The Law and Politics of the Enforcement of Federal Standards for the Administration of Unemployment Insurance Hearings

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Unemployment insurance claimants are entitled to have state unemployment programs administered in accordance with federal standards, which include the provision of prompt and fair hearings for claimants if their applications for benefits are denied. Violations of these rights are widespread, but the United States Department of Labor's Unemployment Insurance Service has never brought a formal proceeding to enforce the federal standards of administration. This Article explains why enforcement of the federal standards is needed and why it has not been provided, and suggests methods by which advocates for claimants can seek to enforce federal standards in the face of this failure by the federal agency.

INTRODUCTION

Under the Social Security Act, an unemployment insurance claimant initially denied benefits by a state agency is entitled to a prompt and fair hearing before an impartial tribunal to determine whether the initial denial was correct.\(^1\) Under federal regulations, hearings are prompt if the state issues decisions in sixty percent of them within thirty days, and in eighty percent of them within forty-five days, of the request.
for a hearing. The Social Security Act directs the United States Department of Labor (USDOL) to terminate funding to a state unemployment insurance system if the USDOL finds that the state has failed substantially to meet federal standards, including those requiring a prompt and fair hearing. Despite the long-term poor performance of some states in meeting these standards, the USDOL's Unemployment Insurance Service (UIS) has never commenced a proceeding to terminate funds to any state for these failures.

The goal of this Article is to help advocates for claimants understand and remedy state agencies' noncompliance with, and the USDOL's nonenforcement of, federal rules concerning the administration of unemployment insurance hearings. This is not an easy time to obtain enforcement of federal rules in any federal-state social welfare program. Many members of Congress are working to cut funding for these programs or at least to eliminate federal rules governing the states' use of federal funds. But an effective unemployment insurance program is a critical part of a fraying safety net. Moreover, because the unemployment insurance program is funded by taxes based on wages paid to potential beneficiaries and is not means-tested, it may be less vulnerable to attack than other social welfare programs. Indeed, advocates for claimants have both unique opportunities and special responsibilities in seeking to enforce federal unemployment insurance rules.

Part I of this Article will discuss the need for federal enforcement of existing standards to protect claimants. Part II will review the reasons behind the current enforcement failure. Finally, Part III will outline approaches that advocates for claimants can use to achieve increased enforcement.

2. 20 C.F.R. § 650.4(b) (1995). This provision applies to initial hearings before administrative law judges. See id. §§ 650.3(a), 650.4(a). These hearings are sometimes called "first"- or "lower"-level appeals. See id. § 650.4(a). Many states, including New York, provide for an administrative appeal. E.g., N.Y. LAB. LAW § 621 (McKinney 1988). Different, more flexible timelines apply to these second-level appeals. See id.; 20 C.F.R. § 650.1(d) (1995) (providing that "the criteria for review of State compliance in § 650.3(b) apply only to first level . . . appeals").


5. This Article deals with federal enforcement of rules concerning unemployment insurance hearings only. It may apply by analogy to aspects of the many other federal-state social welfare programs with similar enforcement schemes, such as Aid for Families with Dependent Children and Medicaid.

6. E.g., N.Y. LAB. LAW § 570 (McKinney 1988).
I. Horizontal Enforcement

Without effectively enforced national rules, states may be tempted to provide less than fair treatment to unemployed people. In our federal system, states compete with each other to attract businesses by creating a favorable business climate. An unemployment insurance system offering low taxes to employers and little protection for claimants may be considered part of a favorable business climate. Therefore, states may compete with each other to offer the unemployment insurance system that is most desirable from a business perspective. Unfortunately, the best system from a business perspective may be the worst unemployment insurance system from a claimant's perspective. The danger of this so-called "race to the bottom" among states has been recognized as a potential problem since the advent of the federal unemployment insurance system, and it remains a serious problem today. Recent changes in state laws have contributed to lower rates of receipt of unemployment insurance among the unemployed.

Uniform federal standards limit the ways in which states are allowed to compete with each other in the administration of unemployment insurance. The federal rules requiring fair, timely hearings provides one example. Likewise, effective federal standards are necessary to ensure an acceptable threshold quality of state unemployment compensation administration. Competent state administration is not automatic. Some senior administrators of state unemployment compensation programs may lack the experience, attitudes, and commitment necessary to perform their jobs successfully. Some senior administrators are political appointees who may lack administrative experience or ability; thus heavy administrative responsibilities may

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9. See supra notes 1-2 and accompanying text.
10. See, e.g., N.Y. LAB. LAW § 534 (McKinney 1988) (providing that the Appeal Board, which controls the hearing process, shall consist of five members appointed by the Governor, "not more than three of whom shall be adherents of the same political party").
fall on the permanent staff, many of whom are civil servants. Additionally, civil service laws and powerful unions can make it difficult to terminate these employees, even in light of poor performance.

II. REASONS FOR FEDERAL FAILURE TO ENFORCE

The federal standards governing unemployment insurance hearings are particularly vulnerable to nonenforcement for several reasons. First, the federal unemployment insurance program, like other social welfare programs, primarily benefits people with limited organized political influence. Union support for the unemployed is offset by the greater influence of employers, who may have an economic interest in weak enforcement of federal rules benefitting claimants. Second, it is difficult to enforce federal rules against state agencies because states often have built-in political protection at the federal level. As enforcement typically involves at least a threat of withdrawing federal funds to a state, the state's representatives and senators, not to mention its governor, may be motivated to exert their political influence against such threats. The current conservative efforts to eliminate joint federal-state programs imposing federal rules and to substitute block grants leaving discretion to the states is the extreme form of this political reality.

Finally, enforcing timeliness and due process rights involves challenging the routine practices of state agencies rather than the states' written rules. It is inherently more difficult to

14. Although local groups, such as the Mon Valley Unemployed Committee and the New York Unemployed Committee, have spoken out strongly on unemployment insurance issues on behalf of the unemployed, see, e.g., Nelson Schwartz, An Uncivil Civics Lesson, NEWSDAY, Mar. 19, 1992, at 7, the unemployed lack a strong national lobby.
15. See infra notes 29–30 and accompanying text.
17. Gerard Hildebrand distinguishes between "conformity" issues, which arise when state law does not agree with federal law, and "compliance" issues, which arise
force a change in a practice than it is to force an amendment to a black-letter rule. Practices are complex, hard to prove, and can change constantly. For example, a state's failure to provide basic due process in administrative hearings might result from problems in a wide variety of areas, including the selection of administrative law judges (ALJs); the training, supervision, and monitoring of ALJs; the number of hearings that an ALJ is assigned to conduct daily; or the amount of support services that the state provides. Excuses for continuing violations can change at the convenience of the agency. Even highly bureaucratic organizations, like unemployment insurance agencies, are likely to take on a frustratingly inchoate quality when pressed to change entrenched practices.

Federal administrative agencies, however, were created to overcome exactly these kinds of problems. Federal agencies are supposed to have the detailed experience and expertise in day-to-day operations necessary to identify and solve the complex practical problems of administering a program like unemployment insurance. In fact, the UIS does have access to the necessary expertise, as was observed by one of the authors, who worked with impressive administrators from around the country assembled by the UIS to advise a New York task force on its problems with hearings.

Thus, the limit on the UIS's ability to enforce federal rules against states is not legal or administrative. Rather, the key restraint is political. UIS administrators may believe that aggressive action against states would result in reprimand or retaliation from superiors in the executive branch, from legislators controlling agency budgets, or both. Political limits on enforcement are real yet are often inaccurately perceived by agency staff as absolute. And unfortunately an agency that believes that it has no effective power to enforce has no such power.

when actual state practice conflicts with federal law. Hildebrand, supra note 4, at 531-32. This Article deals with compliance issues.

18. See KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.05 (1958).

19. Id. § 1.05, at 37 (stating that administrative processes are better suited than legislative bodies for handling masses of detail and applying scientific and professional expertise to problems).

20. See infra text accompanying notes 43-44.

21. It is hard to think of any other explanation, except possibly laziness, for the UIS's failure ever to proceed against a poorly performing state. But see Hildebrand, supra note 4, at 540 n.86 (providing some possible reasons).
The relatively weak political position of claimants is reflected in the UIS's failure to include claimants or their representatives in the administrative process. Instead the UIS appears to deem itself a partner of the state agencies in carrying out a rather technical administrative task. For example, the UIS recently established the Performance Enhancement Work Group (PEWG) to revise the methods by which performance is measured in the unemployment insurance system.\(^22\) The UIS describes the PEWG as "a joint Federal/State work group composed of representatives from Federal National and Regional Offices, and State Agencies formed in conjunction with the Interstate Conference of Employment Security Agencies. . . . The group has developed a set of partnership principles which recognize mutual responsibility for the UI system."\(^23\) Thus, the PEWG neatly reflects the UIS's focus on the interests of the state agencies and its willingness to ignore the interests of unemployed individuals.

This method of operating alongside the states is not new. In 1955, one commentator noted that "there have been very few cases where sanctions or threat of sanctions have been used to compel compliance with the. . . Bureau's requirements regarding proper state administration. Apparently the states and the [predecessor to the UIS] have developed working agreements for consultation on problem areas . . . ."\(^24\) This relationship continues to exist. As Gerard Hildebrand has said of the UIS, "When the issue is performance, for example, the USDOL has never taken a consistently poorly performing state to a conformity/compliance hearing. The result may very well be that some states do not take the USDOL seriously concerning performance matters."\(^25\)

Lack of resources or data does not seem to be the immediate barrier to better enforcement. For instance, the Performance Measurement Review (PMR), implemented in 1988 by the UIS to obtain more accurate statistics regarding the performance of state agencies, represents a major commitment of staff and resources.\(^26\) Designed in three phases, the PMR defined eleven timeliness measures and five quality measures. The UIS

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23. Id.
24. De Vyver, supra note 7, at 421.
25. Hildebrand, supra note 4, at 584.
26. See UIPL No. 13-95, supra note 22.
successfully conducted a fifteen-month field test of PMR measures in six states, corrected and validated the data collected with the help of Mathematica Policy Research, Inc., and will eventually implement the program nationwide.\textsuperscript{27}

Although collecting good data is important, it is meaningless if the data is not used for enforcement. Although the UIS's existing system of data collection was sufficient to demonstrate New York's historical compliance problems,\textsuperscript{28} the political will to enforce the federal rules was apparently lacking as strong steps to enforce compliance were never taken. In the absence of political will, sophisticated data systems and multiple consultations with states result in a vast, expensive paper shuffling, not in compliance.

It is sometimes suggested that effective enforcement is virtually impossible because the remedy, termination of funding,\textsuperscript{29} would injure the unemployed as well as the state and therefore is unreasonable and politically unacceptable.\textsuperscript{30} In fact, the UIS, like other agencies, has many informal remedies short of termination of funding, including repeated oversight visits, "jaw-boning," paperwork requirements, and other forms of intense supervision.\textsuperscript{31} These sanctions can force compliance by subjecting agency officials to an unpleasant work environment until standards are met.\textsuperscript{32} Public reports of the performance of particular state agencies can be an effective sanction. Furthermore, because state agencies often seek funding for special purposes, the delay or denial of such funding can be used to influence state behavior. An aggressive supervisory agency can apply many levels of informal sanctions.

\textsuperscript{27.} Id.

\textsuperscript{28.} Compliance now appears on the face of the UIS's form "ETA 5-130," which is filed each month by New York and other jurisdictions. Section C of the form covers "time lapse on state UI appeals decisions" at both lower and higher levels, broken down by time lapse in days as follows: 0–30, 31–45, 45–75, and over 75.


\textsuperscript{30.} Cf. Rosado v. Wyman, 397 U.S. 397, 426 (1970) (Douglas, J., concurring) ("[The Department of Health, Education, and Welfare] has been extremely reluctant to apply the drastic sanction of cutting off federal funds to States that are not complying with federal law.").


\textsuperscript{32.} Not only are these sanctions not applied, but one of the authors also has observed UIS staff conveying exactly the opposite message to the New York agency even when New York was seriously out of compliance.
Although federal enforcement of compliance with performance standards by state agencies is not a simple process, the UIS has the expertise and resources to do a much more aggressive and successful job of enforcement than it has done to date. The main barrier to better enforcement appears to be actual or perceived political opposition.

III. REMEDIES FOR CLAIMANTS

To compensate for the USDOL’s failure to enforce the federal rules governing state administration of unemployment insurance hearings, beneficiaries and their advocates must seek enforcement of federal standards themselves. For claimants and their organizations, the task is a broadly political one.\(^{33}\) This Article, however, will focus on the areas in which lawyers may be able to use their expertise to make a special contribution, including litigation and legislative and administrative advocacy.\(^{34}\)

A. Litigation

1. Suing the State Agency—Unemployment insurance claimants who have been denied federally protected rights by a state agency and who have access to counsel can sue the state agency directly.\(^{35}\) Individual plaintiffs in class actions can assert not only their own rights but also the rights of others similarly situated.\(^{36}\) For example, the authors’ office currently represents claimants in two class actions against the New York unemployment insurance system: Dunn v. New York State

33. See Clune, supra note 31, at 53 (proposing a political model to achieve social change through the law).
34. See id. at 114–15 (identifying the emerging role of lawyers in public law and the regulatory system).
35. See, e.g., California Dep’t of Human Resources Dev. v. Java, 402 U.S. 121 (1971) (involving a class action to enjoin enforcement of the California Unemployment Insurance Code as inconsistent with the Social Security Act). The Department of Labor took no actions to enforce federal requirements concerning the administration of the unemployment insurance program until the Supreme Court recognized claimants’ rights in Java. See Hildebrand, supra note 4, at 537–39, 542.
36. See Java, 402 U.S. at 124; see also FED. R. CIV. P. 23.
Department of Labor, 37 and Municipal Labor Committee v. Sitkin. 38 Dunn challenged the failure of New York’s unemployment insurance program to provide hearings and decisions to claimants within the federal timeliness guidelines. 39 Sitkin involved allegations that the New York Unemployment Insurance Appeal Board failed to provide claimants with basic due process and equal protection guarantees. 40

A 1979 permanent injunction in Dunn requires the New York State Department of Labor (NYDOL) to comply with the federal timeliness regulations for initial administrative hearings before ALJs. 41 For many years the state complied only intermittently with the judgment, and, thus, contempt motions ensued. 42 In 1984, a contempt motion led to the creation of an informal task force, including representatives of the plaintiffs, the NYDOL, and the UIS. 43 The task force attempted to assist in developing practices that would produce timely hearing and appeal decisions. 44 Although some improvements were achieved, after several years the NYDOL’s performance deteriorated, 45 and the agency decided to take steps “on its own” to address the promptness issue.

40. See Consent Judgment, supra note 38.
41. Judgment, Dunn v. New York State Dep’t of Labor, No. 73 Civ. 1656 (KTD), at 2 (S.D.N.Y. Nov. 5, 1977) (on file with the University of Michigan Journal of Law Reform) (ordering the NYDOL’s Industrial Commissioner and his attorneys, agents, employers, successors, and all others acting in concert with him to render 60% of all first-level unemployment insurance appeals within 30 days and at least 80% within 45 days). Dunn did not involve the promptness of decisions on administrative, or “second-level,” appeals.
42. See, e.g., Memorandum and Order, Dunn v. New York State Dep’t of Labor, No. 73 Civ. 1656 (KTD), 1994 U.S. Dist. LEXIS 1512, at *2 (S.D.N.Y. Feb. 16, 1994).
43. Id. at *3. In 1984, the United States Secretary of Labor was added as a defendant against whom no specific relief was sought. See infra notes 86–87 and accompanying text.
44. Memorandum and Order, Dunn, 1994 U.S. Dist. LEXIS 1512, at *3.
45. Id. at *4; Affidavit of Timothy J. Coughlin, Executive Director, New York State Department of Labor Unemployment Insurance Appeal Board, at 5–6, Dunn v. New York State Dep’t of Labor, No. 73 Civ. 1656 (KTD) (S.D.N.Y. Feb. 3, 1993) (on file with the University of Michigan Journal of Law Reform) [hereinafter Coughlin Affidavit] (stating that, as of February 14, 1994, the NYDOL had met promptness standards in only nine of the past 127 months).
A new contempt motion was filed in 1993, and only then did the NYDOL achieve some degree of continuing compliance through such basic techniques as filling vacant ALJ positions and redeploying staff. Because no plan has been developed to deal with an inevitable recession, the next downturn in the economy is likely to bring with it a new round of noncompliance problems. A plan is needed because the formula under which the federal government pays the states' costs of administering their unemployment insurance programs focuses on the number of cases that the states have handled in the recent past. A state's unemployment insurance caseload can go up quickly in a recession, but extra funds for increased staffing are provided only after the fact. Unless special plans are made, a backlog of cases and delays could build up in New York during the initial stages of a recession.

The complaint in Municipal Labor Committee v. Sitkin was filed to challenge a long history of unremedied violations of claimants' due process rights in administrative hearings and appeals. Extensive discovery and negotiations eventually produced a lengthy consent judgment confirming the duty of the defendant New York State Unemployment Insurance Appeal Board to provide claimants with basic procedural rights at the ALJ level. At the administrative appeal level, the consent judgment established an elaborate check list to be included in the file of every Appeal Board case to ensure that claimants' rights were not being violated at the ALJ level. In addition, the judgment provided for the extensive training of ALJs. Although the steps required by the consent judgment produced initial improvements, procedural violations have been identified recently in a growing percentage of the cases reviewed.

46. See Memorandum and Order, Dunn, 1994 U.S. Dist. LEXIS 1512, at *3 n.1.
47. See id. at *4–5 (stating that the NYDOL's "promptness performance" improved significantly during 1993); Coughlin Affidavit, supra note 45, at 2.
48. See Memorandum and Order, Dunn, 1994 U.S. Dist. LEXIS 1512, at *4–5 (noting that "economic conditions dramatically affect the NYDOL's caseload").
50. See Consent Judgment, supra note 38.
52. See 865 F. Supp. at 1017–18.
53. Id. at 1022.
54. For example, for the period of January to June 1995 the violation rate was 51.19%. Letter from David Raff, Counsel for Intervenors, to the Honorable Kevin T. Duffy, United States District Court for the Southern District of New York 3 (Aug. 16, 1995) [hereinafter Raff Letter] (on file with the University of Michigan Journal of Law Reform). Mr. Raff's letter was written on behalf of plaintiffs in the Sitkin case to the judge in the Dunn case. Id. at 1.
Although litigation like Dunn and Sitkin creates significant pressure on agencies to respect claimants' rights, it is, in some respects, a clumsy tool for this purpose. Many judges have neither the desire nor the time to oversee recalcitrant administrative agencies on the detailed level necessary to assure continuous compliance. In a recent decision in the Dunn case, for example, the court refused to require the defendants to prepare a long-term detailed remedial plan to achieve compliance even though the defendant NYDOL's promptness was "very poor" when plaintiffs filed their motion and the agency was not in compliance at the time of the decision. The court noted that the issue of unemployment appeals was "very complicated" and was affected by both "[complex social problems] and "economic conditions." Because the defendants had recently improved their performance, the court concluded that it would be "premature" to grant further relief. The court further noted that the defendant NYDOL was now giving ALJs more flexibility, using advanced computer systems, speeding up training, and coordinating the work of satellite offices.

Courts may be reluctant to commit the time and resources necessary to resolve the many small disputes that can arise in the implementation of a complex decree intended to reform administrative practices. For example, since the Sitkin case, violations of basic due process rules by ALJs have increased despite the efforts of the plaintiffs' diligent lead counsel and judicial decisions generally favorable to the plaintiff class. New administrative problems and failures can arise faster than the court is able to dispose of the old ones, especially if the defendant agency takes up scarce judicial time by litigating each disputed issue. Delay through litigation can be an effective

56. See Memorandum and Order, Dunn v. New York State Dep't of Labor, No. 73 Civ. 1656 (KTD), 1994 U.S. Dist. LEXIS 1512, at *5–6 (S.D.N.Y. Feb. 14, 1994). The court did order the NYDOL to submit a report to the court, to plaintiffs, and to the Municipal Labor Committee every six months for two years; the report was to contain lower and higher promptness percentages filed with the USDOL, the number of unfilled ALJ positions, the percentages of cases not in compliance with Sitkin, and any written recommendations proposed by plaintiffs and the Committee. Id. at *11.
57. Id. at *4–5.
58. Id. at *7–8.
59. Id. at *6 n.4.
tactic for uncooperative defendants unless the usually hard-pressed court is willing and able to devote substantial time and resources to the case.

The federal courts can commit additional judicial resources to resolving these complex problems. Special masters appointed under Rule 53(b) of the Federal Rules of Civil Procedure can recommend and administer detailed remedies. Courts repeatedly hold that, where defendants have been recalcitrant in complying with remedial orders in institutional reform litigation, appointment of a special master is appropriate "to effectuate full compliance." In extreme cases, temporary receivers have been appointed to run public institutions unable to comply with applicable law. But obtaining appointment of even a special master may be difficult. The express language of Rule 53(b) states that "[a] reference to a master shall be the exception and not the rule."

2. Suing the Federal Agency—If courts are reluctant to provide ongoing supervision of state agencies, claimants can sue the UIS to require it to carry out its enforcement function. Yet, suits against federal agencies for their failure to enforce even clear federal standards face difficult legal hurdles. First, American administrative law developed in the context of attempts to limit the allegedly arbitrary power of overreaching administrative agencies, not of efforts to remedy their failure to act. "It was simply assumed that agency zeal in advancing the 'unalloyed, nonpolitical, long-run economic interest of the general public' would be assured by the professionalism of the

62. E.g., EEOC v. Local 580, Int'l Assoc. of Bridge, Structural and Ornamental Ironworkers, 925 F.2d 588, 595 (2d Cir. 1991) (upholding the district court's appointment of a special master "to consider adjustment of the numbers of minority apprentices participating in training program and minority journeymen receiving employment referrals"); Williams v. Lane, 851 F.2d 867, 884 (7th Cir. 1988) (affirming a decision in which the district court appointed a special master to oversee the actions of prison officials and ensure compliance with final injunctive order), cert. denied, 488 U.S. 1047 (1989); Braun, supra note 61, at 220 (stating that "the area with the most scope for creative use of special masters is the remedial stage").
63. E.g., Morgan v. McDonough, 540 F.2d 527, 533 (1st Cir. 1976) (affirming receivership where it was the only reasonable alternative to noncompliance with court-ordered desegregation), cert. denied, 429 U.S. 1042 (1977); see also Miller v. Carson, 563 F.2d 741, 752-53 (5th Cir. 1977) (upholding the appointment of an ombudsman for a county jail).
64. FED. R. CIV. P. 53(b).
65. See DAVIS, supra note 18, § 1.06 (discussing the reasons why an attorney might oppose administrative processes); see also 5 U.S.C. § 702 (1994) (providing a right to judicial review of federal agency actions).
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administrative branch . . . . 66 Actions to require an agency to enforce its rules may be less familiar and congenial to the courts.

Second, while the Administrative Procedure Act (APA) allows suits to challenge "agency action unlawfully withheld or unreasonably delayed," 67 in Heckler v. Chaney, 68 the United States Supreme Court created a presumption that judicial review under the APA is not available for "[r]efusals to take enforcement steps." 69 The presumption of unreviewability is not absolute. Congress can subject an agency decision not to enforce to review under the APA "by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." 70 The Court also limited the presumption by noting that its decision was not applicable to an agency's belief that it lacked jurisdiction or "an abdication of its statutory responsibilities." 71

Although Heckler v. Chaney has been criticized from the beginning, 72 it remains a substantial barrier. Like most statutes establishing federal-state programs, the sections of the Social Security Act governing unemployment insurance state the agency's obligation to enforce in general terms. The Act provides that the Secretary of Labor shall terminate funding whenever he finds "a failure to comply substantially with any provision specified in [section 503,] subsection (a)," 73 which includes the promptness and fair hearing requirements. 74 The generality of this language makes it hard to argue that the Social Security Act set "substantive priorities" or limited the agency's "power to discriminate among issues or cases." 75 In fact, a central goal in the creation of administrative agencies was to give the agencies wide discretion in enforcement so that

69. Id. at 831.
70. Id. at 833 n.4.
71. Id. at 833 n.5.
74. Id. § 503(a)(1), (3); California Dep't of Human Resources Dev. v. Java, 402 U.S. 121, 129–33 (1971) (interpreting § 503(a)(1) to require prompt hearings).
75. See supra text accompanying note 70.
they could make effective use of their experience and expertise. Unfortunately, the general language in the Social Security Act, originally intended to give the federal agency a sword to use in order to actively assist the unemployed, has become, under Chaney, a shield for an agency doing nothing to protect the rights of the Act's beneficiaries. In practical terms, Chaney reflects and reinforces any inclination of many judges to avoid becoming enmeshed in the potential complications of requiring an agency to take action to accomplish a result. In contrast, ordering an agency not to do something is easy.

Although it is an arduous task, it is not impossible to sue the UIS for failure to enforce its hearing requirements, at least with respect to a particular state agency. An action against the UIS for failure to enforce hearing rules might fit at least two exceptions to the presumption of unreviewability that the Supreme Court recognized in Chaney. First, Congress arguably set a "substantive priority" for agency action when it included in the Social Security Act specific requirements that state unemployment insurance programs provide for full payment of benefits "when due" and provide the opportunity for "a fair hearing" when claims are denied.

Second, the UIS's complete failure to enforce compliance with hearing rules is an abandonment of its statutory responsibilities. The UIS has never taken a state to a conformity hearing for poor performance and, in fact, never took any actions at all to enforce federal statutory requirements concerning the administration of the unemployment insurance program until the Supreme Court recognized claimants' rights in California Department of Human Resource Development v.

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76. Davis, supra note 18, § 1.05.
78. Cf. Chaney, 470 U.S. at 850 n.7 (Marshall, J., dissenting) (citing examples); Bargmann v. Helms, 715 F.2d 638 (D.C. Cir. 1983); Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752, 753, 767–68 (3rd Cir. 1982); Carpet, Linoleum, and Resilient Tile Layers Local Union No. 419 v. Brown, 656 F.2d 564 (10th Cir. 1981); Natural Resources Defense Council, Inc. v. SEC, 605 F.2d 1031 (D.C. Cir. 1979); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).
79. Chaney, 470 U.S. at 833.
81. Hildebrand, supra note 4, at 584.
Java. If this is not abdication of the responsibility to enforce federal standards, it would be hard to suggest what is.

However strong a claim may be made against the UIS, joining the UIS as a defendant in an action against a state agency involves a practical litigation risk. If the UIS sides with the state agency in practice, there is a strong possibility that the federal court will defer to the UIS's presumed expertise and deny any relief. On the other hand, if the UIS, as a defendant, sides with the plaintiffs in pressing the state for compliance, the likelihood of an effective remedy for noncompliance is increased greatly. To the extent that the UIS's remedial power is limited to termination of state funding, participation in a court proceeding makes indirectly available to the UIS the broader types of formal relief that a court can order with UIS support, including detailed injunctive relief to resolve particular administrative problems.

In practice, the UIS has not used the opportunity for more flexible remedies presented by pending litigation. In Dunn v. New York State Department of Labor, for example, the United States Secretary of Labor was brought into the case as a defendant. The plaintiffs sought no relief against the Secretary but joined him as a party "to assure the effective administration of justice." Under this approach, plaintiffs avoided the difficulties of seeking judicial review of the UIS's failure to enforce but provided the UIS an opportunity to use the

82. See id. at 542.
83. See, e.g., Rosado v. Wyman, 397 U.S. 397, 406–07 (1970) (stating the general principle that a court should defer to the views of the relevant administrative agency when the application of administrative standards are in doubt); Western Union Tel. Co. v. United States, 217 F.2d 579, 581 (2d Cir. 1954) ("The [FCC's] interpretation of a Formula adopted and approved by it after careful consideration—like other administrative regulations of a responsible governmental agency—is entitled to great weight if not so unnatural or unreasonable as to ensnare and entrap those governed by it.").
85. The consent judgment in Municipal Labor Committee v. Sitkin, No. 79 Civ. 5899 (RLC) (S.D.N.Y. June 6, 1983), is an example of innovative injunctive relief that may be available in litigation, but the UIS was not involved in that case. See supra text accompanying notes 51–54; see generally Chayes, supra note 55, at 1298–1302 (discussing the decree as a form of relief).
court to help it enforce its own rules. The UIS did not take the opportunity. Although the UIS subsequently did participate in the informal task force created in the wake of the court’s 1984 decision in *Dunn*,\textsuperscript{88} it did so only as a passive provider of technical assistance and not as a supervisory agency trying to enforce compliance.\textsuperscript{89} The UIS’s unwillingness to use the opportunity presented by its joinder in *Dunn* tends to confirm that a lack of appropriate remedies is not the main barrier to effective federal enforcement. Rather, it seems that the barrier is the UIS’s lack of political will to take on an aggressive role with respect to state agencies.

Another litigation alternative would be to sue the UIS for a general failure to enforce federal standards without suing a particular state agency. This has the possible advantage of obtaining broad, nationwide relief for claimants who do not have access to lawyers. But this approach runs not only into the presumption of nonreviewability of administrative inaction but also into the issue of standing. In order to have standing to challenge an agency action, “[a] plaintiff must allege personal injury fairly traceable” to the agency action.\textsuperscript{90} In an action against the UIS alone for nonenforcement, the UIS would likely argue that injury to unemployment insurance claimants caused directly by state agencies’ violations of federal law was not “fairly traceable” to any action of the UIS. Plaintiffs suing the UIS for a general failure to enforce thus face difficult barriers given the current state of the law.

**B. Legislative Advocacy**

Some of the weaknesses of litigation as a means of securing enforcement of federal unemployment insurance regulations could be eliminated through remedial legislation. The *Heckler v. Chaney* majority indicated that the presumption of unreviewability of agency inaction would be overcome “where the substantive statute has provided guidelines for the agency to

\begin{footnotes}
88. See Memorandum and Order, Dunn v. New York State Dep’t of Labor, No. 73 Civ. 1656 (KTD), 1994 U.S. Dist. LEXIS 1512, at *3 (S.D.N.Y. Feb. 16, 1994).
89. Personal observation of one of the authors who was a member of the task force.
\end{footnotes}
follow in exercising its enforcement powers. The presumption of unreviewability could be overcome here: clearer enforcement guidelines for the UIS could be set in a wide variety of ways, such as a simple statement in the Social Security Act that the USDOL shall obtain compliance with standards assuring that claimants receive prompt, fair hearings when state agencies deny them benefits. Such a statement could be combined with an authorization to the Secretary to use formal sanctions short of total termination of funding, such as fines. Another possibility would be to amend the APA itself to overturn the Chaney presumption of the unreviewability of discretionary agency inaction. A model for such legislation can be found in the Civil Rights Act of 1991, which overruled a Supreme Court decision that weakened civil rights protections.

Advocates also could work to institutionalize a role for representatives of claimants within the UIS. At present, the UIS, while not formally excluding such representatives from the administrative process, appears to limit them to the peripheral role of commenting on proposals developed jointly with state agencies. A new statute could require that, when UIS staff meet with state agencies, representatives of “consumers” likewise participate. But effective participation by consumers is not easy to achieve through legislation alone, because participation requirements can be neutralized in various ways, including selection of weak consumer participants. Aggressive administrative advocacy by claimant representatives would be required to make a participation requirement yield benefits for claimants.

Another form of legislative advocacy would seek nonstatutory pressure on the UIS from Congress to enforce federal rules. The same representatives and senators who may influence the UIS not to press states for compliance might also force the UIS to be more aggressive by threatening the agency’s appropriation or holding oversight hearings.

C. Administrative Advocacy

Effective representation of the unemployed with respect to the UIS depends on the availability of advocates willing to take on the demanding role of maintaining a continual presence before the federal agency. This role includes not only commenting on proposed regulations and seeking specific agency actions but also developing and distributing reports and proposals and testifying before legislative committees. Some unions have had the expertise, resources, and commitment needed to take on this continuing function for claimants, but it is more difficult for community-based organizations to meet the demand of the national advocate's role. This needs to change for claimants to be fully represented at the national level. The participation of a number of advocates for unemployment insurance claimants in the Symposium for which this Article was written bodes well for the future availability of advocates to represent claimants' interests at the national level.

CONCLUSION

Claimants seeking unemployment insurance benefits have the right to have state unemployment programs administered in accordance with federal standards. Among these standards are requirements that states provide prompt, fair hearings to claimants initially denied benefits. Widespread violations of claimants' rights have not been remedied by the UIS, which has never brought a formal proceeding against a state agency for failure to comply with federal standards of administration. Claimants are entitled to seek relief in federal court. While litigation can be effective, it is limited by case law and practice reflecting the reluctance of many federal judges to become involved in oversight of potentially complex enforcement activity of administrative agencies. Advocates for claimants need to explore opportunities for legislative and administrative advocacy that can combine with litigation to insure that benefits are delivered to their clients in compliance with federal law.