be dismissed.[90] Despite the liberality in accepting year-to-date information (or even a schedule of the missing stubs), the courts have not excused

Sommer anticipated this problem, and suggested its solution, prior to the effective date of BAPCPA.").

88. A few courts, without much reasoning, refused to accept the year-to-date theory. *See In re* Landers, No. 06-22265, 2006 Bankr. LEXIS 2272 (Bankr. D. Utah 2006) (neither year-to-date totals nor debtor's testimony that he did not remember receiving missing statement were relevant). In *In re Kruitbosch*, No. 07-22203, 2007 Bankr. LEXIS 3451 (Bankr. D. Utah Aug. 29, 2007), the court rejected the year-to-date theory, choosing to rely on the bankruptcy court's decision in *In re Miller*, 371 B.R. 509 (Bankr. D. Utah 2007), over the then more recent appellate opinion from the same jurisdiction, *In re Svigel*, No. WY-07-020, 2007 Bankr. LEXIS 1977, at *5-6 (B.A.P. 10th Cir. 2007), which adopted the year-to-date theory. Shortly thereafter, the bankrupt court's opinion in *Miller* was reversed on appeal. See discussion of *In re Miller*, 383 B.R. 767, 772 (B.A.P. 10th Cir. 2008), *infra* note 93.

89. *See, e.g.*, *In re* Richardson, 406 B.R. 586 (Bankr. W.D.N.Y. 2009) (single final pay stub sufficient if it contains year-to-date totals, even though all remaining pay stubs not timely filed, as long as debtor acts in good faith and reasonably provides missing pay stubs upon request); *In re* Miller, 383 B.R. 767, 772 (B.A.P. 10th Cir. 2008) (finding year-to-date totals sufficient to reverse bankruptcy court's dismissal, court decides debtor's due process arguments are moot); *In re* Riffle, No. 07-22372, 2008 Bankr. LEXIS 673, at *1 (Bankr. W.D.N.Y. Jan. 24, 2008) (single final pay stub with year-to-date totals sufficient to deny dismissal); *In re* Wojda, 371 B.R. 656, 660 (Bankr. W.D.N.Y. 2007) ("[D]ismissal only results upon the failure to file the underlying *information*.") (emphasis added); *In re* Svigel, No. WY-07-020, 2007 Bankr. LEXIS 1977, at *5-6 (B.A.P. 10th Cir. June 18, 2007) (remanding to bankruptcy court to consider whether all "information" in the missing statements available through year-to-date totals); *In re* Reynolds, 370 B.R. 393 (Bankr. N.D. Okla. 2007); *In re* Luders, 356 B.R. 671 (Bankr. W.D. Va. 2006).

90. *See, e.g.*, *In re* Catania, 397 B.R. 667 (Bankr. W.D.N.Y. 2008) (distinguishing *In re* Wojda because all information was not contained in payment advices); *In re* Scalise, No. 08-61739, 2008 Bankr. LEXIS 2983 (Bankr. N.D.N.Y. Oct. 30, 2008) (dismissal mandatory where final pay stubs not filed, even though excusable error and debtors would suffer undue harm from dismissal, and even though stubs received from employer after 60 day period preceding bankruptcy). *See also In re* Williams, No. 08-80292, 2008 Bankr. LEXIS 3303 (Bankr. E.D. Okla. Aug. 22, 2008) (bank records showing payroll receipts not sufficient, because the records do not show all of the information contained in the paystubs).

misdirection errors, such as providing the pay stubs to the trustee rather than filing them.[91]

There is a serious statutory problem with the theory that the court can excuse the failure to file payment advice statements, and deem the case to have not been dismissed, if other information on file contains the same information as the missing statements. While it is true that § 521(a) requires the filing of *specific documents*, it is not true that § 521(i) requires automatic dismissal only if the debtor fails to file the *information* that would be contained in the documents. On the contrary, § 521(i) requires automatic dismissal for failing "to file all of the *information required by subsection (a)(1)* within 45 days after the date of the filing of the petition."[92] The specific documents are the "information required by subsection (a)(1)." The statute does *not* say "the *information* that would be *contained in the documents* required by subsection (a)(1)." The statute defines the "information" to be the documents required by subsection (a)(1). Unfortunately (for those who believe the automatic dismissal rules are misguided), the judicially created exception for year-to-date totals is grounded on a faulty reading of the statutory language.

The bankruptcy court's opinion in *In re Miller*,[93] later reversed by the bankruptcy appellate panel,[94] is the only reasoned opinion attacking the

91. A number of courts have enacted local rules requiring the debtor to provide payment advice statements to the trustee rather than filing them with the court in accordance with the statute. In *In re Barajas*, No. 06-10598-B-13, 2006 Bankr. LEXIS 3095 (Bankr. E.D. Cal. Nov. 8, 2006), a creditor argued that the case was automatically dismissed because the statements were not filed by the court within the forty-five day period as required by statute, but were instead provided to the trustee in accordance with the local rule. The court ruled that the local rule constituted an "order otherwise" under § 521(a)(1)(B), excusing the statutory requirement to file payment advice statements. *Id.* What happens in a jurisdiction with such a local rule if the debtor fails to provide the statements to the trustee in accordance with the local rule? After all, violations of local rules do not require automatic dismissal. Does the local rule obviate the automatic dismissal rules with respect to payment advice statements? Two courts have held that the statutory rule required mandatory dismissal if the payment advices were not timely provided to the trustee, even though the local rule substituted delivery to the trustee for filing with the court. *In re* Miller, No. 06-11566, 2006 Bankr. LEXIS 4378 (Bankr. D. Md. June 9, 2006); *In re* Lovato, 343 B.R. 268, 270 (Bankr. D.N.M. 2006) (same, admin order) ("Had the [statute] . . . left the Court with any discretion, the Court would deny the Chapter 7 Trustee's motion with leave to allow the Debtor to submit the required payment advices. Furthermore, the Court would require the Chapter 7 Trustee to request copies of the payment advices at the § 341 meeting of creditors. Instead, the Debtor's case must be dismissed because BAPCPA leaves the Court with no discretion to fashion any reasonable or equitable solution."). These cases may well be carrying out the intent of Congress in enacting the automatic dismissal rules, but if the local rule relieves the filing requirement under § 521(a)(1)(B), then the automatic dismissal provision in § 521(i) would be entirely inapplicable.

92. 11 U.S.C. § 521(i)(1) (2010) (emphasis added).

93. 371 B.R. 509 (Bankr. D. Utah 2007).

94. *In re* Miller, 383 B.R. 767 (B.A.P. 10th Cir. 2008).

year-to-date exception. The *Miller* court took an entirely different tack than the other courts that had distinguished between the documents required by § 521(a)(1), and the "information" referred to in § 521(i)(1). Instead, the *Miller* court (presumably at the behest of the debtor's lawyer) focused on the language of the provision requiring payment advices to be filed: § 521(a)(1)(B)(4), which requires the debtor to file "[c]opies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor."[95] The issue addressed by the court was whether the "or other evidence of payment" language would allow year-to-date totals, or the re-creation of the missing pay stub made by the debtor, to substitute for the actual payment advices. The court parsed the language carefully, noting that the only verb, "received," modified both "payment advices" and "other evidence." Thus, the court concluded that the language required either copies of the actual payment advices or copies of whatever other evidence the debtor received from his employer—not the debtor's own recreation (and not year-to-date totals).[96] It is difficult to argue with the court's analysis. In the *Miller* case, neither the bankruptcy court, nor the bankruptcy appellate panel that reversed the bankruptcy court's decision, considered the prevailing theory that the "information" required to avoid automatic dismissal under § 521(i) was different from the documents required under § 521(a).[97]

95. 11 U.S.C. § 521(a)(1)(B)(iv).

96. *In re* Miller, 371 B.R. 509, 514-15 (Bankr. D. Utah 2007) ("The only coherent and consistent reading of the statute has the verb 'received' taking the subject nouns 'advices' and 'evidence,' which themselves are part of a prepositional phrase modifying the word 'copies.' Under this reading, debtors have to file copies of one of two things—either 'all payment advices' received from an employer within the 60-day prepetition period or 'all . . . other evidence of payment' received from an employer within the 60-day prepetition period. . . . And it does no good in this case to assert that the year-to-date information contained in the January 20, 2007 payment advice somehow substitutes as the actual January 5, 2007 payment advice, arguing that it provides evidence by extrapolation of the content of the actual missing payment advice. An extrapolation made by Debtors' counsel or the Court is not evidence received from the employer.").

97. In reversing the bankruptcy court, the bankruptcy appellate panel in *Miller* ruled that "other evidence of payment" need not come from the employer, because employers do not issue anything concerning payroll other than payment advice statements. *In re* Miller, 383 B.R. 767 (B.A.P. 10th Cir. 2008). Therefore, the court reasoned, the bankruptcy court's careful parsing of the language would read out the "other evidence of payment" language from the statute. *Id.* at 771 ("It is difficult to imagine what type of evidence, other than a debtor's payment advices, would satisfy this reading of the statute. In other words, the bankruptcy court's interpretation makes the 'other evidence of payment' option effectively non-existent."). The bankruptcy appellate panel's premise is faulty. An employer could issue at the debtor's request, for example, a historical payroll summary showing all of the amounts for each payroll period. Indeed, it is likely common for employers to provide schedules rather than the actual payment advices when requested to recreate historical payroll information. Congress clearly wanted the information to come from the employer,

Another ambiguity in the statutory language is whether only those payment advices received within sixty days of bankruptcy must be filed, or whether all payment advices reflecting "income" earned within sixty days of bankruptcy must be filed, even if the advices were received later. This is important where the debtor did not receive payment advices, or where the payment advices were received after bankruptcy but covered income earned during the sixty-day period before bankruptcy. Two courts considering the question have reached different results.[98] As the bankruptcy court in *Miller* correctly concluded, there is only one verb—"received"—and therefore the statutory language can only be properly interpreted to refer to documents received by the debtor within sixty days of bankruptcy, regardless of when the income was paid.[99]

### *C. Violating Einstein's Theory of Relativity by "Ordering Otherwise"*

Albert Einstein theorized that a person could go back in time only by traveling faster than the speed of light.[100] Unfortunately, according to his theory of relativity, it would take an infinite amount of energy to move a stationary object faster than the speed of light.[101] While physicists have

and not to be created by the employee, in order to assure its validity. There is no similar reason to prefer separate statements to a schedule provided by the employer.

98. *Compare In re* Mitchell, 367 B.R. 370, 371 (Bankr. W.D.N.Y. 2007) (statute only requires payment advices or other evidence of payment that were received by the debtor during the sixty days before bankruptcy to be filed) *with In re* Scalise, No. 08-61739, 2008 Bankr. LEXIS 2983, at *3-5 (Bankr. N.D.N.Y. Oct. 30, 2008) (debtor argued that at the time of filing, the debtor had yet to receive a pay stub covering the date of filing. However, there is no assertion that within the subsequent forty-five day period he was unable to obtain and file the pay stub for the period.). Interestingly, the court in *Scalise* relied on the bankruptcy appellate panel's liberal decision in *Miller*, *supra* note 93, to deny relief to a debtor who in fact met the strictures of the statute. In fact, the bankruptcy appellate panel's opinion in *Miller* addressed the meaning of "other evidence of payment"; it did not consider the timing issue raised by the *Scalise* case.

99. *In re* Miller, 383 B.R. at 767.

100. *See* Mark Jarrell, *The Special Theory of Relativity*, http://www.phys.lsu.edu/~jarrell/COURSES/ELECTRODYNAMICS/Chap11/chap11.pdf (Nov. 9, 2001) (If one were able to move information or matter from one point to another faster than light, then according to special relativity, there would be some inertial frame of reference in which the signal or object is moving backward in time. Whether someone traveling faster than the speed of light would actually go backward in time, or would only be able to see events that occurred earlier in time, is a subject beyond the scope of this article).

101. *See* U.S. Dep't of Energy, *Ask a Scientist Physics Archive, Einstein Light Speed Questions*, http://www.newton.dep.anl.gov/askasci/phy99/phy99214.htm ("According to our present understanding, it is not possible to move faster than the speed of light."); Scott I. Chase, *Tachyons Entry from Usenet Physics FAQ*, http://math.ucr.edu/home/baez/physics/ParticleAndNuclear/tachyons.html (According to special relativity it would take an infinite amount of energy to accelerate a slower-than-light object to the speed of light. And, although relativity does not forbid the theoretical possibility of tachyons, which move faster than light at all times, when analyzed using

since speculated that black holes or some other phenomenon might allow backward time travel, so far we have all been forced to endure time's unabated forward march.[102]

Unlike physical matter, court orders can go back in time in limited circumstances. For example, courts can enter orders "nunc pro tunc," giving them retroactive effectiveness, but only to correct errors by reflecting what the court actually intended to do at the earlier time.[103]

If a case has already been "automatically dismissed," may the court undismiss the case, retroactively, through the magic of judicial decree? And if so, would the undismissal be retroactive or only prospective (similar to a reinstatement), resulting in a gap during which the case did not exist?

In 2009, the bad debtor cases—the attempts by debtors who were abusing the bankruptcy process to seek to obtain the dismissal of their own case through their own failure to file required documents—began reaching the courts of appeals. To prevent debtors from abusing the bankruptcy system, the appellate courts quickly recognized the courts' power to relieve the filing requirements by "ordering otherwise" under § 521(a)(1)(B), even *after* the case had been "automatically dismissed" at the end of the forty-five day period.

In *In re Warren*,[104] Mr. Warren filed for bankruptcy, without filing any of the required schedules, after his ex-wife garnished his bank account. The court notified Warren that his case would be dismissed unless he timely filed his schedules.[105] Warren did not respond to the court's notice, and so the court set a hearing on the dismissal of the case (although under the statute no hearing was required because the case was "automatically dismissed").[106] The trustee objected to the dismissal of the case because she needed time to investigate the debtor's bankruptcy filing and financial situation to determine whether assets were available to pay creditors.[107]

quantum field theory it seems that it would not actually be possible to use them to transmit information faster than light, and there is no evidence for their existence.).

102. *See Time Travel*, WIKIPEDIA, http://en.wikipedia.org/wiki/Time_travel (discussing various theories).

103. *See, e.g.*, *In re* Warren, 568 F.3d 1113, 1116 n.1 (9th Cir. 2009) (quoting United States v. Sumner, 226 F.3d 1005, 1010 (9th Cir. 2000)) (*Nunc pro tunc* "is limited to making the record reflect what the . . . court actually intended to do at an earlier date, but which it did not sufficiently express or did not accomplish due to some error or inadvertence."); Kusay v. United States, 62 F.3d 192, 193 (7th Cir. 1995) ("The power to correct erroneous records does not imply ability to revise the substance of what transpired or to back-date events."); *In re* Singson, 41 F.3d 316, 318 (7th Cir. 1994) ("Such a recension is available as a matter of right; no judge would insist on an 'extraordinary' justification for conforming the paper record to decisions actually taken.").

104. *In re* Warren, 568 F.3d at 1115.

105. *Id.*

106. *Id.*

107. *Id.*

Warren, seeking to avoid the trustee's scrutiny, argued that dismissal was automatic and mandatory because he had not filed his own schedules within the forty-five day period, which had now passed.[108]

Similarly, in *In re Acosta-Rivera*,[109] the debtors filed for bankruptcy without filing their required payment advice statements or their statement of monthly income, and without properly disclosing the existence of the pending wrongful termination lawsuit that had been filed against their former employer. After discovering the lawsuit, the trustee negotiated and sought approval for a settlement of the lawsuit that would pay all creditors in full, but at a price significantly lower than the debtors wanted.[110] The debtors sought to have their own case dismissed under the automatic dismissal rules, due to their own failure to file the required statements within the statutory forty-five day period.[111] As in *Warren*, the trustee objected to a dismissal.[112]

In both *Warren* and *Acosta-Rivera*, the bankruptcy courts ruled that they had and would exercise the discretion not to dismiss the cases by retroactively excusing the debtor's filing deficiencies, even after the forty-five day period had expired, under § 521(a)(1)(B).[113] In both cases, the district courts disagreed on appeal, holding that the automatic dismissal rules prevented the bankruptcy courts from excusing the filing defects after the forty-five day period.[114]

Finally, in both cases, the courts of appeal reversed the district courts and affirmed the bankruptcy courts' authority and decisions to refuse to dismiss the cases. The theory for denying dismissal was the same in both cases, summed up in this quote from *In re Warren*:

> Interpreting § 521 to grant authority to "order[ ] otherwise" even after § 521(i)(1)'s forty-five day filing deadline has passed not only furthers congressional intent, but also preserves "the authentic value of automatic dismissal." When a party moves for an order dismissing an incomplete petition, the court can do one of three things: (1) dismiss the case, (2) decline to dismiss the case if an exception applies, or (3) determine, in its discretion, that the missing information is not required or that denial of dismissal is necessary to prevent a debtor from abusing and manipulating the bankruptcy system. This approach recognizes that the missing information may or may not be required, in a practical sense, depending upon what is deemed material by the

108. *Id.*
109. 557 F.3d 8, 10 (1st Cir. 2009).
110. *Id.* at 10-11.
111. *Id.* at 10.
112. *Id.*
113. *Warren*, 568 F.3d at 1116; *Acosta-Rivera*, 557 F.3d at 11.
114. *Id.*

> court many months (or even years) after the bankruptcy petition has been filed.[115]

If the bankruptcy court has the power to retroactively "order otherwise" in the bad debtor cases, why do they not have the same power for debtors who make innocent, excusable and harmless mistakes?[116] If taken to its logical extreme, the power to "order otherwise" after the expiration of the forty-five day period would swallow the "automatic dismissal" rule in one gulp, restoring judicial discretion to a statutory procedure intended to eliminate it.

While the policy justifications advanced by the two courts of appeal in *Acosta-Rivera* and *Warren* are compelling, the statutory analysis is wanting. The manifest purpose of the "automatic dismissal" statute was to deny judicial discretion when the required papers are not filed within the forty-five day period (or up to a ninety-day period if the debtor timely requests an extension of time). "Automatic dismissal" has no meaning if the court can nullify the dismissal by essentially forgiving the filing requirement retroactively.[117]

### *D. The Supreme Court Rules Against Backward Time Travel*

The Supreme Court has recently in dicta rejected the concept of backward time travel to un-dismiss the automatically dismissed case by retroactively relieving the filing requirement. The issue in *Hamilton v.*

115. *In re* Warren, 568 F.3d at 1118-19 (citations to *In Re* Acosta-Rivera omitted). *Accord In re* Amir, No. 08-13700, 2009 Bankr. LEXIS 1522 (Bankr. N.D. Ohio Mar. 17, 2009) (denying an attempt by debtor abusing bankruptcy process to dismiss his own case, following *Acosta v. Rivera*); *In re* Scotto, No. 809-75956-reg, 2010 Bankr. LEXIS 1370 (Bankr. E.D.N.Y. Apr. 26, 2010) (refusing to dismiss a bizarre bankruptcy case in which paralegal forged debtor's signature on skeletal bankruptcy petition because debtor did not repudiate paralegal's actions quickly enough).

116. *See, e.g.*, *In re* Taylor, No. A09-63120-PWB, 2009 Bankr. LEXIS 792 (Bankr. N.D. Ga. Mar. 25, 2009) (noting ability to "order otherwise" to excuse late filing of payment advices if creditor sought to obtain dismissal of case on technicality); *In re* McCarver, No. 06-10603-WHD, 2006 Bankr. LEXIS 4718 (Bankr. N.D. Ga. May 31, 2006) (excusing late payment advices by "ordering otherwise" where no objection to debtor's motion). *See also In re* Aiello, 428 B.R. 296 (Bankr. E.D.N.Y. 2010) (noting that creditor did not request dismissal under 521(i), and that any request under (i) would be moot because the deficiency had been cured, even though the cure occurred after the forty-five day period, and thus after the case was "automatically dismissed").

117. It is worth noting that the court of appeals in *Warren* rejected the bankruptcy court's attempt to enter its order forgiving the filing requirement *nunc pro tunc*, or retroactively, to come within the forty-five day period even though the issue was first raised, and the order was first entered, after the forty-five day period. The court of appeals correctly ruled that an order may be entered *nunc pro tunc* only if the court intended at the earlier time to enter the order, but through inadvertence or error the order was not timely entered. *See Warren*, 568 F.3d at 1116 n.1.

*Lanning*[118] concerned the interpretation of the Chapter 13 rule that debtors must pay all of their "projected disposable income" during the plan period to creditors.[119] The Bankruptcy Code defines "disposable income" by taking "current monthly income"—the debtor's average income during the six months before bankruptcy[120]—and subtracting either the IRS allowed expenses for debtors who had current monthly income above the median in their state, or amounts "reasonably necessary to be expended . . . for . . . support" for debtors who have current monthly income below the median in their state.[121]

The debtor in *Lanning* received a one-time buyout from her employer during the six-month period preceding bankruptcy, causing her to be an above-median debtor with "disposable income" greatly in excess of her expected post-bankruptcy income.[122] If her statutorily-calculated "disposable income" were to be "projected" forward during the plan term, her required plan payments would be so high that she would be unable to confirm or complete a Chapter 13 plan. The debtor in *Lanning* argued that the use of the term "projected" gives the court the discretion to adjust the statutorily-calculated "disposable income" for changed circumstances.[123] All of the justices, except Justice Scalia, agreed with the debtor's argument, allowing the court to adjust the statutorily calculated "disposable income" for changed circumstances when determining the debtor's "projected disposable income."[124]

In arguing that the mechanical test should apply, the trustee in *Lanning* suggested that debtors who have changed circumstances could ask the court to excuse or delay the filing of the debtor's income and expense schedule, and then seek to have "current monthly income" determined on the basis of a later six-month period (after the statement is eventually filed, for example), rather than the six-month period preceding the bankruptcy petition.[125] The definition of "disposable income" allows the court to determine the amount if the debtor filed the required means test statement late or, with the court's permission, not at all.[126] The Supreme Court rejected the trustee's argument by noting that § 521(i)(3) allows at most only an additional forty-five days to file the schedule, and would require a motion to be filed within the initial forty-five day period, and therefore

118. 130 S. Ct. 2464 (2010).
119. *Id.*; 11 U.S.C. § 1325(b)(1)(B) (2010).
120. 11 U.S.C. § 101(10A).
121. 11 U.S.C. § 1325(b)(2).
122. *Lanning,* 130 S. Ct. at 2470.
123. *Id.* at 2471.
124. *Id.* at 2471-74.
125. *Id.* at 2476-77.
126. *See* 11 U.S.C. § 101(10A)(A) (2010) (defining the time period and filing requirement to derive a debtor's "current monthly income").

would not help debtors like Ms. Lanning.[127] The Supreme Court's statement conflicts with the theory advanced by the courts of appeal in *Warren* and *Acosta-Rivera* that the bankruptcy court could relieve the filing requirement after the forty-five day (or upon timely request by the debtor, ninety-day) period after the bankruptcy filing.[128]

Justice Scalia's dissent in *Lanning* opposed the majority ruling on the merits, contending that the bankruptcy court could permanently excuse the requirement to file an income and expense statement, as long as it did so within the forty-five day (or, if a timely motion filed by the debtor is granted by the court, ninety-day) period following bankruptcy.[129] However, even Scalia rejected the argument that had been accepted by the courts of appeal in *Warren* and *Acosta-Rivera*—that the extension could be granted after the case had been automatically dismissed:

> But the statute appears to assume that a court may excuse the filing of such a schedule altogether: A debtor is required to file a schedule in the first instance "*unless* the court orders otherwise," § 521(a)(1)(B) (emphasis added). And § 101(10A)(A)(ii)'s provision of a method for calculating current monthly income "if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii)" makes little sense unless a court can excuse the failure to do so, since an *unexcused* failure to do so would be a basis for dismissing the case, see § 521(i). Allowing courts to excuse such schedules does not render superfluous § 521(i)(3)'s authorization for limited extensions, since that applies to extensions sought up to 45 days *after* the filing deadline, whereas § 521(a)(1)(B) seems to apply only *before* the

127. *Lanning*, 130 S. Ct. at 2477 n.6. It is worth noting that bankruptcy courts have used the forty-five day extension to obtain a different period for calculating disposable income where the debtor suffered a significant drop in income from the six-month period preceding bankruptcy. *See In re* Shelor, No. 08-80738C-13D, 2008 Bankr. LEXIS 3974 (Bankr. M.D.N.C. Sept. 23, 2008) (noting that Court must use the six-month period from the date that the income determination is made, and cannot simply select any six-month period that the debtor may request); *In re* Cummisky, No. 08-01579-8-JRL, 2008 Bankr. LEXIS 4061 (Bankr. E.D.N.C. Mar. 17, 2008) (holding that in order to enable joint debtors to propose confirmable plan after one of the debtor's lost a job, court could strike filed means test form B22C, and allow debtor to file a revised form using actual post-petition income); *In re* McQueen, No. 07-03011-8-JRL, 2007 Bankr. LEXIS 4591 (Bankr. E.D.N.C. Dec. 21, 2007) (granting request to strike portions of petition showing disposable income during six months before bankruptcy, and directing new schedules to be filed, to more accurately reflect post-bankruptcy ability to pay). Presumably after the Supreme Court's decision in *Lanning*, this kind of manipulation of the debtor's filing data will no longer be necessary to achieve an appropriate bankruptcy result.

128. *In re* Acosta-Rivera, 557 F.3d 8 (1st Cir. 2009); *In re* Warren 568 F.3d 1113 (9th Cir. 2009).

129. *Lanning*, 130 S. Ct. at 2483 n.5.

deadline.[130]

Justice Scalia appears to have misread § 521(i)(3), which does not allow requests for extensions after the original forty-five day period.[131] In any case, all of the justices, both the majority and Justice Scalia in dissent, rejected the argument that § 521(a)(1)(B) allows the court to excuse the filing requirement after the initial forty-five day (or if an extension is timely granted, ninety-day) period has passed.[132] The Court of Appeals' theory in both *Warren* and *Acosta-Rivera* would turn an automatic dismissal into a discretionary one. While this almost certainly would result in better judicial policy, it is simply not consistent with the statutory language and Congress's manifest intent. After the Supreme Court's statements, it is difficult to see how the "order otherwise" language could be used after the forty-five day period to retroactively undismiss a case that has already been automatically dismissed.

### *E. Trustee Motions to Excuse Compliance*

There is one part of the statutory scheme that cannot be reconciled with the Supreme Court's view that the bankruptcy courts cannot go back in time to un-dismiss an automatically dismissed case by "ordering otherwise" after the forty-five day period has expired. We have an overly-aggressive small upstate New York credit union, bent on testing the limits of the automatic dismissal rules, to thank for bringing to light this statutory anomaly. First, to demonstrate its over-aggressiveness, the credit union sought the dismissal of two bankruptcy cases because the debtors failed to indicate in their schedules whether or not they anticipated any increase in income or expenses during the year following bankruptcy.[133]

The statute requires the filing of "a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition . . . ."[134] The bankruptcy courts in both cases held that that the statute only requires filing a statement if an increase is reasonably anticipated. Since the debtors did not reasonably anticipate an increase in income in either case, they did not have to file anything during the 45-day period.[135] The credit union

130. *Id.* (emphasis in original).

131. *See* 11 U.S.C. § 521(i)(3)(2010) ("Upon request of the debtor made within 45 days after the date of the filing of the petition described in Paragraph (1) . . . .").

132. *Lanning*, 130 S. Ct. at 2464.

133. CFCU Fed. Credit Union v. Frisbie, No. 06-CV-6596-CJS, 2009 U.S. Dist. LEXIS 89464 (W.D.N.Y. Sept. 18, 2009); CFCU Fed. Credit Union v. Pierce, No. 06-CV-6595-CJS, 2009 U.S. Dist. LEXIS 61555 (W.D.N.Y. July 17, 2009).

134. 11 U.S.C. § 521(a)(1)(B)(vi).

135. *Frisbie*, 2009 U.S. Dist. LEXIS 89464, at *6.

appealed both cases, apparently contending that the statute required the debtors to indicate *whether* they anticipated an increase in income or expenses, even if they did not anticipate an increase. Both appeals were dismissed on procedural grounds.[136]

It is to the credit union's third case, *CFCU Community Credit Union v. Swimelar*,[137] that we owe a debt of gratitude for pointing out the statutory anomaly. In *Swimelar*, the debtors filed six months of payment advice statements with their Chapter 13 petition, but due to oversight did not file payment advice statements for the five-week period preceding bankruptcy, as required by the statute.[138] The credit union waited stealthily in the weeds until five days after the "automatic dismissal" period expired to pounce, by moving for an order declaring the case "automatically dismissed."[139] In response to the credit union's motion, a sympathetic trustee moved under § 521(i)(4) to prevent dismissal, arguing that the debtor's error was inadvertent and harmless, and creditors would be better off with the administration of the case.[140] The problem was that the trustee's motion was filed after the case had been "automatically dismissed" at the end of the forty-five day period. Nevertheless, both the bankruptcy court and the district court refused to dismiss, and found the trustee's motion to be timely because it was brought within five days after the creditor's motion for dismissal was filed, even though both the creditor's motion and the trustee's opposition were filed after the case had been "automatically dismissed."[141] The courts simply interpreted the loose time reference in § 521(i)(4) to validate the trustee's late motion.

In dicta, the District Court stated that a strict interpretation of the automatic dismissal language would create due process problems. It stated, "[w]hile this Court recognizes these potential problems arising from the statutory language, the Court ultimately finds that the interpretation suggested by those cases would lead, at times, to unduly harsh results, and possibly runs afoul of due process protections afforded by the

136. *In re* Frisbie was dismissed because CFCU did not prosecute the appeal. *Frisbie*, 2009 U.S. Dist. LEXIS 89464, at *7. *In re* Pierce was dismissed because CFCU Federal Credit Union did not appeal from the order granting the debtor a discharge, mooting the appeal. *Pierce*, 2009 U.S. Dist. LEXIS 61555, at *8.

137. No. 6:07-CV-00341, 2008 U.S. Dist. LEXIS 3991 (N.D.N.Y. Jan. 18, 2008).

138. *Swimelar*, 2008 U.S. Dist. LEXIS 3991, at *1-2. It was not clear in the case whether the debtor received the payment advices during the 60-day period, as is required by a careful reading of the statute, or only received income during the 60-day period for which no payment advice statements were filed. The court did not discuss this interpretative question, and assumed that the debtors were required to file the payment advice statements. *Id.*.

139. *Id.* at *4 (quoting 11 U.S.C. § 521(i)(1)).

140. *Id.* at *2.

141. *Id.* at *2, 19.

constitution."[142]

The District Court recognized that earlier courts had rejected its view that a trustee motion under § 521(a)(4), filed within five days after a creditor request for an order confirming dismissal but after the case was "automatically dismissed," could be used to maintain the continuity of the case.[143]

One of the contrary opinions cited by the District Court in *Swimelar*, *In re Fawson*,[144] involved two separate cases in which the debtors failed to timely file their payment advice statements. In both cases, the court scheduled a hearing to determine whether the debtors were required to file payment advice statements before entering an order of dismissal. In response, the debtors quickly filed their missing payment advice statements.[145] One of the debtors indicated that the payment advice statements had been delivered to his attorney, but through inadvertence the attorney had not filed them.[146] The debtors argued that the court retained discretion not to dismiss the case. The *Fawson* court disagreed:

> The section provides that the case is automatically dismissed on the 46th day if an individual debtor fails to file the § 521(a)(1) papers within 45 days of filing the petition. Automatic means "acting or operating in a manner essentially independent of external influence or control." Section 521(i)(1) does not contemplate any independent action by the Court or any other party—the case is merely dismissed by operation of the statute itself. There is no ambiguity.[147]

In a footnote, the court also rejected the argument that Congress really did not intend automatic dismissal because § 521(i)(4) would allow the trustee to seek to have the case continued even after it had been automatically dismissed:

> The only discretion built into § 521(i) is found in subsections (3) and (4), discussed below, which allow courts to enlarge the time to file § 521(a)(1) papers upon the timely request of the debtor or the trustee. The Court has no discretion to enlarge the time to file § 521(a)(1) documents after the 45-day period has expired because by operation of the statute, the case is already

142. *See id.* at *10.

143. *Id.* at *9-10 (citing *In re* Fawson, 338 B.R. 505, 511 (Bankr. D. Utah 2006) and Rivera v. Miranda, 376 B.R. 382, 386 (D. Puerto Rico 2007)). *Rivera* was later overturned by the appellate court, which allowed the bankruptcy court to retroactively relieve the filing requirement. *See In re* Acosta-Rivera, 557 F.3d 8, 9 (1st Cir. 2009).

144. *In re* Fawson, 338 B.R. at 510.

145. *Id.* at 507.

146. *Id.* at 508.

147. *Id.* at 510.

automatically dismissed.[148]

The court also ruled that it had no discretion to grant more time or relieve the default once the case had been automatically dismissed under § 521(i)(1).[149] The comments in *Fawson* concerning § 521(i)(4) are entirely dicta, because the case was dismissed on the court's own motion without the filing of either a creditor request for dismissal or a timely trustee motion to excuse the filing requirement. But what it means for a court to deny an order of dismissal when a case has been "automatically dismissed" remains a statutory mystery.

The court in *In re Spencer*[150] completed the half circle left by *Swimelar*, ruling that the "automatic dismissal" language in § 521(a)(1) should be rendered meaningless because it would otherwise prevent the trustee exception from having meaning.[151] In *Spencer*, the court entered an order dismissing a debtor's bankruptcy case for failing to comply with the filing requirements.[152] The court then raised sua sponte the issue whether the dismissal occurred automatically when the forty-five day "automatic dismissal" period had passed under § 521(i)(1), or only later when the court finally entered an order dismissing the case.[153] The court ruled that since it still had authority after the forty-five day automatic dismissal period either to relieve the default under § 521(a), or to grant a trustee motion under § 521(i)(4), the "automatic dismissal" was not really automatic, and therefore dismissal does not occur until the court actually enters a dismissal order.[154] The *Spencer* court's ruling, if followed, would render the "automatic dismissal" language entirely meaningless. The exception would swallow the rule, even when the exception does not apply!

Although there has been a strong push by appellate courts to exploit imperfections in the statutory language to give the bankruptcy courts broad discretion to prevent "automatic dismissal," most of these decisions are not consistent with the statutory language itself. Manifestly, Congress intended to eliminate judicial discretion by providing for automatic dismissal, and by setting forth very limited grounds for relief from that automatic dismissal. As the Supreme Court has made clear in its *Lanning* dicta, a court can only forgive the filing requirement if requested to do so within the initial forty-five days of the case (or within ninety days if the debtor files a request for extension within the initial forty-five day period). After that, the case is automatically dismissed and the court cannot render relief, except maybe in

148. *Id.* at 510 n.10.
149. *Id.* at 515.
150. 388 B.R. 418 (Bankr. D.D.C. 2008).
151. *Id.* at 420-21.
152. *Id.* at 421.
153. *Id.*
154. *Id.* at 422.

the limited circumstance identified in *Swimelar*—a timely trustee opposition to a request for an order of dismissal.

The district court in *Swimelar* correctly recognized a problem with the circular language in § 521(i)(1), (2) and (4). If a creditor or other party-in-interest requests entry of an order of dismissal under § 521(i)(2) after the case has been "automatically dismissed," and if the trustee within five days after such request files a motion asking the court not to dismiss the case, the court *may* decline dismissal if the court finds (1) the debtor attempted in good faith to comply with the filing requirement, and (2) the best interest of creditors would be served by administering the case.[155] This is a very limited exception. It applies only if the trustee takes affirmative action on the debtor's behalf, and the court makes the required findings. The statute fails to tell us what happens when a case has been "automatically dismissed" under (i)(1), yet the court denies dismissal under (i)(4). The statute would make much more sense if Congress had provided that the case would be "reinstated" upon the trustee's request, and perhaps that is the best way to reconcile the inconsistency. The attempt by the court in *Spencer* to bootstrap this very limited exception into a general invalidation of the automatic dismissal language is surely unsupported by any notion of congressional intent or statutory interpretation. If the automatic dismissal language is to be invalidated, something more than the limited exception in § 521(i)(4) is needed.

Thus, many bankruptcy courts have tried to address the unfairness of the automatic dismissal rules by exploiting ambiguities in the statutory language, or by interpreting the limited exceptions to swallow the general rule. But the "shall be automatically dismissed effective on the 46th day"[156] language is not reasonably susceptible to the argument that it is neither mandatory nor automatic, and does not require dismissal effective on the forty-sixth day. The exceptions may be interpreted broadly when they apply, but they cannot swallow the general rule when they do not apply. Congress's intent to provide for automatic dismissal is clear. If automatic dismissal rules are to be invalidated, the power of Congress to enact those rules must be challenged.

## IV. PROCEDURAL DUE PROCESS

The Fifth Amendment to the United States Constitution provides that no individual shall be deprived of "life, liberty, or property, without due process of law."[157] The Supreme Court has long held that "due process" embodies both a substantive element (discussed in Part V of this article)

155. 11 U.S.C. § 521(i)(4).
156. *Id.*
157. U.S. CONST. amend. V.

and a procedural element—that the law be implemented in a fair manner.[158] However, in order for due process protection to apply, there must first be a deprivation of "life, liberty or property." The first question, then, is whether the government, by dismissing the debtor's bankruptcy case without a hearing, has deprived the debtor of "property."[159]

Early in the twentieth century, the Court attempted to draw the kind of constitutional distinction between "rights" and "privileges" exemplified in *Miller*, ruling that due process only applied to the deprivation of "rights." So, famously, when a policeman was fired from his job for political activities, Justice Oliver Wendell Holmes wrote: "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[160] The Court also allowed public universities to discriminate in admissions because college admission was a "privilege" not a "right."[161]

"This view was at least formally ended as the justices began to realize that, unless the government were required to accord fair treatment of individual interests that could not be termed 'rights,' there would be almost no check on the power of government to limit individual freedom in society."[162] After a long period of erosion, the "rights" versus "privileges" distinction was formally replaced with the concept of "entitlement" in the early 1970s.[163] Now "when the government acts to dispense benefits, it

158. *See* United States v. Salerno, 481 U.S. 739, 746 (1987); Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976).

159. *See, e.g.*, Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' . . . Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.") (internal citations omitted); Mathews v. Eldridge, 424 U.S. at 332.

160. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892), *abrogated by* Pereira v. Comm'r of Soc. Serv., 733 N.E.2d 112, 117 (Mass. 2000).

161. *See* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 264 (1934) (allowing Regents to require "able bodied student[s]" to take courses in military tactics, and dismissing challenges by conscientious objectors: "The privilege of the native-born conscientious objector to avoid bearing arms comes, not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and, if it be withheld, the native-born conscientious objector cannot successfully assert the privilege.").

162. JOHN E. NOWACK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 595 (Thompson-West 7th ed. 2000) [hereinafter NOWACK & ROTUNDA].

163. *Id.* at 620. *Accord* Graham v. Richardson, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'"). *See also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, *have a legitimate claim of entitlement to it*. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those

must conform to the restrictions of the Constitution, which means that it may not deprive someone of an interest to which they are otherwise entitled without a procedure to determine the basis for the deprivation."[164]

It is therefore irrelevant that an individual has no constitutional right to file a bankruptcy petition or receive a discharge in the absence of a congressionally created benefit. Once Congress has created a bankruptcy system and given qualified individuals an expectation of receiving benefits under it, Congress cannot deprive particular individuals of their right to receive continuing benefits without providing them with due process.[165]

Prior to being reversed on appeal on other grounds, the bankruptcy court in *Miller* stated that the dismissal of the debtor's bankruptcy case, even without due process, would deprive the debtor of no interest in property, because bankruptcy is not a constitutional right:

> [T]here is no such federally protected property interest at stake in this case. The Supreme Court has long held that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." The nation's bankruptcy laws are a matter of legislative largesse and do not provide debtors with constitutionally protected interests in the mere continued existence of a bankruptcy case. Automatic dismissals under § 521(i)(1), absent other grounds for dismissal, are also without

claims.") (emphasis added); Bell v. Burson, 402 U.S. 535, 539 (1971) (termination of motorist's license: "This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege.'"); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (entitlement to welfare benefits).

164. NOWACK & ROTUNDA, *supra* note 162, at 620.

165. The Court has ruled on occasion that one must be receiving benefits before due process protection applies. In *Am. Mfg. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999), the Court held that the plaintiff had no property right to workers' compensation medical benefits under Pennsylvania law until the claimant proved both that he or she suffered a work-related injury and that the proposed treatment was reasonable and necessary. *Id.* at 60-61. The court distinguished its earlier holdings in *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), as involving, respectively, the continuation of state welfare benefits and federal social security disability benefits: "In both cases, an individual's entitlement to benefits had been established, and the question presented was whether pre-deprivation notice and a hearing were required before the individual's interest in *continued* payment of benefits could be terminated." *Id.*; *see also* Lyng v. Payne, 476 U.S. 926, 942 (1986) (stating in dicta that "[w]e have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement . . . ."). The "applying versus continuing" benefits distinction is not relevant here, because the automatic dismissal rules apply only to *pending cases*—i.e., to debtors who are receiving the benefits of bankruptcy protection prior to dismissal, and have therefore developed an expectation of continued benefits. The "applying versus continuing" concept, however, would be another basis for distinguishing the filing fee cases (which are challenges by people who have not yet started to receive the bankruptcy benefit) from the instant automatic dismissal cases.

> prejudice to the refiling of a bankruptcy petition. With neither the right of access to file for bankruptcy relief nor the discharge of debts in bankruptcy having constitutional significance, the Court simply cannot see how dismissal of Miller's bankruptcy case—automatic or not—deprives him of any federally protected property interest.[166]

It is, of course, true that bankruptcy is not a constitutional right. As the bankruptcy court in *Miller* recognized, the Supreme Court held in *United States v. Kras* that bankruptcy relief was neither constitutionally required nor a fundamental right.[167] The issue in *Kras* was whether Congress could constitutionally require an indigent debtor to pay a $50 fee to file a bankruptcy petition.[168] Shortly before hearing *Kras* the Supreme Court had ruled in *Boddie v. Connecticut* that the Connecticut state courts could not constitutionally require indigent welfare recipients to pay a fee for filing divorce petitions.[169] In *Kras*, the five-judge majority, over a strong four-judge dissent, ruled that a bankruptcy discharge was not a fundamental individual right, like divorce, and therefore the Congress could constitutionally require the modest filing fee for accessing the bankruptcy process. The Court theorized that the government's control over the adjustment of debts was not nearly as pervasive as it was over marriage relationships.[170] The Court also denied Mr. Kras's equal protection argument, finding that the right to bankruptcy was not like free speech or marriage, which "the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated."[171] The Court pointed out that there is no constitutional right to a bankruptcy discharge. The Constitution gives Congress the *power* to make uniform laws on the subject of bankruptcies,[172] but does not require it to exercise that power. Indeed, there were long stretches in American history during which Congress did not enact bankruptcy laws, and debtors were left to the tender mercy of state law.[173] Finally, the Court held that there was a rational basis for the

166. 371 B.R. 509, 516-17 (Bankr. D. Utah 2007), *rev'd on other grounds*, 383 B.R. 767 (B.A.P. 10th Cir. 2008).

167. 409 U.S. 434, 440 (1973).

168. *Id.* at 436-37.

169. 401 U.S. 371, 380-31 (1971).

170. *Kras*, 409 U.S. at 445 ("In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. The utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie*.").

171. *Id.* at 446.

172. U.S. CONST. art. 1, § 8, cl. 4.

173. *Kras*, 409 U.S. at 447 ("Indeed, for the entire period prior to the present Act of 1898, the Nation was without a federal bankruptcy law except for three short periods aggregating about 15 1/2 years.").

fee requirement, and that installment payments were available (allowing the petition to be filed without the fee paid up front).[174] The dissent disagreed with the basic idea that bankruptcy was not a fundamental right, like marriage, and argued that "[t]he Constitution cannot tolerate achievement of the goal of self-support for a bankruptcy system, any more than for a domestic relations court, at the price of denying due process of law to the poor."[175]

In 2005, Congress put the filing fee question to rest, at least in Chapter 7 cases, by amending the fee provisions to permit *in forma pauperis* fee waivers.[176]

Nevertheless, whether bankruptcy is a constitutional right or not has nothing to do with whether a debtor who has filed bankruptcy has a property right or entitlement. Apparently without knowing it, the bankruptcy court in *Miller* erred by relying on the long rejected distinction between "rights" and "privileges," rather than focusing on the debtor's entitlement—an entitlement resulting from the expectation of receiving continuing benefits under the bankruptcy system that Congress created. Congress has no obligation to create a bankruptcy system, but once it does so, it must provide debtors with due process before depriving them of continuing benefits.

Having determined that debtors in bankruptcy have an "entitlement"—an expectation of continuing bankruptcy benefits after filing their petition and paying any required filing fee, the second question is whether the procedures adopted by Congress for the deprivation of those benefits comport with the Constitution's "due process" mandate. It is important here to distinguish between a challenge to the *substantive rules* adopted by Congress for dismissal (failing to file one of the listed documents within forty-five days), and the *procedures* adopted by Congress for dismissal. Part V below considers whether requiring dismissal in the event of, say, a harmless error comports with the requirement for substantive "due process." Here, however, the issue is whether Congress has established adequate procedures to protect against the *wrongful* deprivation of the benefit—the wrongful dismissal of the case.[177]

174. *Id.* at 639-40.

175. *Id.* at 456 (Stewart, J., dissenting).

176. *See* 28 U.S.C. § 1930(f)(1), (3) (authorizing waiver of fees in Chapter 7 cases for debtors who make less than 150% of the applicable poverty guidelines, and possibly even permitting waivers in other cases "in accordance with Judicial Conference policy"); FED. R. BANKR. P. 1006(c) (incorporating the fee waiver statute).

177. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) ("'Procedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or property.'" (emphasis added) (quoting Carey v. Piphus, 435 U.S. 247, 259 (1978))).

The Supreme Court has consistently held that the government must provide notice of an opportunity for a fair hearing before permanently depriving an individual of a governmental entitlement.[178] This does not necessarily mean that a hearing must be held *before* benefits are temporarily suspended, pending a final hearing on permanent deprivation, because sometimes a post-deprivation hearing will provide all the process that is due. In *Mathews v. Eldridge*,[179] the Supreme Court adopted a balancing test for determining whether a hearing must be held before benefits are suspended:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[180]

The Court in *Mathews* held that the procedure for suspending social security disability benefits satisfied the requirements for procedural due process even though a pre-deprivation hearing was not held—distinguishing its earlier decision in *Goldberg v. Kelly*, which required an evidentiary hearing before the termination of welfare benefits—primarily because disability benefits were not calculated on the basis of need, and because other procedures were in place to prevent immediate harm to the disability claimant before a full post-deprivation hearing could be held.[181] The *Mathews* court balanced the anticipated harm to the claimant from the temporary suspension of benefits before a full hearing, with the administrative needs of the state in seeking to avoid inappropriate payments that may prove difficult to recover.

The Court refined its analysis of the right to a pre-deprivation hearing when the statutory or administrative procedures fail to assure due process before terminating a claim. In *Logan v. Zimmerman Brush Co.*, the plaintiff, Logan, timely filed an administrative action under Illinois law claiming that he was wrongfully fired from his job on a loading dock

178. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." (citing Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974))).

179. *Id.*

180. *Id.* at 334-35.

181. 397 U.S. 254, 268-70 (1970).

because of a physical condition (a short leg).[182] The Illinois statute required a fact-finding conference to be held within 120 days of filing. Due to a clerical error by the state administrators, the fact-finding conference was not timely held, and the employer argued that the claim was therefore barred.[183] The Court rejected the employer's argument, holding that Logan had been deprived of due process under a state procedure because the state did not provide a fair opportunity for hearing before Logan's claim was terminated.[184] The Court suggested that parties have a constitutional right to a hearing *before* the permanent dismissal of a claim:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. What the Fourteenth Amendment does require, however, "is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' 'for [a] hearing appropriate to the nature of the case.'" It is such an opportunity that Logan was denied.[185]

The Court has held that post-deprivation hearings, or even a post-deprivation tort claim, can be all the process that is due if there is a strong governmental interest in prompt determination that might be destroyed by providing a pre-deprivation hearing, and if that interest outweighs the risk of harm to the claimant. In *Mathews* that strong governmental interest took the form of payments that might be difficult to later recover. In other situations, a pre-termination hearing might be impossible or extremely difficult or costly.[186] In other cases, the slight harm from sequestering a

182. 455 U.S. 422, 426 (1982).

183. *Id.*

184. *Id.* at 434-35.

185. *Id.* at 437 (internal citations omitted).

186. *See generally* Parratt v. Taylor, 451 U.S. 527 (1981). A prisoner mail-ordered a hobby kit, which was lost before delivery. The prisoner claimed that his due process rights had been violated because he was not afforded a hearing before the government deprived him of his property by losing it. *Id.* at 529. The Court recognized that it would not be possible to provide the prisoner with a hearing before losing his hobby kit because the loss was not the result of an intentional act. The Court held that the prisoner's post-deprivation right to lawsuit is all the process that was due under circumstances, because a pre-deprivation hearing would not be possible. *Id.* at 543-44. While *Parratt* was later overruled in part by *Daniels v. Williams*, 474 U.S. 327 (1986), because the lack of due care by a state or federal actor does not "deprive" a person of property within the meaning of the due process clauses, *id.* at 330-31, the ruling that factual impossibility will overcome the general rule of entitlement to a pre-deprivation hearing remains good law. *See also* County of Sacramento v. Lewis, 523 U.S. 833, 836 (1998) (after a police officer killed an innocent bystander during a high-speed chase to catch a fleeing criminal, the Court held that "only a purpose to cause harm . . . will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.").

defendant's property would be greatly outweighed by the risk that assets would be dissipated by the time of a hearing.[187]

There is little doubt under the Court's analysis in *Mathews* and *Logan* that the bankruptcy court must provide an opportunity for a pre-dismissal hearing. First, there is a substantial risk of governmental error in automatically dismissing a bankruptcy case without notice or an opportunity for a hearing. My client's case discussed in the introduction is a perfect example.[188] It was wrongly dismissed because the court saw no payment advice statements on file when, in fact, none were due because the client had been unemployed during the relevant sixty-day period. The bankruptcy court has no way to determine from a simple review of the docket whether or not the debtor was required to file payment advice statements. The bankruptcy court needs evidence—namely, whether the debtor was employed and received payment advice statements during the applicable sixty-day period—to determine whether a violation occurred.

Moreover, while many of the other required documents must be filed by *all* debtors, and therefore a simple review of the docket would usually show an apparent violation, the possibility for error still exists. File clerks and computer programs are fallible. Documents may be misfiled by a clerk, misindexed by a computer operator, or misreported by defective computer software. Every step in the process is subject to error, and only through the opportunity for a pre-deprivation hearing can the damage from wrongful dismissal be avoided.

Second, under the first factor of the *Mathews* balancing test, a debtor may suffer irreparable harm through the wrongful dismissal of a bankruptcy case, such as the loss of a home or other property that could have been saved in bankruptcy. Upon dismissal, the automatic stay is terminated,[189] permitting creditors to proceed with their state law collection and sale remedies. The reinstatement of the case following a post-deprivation hearing would not restore the debtor's lost property during the gap in time between dismissal and reinstatement.[190]

Third, the government has no countervailing interest or need for denying a pre-deprivation hearing. There is no administrative savings from having a post-deprivation hearing in lieu of a pre-deprivation hearing

187. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 20-21 (1978) (hearing required before cutting off utility service, but noting that post-deprivation hearings can be sufficient where the delay will not cause harm); Mitchell v. W. T. Grant Co., 416 U.S. 600, 619-20 (1974) (allowing sequestration of debtor's property that might otherwise be dissipated).

188. *See supra* note 12 and accompanying text.

189. 11 U.S.C. § 362(c)(2)(B).

190. FED. R. CIV. P. 60(c)(2) ("The motion [to reinstate a dismissed case] does not affect the judgment's finality or suspend its operation."); *see also* FED. R. BANKR. P. 9024 (stating that FED. R. CIV. P. 60 applies in cases under the Code in most situations).

(indeed, the process for obtaining a post-deprivation hearing is far more cumbersome).[191] Nor does the government have any special need for prompt action, as would exist if state funds were paid out and might be difficult to recover. Creditors who are delayed by the continuation of the automatic stay are protected by the requirement that they be given adequate protection of their interests during the stay, and by the ample relief from stay provisions that are available during the pendency of the case.[192]

There is simply no governmental or administrative benefit from early dismissal to counterbalance the harm caused to the debtor from wrongful dismissal. The *Mathews* balancing test thus strongly (maybe even conclusively) weighs in favor of requiring a pre-deprivation hearing. Furthermore, unlike the provisional determination pending a final hearing in *Mathews*, the dismissal of the bankruptcy case is final, subject to review only on appeal and not as part of the continuing administrative process. The added gloss from *Logan* makes the debtor's case even stronger. A judicial or administrative procedure for determining claims must fairly provide for an opportunity for a hearing prior to dismissal. The Bankruptcy Code's requirement that the case "shall be automatically dismissed effective on the forty-sixth day"[193] is unconstitutional because it deprives parties of the Fifth Amendment's due process right to a pre-deprivation hearing.

## V. DOES THE CONSTITUTION REQUIRE RELIEF FOR HARMLESS ERRORS?

The bankruptcy court's constitutional obligation to provide notice of, and an opportunity for, a hearing before dismissing a debtor's bankruptcy case will ultimately benefit debtors in only a small minority of cases—those in which the debtor had in fact timely filed the paperwork required by the Bankruptcy Code, but for some reason the court erroneously believes that one or more of the required documents have not been filed. In most cases, the debtor will in fact not have filed one or more of the required documents within the forty-five day deadline. This section considers whether the bankruptcy court has the power or duty to relieve the debtor's default when it was the result of a harmless error.

Having determined in Part III that the automatic dismissal provisions

191. *See* FED. R. BANKR. P. 9024 (incorporating FED. R. CIV. P. 60, which allows a motion for relief from a judgment or order under certain conditions if the motion is filed within an undefined "reasonable time" but no more than one year after entry, or through an appeal filed within fourteen days of entry of the order under FED. R. BANKR. P. 8002).

192. *See* 11 U.S.C. § 361 (defining "adequate protection"); 11 U.S.C. § 363(d) (stating that relief from stay for cause is not adequately protected); 11 U.S.C. § 363(e) (explaining that creditors can prohibit use, sale or lease of collateral if they are not adequately protected).

193. 11 U.S.C. § 521(i)(1).

are unconstitutional as drafted, the first question is whether the courts will wipe the entire provision out of the statute, or whether they will "red-pencil" the statutory provision to make it constitutional by requiring notice and a hearing. If the statute is "red-penciled," it would still require the court to dismiss the case at the hearing if it finds that a required document was not timely filed. The standard consistently applied by the court for many years is to determine whether the unconstitutional provisions or portions of a statute (or series of interconnected statutes) are so connected with the constitutional ones that Congress would not have intended the constitutional portions to survive without the unconstitutional portions. As stated in the early case of *Allen v. Louisiana*:

> It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. But . . . if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must [fall] with them.[194]

The same rule has been in effect for many years.[195]

It is difficult to imagine that Congress would not have wanted the automatic dismissal rules to be interpreted as mandatory dismissal rules if the "automatic" portion of the statute were to be declared unconstitutional. Congress clearly intended to enact a strict rule for filing errors, and its purpose could well be served by mandating dismissal after, rather than without, notice and an opportunity for hearing. Therefore, absent another basis for challenging the surviving statute, the courts would almost certainly hold the remainder of the statute to be valid, and interpret the surviving statute to require dismissal after notice and a hearing for even innocent and harmless filing errors.

194. 103 U.S. 80, 83-84 (1880) (internal citations and quotation marks omitted).

195. *See, e.g.*, Denver Area Ed. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion) ("Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?" (quoted with approval in *United States v. Booker*, 543 U.S. 220, 246 (2005)) (internal quotation marks omitted)); Basardh v. Gates, 545 F.3d 1068, 1070 (D.C. Cir. 2008) (noting that the quotation from *Allen* "has long been the rule").

### *A. Separation of Powers*

Is there some other basis for preserving judicial discretion to relieve innocent harmless errors notwithstanding Congress's intent to require mandatory dismissal? After all, it has been repeatedly stated that the bankruptcy courts are "courts of equity,"[196] and one of equity's most cherished and fundamental maxims is that "equity abhors a forfeiture." Indeed the Federal Rules of Bankruptcy Procedure incorporate a Federal Rule of Civil Procedure titled "Harmless Error" which directs that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."[197]

Unfortunately for the debtor who has committed a harmless error in failing to file required documents, the general principles of equity and the general provisions of the Bankruptcy Rules would give way to a specific statute enacted by Congress. As stated by the bankruptcy court in *In re Beaty*, "a bankruptcy court is a court of equity and should invoke equitable principles and doctrines, *refusing to do so only where their application would be 'inconsistent' with the Bankruptcy Code*."[198] In this case, the Courts have long and consistently recognized that the exception swallows the rule—the specific provisions of the Bankruptcy Code override both general equitable principles[199] and any procedural rules.[200] If Congress has

196. Katchen v. Landy, 382 U.S. 323, 327 (1966) ("[Bankruptcy] courts are essentially courts of equity . . . ."); Loan Co. v. Hunt, 292 U.S. 234, 240 (1934) ("[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity."); Bardes v. First Nat'l Bank of Hawarden, 178 U.S. 524, 535 (1900); *In re* Beaty, 306 F.3d 914, 922 (9th Cir. 2002).

197. *See* FED. R. BANKR. P. 9005 (incorporating FED. R. CIV. P. 61).

198. 306 F.3d at 922 (emphasis added).

199. *See, e.g.*, Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988) ("[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."); SEC v. U.S. Realty & Improvement Co., 310 U.S. 434, 455 (1940) ("A bankruptcy court is a court of equity, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act.") (internal citations omitted); *In re* Chi., Milwaukee, St. Paul & Pac. R.R. Co., 791 F.2d 524, 528 (7th Cir. 1986) ("The fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be."); Guerin v. Weil, Gotshal & Manges, 205 F.2d 302, 304 (2d Cir. 1953) ("Although it has been broadly stated that a bankruptcy court is a court of equity, the exercise of its equitable powers must be strictly confined within the prescribed limits of the Bankruptcy Act.") (internal citation omitted). *See also In re* Jamo, 283 F.3d 392, 403 (1st Cir. 2002) ("But section 105(a) [the "all writs" statute in the Bankruptcy Code] does not provide bankruptcy courts with a roving writ, much less a free hand. The authority bestowed thereunder may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code."); Official Comm. of Equity Sec. Holders v. Mabey, 832 F.2d 299, 302 (4th Cir. 1987) (discussing limitations of the courts' equitable powers).

the constitutional power to mandate dismissal, it can exercise that power to overcome general common law principles of equity and subordinate rules of procedure. The question, therefore, is whether there are any constitutional limits on the power of Congress to mandate dismissal for innocent harmless errors.

My first thought was that the power to grant relief from harmless errors might be an essential attribute of judicial power with which Congress could not interfere under the basic principles of separation of powers. Neither the Constitution nor the Court's separation of powers cases support this theory, however. The starting place for the analysis, of course, is the language of the Constitution itself, which gives Congress, not the courts, the power to prescribe the rules applicable in the federal courts:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court [sic] shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*.[201]

This language was interpreted by the Supreme Court in an early decision written by Chief Justice John Marshall, *Wayman v. Southard*.[202] Congress enacted legislation, the Process Act, providing that federal courts should follow the state court procedures in effect in September 1789, "subject, however, to such alterations and additions as the said [federal] Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe . . . ."[203] The defendants contended that Congress could not lawfully delegate its rule-making authority to the Supreme Court, and therefore the state rules and not the language of the

200. Congress gave the Supreme Court the power to provide rules of bankruptcy procedure in 28 U.S.C. § 2075, which specifically provides that the rules "shall not abridge, enlarge, or modify any substantive right." The language confers a power that is substantially similar to the Supreme Court's ability to make procedural rules for Article III courts, such as the Federal Rules of Civil Procedure. *See generally* Rules Enabling Act, 28 U.S.C. § 2072(b). The Supreme Court held in *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965), that rules could not affect substantive law, and were subject to any specific substantive law enacted by Congress. The same theory applies to the Bankruptcy Rules. *See, e.g.*, *In re* Beaty, 306 F.3d at 924 ("Like a Federal Rule of Civil Procedure, 'a Bankruptcy Rule cannot create an exception to the Bankruptcy Code,' and it cannot 'abridge, enlarge, or modify any substantive right.'" (quoting *In re* Jastrem, 253 F.3d 438, 441 (9th Cir. 2001))); *In re* Pac. Atl. Trading Co., 33 F.3d 1064, 1066 (9th Cir. 1994) ("[A]ny conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code.").

201. U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

202. 23 U.S. (1 Wheat.) 1 (1825).

203. *Id.* at 14-15.

federal court's writ should govern the sheriff's conduct in enforcing the writ.[204]

Justice Marshall began his analysis by first recognizing Congress's plenary constitutional power over the procedures used in federal courts: "It is, undoubtedly, proper for the legislature to prescribe the manner in which these ministerial offices shall be performed, and this duty will never be devolved on any other department without urgent reasons."[205] Nevertheless, the Court allowed Congress to delegate its power to make procedural rules to the courts, and to "fill up the details,"[206] because it involved a subject "to be properly within the judicial province, and has been always so considered."[207] In *Sibbach v. Wilson & Co.*,[208] the Court followed *Wayman v. Southard* in upholding Congress's power under the Rules Enabling Act of 1934 to enact the Federal Rules of Civil Procedure, stating: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."[209] *Wayman* and *Sibbach* show that the Court has consistently recognized that the Congress has plenary power over federal court procedure, and the courts have only secondary power to regulate when that authority is either expressly delegated by Congress, or possibly when Congress is silent. The judiciary's power to regulate its own procedures comes from Congress's express or implied delegation.

The Court's separation of powers jurisprudence has focused on two major areas of concern for the relationship between the legislative and judicial branches. In *Mistretta v. United States*, the Court considered, and ultimately upheld, the validity of the federal sentencing guidelines written under a delegation of power by Congress to the United States Sentencing Commission.[210] The Commission was housed in the judicial branch, and included as members three sitting federal judges appointed by the President. The law provided that the guidelines would be binding on the courts in imposing sentences, and thus the Commission at the time had the

204. *Id.* at 11.

205. *Id.* at 45-46.

206. *Id.* at 43.

207. *Id.* at 45. The Court also refused to specify what powers could and could not be delegated by Congress to another branch: "The difference between the departments undeoubtedly [sic] is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily." *Id.* at 46.

208. 312 U.S. 1 (1941).

209. *Id.* at 9-10.

210. 488 U.S. 361, 412 (1989).

earmarks of a law-making body.[211] Mistretta, a criminal defendant who had been sentenced under the guidelines, challenged the guideline system as an improper delegation of legislative authority from the legislative to the judicial branch.[212]

The Court began its analysis in *Mistretta* by identifying its two primary separation of powers concerns in respect to the legislative and judicial branches:

> In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch."[213]

The assignment concern was considered in *Morrison v. Olson*, which gave the judicial branch the power to appoint, on referral from the Attorney General, an independent counsel to investigate and, if warranted, prosecute a member of the executive branch for criminal conduct.[214] The Act also gave the judicial branch various administrative duties in connection with the appointment.[215] The Court, over a vigorous dissent by Justice Scalia who claimed that the majority was permitting the creation of a fourth branch of government answerable to no one, upheld the Act because the judiciary was not given the power to unilaterally appoint prosecutors without executive involvement. Importantly, the Court's decision recognized that there are important limits on Congress's power to assign to the judiciary functions that should under the Constitution be performed by other branches.[216]

The assignment concern seems entirely inapplicable to the mandatory dismissal rules. In requiring the mandatory dismissal of bankruptcy cases for filing errors, Congress is not requiring the judiciary to perform any acts that should properly be performed by another branch of government under the Constitution.

The Court's second separation of powers concern involved protecting the institutional integrity of the judicial branch. The cases cited by the Court involved concerns over Congress eroding the judicial branch's role in adjudicating questions within its jurisdiction by assigning adjudicatory functions to courts or agencies established outside of Article III's mandate of life tenure and undiminishable salaries—protections designed to assure

211. *Id.* at 367.
212. *Id.* at 369.
213. *Id.* at 383 (internal citations omitted).
214. 487 U.S. 654, 660 (1988).
215. *Id.* at 680.
216. *Id.* at 684-87.

the independence of the decision maker against potential threats from the political branches.[217] Once again, the Court's concern with the delegation of adjudicative power to judges who lack the hallmarks of independence required by Article III seems entirely unrelated to any concern with Congress mandating case dismissal for harmless filing errors.

The Court has also expressed concern that its core judicial powers are eroded when Congress improperly interferes in individual cases after the Court's powers have attached. Although the Court has historically given Congress great leeway in defining the Court's jurisdiction,[218] the Court has rejected blatant attempts by Congress to legislate the result in particular cases. The grandfather of this separation of powers line is *United States v. Klein*.[219]

*United States v. Klein* arose shortly after the Civil War, during Reconstruction. Congress, through various statutes, authorized a prior owner to recover property seized during the war upon proof that the owner had not offered "aid and comfort to the late rebellion."[220] Prior to *Klein*, the Supreme Court ruled that a presidential pardon would, as a matter of law, satisfy the statutory requirement.[221] Congress enacted a new law to reverse the Supreme Court's ruling.[222] The new law provided that presidential pardons would neither be admissible in evidence nor considered by the Court of Claims in determining whether the claimant had provided aid and comfort to the enemy.[223] Furthermore, the law required pardons to state the specific acts being pardoned, and required the Court of Claims to accept the stated facts as conclusively proven.[224] Finally, the statute deprived the Supreme Court of appellate jurisdiction to overturn a Court of Claims determination of forfeiture if a presidential pardon existed, so that the Court would be unable to question the constitutionality of the new law.[225] The Court held that the statute was unconstitutional under

217. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986) (upholding legislative scheme allowing the Commodity Futures Trading Commission, a non-Article III adjudicative body, to hear related counterclaims asserted in an enforcement proceeding within its jurisdiction); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (striking down the bankruptcy system which allowed non-Article III bankruptcy judges to hear a broad range of matters that were only related to bankruptcy).

218. *See, e.g.*, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 511-12 (1868) (allowing the Civil War Congress to repeal a habeas corpus statute to deprive the Court of jurisdiction to hear McCardle's petition).

219. 80 U.S. (13 Wall.) 128 (1871).

220. *Id.* at 129.

221. United States v. Padelford, 76 U.S. (9 Wall.) 531, 536 (1869).

222. *Klein*, 80 U.S. at 143.

223. *Id.*

224. *Id.*

225. *Id.* The Court in *Klein* summed up the effect of the statute as follows: "The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be

separation of powers principles for three reasons. First, it was the Court's job to determine the effect of a pardon under the Constitution, which it had already done, and Congress could not alter a pardon's affect.[226] Second, the statute unconstitutionally purported to strip the Supreme Court of jurisdiction based on its findings that a pardon existed, which amounted to a usurpation of its judicial function to determine the merits of the case.[227] The attempt to condition the Court's jurisdiction on the outcome of the case deprived the court of its proper role in deciding the constitutionality of the statute:[228]

> Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.[229]

Finally, the Court held that the statute infringed on the executive's pardon power.[230]

The separation of powers principles enunciated in *Klein* carry through to modern times in several ways. First, while Congress can change the judiciary's interpretation of a law prospectively (or even retrospectively to pending cases) by changing the law,[231] it cannot change the final outcome of a court decision between the parties through a change in the law. For example, in *Plaut v. Spendthrift Farm, Inc.*, the Court, citing *Klein*, held that Congress could not extend retroactively the statute of limitations to cases that had already been dismissed as untimely.[232]

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conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal." *Id.* at 144.

226. *Id.* at 148 ("Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration."). Note that the dissent argues that the Court's previous decision in *Padelford* applied only to a governmental seizure *after* a pardon had been granted, not before as in *Klein*. *Id.* at 150 (Miller, J., dissenting) (emphasis added).

227. *Id.* at 146.

228. *Id.* ("The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?").

229. *Id.* at 147.

230. *Id.* ("The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.").

231. *See, e.g.*, Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 440 (1992) (identifying ways how Congress can modify a judicial interpretation of the law); Pa. v. Wheeling & Belmont Bridge Co., 59 U.S. (1 How.) 421, 435 (1855) (recognizing that, through retrospective amendments to existing law, Congress can change the rules for decision in pending cases).

232. 514 U.S. 211, 227 (1995).

Second, Congress cannot require the judiciary blindly to accept someone else's fact findings. In *Gutierrez de Martinez v. Lamagno*, the Attorney General certified that defendant Lamagno was acting as an agent of the United States when Lamagno allegedly committed a tort, injuring the plaintiff, in a foreign country.[233] If the Attorney General's certification was correct, Lamagno would have no personal liability for the suit, and the principle of sovereign immunity would bar the claim against the United States. The plaintiff argued that the Attorney General's certification was erroneous, and Lamagno argued that by statute the Attorney General's certification was binding on the Court.[234] The Court rejected Lamagno's interpretation of the statute, assuming that Congress did not intend to vest the Attorney General with final fact-finding authority in cases where the government would have immunity.[235] Citing *Klein*, the Court also suggested that if Congress had intended to require the Court to rubber stamp the Attorney General's certification, Congress's action would likely violate separation of powers principles:

> Congress may be free to establish a compensation scheme that operates without court participation. But that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate. Cf. *United States v. Klein*, 13 Wall. 128, 146 (1872) (Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it"). We resist ascribing to Congress an intention to place courts in this untenable position.[236]

The threat in *Lamagno* to hold unconstitutional any attempt by Congress to require the judiciary to adopt someone else's fact-finding is clear.

Congress has not sought in the automatic dismissal rules to eliminate the courts' fact-finding function. As drafted, cases automatically are dismissed *only* if required documents are not filed. If the court finds that the required documents have been filed, the case would not be subject to automatic or mandatory dismissal. Therefore, the threat in *Lamagno* would have no direct applicability to the automatic dismissal rules that are the subject of this article.

However, it is also a core Article III "province and duty" of the judiciary "'to say what the law is' in particular cases and controversies."[237]

233. 515 U.S. 417, 420 (1994).

234. *Id.* at 422-23.

235. *Id.* at 426.

236. *Id.* at 430 (citation omitted).

237. *Plaut*, 514 U.S. at 218 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

If Congress cannot interfere with the core judicial function of fact-finding, may an analogous argument be made that Congress cannot constitutionally interfere with the judiciary's interpretive function by mandating dismissal of bankruptcy cases for filing errors?

There is an important distinction between fact-finding and law interpretation that must be recognized at the outset: Congress does not make facts but it has the power to make the law. While Congress cannot change what the court interpreted the law to be in a particular case,[238] it can change the law itself. For example, in *Robertson v. Seattle Audubon Society*, environmental groups sued to prevent timber harvesting in certain areas to protect the northern spotted owl, an endangered species.[239] The courts enjoined some of the harvesting and timber sales. Congress responded to the litigation by passing a law that specifically allowed some of the harvesting that had been enjoined by the court.[240] The environmental defendants sought immediate dismissal of their cases and argued that Congress was interfering with the judiciary's function to decide particular cases.[241] The Court of Appeals for the Ninth Circuit agreed with the environmental groups, and held Congress's law to be an unconstitutional intrusion into the judicial process:

> The statute "does not, by its plain language, repeal or amend the environmental laws underlying this litigation," but rather "directs the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases."[242]

The Supreme Court in *Seattle Audubon Society* rejected the Court of Appeals' analysis. The Supreme Court determined that Congress had *effectively* changed the law by allowing the logging.[243] The Court refused to consider, because it had not been advanced below, an argument made by one of the environmental groups that a law which amends a statute only so broadly as to affect the decision in a particular case should be invalidated as a violation of separation of powers.[244]

238. *Id.* at 240 (holding that Congress cannot revive cases that have been dismissed by final court orders).

239. 503 U.S. 429, 432 (1992).

240. *Id.* at 433.

241. *Id.* at 435-36.

242. *Seattle Audubon Soc'y*, 503 U.S. at 436 (quoting Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990)).

243. *Id.* at 440-41.

244. *Id.* at 441 ("[Public Citizen] contends that even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases. This alternative theory was neither raised below nor squarely considered by the Court of Appeals; nor was it advanced by respondents in this Court. Accordingly, we decline to address it here.").

Any separation of powers arguments concerning the Court's inherent equitable powers that might have survived *Seattle Audobon Society* were quickly quashed in *Miller v. French*.[245] A lower court had issued an injunction in 1975, which was still in effect at the time of the decision in 2000, prohibiting the operation of a state prison in violation of the Eighth Amendment.[246] In 1996, Congress passed new law setting specific standards for the entry and termination of prospective relief in prison cases.[247] The statute also provided that if the prison authorities file a motion under the new law for termination of prospective relief, the court was required to rescind its existing injunction and was prohibited from entering a new injunction until it determined the motion on the merits.[248] The district court ruled that the provision automatically staying any interim equitable relief was unconstitutional because it deprived the court of its inherent equitable powers.[249] The Supreme Court reversed, holding that Congress has the power to change the law and overturn any earlier grant of prospective relief without implicating any separation of powers concerns under *Klein*.[250] The Court distinguished between legislation that purported to overturn a final court ruling granting retrospective relief,[251] such as a damages award, and legislation that overturns a court ruling granting prospective relief.[252] The former violates the Court's authority under separation of powers principles, while the latter is a proper act of the legislature to change the law. Similarly, the Court quickly dispatched the prisoner's arguments that Congress's legislation interfered with the equitable powers of the judiciary:

> [The automatic stay] operates in conjunction with the new standards for the continuation of prospective relief; if the new standards . . . are not met, then the stay "shall operate" unless and

245. 530 U.S. 327 (2000).
246. *Id.* at 331-32.
247. *Id.* at 333.
248. *Id.* at 333-34.
249. *Id.* at 331-32.
250. *Id.* at 349.
251. *See supra* note 232 and accompanying text.
252. *Miller*, 530 U.S. at 344 ("Prospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law."). In support of this proposition, the Court cited *Pa. v. Wheeling & Belmont Bridge Co*., 54 U.S. (13 How.) 518 (1851) [hereinafter *Wheeling Bridge I*] and *Pa. v. Wheeling & Belmont Bridge Co*., 59 U.S. (18 How.) 421 (1855) [hereinafter *Wheeling Bridge II*]. In *Wheeling Bridge I*, the court issued an injunction requiring the removal of a bridge because it was built too low under existing law. 54 U.S. (13 How.) at 608-09. Following the Court's decision, Congress passed a law validating the construction of the bridge. After the bridge was destroyed in a storm, Pennsylvania sought to prevent the reconstruction of the bridge in violation of the court's injunction. In *Wheeling Bridge II*, the Court held that Congress's law validating the bridge rendered the injunction from *Wheeling Bridge I* unenforceable. 59 U.S. (18 How.) at 436.

> until the court makes the findings required by [the new law]. Rather than prescribing a rule of decision, [the law] simply imposes the consequences of the court's application of the new legal standard.[253]

After the Court's ruling in *Miller v. French*, it is difficult to see any constitutional challenge to the automatic dismissal rules under separation of powers principles. In *Miller*, the Court rejected the prisoner's arguments that the Court has inherent equitable powers of relief over which Congress cannot legislate. The Court's separation of powers jurisprudence puts no limits on Congress's powers to legislate prospectively, or to apply the law to pending cases and even to previous grants of prospective relief.

Several constitutional law experts suggested that I look into the Court's recent jurisprudence overturning the mandatory nature of the federal sentencing guidelines, suggesting that the mandatory nature of the guidelines was held to be unconstitutional because the guidelines encroached on the judiciary's turf. While the sentencing guideline cases are fascinating, the decisions were not based on separation of powers principles.

Preceding the attack on the sentencing guidelines, the Supreme Court ruled in *Apprendi v. New Jersey* and *Blakely v. Washington* that a trial judge could not enhance a criminal defendant's sentence beyond the statutory maximum prescribed for the crime on the basis of the facts either admitted by the defendant or found by the jury.[254] In *United States v. Booker*, the Court was forced to apply the theory of *Apprendi* and *Blakely* to the mandatory sentencing guidelines.[255] In both cases, the applicable federal statute under which the defendants were convicted provided for a broad sentencing range of between ten years and life.[256] However, the sentencing guidelines were much more specific than the statute, requiring sentences to be imposed in narrow guidelines depending on the quantity of drugs for which the defendant was responsible.[257]

After the jury's verdict, the trial judges in the two cases heard evidence in the sentencing phase showing that the defendants were responsible for much larger quantities of drugs than had been determined

253. *Miller*, 530 U.S. at 349.

254. Blakely v. Washington, 542 U.S. 296, 303 (2004) ("the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (emphasis omitted)); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

255. 543 U.S. 220, 243-44 (2005).

256. *Id.* at 226.

257. Based on the quantity of drugs found by the jury, the sentencing guidelines would be between 210 and 262 months for Booker, and 78 months for Fanfan. *Id.* at 227-28.

by the jury. The judge's findings resulted in longer sentences under the sentencing guidelines than would result under the sentencing guidelines on the basis of the jury's quantity determinations, although both sentences would have been within the broad statutory range.[258]

The Court determined that the sentencing guidelines, if interpreted as drafted to be mandatory, had the effect of binding law, just like a statute.[259] Therefore, under *Apprendi* and *Blakely*, the courts could not constitutionally sentence the defendant to a term longer than prescribed by the sentencing guidelines on the basis of the facts determined by the jury. However, if the sentencing guidelines were not mandatory, but merely suggested ranges to be considered by the trial judge, then the guidelines would no longer have the effect of a statute under *Apprendi* and *Blakely*. This would allow the judge to consider facts not admitted or determined by the jury in enhancing the guideline sentence, as long as it was within the broad range statutory limits set by statute.[260] In a separate opinion by Justice Breyer, the Court solved the tangle between the sentencing guidelines and the Sixth Amendment by making the guidelines advisory rather than mandatory:

> We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, which depends upon the Guidelines' mandatory nature. So modified, the federal sentencing statute makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.[261]

The Court's sole stated concern in *Booker* and *Fanfan* was for the defendant's Sixth Amendment right to have a jury determine all facts upon which a mandatory penalty is imposed. The Justices did not express any concern with the power of Congress to establish penalties ranges, or even

258. In Booker's case, the judge's findings resulted in a sentence of thirty years to life, and in Fanfan's case between 188 and 235 months. *Id.*

259. *Id.* at 233 ("As the dissenting opinions in *Blakely* recognized, there is no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in that case. This conclusion rests on the premise, common to both systems, that the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges." (internal citations and quotation marks omitted)).

260. *Id.* at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

261. *Id.* at 245 (internal citations omitted).

to fix a specific penalty that the court must impose for specific crimes. Nothing in the decision or its antecedents states any separation of powers limitation on Congress's authority to require mandatory dismissal of bankruptcy cases for filing errors.[262]

Under existing Supreme Court authority, there seems to be no basis for challenging the mandatory dismissal rules on separation of powers grounds. The Court's separation of powers concerns have extended only to laws that impose someone else's fact findings on the judiciary, overturn final judicial decisions granting retrospective relief, delegate excessively broad judicial authority to non-Article III decision makers, or attempt to improperly assign non-adjudicatory functions to the judiciary. None of these concerns are implicated in the automatic dismissal rules. The bankruptcy court retains its authority to adjudicate the facts of the case (whether or not any required papers were timely filed), the law does not apply retroactively to cases finally determined prior to its effective date, and no adjudicative functions were assigned outside of the bankruptcy process supervised by Article III judges.[263] If the judiciary has some inherent equitable powers that Congress cannot eliminate under constitutional separation of powers principles, that power has yet to be

262. It is worth noting that some scholars believe that the Court's sentencing jurisprudence that led to *Apprendi* was based on separation of powers principles. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 512 (2009) (noting that the Court rejected the legislature's characterization of facts as sentencing factors that would not be subject to the Sixth Amendment). Moreover, Justice Stevens argued in his dissent in *Dillon v. United States*, 130 S. Ct. 2683 (2010), a case upholding against Sixth Amendment challenge a portion of the sentencing guidelines requiring their mandatory use in a sentence reduction proceedings brought about by a guideline reduction, that the sentencing commissions interpretations after *Booker* should not be given effect under separation of powers principles. Justice Stevens suggested that if the sentencing commission sought to uphold the mandatory nature of the guidelines by requiring judges to submit all sentencing facts to the jury "we would either strike down such an act on separation-of-powers grounds or apply the same remedy we did in Booker to render the statement advisory." *Id.* at 2702 (Stevens, J., dissenting). Thus, although a majority of the court decided *Booker* on the basis solely of the Sixth Amendment, there remains some room for the development of the separation of powers doctrine.

263. Following the Supreme Court's decision in *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 50 (1982), invalidating the bankruptcy system for delegating excessive adjudicatory authority to non-Article III judges, the bankruptcy system was restructured to vest all bankruptcy jurisdiction in the Article III district courts, 28 U.S.C. § 1334, who then refer cases to the bankruptcy courts. *Id.* at § 157(a). The Article III district courts retain complete and unfettered control of the jurisdictional reference, *id.* at § 157(d), and Article III courts must provide de novo review of non-core matters, and appellate review of core matters. *See id.* at §§ 157(c)(1), (b)(1), 158 (respectively). The automatic dismissal provisions raise no special concerns of the type at issue in *Marathon*, because the rules apply only to the debtor's post-petition obligations arising directly under the Bankruptcy Code, and not to the state law claims in *Marathon* that were only "related to" bankruptcy.

identified or recognized by the Court.

### *B. Substantive Due Process*

The second constitutional basis for challenging the mandatory dismissal rules is, once again, the Due Process Clause. This challenge, unlike the procedural one discussed earlier, would require the Due Process Clause to impose substantive limits on the power of the legislative branch to legislate.

At the beginning of the twentieth century, a conservative Supreme Court regularly used the doctrine of substantive due process to strike down progressive-area economic legislation.[264] As the century progressed, however, the doctrine had the misfortune of colliding head-on with President Franklin Roosevelt's New Deal in the depths of the Great Depression, and all but died in the crash.[265] The court has not struck down

264. The period from 1874-1937, during which the Supreme Court felt free to question and strike down state and federal laws attempting to regulate the free market, has become known as the Lochner era, after the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905), which struck down New York's attempt to limit the hours worked in the baking industry.

265. The well-known story of the demise of the *Lochner* era is suitable for a feature film. After the Court struck down a number of key New Deal programs, President Franklin Roosevelt, who had just received a landslide victory in the 1936 election, announced that he would support the Judiciary Reorganization Bill of 1937, which has become known as the "Court Packing Plan." The bill would have expanded the number of justices on the Court—one new justice for each sitting member who was over 70.5 years of age, up to a total of six new justices. Less than two months before the court packing plan was announced, however, Justice Owen Roberts announced that he was switching sides in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which upheld state minimum wage laws, and overturned the Supreme Court's earlier minimum wage precedent in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). *West Coast Hotel* was issued at around the same time as the Court Packing Plan was announced, and was followed by a string of decisions upholding new deal legislation. *See* Wright v. Vinton Branch, 300 U.S. 440 (1937) (upholding the new Frazier-Lemke Act staying foreclosure actions); Virginian Ry. Co. v. Ry. Emps., 300 U.S. 515 (1937) (upholding the Railway Labor Act); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding the National Labor Relations Act); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937) (same); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937) (same); Associated Press v. NLRB, 301 U.S. 103 (1937) (same); Wash. Coach Co. v. NLRB, 301 U.S. 142 (1937) (same). In July 1937, Senate Majority Leader Joseph T. Robinson led the charge to pass the Court Packing Plan, holding the floor for two days arguing for its passage. MARIAN CECILIA MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 498-505 (Fordham University Press 2002). A short time later, Robinson was complaining of chest pain, and on July 14 was found dead of a heart attack in his apartment. *Id.* According to McKenna, any hope of passing the Court Packing Plan died along with him. On July 22, the Senate voted by an overwhelming majority to send the judicial reform measure back to committee, where the court packing language was stripped out. Justice Roberts's decision to shift the Court's majority to support new deal programs became known as the "switch in time that saved

a single piece of state or federal legislation on substantive due process grounds since 1937.[266]

The modern Supreme Court has established about as loose a standard as possible for testing the validity of legislation—the rational basis test. The test asks only that the legislation be "rationally related to a legitimate governmental purpose."[267] In determining whether the legislation had a "rationally related" basis, the Court will strain to imagine any supportive theory, even if the basis stated in the legislation was not rational, or even if no basis was stated in the legislation itself or in its legislative history.[268]

The Court would not have to strain to find a rational basis for the mandatory dismissal rule. Congress may have believed that bankruptcy judges were too timid in using their discretionary dismissal powers, allowing debtors who regularly failed to comply with the filing rules to nevertheless obtain the generous benefit of a bankruptcy discharge. The tougher standard of mandatory dismissal could be easily justified as a remedy for lax judicial enforcement.

But that justification does not explain the need to eliminate the standard equitable defenses of excusable neglect and harmless error. Congress could have obtained the same benefit by requiring dismissal unless the debtor establishes that the filing error was excusable, promptly cured and harmless. In its zeal to distance itself from the unprincipled Lochner era[269] decisions, however, the Court has stated that it will not use substantive due process to question legislation that is overbroad. For example, in *Williamson v. Lee Optical of Oklahoma, Inc.*, the Court upheld an Oklahoma law prohibiting opticians from fitting or duplicating eye glasses, or even soliciting the sale of frames or mountings, without a prescription from a licensed optometrist or ophthalmologist.[270] The Court

nine," although his decision to change sides preceded the introduction of the court packing bill. *The Switch in Time that Saved Nine*, WIKIPEDIA, http://en.wikipedia.org/wiki/The_switch_in_time_that_saved_nine. It also spelled the death knell for the liberal application of substantive due process.

266. *See* IRWIN CHEMERINSKY, CONSTITUTIONAL LAW 628 (3d ed., Walters Kluwer 2009).

267. United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

268. *Id.*; *see also* Heller v. Doe, 509 U.S. 312, 326 (1993) ("'States are not required to convince the courts of the correctness of their legislative judgments.' Thus, since 'the question is at least debatable,' rational-basis review permits a legislature to use just this sort of generalization." (internal citations omitted)).

269. *See supra* note 264 and accompanying text.

270. 348 U.S. 483 (1955).

upheld the law even though it recognized that it was unnecessarily overbroad to achieve the state's legitimate objective:

> But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Justice Waite said in *Munn v. State of Illinois*, "for protection against abuses by legislatures the people must resort to the polls, not the courts."[271]

Nevertheless, there is some recent Supreme Court authority that may suggest a new role for substantive due process when the effect of the law is to excessively and inappropriately punish conduct rather than to properly regulate behavior. In *BMW of North America, Inc. v. Gore*, a jury awarded an Alabama new car buyer two million dollars in punitive damages because the manufacturer had repaired, under its standard policy, some minor cosmetic damage to the new vehicle without disclosing the repair to the buyer.[272] The court stated outright: "The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."[273] The Court went on to find the award excessive because the punitive damages were calculated on the basis of national car sales,[274] rather than just Alabama sales, and because the award was so excessive in relation to actual damages that it violated the requirement that parties have fair notice of the severity of punishment to which their conduct might be subject.[275] In later cases, the Court has suggested that the Due Process Clause generally prohibits punitive damage awards that are not "reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered,"[276] and requires a high

271. *Id.* at 487-88 (internal citations omitted).

272. 517 U.S. 559, 567 (1996).

273. *Id.* at 562.

274. *Id.* at 572 ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

275. *Id.* at 574 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

276. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (overturning bad faith insurance punitive damages award of $145 million on actual damages of $1 million). *See also* Philip Morris USA v. Williams, 549 U.S. 346-47 (2007) ("The Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury inflicted on strangers to the litigation.").

level of judicial scrutiny for awards that exceed a single-digit multiple of actual damages.[277]

The only conceivable purpose for dismissing a bankruptcy case for a filing error caused by harmless excusable neglect is deterrence. A severe penalty for mistakes may well encourage diligence by others, but it does nothing useful to the person who committed the harmless excusable error. From the point of view of the innocent mistaken filer, it is an excessive and unwarranted penalty, unreasonable and disproportionate to any conceivable harm caused by the mistake. The same deterrence could be had by requiring dismissal only when the filing errors are not excusable. Without doubt, the punitive damages cases arise in a very different context—the punitive damages award is imposed by a jury during trial, rather than being imposed by legislation designed for a broad proper purpose.[278] Yet, the cases appear to recognize a fundamental principal of American constitutional law: the punishment should fit the crime. While the Court has not extended its punitive damages analysis to statutory procedural penalties, such as mandatory dismissal, the broad theory in the decisions may plant the seeds for a constitutional limit on a mandatory dismissal rule that is so overbroad as to offend traditional equitable notions of fairness.

## VI. CONCLUSION

The automatic dismissal rules by their terms require self-executing dismissal if any of the required documents are not filed within forty-five days after bankruptcy. The courts cannot properly interpret the automatic dismissal rules to be anything other than mandatory and self-executing. As the Supreme Court in *Hamilton v. Lanning* recently suggested, the courts cannot retroactively relieve the filing requirement after the case has been automatically dismissed. There is also no basis for making judicial exceptions to the statutory language. Congress's intent is manifest. To challenge the rules, one must challenge Congress's power to make them

277. *State Farm*, 538 U.S. at 425 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award . . . . We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

278. In *TXO Prod. Corp. v. Alliance Res. Corp.*, the Court rejected the suggestion that a punitive statute should be per se valid, while a Court's punitive damage award should be subject to constitutional scrutiny: "Nonetheless, we find neither formulation satisfactory. Under respondents' rational-basis standard, apparently any award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." 509 U.S. 443, 456 (1993).

rather than argue that Congress did not intend what the rules clearly say. As a matter of statutory interpretation, the bankruptcy court has no discretion under the rule—it must find that the bankruptcy case has automatically been dismissed whenever the debtor fails to file one of the required documents within the forty-five day period, even if the debtor is abusing the bankruptcy process by seeking dismissal of his or her own case, and even if the judge thinks dismissal an excessively harsh sanction for an innocent and harmless filing error. Whether or not the law is unfair is for Congress to decide, as long as Congress acts within its constitutional authority.

The question then is whether Congress has acted within its constitutional authority in enacting the automatic dismissal rules. Once Congress grants a bankruptcy right, it has created an entitlement—an expectation by those who have filed bankruptcy that they will receive the authorized relief. The entitlement constitutes a property right, and Congress cannot constitutionally deprive individuals of that right without according them due process of law. As a matter of procedural due process, Congress must provide notice and an opportunity for a hearing before dismissal, unless there is some governmental need that outweighs the harm of a post-deprivation hearing. There is no government need for prompt dismissal that outweighs the individual harm of wrongful dismissal. Therefore, the requirement that cases be automatically dismissed without notice or an opportunity for a hearing is unconstitutional.

The next question is whether the statute must be stricken entirely, or should be enforced in a constitutional way. The purpose of the statute could be carried out by removing the unconstitutional portion—by requiring notice and an opportunity for a hearing prior to dismissal. Therefore, the Court would likely "red-pencil" the statute to require notice and a hearing, but would enforce Congress's intent by mandating dismissal whenever the rule has been violated. The hearing requirement would only help those who complied with the statute by timely filing all required documents; it would not help those who made an excusable and harmless error in failing to file a required document. To prevent automatic dismissal in cases of excusable harmless error, the court would have to find another constitutional basis for questioning Congress's substantive law-making authority. That is no easy task. The separation of powers cases reject the notion that the Court's equitable powers should override Congress's will, and the doctrine of substantive due process has been largely rendered a dead letter in the law following the heady days of judicial activism at the beginning of the twentieth century.

However, Congress's recent punitive damages jurisprudence raises at least the possibility that requiring mandatory dismissal for excusable and harmless errors may be seen as unfairly punitive and, therefore, offensive

to traditional notions of substantive due process. Whether the Court would extend the substantive principle of proportionality recognized in the punitive damages cases to a law that has the effect of an unfair judicial punishment for innocent filing errors is a matter of uncertainty.

In the end, one can only hope that Congress will remedy the problems associated with the automatic dismissal rules. Most importantly, Congress should amend the rules to, first, require a hearing prior to dismissal, and, second, give the Courts the authority to refuse mandatory dismissal when necessary to prevent bad debtors from abusing the bankruptcy process and protect honest and deserving debtors who made excusable harmless errors.