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Reassessing Administrative Finality: The Importance of New Evidence and Changed Circumstances

Gwendolyn Savitz
University of Tulsa College of Law

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GWENDOLYN SAVITZ*

ABSTRACT

Administrative finality of agency action is generally thought of as a method of avoiding premature judicial review—a claim that the review is too early. But it is also used to prevent judicial review by claiming that the review has now come too late. There are two primary exceptions to this prohibition: new evidence and changed circumstances. However, courts and agencies are reluctant to permit challengers to use these exceptions as often as should be statutorily allowed, an area that scholarship has been neglected.

This Article fills the gap by exploring this aspect of administrative finality, looking at the important government interests the doctrine safeguards, as well as both the individual and government interests counseling against finality in these changed circumstances. It reaches the conclusion that the doctrine is being applied too strictly, examining recent cases involving both disability and immigration where it has prevented proper review of the agency decision at issue.

* Associate Professor, University of Tulsa College of Law. J.D., American University College of Law, LL.M., Yale Law School. This article was supported in part by a University of Tulsa summer research grant.

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I. INTRODUCTION

Administrative adjudications are a critical part of government agency action granting benefits to millions of individuals annually. If individuals could revisit every negative determination, the system would not be sustainable.

There are, however, situations where individuals have the statutory ability to challenge a prior determination based on new evidence or changed circumstances. In

doing so, a balance is struck between the government's interest in finality, achieved by maintaining the status quo, and the individual's interest in receiving the benefit at issue.

This Article addresses the balancing required between these two interests. When balanced alongside the government's interests in obtaining the correct result in adjudications and in restoring public confidence in government, the Article shows that such appeals should be allowed whenever statutorily permitted. The Article then addresses recent situations in immigration and disability benefits where this has not occurred, setting the stage for the situation to be rectified in the future.

II. AN OVERVIEW OF ADMINISTRATIVE ADJUDICATION

The primary actions administrative agencies can take are rulemakings and adjudications. This Part begins by differentiating between rulemaking and adjudication and then examines adjudication more thoroughly, distinguishing between formal and informal adjudication.

A. Adjudication Distinguished from Rulemaking

New evidence and changed circumstances can be potentially relevant for both rulemakings and adjudications. However, since the focus of this Article is adjudication, it is important to be able to distinguish the two.

1. Rulemaking

Rulemaking is the process through which government agencies create, amend, or repeal rules and regulations having the force of law.[1] Rules are generally prospective, aimed at setting forth guidelines and requirements to assist with compliance with statutory mandates and policy objectives of the agency.[2] Regulations are often very detailed, much more so than the governing statute.[3]

The rulemaking process generally involves public notice and a public comment period, allowing specific stakeholders, as well as the general public, an opportunity to

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[1] 5 U.S.C. § 551(4)–(5) (defining rule and rulemaking).

[2] *Id.* § 551(4) ("'[R]ule' means the whole or a part of an agency statement of general or particular applicability and *future effect* . . . .").

[3] *E.g.*, Scott D. O'Malia, Commissioner, CFTC, Remarks at The University of Notre Dame Business Law Forum: Good Government: Making it Our Mission, Not Just a Slogan (Sept. 21, 2012) ("According to the law firm Davis Polk, the entire Dodd-Frank Act totaled 949 pages of statutory text. Thus far, only 30 percent of the rules have been completed and the total number of pages of the regulation has already exceeded 8,800 pages—a 1:10 statute to rule ratio."). Similar observations can be made by comparing the total number of pages in the Code of Federal Regulations (about 185,000 as of 2018), to those in the United States Code (about 60,000 the same year). *Compare* CODE OF FED. REGULS., TOTAL PAGES 1938–1949, *and* TOTAL VOLUMES AND PAGES 1950–2021 at 2, https://uploads.federalregister.gov/uploads/2023/02/23171215/2022_Cfr_Volumes.pdf, *with GPO Produces U.S. Code with New Digital Publishing Technology*, GOVINFO (Sept. 23, 2019), https://www.govinfo.gov/features/uscode-2018.

provide feedback on the proposed rule.[4] It is only after this comment period that the rule can be finalized and made legally binding.[5] Because of the forward-looking nature of regulations, they are generally considered an application of an agency's quasi-legislative, as opposed to quasi-judicial, power.[6] Adjudications are where agencies rely on their quasi-judicial power, as described in the following Part.

2. Adjudication

Just as rulemaking is quasi-legislative, adjudication is quasi-judicial.[7] In an adjudication, the government resolves disputes or makes determinations involving specific individuals or companies.[8] Adjudications involve the application of already existing regulations and statutes to particular factual situations, and result in binding decisions that affect the rights, interests, or obligations of the parties involved.[9] In contrast to rulemaking, which is prospective, adjudication is reactive and retrospective, focusing on resolving individual disputes by applying current standards.[10]

Although these standards are generally direct applications of statutes and regulations, when a question arises in an adjudication on how to interpret the relevant statute or regulation, the agency can make a determination that will apply immediately to those parties and potentially to future, similarly-situated parties, as well.[11]

With a general overall understanding of what an adjudication is, this Article next describes different ways of classifying adjudications.

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4 TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 2 (2017).

5 *Id.* at 2–3.

6 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 14.01 (LexisNexis 2023) ("Rulemaking, the quasi-legislative power, is intended to add substance to the Acts of Congress, to complete absent but necessary details, and to resolve unexpected problems.").

7 *Id.* ("Adjudication, the quasi-judicial power, is intended to provide for the enforcement of agency statutes and regulations on a case-by-case basis.").

8 *Id.*

9 Admittedly, through a somewhat circuitous route, adjudication itself is an "agency process for the formulation of an order." 5 U.S.C. § 551(7). While an order is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." *Id.* § 551(6).

10 POPPER ET AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 875 (4th ed. 2021).

11 This is the reason the Board of Immigration Appeals chooses specific cases to publish—to notify the public that these are going to be precedential opinions. One way this happens is through 8 C.F.R. § 103.10. *See* 8 C.F.R. § 103.10(b) (2011) ("By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues.").

B. Understanding Different Types of Adjudications

Different types of adjudications have different levels of procedural protection. The most protected are formal adjudications, which this Part begins with, but they are extremely rare. Far more common, and what are most at issue in this Article, are informal adjudications, discussed second.

1. Formal Adjudication

Formal adjudications look like trials.[12] There is a neutral judge, parties can present their evidence orally and can cross-examine evidence produced by other parties, and, at the conclusion, the judge must issue findings of fact and conclusions of law.[13] Formal adjudications are only used when the governing statute mandates the decision be "determined on the record after opportunity for an agency hearing."[14]

Although formal adjudications provide the greatest level of procedural protections, they are also the most burdensome and expensive for the agency.[15] This partly explains why the vast majority of adjudications are informal, as described in the next Part.

2. Informal Adjudication

An adjudication is technically informal if any of the formal adjudication requirements are not met, which means there is a vast array in what qualifies as an informal adjudication.[16]

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[12] FMC v. S.C. State Ports Auth., 535 U.S. 743, 757 (2002) ("[S]uch a proceeding 'walks, talks, and squawks very much like a lawsuit.'" (quoting S.C. State Ports Auth. v. FMC, 243 F.3d 165, 174 (4th Cir. 2001))).

[13] *Id.* at 756–57 ("Federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. They are conducted before a trier of fact insulated from political influence. A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitutes the exclusive record for decision. The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record.").

[14] 5 U.S.C. § 554(a).

[15] David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1198 (2016) ("[M]any administrative law scholars think that formal adjudication is a rather inefficient system that plays an increasingly unimportant role in agency policymaking because it offers so much process to defendants at some cost to administrative efficiency and bureaucratic rationality.").

[16] While the APA effectively defines formal and informal adjudication as those that do and do not have to follow all the requirements of 5 U.S.C. 556 and 557, so few adjudications in fact adhere to the formal requirements that the overwhelming majority of those conducted are considered informal. In fact, there are so many informal adjudications, however, that attempts have been made to further classify them. *See, e.g.*, Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 DUKE L.J. 1749, 1760–61 (classifying informal adjudications into Type B—not meeting every requirement for a formal adjudication but still having a hearing of some sort with evidence presentation and Type C—"those in which an evidentiary hearing is not legally required and the agency may decide without a hearing").

Informal adjudications encompass everything from a paper determination made by an agency official,[17] to an in-person hearing where an agency judge hears testimony from the individual and others they choose to present on their behalf.[18]

What most people think of when they picture an informal adjudication is the decision-making process used in immigration deportation hearings or social security disability claims. A removal hearing, used to determine whether an individual immigrant will be ordered deported, is the culmination of a process initiated with the issuance of a notice to appear.[19] The notice specifies the legal basis for removal and the charges against the individual.[20] The individual then has a master calendar hearing before an immigration judge ("IJ").[21] At this hearing, the individual can admit or deny the allegations against them and apply for relief from removal (permission to remain within the country).[22]

If the individual contests the charges or applies for relief, they will be scheduled for an individual hearing.[23] During this hearing, the immigration judge evaluates the evidence, hears testimonies, and considers legal arguments from both the individual and the government.[24] The immigration judge will determine whether the individual is eligible for any form of relief or rather should be subject to removal.[25] It is after this hearing that the order of removal is issued.[26] The individual can agree to leave the country voluntarily, or the government can carry out enforcement actions to ensure it occurs.[27]

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[17] I.e., one made only based on the written submissions. *See* U.S. DEP'T OF HOMELAND SEC., RAIO DIRECTORATE OFFICER TRAINING: INTERVIEWING—ELICITING TESTIMONY 48 (2019) (stating that an in-person interview is not automatically required for intercountry adoptions).

[18] This is more typical of the disability adjudications discussed in this Article. *See* Diana Chaikin, *What Happens at a Social Security Disability Hearing?*, NOLO, https://www.disabilitysecrets.com/what-happens-hearing.html (last visited Apr. 6, 2024) ("ALJs often schedule their [disability] hearings in one-hour increments, but hearings are more likely to last between 30–45 minutes. A complex case with multiple expert testimonies might run longer than an hour, while a case that needs little additional information might be over in 15 minutes.").

[19] *See* 8 C.F.R. § 239.1(a) (2016).

[20] *Id.* § 1003.15(b)(1)–(4).

[21] Khan v. Ashcroft, 374 F.3d 825, 829 (9th Cir. 2004) ("Although no regulation defines what constitutes a 'master calendar hearing,' it generally resembles a 'docket call' or 'status call' in state and federal courts.").

[22] *Id.*

[23] U.S. DEP'T OF JUST., IMMIGRATION COURT PRACTICE MANUAL at ch. 4.16(a).

[24] *Id.* at ch. 4.16(d).

[25] *Id.* at ch. 1.4(a).

[26] *See id.* at ch. 4.16(g).

[27] 8 U.S.C. § 1229c(b)–(d).

Individuals generally have thirty days to appeal an order of removal to the Board of Immigration Appeals ("BIA").[28] After reviewing the case, the BIA may uphold the decision, reverse it, or remand it back to the immigration judge for further proceedings.[29]

In many ways, this process superficially resembles that of a typical court case, and thus seems equivalent to formal adjudication. But there are still important differences, even in this relatively formal version of an informal adjudication.[30]

One difference is that the individual who oversees the hearing is an immigration judge rather than an administrative law judge ("ALJ").[31] This is more than merely a change in nomenclature. An IJ is subject to significantly more agency oversight and control than a typical ALJ would be, and there are fewer procedural protections.[32]

It is this type of informal adjudication where challenges to finality become most important, as discussed in the following Part.

III. FINALITY IN ADMINISTRATIVE ADJUDICATIONS

Administrative finality has two different connotations. It can mean either that the action at issue has not yet been completed, such that the agency should be able to complete the process before any court interference occurs; or it could mean that the action was completed so long ago that it should not be revisited.

This Article is focused on the second definition. This Part aims to clear up any confusion. Before explaining the government's interests underlying administrative finality, this Article first provides an overview of this type of finality. The Article then distinguishes in greater detail the two types of administrative finality before describing how finality is used when reviewing government action.

A. An Introduction to Administrative Finality

Administrative finality is the concept that, once an administrative decision has been made, it is generally considered conclusive and not subject to constant

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[28] 8 C.F.R. § 1003.38(b) (2022).

[29] *Id.* § 1003.1.

[30] The type of adjudication discussed in the main text is a particularly formal type of informal adjudication. Many decisions made in the immigration context will have far less protection, including immediate and unappealable decisions made at the border. Gomez-Velazco v. Sessions, 879 F.3d 991, 991 (9th Cir. 2018) ("Today . . . most non-citizens are ordered removed through streamlined proceedings—expedited removal, administrative removal, and reinstatement of removal—that do not involve a hearing before an immigration judge.").

[31] BEN HARRINGTON & DANIEL J. SHEFFNER, CONGR. RSCH. SERV., R46930, INFORMAL ADMINISTRATIVE ADJUDICATION: AN OVERVIEW 13 (2021) ("[N]on-ALJ adjudicators rarely enjoy the level of protection from agency influence—such as restrictions on termination, salary adjustments, and agency performance appraisals—that ALJs enjoy.").

[32] *Id.* at 14 ("Beyond differences in adjudicators, informal trial-type hearings also commonly deviate from the APA by lacking specific statutory parameters for certain issues. The APA's formal adjudication provisions establish rules for a range of procedural issues, including limitations on ex parte contacts, promotion of the separation of investigative and adjudicatory functions, and the right to an oral hearing (not merely a written one).").

reconsideration or revision.[33] It signifies that the decision is intended to be the final determination of the administrative process, bringing closure to the matter at hand.[34] It recognizes that there is value in reaching a decision and allowing it to take effect, providing stability and certainty to the parties involved.[35]

This principle recognizes the need for administrative agencies to efficiently allocate their limited resources and focus on their core functions. By establishing finality, the government promotes administrative efficiency and prevents an endless cycle of reconsiderations that could strain agency resources and delay the delivery of services or benefits to the public.[36]

The government's interest in finality is frequently one of the factors considered when deciding whether to allow a challenge to an agency adjudication (and sometimes rulemaking) *after* the statutory time period to challenge the action has expired, as further explained in the following Part.

B. The Government's Interests in Favor of Administrative Finality

Agencies exist specifically for the task of carrying out specific objectives.[37] Although agencies can choose which method to use to accomplish these objectives, many agencies fulfill at least some of their congressionally delegated duties through adjudications.

This is particularly common in areas where an agency is tasked with determining whether an individual qualifies for a particular benefit, such as receiving social security disability benefits or asylum. Not only are these likely to be resolved by adjudication, they almost certainly are the types of informal adjudications described in Part II.B.2.

The government has numerous reasons for favoring the finality of such actions. This Part discusses the three primary benefits of finality for the government: (1) preserving limited agency resources, (2) ensuring compliance by the public, and (3) taking swift action consistent with the charging statute.

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[33] This is a particular concern in removal cases. Islas-Saldana v. Garland, 59 F.4th 927, 930 (8th Cir. 2023) ("Motions to reconsider, like motions to reopen, are 'disfavored because they undermine the government's legitimate interest in finality, which is heightened in removal proceedings where, as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'" (quoting Martinez v. Lynch, 785 F.3d 1262, 1264–65 (8th Cir. 2015))).

[34] 2017 DOHA Lexis 187, at *6 (Def. Off. of H. App. 2017) ("[T]he doctrine of administrative finality requires that at some definable point a record be closed for adjudication.").

[35] Moore v. Bureau of Land Mgmt., 174 Int. Bd. Land. App. 45, 55 (2008) (refusing to reopen a matter after eighty years had elapsed based on administrative finality).

[36] 10 FCC Rcd. 13068, 13069 (1995) (noting that "administrative finality advances the public's interest in having broadcast licenses issued and service provided without undue delay." (citing Fla. Inst. of Tech. v. FCC, 952 F.2d 549, 554 (D.C. Cir. 1992))).

[37] *See Administrative Agency*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/administrative_agency (last visited Apr. 6, 2024).

1. Preserving Limited Agency Resources

It is likely that the government's most significant interest in finality is that it helps preserve limited government resources.[38] When a case is considered final after the exhaustion of traditional appeals, the government can direct the resources previously spent on that case to others.[39]

Agencies are tasked with critical issues, including immigration, social welfare, and environmental regulation, and yet are also generally critically underfunded.[40] Agencies, thus, generally face substantial caseloads and limited resources with which to handle them.[41]

Enforcing the government's finality interest helps ensure that these limited case resources can be directed to new cases, rather than further draining agency coffers reviewing the same cases repeatedly as individuals engage in prolonged administrative and judicial proceedings.[42]

If the goal is to work through an agency backlog of decisions, it is more efficient for the government to decide two cases than to decide the same case twice. Accelerating the handling of cases reduces the wait time for all those still in line awaiting their determination.[43]

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[38] This is also true for the finality of court cases. G2A.com Sp. z.o.o. (Ltd.) v. United States, 789 F. App'x 296, 302 (3d Cir. 2019) ("[C]ourts also have an interest in 'promoting the finality of judgments and conserving judicial resources and preventing district courts from being reversed on grounds that were never urged or argued before [them].'" (quoting Lesende v. Borrero, 752 F.3d 324, 333 (3d Cir. 2014))).

[39] *See* Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality,"* 2013 UTAH L. REV. 561, 568–69 (2013).

[40] *E.g.*, H.R. REP. NO. 114-651, at 10 (2016) ("Like many federal agencies, BLM has suffered from chronic underfunding for years.").

[41] *See* Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1159 (2018) (noting that federal judges reviewing agency action generally have little understanding of these constraints). This is not a new problem. *See* Sarah M. Lakhani, *Universalizing the U Visa: Challenges of Immigration Case Selection in Legal Nonprofits*, 107 CALIF. L. REV. 1661, 1674 (2019) ("Socio-legal scholars have studied the function of human services bureaucracies—agencies that deal directly with the public and cope with significant caseloads, ambiguous agency goals, and limited resources—for decades.").

[42] Union Oil Co. of Cal. et al., 71 Int. Dec. 169, 177 (Dep. Int. 1964) ("Every reason of policy which supports the doctrine [of res judicata] in the courts is applicable here [to administrative finality]. There must be an end to administrative litigation also.").

[43] And the waits can be long. *See* Nahid Ghulam Dastagir v. Blinken, 557 F. Supp. 3d 160, 162–63 (D.D.C. 2021) (weighing different factors to gauge the length of time taken for the final step of spousal visa processing after completing an interview and finding five years was not unreasonable); *see also* U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS PROCESSING TIMES FISCAL YEARS 2016 - 2020 at 4 (2021) (showing an increase in average processing time for immediate relative petitions from 6.3 to 10.1 months and preference relatives from 7.9 to 36.2 months over the five-year period).

This interest in finality at the conclusion of the initial process could also be said to provide the incentive for the agency to "get it right the first time" because there will likely be no later opportunity.[44] If the parties feel that the decision is likely to be considered final and hence unappealable, the parties will also have little choice but to comply with it. This leads to the next government benefit—ensuring compliance.

2. Ensuring Public Compliance

The government has a strong interest in the finality of administrative adjudications as it serves to promote public compliance and enhances administrative efficiency. When administrative decisions are considered final once made, it creates a sense of certainty and obligation for individuals and organizations affected by those decisions.[45]

Administrative agencies are created and authorized for specific congressional purposes, such as determining which individuals should be allowed to come to and remain within the United States[46] and which individuals should be eligible for disability benefits.[47]

Adjudications related to these goals, once complete, determine a clear set of rights and obligations for those involved, such as an obligation to leave the country within a certain period of time[48] or a right to benefit payments.[49]

When individuals and entities perceive that administrative decisions can be endlessly challenged or reopened, it can undermine the public's confidence in the administrative system and lead to a lack of adherence to lawful directives.[50] Finality

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44 There has been an effort to make it more difficult to challenge social security determinations with additional evidence. *See infra* Part IV.C.2.b.i.

45 *See* Angels Broad., Inc. v. FCC, 745 F.2d 656, 663–64 (D.C. Cir. 1984) ("It defies reason to suggest that the Commission abused its discretion by concluding that to permit at this late date new competitors for the Channel 9 license would thwart the vital goal of bringing about a fair and final resolution of this long and drawn-out controversy.").

46 *Mission and Core Values*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/mission-and-core-values (last visited Apr. 6, 2024).

47 *See Disability Benefits*, SOC. SEC. ADMIN., https://www.ssa.gov/benefits/disability/ (last visited Apr. 6, 2024).

48 *See Immigrant Classes of Admission*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/lawful-permanent-residents/ImmigrantCOA (last visited Apr. 6, 2024).

49 *See Benefits for People with Disabilities*, SOC. SEC. ADMIN., https://www.ssa.gov/disability/ (last visited Apr. 6, 2024); *see also Spotlight on SSI Benefits for Noncitizens*, SOC. SEC. ADMIN., https://www.ssa.gov/ssi/spotlights/spot-non-citizens.htm (last visited Apr. 6, 2024).

50 Rebecca M. Bratspies, *Perspectives on the New Regulatory Era: The New Regulatory Era—An Introduction*, 51 ARIZ. L. REV. 559, 572 (2009) ("[T]he inevitable uncertainty under which regulatory agencies operate erodes public trust."); *cf.* J. Bruce Bennett, *The Top Five Points of Error*, 4 TEX. TECH J. TEX. ADMIN. L. 55, 66 (2003) ("[P]ublic confidence in the fairness of agency adjudication is seriously eroded when an agency gives the appearance of

creates certainty and predictability and fosters an environment where individuals are more likely to accept and comply with an administrative decision. Individuals are more likely to abide by the decision when they know that it is the definitive word of the government on the issue.[51] Finality, therefore, helps ensure that these administrative decisions are respected to the extent that the public follows the requirement.

This aligns with the next benefit to the government, taking swift action in line with the governing agency statutes.

3. Taking Swift Action Consistent with the Charging Statute

Agencies exist to act within their designated area of specialty.[52] The enabling statute and any subsequent congressional delegations of power give the agency the authority to act within its sphere of authority.[53] This Part examines how finality serves the government's interest in enforcing the law effectively and promptly.

Agencies have a duty to enforce their applicable laws and regulations.[54] Administrative adjudications are the method through which many of these legal standards are enforced.[55] Among other purposes, they play a critical role in determining whether many individuals qualify for benefits, whether that benefit is monetary, in social security determinations, or the ability to enter or remain in the country, as is the case with immigration adjudications.

Viewing adjudications as final once complete allows the government to enforce these laws and regulations effectively by bringing closure to petitions in a timely

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flitting 'serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.'" (quoting Henry v. INS, 74 F.3d 1, 6 (1st Cir. 1996))).

[51] Frusher ex rel. Frusher v. Astrue, No. CA 08-271 ML, 2009 U.S. Dist. LEXIS 112974, at *39 (D.R.I. Sep. 25, 2009), *vacated on other grounds*, 391 F. App'x 892, 897 (1st Cir. 2010) ("Third, regarding the Government's interest, clearly the Government has an interest in administrative finality of determinations pertaining to claims for benefits."); *see also* Califano v. Sanders, 430 U.S. 99, 108 (1977) (noting congressional policy choice in § 205(g), 42 U.S.C. § 405(g), which was "obviously designed to forestall repetitive or belated litigation of stale eligibility claims"); Young v. Bowen, 858 F.2d 951, 955 (4th Cir. 1988) ("In the context of social security law, both res judicata and administrative finality accomplish one similar task—they prevent reexamination of the merits of an administrative decision.").

[52] Michael J. Hays, *Where Equity Meets Expertise: Re-Thinking Appellate Review in Complex Litigation*, 41 U. MICH. J.L. REFORM 421, 435 (2008) ("Part of the balance between administrative power and judicial review grows out of recognition of agency expertise. As described above, administrative agencies perform specialized governmental functions.").

[53] Melton Props., LLC v. Ill. Cent. R.R. Co., 539 F. Supp. 3d 593, 609 (N.D. Miss. 2021) (describing how this plays into a four-factor test used in the circuit).

[54] *See* Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons, 954 F.3d 118, 130 (2d Cir. 2020) (collecting sources dictating the ability of citizens to bring actions under the Administrative Procedure Act to ensure the agency follows its own regulations).

[55] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (noting that the choice on whether to proceed through rulemaking or adjudication lies with the agency itself).

manner.[56] Once a decision is rendered and made final, the government can take action based on that outcome, improving both the timeliness and efficiency of the government response.[57] And parties are likely to respond faster and with greater cooperation if they realize that the outcome is final and governmental action is being taken.[58]

Additionally, finality assures the general public that the government is actively enforcing the laws, potentially strengthening public confidence in the system. Thus, there are reasons the government is interested in making determinations final.

Whether determinations are final is also used in another context, one that receives far more attention and from which it is important to distinguish the government's interest in finality, as described in the next Part.

C. Distinguishing the Government's Interest in Administrative Finality from the Requirement of Administrative Finality for Judicial Review

Finality regarding administrative adjudications refers to two different but related concepts[59]: finality as a requirement for judicial review and the government's interest in finality. Both refer generally to a determination that goes through the full agency process, but they have very different effects.

1. Finality as a Requirement for Judicial Review

Finality as a requirement for judicial review refers to the general rule that courts will not review an administrative determination until after the agency has concluded

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[56] Wilce v. Dir., Off. of Workers' Comp. Programs, 144 F. App'x 223, 226 (3d Cir. 2005) ("The government has a legitimate interest in both permitting miners to file duplicate claims in the face of changed circumstances and in administrative finality and the expeditious processing of survivor claims. The legislative classification furthers these goals by allowing duplicate claims only when the relevant conditions of entitlement are capable of change.").

[57] *See* Viridiana Ordonez, *Limiting the Use of the Categorical Approach and Setting a Statute of Limitations for Deportation*, 73 HASTINGS L.J. 1791, 1824 (2021/2022) ("[W]hen immigration authorities do not act timely, the goals of providing finality and predictability are absent.").

[58] The "government has an interest in giving immediate force to an agency's orders and an interest in the authority and finality of agency decisions in general." Mylan Pharms. Inc. v. Henney, 94 F. Supp. 2d 36, 59 (D.D.C. 2000), *vacated, appeal dismissed sub nom*., Pharmachemie B.V. v. Barr Lab'ys, Inc., 276 F.3d 627 (D.C. Cir. 2002), *vacated, appeal dismissed sub nom*., Pharmachemie B.V. v. Barr Lab'ys, Inc., 284 F.3d 125 (D.C. Cir. 2002) (citing Puerto Rico, 764 F. Supp. 220, 224 (D.P.R. 1991)). This is true in multiple contexts, including criminal cases. United States v. Truette, 2008 U.S. Dist. LEXIS 112209, at *43 (N.D. Fla. June 6, 2008) ("Graham advised Defendant that he had no issues to present on appeal, and, realizing that was true, Defendant decided to pursue relief by cooperation. . . . Pursuit of a meritless appeal was contrary to the much better strategy of trying to obtain sentence relief through cooperation with law enforcement.").

[59] Both of which are long established. *See* Civ. Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 326 (1961) (distinguishing the approaches that should be taken for the different meanings of administrative finality).

its regular agency-determined process.[60] This ensures that the agency has an opportunity to fully consider the issue before it is heard by courts.[61] It is derived from the APA itself, which allows for review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court,"[62] and helps avoid premature or piecemeal judicial review.[63]

This finality requirement helps ensure that the agency is given the opportunity to fully consider all aspects of the case, resulting in a full administrative record that allows proper judicial review.[64]

Importantly, when finality is raised in this context, it is because the agency is arguing that the determination is not yet final[65] and that litigation should not be allowed until the agency has made a final determination.

2. The Government's Interest in Finality

In contrast, the government's interest in finality—the issue addressed in this Article—is based on the idea that once an administrative decision has been made and becomes final, there is value in preserving the stability and predictability of that decision. The government has a legitimate interest in ensuring the efficient and effective operation of administrative processes, as well as the conservation of limited agency resources.[66]

Thus, finality in this sense has the opposite perspective. When the government makes a finality argument in these cases, it looks backwards, claiming that the agency

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[60] Hoopa Valley Tribe v. U.S. Bureau of Reclamation, 2023 U.S. Dist. LEXIS 5521, at *4 (E.D. Cal. Jan. 11, 2023) ("In interpreting the finality requirement, we look to whether the agency action represents the final administrative work. This requirement ensures judicial review will not interfere with the agency's decision-making process." (quoting Dietary Supplemental Coal., Inc. v. Sullivan, 978 F.2d 560, 562 (9th Cir. 1992))).

[61] *Id.*

[62] 5 U.S.C. § 704.

[63] Colbert v. McDonnell Douglas Corp., 1997 U.S. Dist. LEXIS 141, at *7 (E.D. La. Jan. 8, 1997) ("The finality requirement is designed to avoid piecemeal litigation and the delays and costs of multiple appeals upon both parties and courts."); *see also* Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399, 400 (5th Cir. 1984) ("The required finality for reviewability of an order of the Board follows, for the same reasons of policy, the contours of the finality-requirement under 28 U.S.C. § 1291 for appealability of decisions of the district courts.").

[64] Kurtz v. Verizon N.Y., Inc., 758 F.3d 506, 512 (2d Cir. 2014) (noting that it also "limits judicial entanglement in constitutional disputes, and gives proper respect to principles of federalism").

[65] *E.g.*, U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 141 S. Ct. 777, 788 (2021) (reasoning no requirement of a draft opinion to be released even though it proved to be the "last word within the Services about the 2013 version of the EPA's proposed rule").

[66] CBDA Dev., LLC v. Town of Thornton, 137 A.3d 1107, 1111 (N.H. 2016) ("Administrative finality 'prevents repetitive duplicative applications for the same relief, thereby conserving the resources of the administrative agency . . . .'").

decision has already been completed—so long ago that it is past the statutory period for review—and should be allowed to remain undisturbed.[67]

Statutory deadlines generally dictate when a review can be taken.[68] When this deadline has passed, the court generally defers to the government's interest in finality to prevent reopening the issue.[69] This is true both when the appeal is to a court and when the appeal is within the agency.[70]

There are two primary possible exceptions, discussed further in Part III.D.2. The first possible exception is when new evidence has come to light pertaining directly to facts that were previously argued in the original adjudication.[71] The second possible exception is when the relevant conditions have changed significantly enough that the petitioner can argue the agency decision should be redetermined.[72] The word "possible" is emphasized here because these exceptions are not automatically triggered: when a petitioner seeks to use an exception, the agency and/or court will often still balance the petitioner's interest against the government's interest in ensuring that the administrative decision is final, for the reasons discussed in Part III.B.

The following Part provides more detail on standard and non-standard reviews of final agency action.

D. Reviewing Final Agency Action

The government's interest in administrative finality becomes relevant when someone seeks to challenge a governmental determination outside the allowed appeal time.

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[67] George v. McDonough, 142 S. Ct. 1953, 1962–63 (2022) (refusing to allow an appeal of an otherwise final decision under an exception for clear and unmistakable error even if the regulation applied was later held to be invalid).

[68] For example, under the Hobbs Administrative Orders Review Act, which among other agencies governs appeals from the FCC, the appeal must be taken within sixty days of a final order. This requirement was at issue in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2053, 2056 (2021) (remanding to a lower court to determine, among other things, whether the sixty-day period was applicable to an agency order at issue).

[69] N. Cnty. Cmty. All. v. Kempthorne, 2007 U.S. Dist. LEXIS 113131, at *11–13 (W.D. Wash. Nov. 16, 2007) ("[T]he government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure." (quoting Wind River Mining Corp. v. United States, 946 F.2d 710, 716 (9th Cir. 1991))). In the quoted case, the court had created a limited exception to allow challenges still within the statute of limitations but starting from when the agency action at issue was applied to the petitioners.

[70] This is also related to the idea of exhaustion, that to challenge agency action in court, the individual must exhaust all administrative remedies. Failing to do so within the required period can prevent future appellate review as well. Martinez-Guevara v. Garland, 27 F.4th 353, 359 (5th Cir. 2022) ("Requiring exhaustion ensures that the BIA can apply its expertise to claims before they reach us. Exhaustion also promotes finality in immigration cases; it cuts the risk that we must prolong a proceeding by reversing to correct errors that the Board had no chance to address.").

[71] *See infra* Part III.D.2.a.iii.b.

[72] *See infra* Part III.D.2.a.i.

In typical appeals, where the individual alleges only that the agency committed some error, the finality interest wins, as it should. This Part begins by discussing such regular appeals.

It then moves on to the appeals where the government's interest in administrative finality does not automatically win—those involving new evidence and changed circumstances.

1. Standard Appeals Involving Errors of Fact or Law

The standard challenge to an administrative adjudication is that the agency made a legal or factual error in the adjudication, similar to a standard appeal from a trial-level court decision.[73] Such a review is generally based entirely on the administrative material and legal standards in place during the adjudication and relies on the administrative record created and used by the agency.[74]

"Legal errors" refer to situations where the agency misinterpreted or misapplied the relevant statute or regulation.[75] Depending on the law in question and the agency document being reviewed, the agency may be entitled to deference in its legal opinion, while other situations would involve a de novo review of the relevant legal interpretation.[76]

"Factual errors" refer to situations where the agency's findings of fact are unsupported by substantial evidence or are otherwise arbitrary, capricious, or an abuse of discretion.[77] Substantial evidence is a highly deferential standard, similar to how an appellate court reviews factual findings made at the trial level,[78] but with the

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[73] This does not mean legal and factual errors are evaluated in the same manner. Factual errors are often entitled to deferential substantial evidence reviews while legal errors are often evaluated de novo, again as with an appeal from a trial court. Jeffrey C. Dobbins, *Changing Standards of Review*, 48 LOY. U. CHI. L.J. 205, 210 (2016) ("While there are, of course, differences between appellate court review of trial court decisions and the role of courts in reviewing administrative agencies' decisions, the relevant standards are often discussed together, or in comparison with one another, and the concerns and considerations regarding the importance of standards of review are similar in the two contexts.").

[74] Robinette v. Comm'r, 439 F.3d 455, 459 (8th Cir. 2006) ("It is a basic principle of administrative law that review of administrative decisions is 'ordinarily limited to consideration of the decision of the agency . . . and of the evidence on which it was based.'" (quoting United States v. Carlo Bianchi & Co., 373 U.S. 709, 714–15 (1963))). There are, however, limited exceptions, including when the individual argues the record was incomplete. Canter v. AT&T Umbrella Benefit Plan No. 3 & AT&T Servs., 33 F.4th 949, 958 (7th Cir. 2022) ("[W]e have recognized that a court may look beyond what was before the plan administrator if the record appears incomplete, internally contradictory, or suggestive of bad faith.").

[75] Fox v. Bowen, 835 F.2d 1159, 1162–63 (6th Cir. 1987).

[76] This is highly dependent on the continued existence of the *Chevron* doctrine. *E.g.*, Hernandez v. Garland, 38 F.4th 785, 791 n.5 (9th Cir. 2022) ("Although the BIA's published decisions warrant *Chevron* deference, unpublished decisions ordinarily warrant only *Skidmore* deference unless they rely on a prior published decision.").

[77] 5 U.S.C. §§ 706(2)(A), (E).

[78] Dickinson v. Zurko, 527 U.S. 150, 162–63 (1999) ("The court/agency standard, as we have said, is somewhat less strict than the court/court standard. But the difference is a subtle one—

additional effect that deference may be given to the agency in the area of its particular expertise as opposed to a generalist appellate court reviewing a generalist trial decision.[79]

The focus here is on evaluating the agency determination based on the facts known at the time the agency rendered the determination.[80] Although generally allowed as of right, these appeals must be filed within a relatively limited period of time or they are disallowed.[81] Any challenge to an agency adjudication after this statute of limitations runs therefore depends on the options in the following Part: new facts and/or changed circumstances.[82]

2. Out-of-Time/Additional Challenges

There are two important exceptions to the general rule in favor of administrative finality: changed circumstances and new evidence. While the terms are occasionally used as synonyms,[83] that is not so in this Article. This Part therefore begins by

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so fine that (apart from the present case) we have failed to uncover a single instance in which a reviewing court conceded that use of one standard rather than the other would in fact have produced a different outcome.").

79 While this expertise may be considered to fall under the arbitrary and capricious standard rather than substantial evidence, the two are considered functionally synonymous. Bellion Spirits, LLC v. United States, 393 F. Supp. 3d 5, 13 (D.D.C. 2019) ("As to factual determinations, while agency expertise undoubtedly provides a basis for deference, substantial-evidence review is not premised on its existence."); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 658 (2007) ("Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it . . . 'is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))); Hamsher v. N. Cypress Med. Ctr. Operating Co., 620 F. App'x 236, 239 (5th Cir. 2015) ("'Abuse of discretion review is synonymous with arbitrary and capricious review in the ERISA context. When reviewing for arbitrary and capricious actions resulting in an abuse of discretion, we affirm an administrator's decision if it is supported by substantial evidence.'" (quoting Cooper v. Hewlett-Packard Co., 592 F.3d 645, 652 (5th Cir. 2009))).

80 Minto v. U.S. OPM, 765 F. App'x 779, 784 (3d Cir. 2019) ("The reviewing court is limited to 'the administrative record [that was] already in existence before the agency, not some new record made initially in the reviewing court or post-hoc rationalizations made after the disputed action.'" (quoting Christ the King Manor, Inc. v. Sec'y U.S. HHS, 730 F.3d 291, 305 (3d Cir. 2013))).

81 *See supra* Part III.C.2.

82 Green v. White, 319 F.3d 560, 566 (3d Cir. 2003).

83 *E.g.*, *id.* at 565 ("[T]he Court also drew a crucial distinction between petitions for reconsideration which merely allege 'material error' and those which allege 'new evidence' or 'changed circumstances.' The Court observed that 'all of our cases entertaining review of a refusal to reopen appear to have involved petitions alleging 'new evidence' or 'changed circumstances' that rendered the agency's original order inappropriate.'" (quoting Interstate Com. Comm'n v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 278–79 (1987))); *see also* Blouir v. McDonough, No. 21-7269, 2023 Vet. App. LEXIS 404, at *3 (Vet. App. Mar. 9, 2023) ("Second, though this Court may conduct a limited review of the Board's Chairman's denial of a motion for reconsideration, appellant must allege 'new evidence or changed circumstances.'").

describing appeals involving new evidence before moving on to those involving changed circumstances.

a. Appeals Based on New Evidence

The first type of appeal addressed, one based on new evidence, is more common because it does not require the evaluation of a different time period. This Part begins by describing what the "new evidence" means before explaining when its use is limited and providing an example of a social security case allowing in new evidence.

i. What New Evidence Means

For purposes of this Article, "new evidence" as used in administrative adjudications refers to information that provides further support for a fact that was presented in the initial adjudication, specifically relating to the time period being considered at that initial stage. This is different from suggesting that the facts themselves have changed since then.[84]

Allowing in new evidence can have a dramatic impact on the outcome of the case because a fact that lacked substantial evidence during the initial adjudication may meet the substantial evidence standard through the introduction of the new evidence.[85] Indeed, the purpose of allowing new evidence is because, in certain situations, it is understood that justice and fairness demand an opportunity to consider all relevant evidence, especially when that evidence was not available during the original proceeding,[86] albeit with the restrictions addressed in the following Part.

ii. Restrictions on the Use of New Evidence

New evidence appeals are not universally allowed.[87] Even when they are, in order to pursue an appeal based on new evidence, the party seeking the appeal must typically demonstrate that the new evidence is material and relevant to the issues addressed in

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84 *E.g.*, 38 C.F.R. 3.156(a) (2021) ("New and material evidence. . . . A claimant may reopen a finally adjudicated legacy claim by submitting new and material evidence. New evidence is evidence not previously part of the actual record before agency adjudicators. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.").

85 This does not, however, mean this is the method through which it should be evaluated when trying to determine whether to admit it, as expanded in Part IV.C.2.b.ii.

86 *Green*, 319 F.3d at 564 n.3 ("[Excusing] a failure to file within three years after discovery if . . . . [The agency] finds it to be in the interest of justice.").

87 The BIA, for instance, is not supposed to consider new evidence on appeal. 8 C.F.R. § 1003.1(d)(7)(v)(A) (2022) ("[With limited exceptions] the Board shall not receive or review new evidence submitted on appeal, shall not remand a case for consideration of new evidence received on appeal, and shall not consider a motion to remand based on new evidence. A party seeking to submit new evidence shall file a motion to reopen in accordance with applicable law.").

the administrative decision.[88] Thus, new evidence has the potential to influence the outcome of the case in a significant way.

There can be additional constraints on when new evidence can be introduced. In some situations, the proponent of the evidence must show that, through no fault of the proponent, the evidence did not exist, was not obtainable, or was not reasonably discoverable at the time of the initial adjudication.[89] Under this view, it is not an excuse to go looking for documentation to counteract the findings of the administrative judge that the individual could have easily discovered earlier; that is the point of the original hearing itself.[90] On the other hand, new evidence can be introduced in some situations without a showing that the material was not known or reasonably discoverable earlier.[91] Regardless, the focus on this type of review is the time period examined during the initial adjudication.[92] Whatever the new information is, it must relate directly to the time period examined in the prior adjudication.

If the argument instead is that the facts have changed since the initial adjudication, that is not an appeal based on new evidence, but rather an appeal based on changed circumstances, as discussed in Part III.D.2.b. In the following Part, this Article provides an overview of the new evidence approach taken in social security cases—a typical example of a monetary-benefit adjudication.

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88 David C. v. Comm'r of Soc. Sec., No. 6:21-CV-06480-EAW, 2023 U.S. Dist. LEXIS 37739, at *8 (W.D.N.Y. Mar. 6, 2023) ("'[T]he Appeals Council, in reviewing a decision based on an application for benefits, will consider new evidence only if (1) the evidence is material, (2) the evidence relates to the period on or before the ALJ's hearing decision, and (3) the Appeals Council finds that the ALJ's decision is contrary to the weight of the evidence, including the new evidence.'" (quoting Rutkowski v. Astrue, 368 F. App'x 226, 229 (2d Cir. 2010))).

89 Cornwall v. Kijakazi, No. 3:21-cv-00665-SMD, 2023 U.S. Dist. LEXIS 27287, at *12 (M.D. Ala. Feb. 17, 2023) ("[T]he claimant must show that the evidence is new and material and that he had good cause for failing to submit the evidence at the agency level. The good cause requirement is satisfied when the evidence did not exist at the time of the administrative proceedings. If, however, the claimant could have obtained the evidence sooner, good cause is not shown." (quoting Arnold v. Soc. Sec. Admin., Comm'r, 724 F. App'x 772, 781–82 (11th Cir. 2018))).

90 *Id.*

91 Up to the point of the ALJ hearing, for instance, the second level of appeal, a disability claimant is allowed to present any additional (relevant) material evidence desired. *See* 48 Fed. Reg. 21967, 21968 (May 16, 1983) ("The proposed changes would have no effect on the claimant's ability to submit new or additional evidence either at the reconsideration level or in a hearing before an administrative law judge. At either of these levels, the claimant would still be allowed to submit additional evidence and will still receive a completely new and independent determination or decision based on the record, including the additional evidence.").

92 A loss of this focus was one reason for the changes restricting the availability of new evidence at higher appeal levels. *Id.* ("The proposed regulations would help remedy the situation in which, as described by the Senate Finance Committee report, a disability claimant 'can continue to introduce new evidence at each step of the appeals process, even if it refers to the worsening of a condition or to a new condition that did not exist at the time of the initial application.'").

iii. Sample Appeal Based on New Evidence

This Part provides a brief overview of the social security disability determination process and then a disability case relying on new evidence.

To determine whether an applicant for social security disability qualifies for benefits, the Social Security Administration ("SSA") must go through a five-step process.[93]

In step one, the agency looks at whether the applicant was engaged in "substantial gainful activity" during the relevant period,[94] which is determined based on whether their earnings in the relevant period met a set threshold amount.[95] If the applicant's earnings are above the threshold, then they engaged in substantial gainful activity, they are not considered to be disabled, and they therefore are not entitled to social security benefits.[96] If earnings fall below the set amount, the process proceeds to the next step.

In step two, the agency assesses the severity of the applicant's impairment(s).[97] The impairment must be medically determinable, meaning it can be supported by objective medical evidence such as medical records, test results, and statements from medical professionals.[98] If the impairment does not significantly limit the applicant's ability to perform basic work activities, the applicant is not considered disabled and is therefore not entitled to benefits.[99] However, if the impairment is severe and expected to last for at least twelve months or result in death, the evaluation process moves on to the next step.[100]

In step three, the agency refers to a comprehensive list of medical conditions known as the "Listing of Impairments" (also known as the "Blue Book").[101] The Blue Book outlines specific criteria for various impairments, including physical and mental health conditions, and their severity levels.[102] If the applicant's impairment meets or equals the criteria outlined in the Blue Book, they are considered disabled and eligible

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93 20 C.F.R. § 416.920 (2012).

94 *Id.* § 404.1571.

95 For 2023, the maximum monthly earnings were $1,470. *Substantial Gainful Activity*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/cola/sga.html (last visited Apr. 6, 2024).

96 20 C.F.R. § 404.1571 (2000).

97 *Id.* § 416.920(c).

98 *Id.* § 404.1521.

99 *Id.* § 416.920(c).

100 *Id.* § 404.1509.

101 *Id.* § 416.920(d); WILLIAM R. MORTON, CONG. RSCH. SERV., R44948, SOCIAL SECURITY DISABILITY INSURANCE (SSDI) AND SUPPLEMENTAL SECURITY INCOME (SSI): ELIGIBILITY, BENEFITS, AND FINANCING 43 (2018).

102 MORTON, *supra* note 101. The residual function can be classified both in terms of the mental and physical requirements of the job. 20 C.F.R. § 404.1568 (2008) (classifying mental requirements); *id.* § 404.1567 (classifying physical requirements).

for benefits.[103] This means for those qualifying based on a listed impairment, the evaluation process ends at step three.[104] For those who fail to qualify at this stage, the process continues for two additional steps.

In step four, the agency considers the applicant's residual functional capacity to perform work.[105] The "residual functional capacity" is defined as the most a claimant can still do despite his or her physical or mental limitations.[106] Using this information, the agency looks at whether the applicant would be able to perform their "past relevant work," meaning any substantial gainful activity the applicant performed in the past fifteen years.[107] If the applicant would be able to perform their past work, they are not considered disabled and therefore not eligible for benefits.[108] If they would not be able to perform their past work, the process continues to the final step.

In step five, the agency again uses the residual functional capacity determination, this time to evaluate whether the applicant can perform any other work available in the national economy, taking into consideration their age, education, and work experience.[109] This is generally done through the use of standardized grids or the help of a vocational expert, who can testify about jobs the expert determined to be available based on the residual functional capacity of the applicant.[110] This step does not take into account whether the individual would be able to obtain the jobs or where the jobs are located.[111] If the SSA determines that the applicant is unable to adjust to any other work, they are considered disabled and eligible for Social Security Disability benefits.[112]

1) Specific Example in Social Security Disability Determination

In *Bodway v. Kijakazi*, Bodway applied for benefits starting November 7, 2019.[113] Using the five-step analysis for determining benefits, the ALJ first determined that the applicant had not engaged in substantial gainful employment during the relevant time period, meeting step one.[114] Then, in step two, the ALJ found that Bodway had several

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[103] 20 C.F.R. § 416.920(d) (2012).

[104] *Id.*

[105] *Id.* § 416.920(e).

[106] *Id.* § 416.945(a)(1).

[107] *Id.* § 404.1560(b)(1).

[108] *Id.* § 404.1560(b)(3).

[109] *Id.* § 404.1560(c)(1).

[110] MORTON, *supra* note 101, at 45, 50.

[111] 20 C.F.R. § 404.1566(a).

[112] *Id.* § 404.1520(g)(1).

[113] Bodway v. Kijakazi, No. 4:21-CV-1195-SRW, 2022 U.S. Dist. LEXIS 154001, at *1–2 (E.D. Mo. Aug. 26, 2022).

[114] *Id.* at *7.

severe impairments including bipolar disorder, generalized anxiety disorder, and post-traumatic stress disorder.[115] But these impairments were not equivalent to any of the listed impairments, meaning he was not considered disabled at step three so the evaluation proceeded to step four.[116] The ALJ determined that the applicant had "no more than a mild limitation in interacting with others," and "a mild limitation in concentrating, persisting, or maintaining pace."[117] The ALJ also noted that "[n]othing convincing exists in the record to suggest that the claimant has experienced psychotic symptoms since he alleges disability began in November 2019."[118] There was no past relevant work, so the process proceeded to step five, where the ALJ determined that there were jobs in the national economy he could perform, including hand assembler, machine tender, and table worker, and he was therefore not eligible for benefits.[119]

Bodway appealed the decision and included new evidence with the appeal (as is allowed under the regulations), specifically, a questionnaire filled out by his treating psychologist.[120] In the questionnaire, the psychologist said that Bodway would be:

> [U]nable to meet competitive standards in . . . completing a normal work day and work week without interruptions from psychologically based symptoms, performing at a consistent pace without an unreasonable number and length of rest periods, accepting instructions and responding appropriately to criticism from supervisors, getting along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes, dealing with normal work stress, interacting appropriately with the general public, coworkers and supervisors, and maintaining socially appropriate behavior.[121]

The psychologist also said that Bodway was likely to "miss, on average, four or more days of work per month due to his mental impairments."[122]

However, the Appeals Council denied Bodway's request for review, finding that the additional evidence "does not show a reasonable probability that it would change

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[115] More specifically, he was found to have "chronic obstructive pulmonary disease (COPD), scar tissue due to burns over 80% of his body, bipolar disorder, generalized anxiety disorder and post-traumatic stress disorder (PTSD)." *Id.*

[116] *Id.* at *7–8.

[117] *Id.* at *16, 18.

[118] *Id.* at *20.

[119] *Id.* at *8.

[120] *Id.* at *9–10.

[121] *Id.* at *11.

[122] *Id.*

the outcome of the decision."[123] The Appeals Council, therefore, did not officially consider the new evidence.[124]

On appeal, the district court viewed its job as evaluating the ALJ's determination, looking at whether it was still supported by substantial evidence, including the new evidence.[125] However, even under that lenient standard, the court was unwilling to find substantial evidence supporting the ALJ's decision as portions of the new evidence directly contradicted previously unchallenged portions of the decision.[126] The court, therefore, remanded the case to the agency.[127]

b. Appeals Based on Changed Circumstances

In contrast to appeals based on new evidence, those based on changed circumstances look at present-day conditions. This Part begins by describing in greater detail what "changed circumstances" are and when they can be used before providing an example of their use in an asylum case.

i. An Overview of Changed Circumstances

An appeal based on changed circumstances argues that a significant change in the relevant facts has occurred since the original determination, and that the new facts affect the validity, fairness, or appropriateness of the original administrative decision.[128]

Administrative decisions are rendered based on the facts and circumstances that existed at the time of the original adjudication.[129] However, situations can evolve and new developments that arise may fundamentally alter the context in which the administrative decision was made. These changes in circumstances may warrant a reevaluation of the decision to ensure that it remains just and responsive to the current state of affairs.[130]

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123 *Id.* at *11–12.

124 *Id.*

125 *Id.* at *14–15. The court noted that the approach in the Eighth Circuit was not universal, as other circuits did not consider the additional evidence at all. *Id.* at *16.

126 *Id.* at *21–22 ("[I]f Dr. Asher's Mental RFC Questionnaire was in the record at the time the ALJ issued his opinion, there is a reasonable likelihood Dr. Asher's assessment would have changed the ALJ's determination because Dr. Asher sets limitations rendering Plaintiff disabled.").

127 *Id.* at *22.

128 *E.g.*, 18 C.F.R. Parts 292 & 375, 172 FERC ¶ 61,041, 262 n.733 (2020) ("[A]ny later petition for declaratory order protesting the QFs existing certification must demonstrate changed circumstances from the time the Commission acted on the certification that call into question the continued validity of the earlier certification.").

129 *Id.*

130 This goes both ways; the government can also be bound if it is unable to show changed circumstances. Drummond v. Comm'r of Soc. Sec., 126 F.3d 837, 842 (6th Cir. 1997) ("Absent evidence of an improvement in a claimant's condition, a subsequent ALJ is bound by the findings of a previous ALJ. We reject the Commissioner's contention that the Social Security

Not every administrative decision can be challenged under changed circumstances. In many instances, all that matters and will continue to matter are the circumstances at the time of the initial determination.[131] That highlights the major difference in focus between the approaches—the relevant time period is being examined.

For new evidence appeals, the relevant time period remains that was examined in the original adjudication, which often concludes at the adjudication itself,[132] although the time can also be earlier or later,[133] and can even differ for different components of a single consideration.[134] For social security disability claims, for instance, age is taken into account as part of the determination—not merely the age at which the original petition was filed, but can include the time up until the ALJ hears the case after it has been through multiple reconsideration requests at the agency.[135] The ALJ is even explicitly instructed to consider whether the individual is "days or months" from aging into a new category at the hearing, and whether the new category would be a better fit given the surrounding circumstances.[136]

The individual's physical or mental abilities, however, are considered as of the time the petition is filed (and thereafter, when the individual is examined based on the claims initially made through the hearing with the ALJ).[137] If the individual's health changes after that point, thereby creating an argument that there are new or more

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Administration has unfettered discretion to reexamine issues previously determined absent new and additional evidence. To allow the Commissioner such freedom would contravene the reasoning behind 42 U.S.C. § 405(h) which requires finality in the decisions of social security claimants.").

131 This is true both for social security disability appeals, where the relevant time period extends to the hearing before the ALJ, and to many personal factors in asylum cases, which are not considered after the initial determination. *See infra* Part III.D.2.b.i.

132 As in social security disability cases revolving around the hearing before the ALJ. *See* 20 C.F.R. § 404.970(a)(5) (2020) (stating that the Appeals Council will consider evidence relating to the period up to the hearing with the ALJ).

133 For instance, when evaluating an unfair labor practice, the National Labor Relations Board looks not at the time the order is being issued but at the conditions at the time the violation occurred. 332 NLRB ANN. REP. 1, 676 (2000/2001) ("The Board traditionally . . . assesses the appropriateness of this remedy at the time the unfair labor practices were committed. Otherwise, the employer that has committed unfair labor practices of sufficient gravity to warrant the issuance of a bargaining order would be allowed to benefit from the effects of its wrongdoing.").

134 For asylum cases, for instance, while changed country conditions can be taken into account, many changed personal situations are not. *See Asylum Manual*, IMMIGR. EQUAL., https://immigrationequality.org/asylum/asylum-manual/ (last visited Apr. 6, 2024).

135 *See infra* Part III.D.2.a.iii (describing the disability scheme).

136 20 C.F.R. § 416.963(b) (2008) ("We will not apply the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.").

137 *Id.* § 404.970(a)(5) (stating that the Appeals Council will consider evidence relating to the period up to the hearing with the ALJ).

severe disabilities—such as a car accident making a previous injury significantly worse—then the individual must generally start the process over again.[138]

In situations where the relevant time to be examined ends at the initial adjudication, changed circumstances will be irrelevant because the later time period is not under consideration at all. There are some statutes, however, that specifically call on the agency to make the sorts of continual determinations that make changed circumstances a relevant basis for appeal.

For example, those whose initial claims for asylum are denied have a statutory right to seek an appeal based on a change in the relevant circumstances of the country.[139] If the country has recently started targeting members of a group the petitioner is part of or significantly stepped-up targeting—making return significantly more dangerous—the petitioner may be entitled to asylum. However, there are restrictions on the use of this exception, as the next Part describes.

ii. Restrictions on the Use of Changed Circumstances

There are relatively few situations in which truly changed circumstances are relevant as they must be situations where the continued circumstances of the parties are relevant to the initial determination.[140] As mentioned, this can include asylum claims dealing with changed country conditions, but also other ongoing situations, like antidumping and countervailing duties,[141] and ongoing bank supervision.[142] In contrast, for most other situations, like a social security disability determination, truly changed circumstances would necessitate restarting the process, with a new effective date (time from which benefits would start).[143]

Finally, even in situations that allow the examination of changed circumstances, the circumstances must be of the type allowed for consideration. In asylum cases, as discussed, the circumstances must relate to the conditions in the destination country, rather than the changed personal circumstances of the applicant.[144]

In addition, the new circumstances must be the type that would qualify the immigrant for asylum: the immigrant must show that (1) they have been or will be persecuted on one of the protected grounds ("race, religion, nationality, membership

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138 Earley v. Comm'r of Soc. Sec., 893 F.3d 929, 931 (6th Cir. 2018) ("The key principles protected by Drummond—consistency between proceedings and finality with respect to resolved applications—apply to individuals and the government. At the same time, they do not prevent the agency from giving a fresh look to a new application containing new evidence or satisfying a new regulatory threshold that covers a new period of alleged disability . . . .").

139 8 U.S.C. § 1229a(c)(7)(C)(ii).

140 20 C.F.R. § 404.902 (2008).

141 19 C.F.R. § 351.221(c)(2)(iii) (1998).

142 12 C.F.R. § 747.2002(f) (2015) (detailing a request to "modify or rescind" a directive imposing a discretionary supervisory action issued by the National Credit Union Administration Board).

143 *See supra* Part III.D.2.a.iii.

144 *See infra* Part III.D.2.b.iii.

in a particular social group, or political opinion"),[145] and (2) the government of the destination country is unable or unwilling to control the persecution.[146] This means that an applicant does not merely need to show conditions in the country have changed, but also that conditions in the country have changed in a way in which they can now qualify as a refugee. In other words, there is a high bar to qualify for asylum, but not an insurmountable one, as the next Part shows.

iii. Changed Circumstances in the Asylum Statutory Scheme

Changed circumstances are particularly important in immigration cases involving asylum and withholding of removal. Given the overlap in these areas, however, this Part focuses particularly on asylum cases. It provides an overview of the statutory scheme and a sample case where the court allowed consideration of the changed circumstances.

1) The Asylum Statutory Scheme

Asylum is a discretionary form of relief—once an immigrant has demonstrated that they qualify for asylum, it is still within the discretion of the Attorney General whether to grant it.[147] That said, this discretionary grant is very rarely withheld.[148]

To qualify, the applicant must demonstrate that they qualify as a refugee under international law.[149] This, in turn, means that the individual "is unable or unwilling to return to . . . [their home] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."[150]

"Persecution is defined as 'the infliction of suffering or harm . . . in a way regarded as offensive.'"[151] Not just any suffering is sufficient, however. "Persecution is an extreme concept that means something considerably more than discrimination or harassment."[152]

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[145] 8 U.S.C. § 1101(a)(42). This is commonly based on membership in a protected social group. *See* Delgado-Ortiz v. Holder, 600 F.3d 1148, 1151–52 (9th Cir. 2010) (requiring a showing that the individual is a member of the particular social group that is the basis of their claim of persecution).

[146] 8 U.S.C. § 1101(a)(42).

[147] *See id.* § 1158 (b)(1)(A).

[148] Thamotar v. U.S. Attorney General, 1 F.4th 958, 971 (11th Cir. 2021) (calling a discretionary denial of asylum "exceedingly rare").

[149] 8 U.S.C. § 1158(b)(1)(A).

[150] *Id.* § 1101(a)(42).

[151] Molina v. Garland, 37 F.4th 626, 633 (quoting Mendoza-Pablo v. Holder, 667 F.3d 1308, 1313 (9th Cir. 2012)).

[152] Delgado v. Garland, No. 20-72178, 2023 U.S. App. LEXIS 12447, at *3 (9th Cir. May 22, 2023) (quoting Donchev v. Mukasey, 553 F.3d 1206, 1213 (9th Cir. 2009)).

To demonstrate persecution, an immigrant can either show past persecution (giving rise to a presumption it will continue) or a well-founded fear of future persecution.[153]

This persecution must involve the government—either the government is directly engaged in the persecution, turning a blind eye to it, or otherwise unwilling to help.[154] The actions of a private party alone, if the government is taking steps to combat the violence, is insufficient.[155]

An immigrant who is granted asylum receives significant benefits. First, the alien is at least temporarily allowed to remain in the United States.[156] Second, they gain permission to work in the United States.[157] Third, they are allowed to travel abroad with permission from the government.[158] Finally, they are allowed to petition to bring their relatives to the United States.[159]

An immigrant may also have more than one chance to demonstrate they qualify as a refugee. If an initial application has been turned down, the immigrant may later petition again "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding."[160]

2) Specific Asylum Example

In *Tanusantoso v. Barr*, the petitioners appealed the Board of Immigration Appeal's denial of an asylum application filed thirteen years after the initial determination against them.[161] The petitioners alleged that conditions for Christians in Indonesia had dramatically worsened since the initial determination.[162] To support this, they provided:

> [T]wo recent U.S. government reports and two articles detailing how "intolerant groups" seeking to persecute religious minorities have risen

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153 8 U.S.C. § 1101(a)(42).

154 Mario Ernesto Navas v. Immigr. & Naturalization Serv., 98-70363, 332 F.3d 452, para. 4 (9th Cir. 2000) (available at https://www.refworld.org/jurisprudence/caselaw/usaca9/2000/en/94550.

155 ARUNA SURY, QUALIFYING FOR PROTECTION UNDER THE CONVENTION AGAINST TORTURE 8 (2020).

156 *Asylum*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum (last visited Apr. 6, 2024).

157 Ruiz-Perez v. Garland, 49 F.4th 972, 979 (5th Cir. 2022).

158 *Id.*

159 Thamotar v. U.S. Attorney General, 1 F.4th 958, 974 (11th Cir. 2021).

160 8 U.S.C. § 1229a(c)(7)(C)(ii).

161 Tanusantoso v. Barr, 962 F.3d 694, 698 (2d Cir. 2020).

162 *Id.* at 696.

> to power in Indonesia; how Indonesian state and local governments have increasingly interfered with the free exercise of religion, particularly for Christians; and how Christian public figures and houses of worship increasingly have been the subject of opprobrium and vandalism by members of the Indonesian public.[163]

However, the BIA opinion denying the motion for asylum mentioned none of this, nor did it mention additional reports of the imposition of Sharia law on non-Muslims, nor a report of the U.S. Commission of International Religious Freedom that stated government officials allowed and in some cases directly perpetrated the abuse.[164] Instead, the opinion contradicted this information, stating "'the Indonesian government continues to work to promote religious freedom' and that 'there has not been a showing of worsening conditions or circumstances.'"[165] Following similar decisions in both the First and Third Circuits, the Second Circuit remanded the case to the BIA to properly consider the changed country conditions.[166]

While the court did not state that the petitioners had demonstrated changed country conditions, requiring only that the BIA actually consider the submitted evidence,[167] this is the type of situation that should unquestionably qualify. There is evidence of a broad societal change that targets the specific group the petitioners are members of and that has the support of the destination country's government. But courts are not always so open to these challenges, as the next Part shows.

IV. THE GOVERNMENT'S INTEREST IN ADMINISTRATIVE FINALITY SHOULD NOT TRUMP CIRCUMSTANCES WHERE THE INDIVIDUAL IS NOT STATUTORILY PROHIBITED FROM THE INTRODUCTION OF NEW EVIDENCE OR CHANGED CIRCUMSTANCES

This Part begins by laying out the strong interest an individual has in the result of their individual adjudication. It then explains why, in ordinary cases, that interest is nevertheless insufficient to overcome the interest the government has in the finality of administrative actions. Finally, it explains the situations where an individual's interest in reopening the matter should trump the government's interest in finality: cases in which an individual can show new evidence or changed circumstances. After establishing the way this balance should tilt, this Part concludes by pointing out recent cases that failed to properly balance these interests in immigration and disability benefits cases.

A. The Affected Individual has an Extremely Strong Interest in Overcoming Finality to Ensure the Government Can Correct Errors or Injustices

Given the inherent nature of an adjudication, where a decision is being reached regarding the application of relevant law to an individual, that individual will have a direct and personal interest in the outcome.

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163 *Id.* at 698.

164 *Id.*

165 *Id.* at 699.

166 *Id.* at 701.

167 *Id.* at 698.

The adjudication will generally be a petitioner's only chance to present their side of the story, challenge the earlier agency determination, and assert their rights under the applicable laws and regulations, which they hope will entitle them to the relief sought.[168]

From an individual's standpoint, then, finality in administrative adjudications can hinder the pursuit of justice and fairness. Finality, therefore, is often not an individual's primary concern. Instead, they are more likely to prioritize the correction of errors and the rectification of injustices.

Administrative decisions can significantly impact an individual's rights,[169] benefits,[170] and entitlements,[171] or impose obligations upon them.[172] In cases where errors or injustices have occurred, finality can limit an individual's ability to present new evidence that may have a bearing on the outcome of their case.

When individuals are parties to an administrative adjudication, they deserve a fair and unbiased process that allows them to present their case, challenge erroneous decisions, and seek appropriate remedies for any violations of their rights. Principles of fairness and justice require that errors and injustices be corrected and that individuals have the opportunity to rectify any harm they have suffered. Finality, as an absolute principle, may undermine this pursuit of justice and impede the individual's ability to correct administrative errors or challenge unjust outcomes.

The individual interest in many of these adjudications can effectively be life on one hand and death or abject poverty on the other hand. Individuals can be returned to

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168 Or part of their determination method, as often the adjudication at issue is specific appeals from earlier paper denials. Disability claimants, for instance, are likely to come before a person only on their second level of appeal. SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2021 at 2 fig.11 (2021).

169 Morton v. Ruiz, 415 U.S. 199, 232 (1974) ("The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations."). These rights need not (and generally are not) constitutionally protected rights; they are things closer akin to the "right to immigrate." Hazama v. Tillerson, 851 F.3d 706, 707–08 (7th Cir. 2017) (noting all the steps required to be completed before the applicant had the right to immigrate to the United States).

170 Barnhart v. Thomas, 540 U.S. 20, 22 (2003) (denying an entitlement to social security disability benefits for an elevator operator who was still able to do her past job despite the fact that it no longer existed in meaningful numbers in the national economy).

171 Arellano v. McDonough, 143 S. Ct. 543, 549 (2023) (discussing when equitable tolling would make sense in a benefits entitlement situation).

172 Air Brake Sys. v. Mineta, 357 F.3d 632, 641 (6th Cir. 2004) ("An agency's determination of 'rights or obligations' generally stems from an agency action that is directly binding on the party seeking review, such as an administrative adjudication.").

a country where they expect to be tortured or injured if not killed.[173] Government means-tested benefits provide "the very means by which to live."[174]

Given the enormous stakes involved, for many of these individuals the adjudication is the single most important issue in their lives, and the most important interaction they will likely ever have with the government.

Although the individual has an obvious interest in making their case successfully, they also have an interest in being able to bring forth all relevant evidence. One of the cornerstones of our judicial system is the idea that individuals will feel better if they can bring their disputes before a neutral decisionmaker, that is, the mere opportunity to make a case is supposed to be valuable.[175] That same principle is true in the administrative context as well. There is a reason due process involves the opportunity to be heard.

This interest the individual has in their particular adjudication (and the interest in being able to make the case if additional information is only obtained later) can be contrasted with the weaker interest the government has in the finality of any single adjudication, as discussed in the following Part.

B. The Government's Interest in Finality Should Trump Regular Out-of-Time Appeals

Administrative adjudications play a vital role in the functioning of government agencies and the administration of justice.[176] Finality is a critical principle in administrative adjudications that aims to bring closure to the decision-making process and promote stability in administrative actions.[177] This Part examines why the

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[173] *E.g.*, Zelaya-Moreno v. Wilkinson, 989 F.3d 190, 211 (2d Cir. 2021) (Pooler, J., dissenting) (explaining why the immigrant would face torture and death when returned to their country of origin).

[174] Goldberg v. Kelly, 397 U.S. 254, 264 (1970) ("[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy."). While *Goldberg* dealt with the removal of benefits, the need the individual has for the money is true both before and after payments have started. This is therefore not an attempt to base the argument only on the deprivation of a protected interest (which is no longer officially a protected interest). 42 U.S.C. § 601(b) ("No individual entitlement. This part [42 USCS §§ 601 et seq.] shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.").

[175] Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("[W]hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.").

[176] Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III.*, 101 HARV. L. REV. 915, 925 (1988) ("Even more than the legislative courts tradition, the legal doctrine validating adjudication by administrative agencies establishes the impracticability of article III literalism. It is far too late to reject the entrenched role of administrative agencies in American government.").

[177] The interests here are virtually identical to those of courts applying the doctrine of res judicata. George A. Martinez, *The Res Judicata Effect of Bankruptcy Court Judgments: The Procedural and Constitutional Concerns*, 62 MO. L. REV. 9, 24 n.102 (1997) ("[Res judicata]

government's interest in finality should generally take precedence in challenges to administrative adjudications that occur outside the statute of limitations and are not based on new evidence or changed circumstances.

Finality provides certainty and predictability to the parties involved in administrative adjudications.[178] It allows both the government as well as individuals and organizations to plan their affairs based on the outcome of a decision.[179] Certainty is crucial for the effective functioning of government programs, policies, and regulations because it enables individuals and businesses to rely on and comply with the established rules and decisions.

Appeals made outside the prescribed timeliness, out-of-time appeals, can introduce uncertainty and disrupt the stability of administrative processes. By upholding the principle of finality when there has been no changed circumstance that justifies revisiting the issue, the government ensures that parties can rely on the outcomes of administrative adjudications, which promotes stability and consistency in the application of laws and regulations.

Finality also serves as a mechanism to ensure prompt compliance with administrative decisions. When individuals are aware that the government's decisions are binding and final, they are more likely to comply with those decisions in a timely manner.[180] This promotes efficient administration and avoids unnecessary delays in the implementation of policies, benefits, or other actions contemplated by the government's decision.[181]

In addition, finality upholds the rule of law by giving due respect to the decisions made by administrative tribunals. It reinforces the notion that administrative decisions should be respected and complied with, absent exceptional circumstances like those discussed in the following Part. Regular out-of-time appeals can undermine the authority and integrity of administrative tribunals, creating a perception of arbitrariness and eroding public confidence in the administrative process. By valuing

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promotes reliance on judicial decisions and the stability of judgments. Stability of judgments is important so that the moral force of judgments is not undermined.").

178 *But see* Baystate Med. Ctr. v. Leavitt, 545 F. Supp. 2d 20, 20–21, 55 (D.C.D. 2008) (preventing the Secretary of Health and Human Services from refusing to recalculate Medicare reimbursement amounts due despite the secretary's insistence on the importance of the predictability provided by administrative finality).

179 *See* Smith v. U.S. Bank N.A. (In re Smith), 999 F.3d 452, 454 (6th Cir. 2021) (explaining the benefits of certainty in the bankruptcy context).

180 *Cf.* ROBERT A. FINNIE, JR. & PAUL B. SNIFFIN, GOOD ENDINGS: MANAGING EMPLOYEE TERMINATIONS 3 (1984) (stating forcefully the value of making clear that the decision to terminate is final). "You do the employee no favor by implying there is any ray of hope. . . ." *Id.* at 10. This is still the prevailing advice. *E.g.*, Ashley Gould, *What Are Compassionate Layoffs?*, KUDOBOARD (Apr. 13, 2023), https://www.kudoboard.com/blog/what-are-compassionate-layoffs/ (suggesting statements including: "I know this is difficult news to hear," "I hear your frustration," and "The decision is final").

181 In this respect, it overlaps with the requirement that a decision must be final at all before it can be reviewed. Colbert v. McDonnell Douglas Corp., No. 96-3166, 1997 U.S. Dist. LEXIS 141, at *7 (E.D. La. Jan. 7, 1997) ("The finality requirement is designed to avoid piecemeal litigation and the delays and costs of multiple appeals upon both parties and courts.").

finality, the government demonstrates its commitment to upholding the rule of law and maintaining the legitimacy of administrative decisions.[182]

Government agencies operate with limited resources, including time, personnel, and financial capacities.[183] Not having to continually revisit every decision allows agencies to allocate their resources efficiently and effectively. Regular out-of-time appeals may require agencies to expend additional resources to reconsider decisions that have already undergone a thorough adjudicative process.[184] By placing the emphasis on finality for most determinations, the government optimizes resource allocation, enabling agencies to focus on current and future cases and promoting the overall effectiveness of the administrative system. Striking the appropriate balance between finality and fairness ensures the government can effectively function while still providing avenues for individuals to seek redress in exceptional circumstances, such as those discussed in the following Part.

C. The Government's Interest in Finality Should NOT Trump Appeals Based on New Evidence or Changed Circumstances

Finality should not always win; specifically, it should not be the deciding factor when the individual can demonstrate changed circumstances or new evidence relevant to the adjudication.

This Part first describes why the government's interest in finality is weaker in such cases and then explains why the balance should come out in favor of additional evidence, and recent problems in various areas applying that result.

1. The Government's Interest in Finality is Not as Strong

The interest of the individual, as described in the prior Part, revolves entirely around obtaining the benefit or avoiding the penalty at issue in the adjudication. The government, in contrast, has multiple different competing interests.

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182 Union Mfg. Co. v. Han Baek Trading Co., 763 F.2d 42, 45 (2d Cir. 1985), *overruled on other grounds*, Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 773 (1992) ("Nor is it apparent why the policies underlying the doctrine of *res judicata* should not require Union, having chosen to initiate an administrative adjudication, to take the exclusive avenue of appeal afforded by law . . . *res judicata* should bar the relitigation of the claim in federal court. To hold otherwise would undermine the legitimacy of the ITC proceeding . . . .").

183 Oakbrook Land Holdings, LLC v. Comm'r, 28 F.4th 700, 711 (6th Cir. 2022) (noting that similar constraints prevent an agency from responding to all possible issues in a rulemaking).

184 Cunningham v. RRB, 392 F.3d 567, 577 (3d Cir. 2004) ("In addition, we are troubled by the implication of Cunningham's position, which would require the Board to provide an oral hearing each time a pro se claimant sought to show good cause to reopen an untimely appeal. Such hearings would be a significant strain on the RRB's resources, yet it is not entirely clear from Cunningham what additional value would be gained by imposing such an obligation on the Board when written submissions, properly crafted, would be sufficient."). The court went on to cite *Mathews v. Eldridge* for the reminder that "'the administrative burden' must be considered when 'striking the appropriate due process balance.'" *Id.* Preventing a flood of appeals can also be an incentive to issue a rule of some sort. *See* Smith v. Becerra, 44 F.4th 1238, 1246 (10th Cir. 2022) (noting that CMS had issued a retroactive rule in an attempt to prevent numerous appeals on continual glucose monitors).

No adjudication will be life or death for the government. Instead, the government's concerns are broader, like ensuring efficiency.[185] But the government also has a separate interest in ensuring the correct decision is reached that may counsel against strict administrative finality. The next Part describes these different competing interests.

a. The Government Does Not Have as Much at Stake as the Individual in any Given Adjudication

As previously mentioned, one of the government's interests in finality is ensuring the administrative process functions properly, especially in areas like immigration and disability benefits. However, the government's stake in any given adjudication is less immediate and personal than the stake of the individual involved. The government's primary antagonistic concerns lie in the government's overall functioning, including efficient resource allocation, smooth operation of agencies, and overall administrative effectiveness.[186] These considerations aim to streamline processes, reduce unnecessary delays, and avoid reopening decisions that have already been made.[187]

The government is continually looking for ways to move high-volume adjudications through the system as expeditiously as possible.[188] The fewer government resources spent on any given adjudication, the more resources that will be potentially available for other things.[189]

Even after attempts at improvements, backlogs are nevertheless a fact of life in all areas under discussion. It currently takes years to work through the disability appeals process if the application is not approved immediately (and even immediately means

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185 *See, e.g.*, *Colbert*, 1997 U.S. Dist. LEXIS 141, at *7 (describing the government's interests in the finality requirement, such as the promotion of financial efficiency and organization within the court system).

186 *See* CBDA Dev. v. Town of Thornton, 137 A.3d 1107, 1111 (N.H. 2016) (describing how administrative finality is an "essential" function of agencies because finality conserves resources and promotes organization within agencies). Administrative finality furthers overall administrative effectiveness. *See* Johnston Ambulatory Surgical Assocs. v. Nolan, 755 A.2d 799, 810 (2000) ("Administrative finality also limits arbitrary and capricious decision-making . . . .").

187 *See, e.g.*, Robert L. Koehl, *Perpetual Finality: In Immigration Removal Proceedings, Motions to Reopen Create More Problems Than They Solve*, 2 TEX. A&M L. REV. 107, 121 (2014) ("Courts disfavor motions to reopen. There is an interest in finality in any hearing, and immigration courts are interested in preventing aliens from delaying their removal in perpetuity by filing successive motions.").

188 This was one purported reason for changing the social security disability appeal process to prevent the addition of evidence that could have been obtained earlier. Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 90987, 90990 (Dec. 16, 2016) ("[W]e expect that our final rule will help to ensure that evidentiary records are more complete at the time of the administrative hearing, which should reduce the need for post-hearing proceedings and help us provide better, more timely service to all claimants.").

189 *Cf.* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 644–45 (1992) (noting that an agency with fewer requests can devote greater time to each one).

more than seven-month wait).[190] Immigrants can wait months or even years for certain government actions to be taken.[191] If only a set number of individuals are allowed to be involved in the decision-making process, the less time spent on each individual adjudication, the more different individuals can be addressed in a given time.

Reopening a decision that has already been made cuts against these interests; it will use additional government resources in the personnel hours allotted to the matter as well as prevent those resources from being applied to other cases. Thus, from this perspective, the government would favor finality of decisions.

But these are not the only government interests at play. As the next Part discusses, the government has other competing, and potentially countervailing, interests in finality.

b. The Government Should Also Be Interested in the Correct Determination

Although administrative finality and the preservation of efficient administrative processes are important government considerations, so too is the pursuit of accurate and just determinations in administrative adjudications. This Part explores the reasons why the government should be interested in ensuring accurate decisions, even if it necessitates reopening the proceedings.

Maintaining public confidence and trust in the administrative system is essential for the government's legitimacy. When individuals perceive administrative decisions as flawed or unjust, it undermines the public's trust in the government's ability to make fair and accurate determinations and undermines the legitimacy of the administrative process.[192]

As a representative of the collective interests of society, the government has a duty to ensure justice and fairness in administrative adjudications.[193] Correct determinations uphold the principles of fairness and due process, which are crucial for

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190 This initial wait time has almost doubled since before COVID-19 to more than seven months, and it takes more than two years to get before an administrative law judge, the point in the process discussed in this Article (and years after that if the appeals process is continued). *See Wait Times to Receive Social Security Disability Benefit Decisions Reach New High*, USAFACTS, https://usafacts.org/data-projects/disability-benefit-wait-time (Dec. 12, 2023).

191 *See, e.g.*, Miriam Jordan & Zolan Kanno-Youngs, *They Forgot About Us: Inside the Wait for Refugee Status*, N.Y. TIMES (Oct. 19, 2022), https://www.nytimes.com/2022/10/19/us/politics/refugees-asylum-immigration.html (noting that delays in refugee processing have increased from around two years to five or more after President Trump "gutted the refugee program").

192 This is widely acknowledged as true in the criminal justice system. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 211 (2012) ("[P]erceptions of procedural fairness—resulting in perceptions of the system's 'legitimacy,' as the term is used—may promote systemic compliance with substantive law, cooperation with legal institutions and actors, and deference to even unfavorable outcomes.").

193 *See, e.g.*, Abraham Lincoln, First Annual Message to Congress (Dec. 3, 1861) ("It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.").

the legitimacy and integrity of the administrative system.[194] By reopening proceedings when necessary, the government demonstrates its commitment to rectifying errors, addressing injustices, and providing affected individuals with a fair opportunity to present their case.

Administrative adjudications often involve the determination of individual rights, benefits, or obligations that can have a significant impact on the lives and well-being of individuals, as described in Part IV.A. By allowing proceedings to be reopened, the government acknowledges the importance of protecting individual rights and ensuring accountability for its actions.[195]

In addition, reopening administrative proceedings, when necessary, showcases the government's commitment to transparency and accountability. It demonstrates that the government is willing to rectify mistakes and consider new information to arrive at a correct determination. This fosters confidence in the government's decision-making processes and reinforces the perception that the government values accuracy and fairness in its administrative actions.

And that confidence is critically needed. Public confidence in government is a cornerstone of a healthy democratic society.[196] It ensures that citizens trust the government's actions, policies, and decision-making processes.[197] A lack of public confidence erodes the legitimacy of the government and hampers its ability to effectively govern.[198] Therefore, it is essential for the government to actively work toward obtaining and retaining the trust of its citizens.

A vital component of fostering such confidence lies in the government's ability to achieve the "correct" result when taking government action.[199] When the initial result is no longer correct, viewing the facts as they currently stand, it is incumbent on the government to change the result.

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194 Luce & Co. v. Minimum Wage Bd. of P.R., 62 D.P.R. 452 (P.R. 1943) ("[I]t is the duty of administrative boards or tribunals not only to do justice but also to act in such a way that interested parties may realize that justice has been done. To this end the procedure followed may contribute as much as the result of the decision itself." (citing ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 10 (1942)).

195 *Id.*

196 Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1438 n.161 (2008) ("[T]rust and public confidence in government is critical for the ongoing stability of the republic.").

197 *See id.* at 1438.

198 *Id.*

199 Civ. Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 321 (1961) ("Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other."). The Court went on to hold that "[t]he gravity of the errors in this action, when considered with the fact that the government itself is requesting a remand and representing that the ITA's errors call into question the integrity of its determination, suggests that in this action, 'the public interest in reaching what ultimately appears to be the right result' outweighs the desirability of finality." Timken Co. v. United States, 10 C.I.T. 86, 101 (Ct. Int'l Trade 1986).

A government that refuses to acknowledge or rectify its mistakes is not accountable for its actions. Currently, public confidence and trust in the U.S. government is critically low.[200] Observing the government make an effort to ensure the correct result is achieved could help restore confidence in the system. Thus, the government has a strong interest in achieving the correct result, which should be the case even if it necessitates reopening the proceeding.

2. Balancing the Two Interests Should Result in Finding in Favor of the Individual for New Evidence and Changed Circumstances Appeals

As described in Part IV.C.1.b, although the government has an interest in efficiency, it also has an interest in reaching the correct result in an adjudication, both for its own sake and to ensure the public continues to support and have faith in the government. When these mixed interests are balanced against the very strong interest an individual has in revisiting an issue that may literally be a life-or-death determination for them, the individual's interest should win whenever such reconsiderations are not explicitly prohibited by statute.

This Part argues that the statutory restrictions should be interpreted as expansively as possible to allow affected individuals the greatest opportunity to effectively make their case. It begins by laying out how important new evidence and changed circumstances are to adjudications, before describing areas in which current interpretation falls short of the strong individual interest.

a. Appeals Based on New Evidence and Changed Circumstances Are a Critical Part of Agency Adjudication and Should be Allowed Whenever Possible

Given the extremely strong interest an individual has in the results of an adjudication and the interest the government should have in obtaining the "correct" result, it would be logical for the government to reexamine the results of an adjudication when new information is available that is related to the relevant period of time.

This is true both for appeals like disability determinations involving new evidence and asylum claims involving changed country conditions. Both should be considered whenever statutorily allowed. Doing so safeguards the private interests at little true cost to the government, because the government's interests also align (at least to some extent) with those of the individual affected.

This does not need to mean that benefits will be awarded. The question of whether to reconsider the initial decision should not depend on whether the new evidence definitively proves the claimant should succeed.[201] The interest an individual has in a fair consideration goes beyond merely receiving benefits. As described in Part IV.A., there are multiple interests at stake that can still be fulfilled—even if the new evidence is ultimately considered—without it changing the final outcome.

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200 *Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (Sept. 19, 2023), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/ (showing a steep decline in public trust of government since the 1960s).

201 The standard should in fact be far lower, whether there is a possibility it would change the outcome. *See infra* Part IV.C.2.b.ii.

An individual involved in an adjudication has an interest in a process that is fair, accountable, and transparent. Certainly, an individual who does not receive the benefit sought will be disappointed, but not having had the opportunity to fully make their case will add significantly to that frustration, with the added damage that the individual could be convinced that had they just been able to properly make their case they would have succeeded—in other words, the process will always seem unfair if the individual is unable to fully make their case. That is not to overlook the benefit of the process also being accountable and transparent. Forcing the government to explain why the new evidence is not sufficient to meet the petitioner's burden helps increase the accountability and transparency of the process, and helps the petitioner better understand their loss if they are not successful.

The government also has an interest in allowing these specific types of adjudications to be reopened. In every adjudication, the government's goal is to make a proper decision about the benefits claimed. It is not in the government's interest to deny every petitioner, even though doing so would increase the ease of processing and benefit the government from a financial perspective. The government, instead, should be focused on achieving the objectively-correct outcome based on the information available. Although that outcome may indeed be denial early on, if the relevant facts change, allowing a reconsideration still helps achieve the "correct" result.

Allowing appeals based on new evidence and evidence of changed circumstances, will not open the floodgates to new litigation, because the restrictions on the types of evidence allowed will still be in place. New evidence is only considered if the petitioner had a good reason for why they were unable to obtain it initially.[202] Further, there will be relatively few circumstances where the evidence is relevant to the time period but reasonably could not have been obtained by the petitioner at the time.

Similarly, the restriction that BIA asylum claims can only be based on changed country conditions[203] places a hard restriction on what is allowed. As the following Part elaborates, this restriction should be interpreted liberally to allow personal information in as evidence as well, but if the immigrant is unable to show any changed country conditions then the determination is ineligible for reconsideration.

The statutes that govern the reopening of administrative adjudications should be interpreted to facilitate the reopening of cases whenever new evidence or circumstances arise that warrant reconsideration, assuming it is not prohibited by the statutory scheme.

By adopting a more expansive approach to statutory interpretation, one that understands the fundamental difference between the government's interest in the finality of adjudications with and without credible new evidence, administrative agencies can ensure that their decisions remain responsive to evolving facts and promote accountability, transparency, and the equitable resolution of disputes.

Once the statutory threshold for reconsideration has been met, the court should consider all relevant evidence that was previously unavailable, allowing for flexible application and interpretation—standards that have not been met in the examples in the following Part.

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202 *See* Cornwall v. Kijakazi, No. 3:21-cv-00665-SMD, 2023 U.S. Dist. LEXIS 27287, at *12 (M.D. Ala. Feb. 17, 2023) (holding that new evidence is only considered when it did not exist at the commencement of the administrative proceedings).

203 *See* 8 U.S.C. § 1229(a)(C)(ii).

b. Given Their Importance, Statutes and Regulations Should be Interpreted to Allow Rather Than Impede Appeals Based on Changed Circumstances and New Evidence

This Part addresses three areas where this has recently fallen short: (1) Changed country conditions in asylum applications, where the agency and court are too quick to consider circumstances out of the applicant's control and occurring in the destination country as irrelevant "personal circumstances;" (2) New evidence in social security determinations, where the agency has recently ratcheted up the requirements for when new evidence will even be considered; and (3) veterans disability benefit claims, where courts have interpreted the statute so as to create a donut hole regarding when new evidence can be submitted, leading to needless delay and frustration.

i. Case Study 1 - Changed Country Conditions Should Only be Restricted to Situations Arising in the Country Without Concern Over Whether They are Widespread

As discussed, the primary exception to an out-of-time appeal for asylum is one based on "changed country conditions."[204] These are not further defined in the implementing regulations.[205]

In certain cases, the meaning of changed country conditions is obvious, like a coup.[206] Other claims are equally obviously inapplicable, such as someone choosing to have a child in the United States.[207] The point is that personal circumstances can be relevant, provided they are tied to a broader country change.[208] What is not well established is how widespread that change must be to qualify as changed country conditions.

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[204] *Id.* § 1229a(c)(7)(C)(ii) (allowing an exception to the filing deadline for applications "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding").

[205] *See* 8 C.F.R. § 1003.23(b)(4) (2021) (using identical phrasing).

[206] Rivera-Gomez v. Holder, 584 F. App'x 729, 730 (9th Cir. 2014) ("The BIA's opinion does not discuss any of the evidence describing changed country conditions. It does not even make mention of the highly significant 2009 military coup. This failure to consider the evidence presented was an abuse of discretion.").

[207] Reyes-Corado v. Garland, 76 F.4th 1256, 1263 (9th Cir. 2023) ("'[A] self-induced change in personal circumstance[,] such as a child's birth in the United States[,] does not suffice for changed country circumstances purposes." (quoting Kaur v. Garland, 2 F.4th 823, 830 (9th Cir. 2021))).

[208] Barros v. U.S. Attorney General, 781 F. App'x 934, 936 (11th Cir. 2019) ("However an alien cannot circumvent the requirement of changed country conditions by demonstrating only a change in personal circumstances.").

As discussed in Part III.D.2.b.iii, to succeed on any asylum claim the applicant must demonstrate they have been or will be persecuted on account of a protected characteristic and the government is unable or unwilling to help.[209]

The family is well-established as a protected family group.[210] However, courts are not always willing to count changed conditions for family members still in the home country as changed country conditions.[211] In the Ninth Circuit, it has been held that as long as the conditions occur out of the applicant's control and within the home country, the court is willing to consider them in evaluating whether there are changed country conditions.[212] However, in the Fifth Circuit, an escalating situation within the family of the petitioner is considered merely personal circumstances and, thus, ineligible for consideration.[213]

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[209] In addition, the immigrant must be found credible—an ongoing requirement. *See, e.g.*, Portillo-Bautista v. U.S. AG, 823 F. App'x 756, 762 (11th Cir. 2020) ("The burden is on the applicant to prove credibility.").

[210] Parada v. Sessions, 902 F.3d 901, 910 (9th Cir. 2018) ("[T]he family remains the quintessential particular social group." (quoting Rios v. Lynch, 807 F.3d 1123, 1128 (9th Cir. 2015))).

[211] While this Part focuses primarily on threats in general, there are also issues including what role finances can play in the issue. *See* Rodriguez-Zuniga v. Garland, 69 F.4th 1012, 1027–28 (9th Cir. 2023) (Gilman, J., dissenting) ("[The majority] discounts persecution that occurs by reason of the petitioner's family membership if the persecutor's motives also contain a financial dimension.").

[212] *Reyes-Corado*, 76 F.4th at 1262 ("As an initial matter, the 'intra-family' nature of the purported changed circumstances does not, as the government contends, take this case outside 8 C.F.R. § 1003.2(c)(3)(ii) . . . . '[C]hanged circumstances [that] occur in the country of nationality or the country to which removal is ordered, and are entirely outside the petitioner's control, may constitute changed country circumstances 'even if they are personal, painful, or life-altering.'" (citing *Kaur*, 2 F.4th at 830)); *accord* Lin Xing Jiang v. Holder, 639 F.3d 751, 756 (7th Cir. 2011) ("A changed circumstance need not reach the level of a broad social or political change in a country; a personal or local change might suffice."); *see also* Ahmed v. Wilkinson, 845 F. App'x 448, 451 (7th Cir. 2021) ("The Board should have said more, since a change in circumstances, as the government acknowledges, can include a change in personal circumstances. *Yahya v. Sessions*, 889 F.3d 392, 395 (7th Cir. 2018) (change in circumstances 'need not reach the level of a broad social or political change in a country; a personal or local change might suffice').").

[213] Martinez-Guevara v. Garland, 27 F.4th 353, 359 (5th Cir. 2022) ("The I.J. acknowledged that the petitioner had evidenced attacks on police officers' relatives and threats against her family. But the I.J. concluded . . . that Martinez-Guevara did not 'meet the heavy burden [she] must overcome to show changed country conditions. Martinez-Guevara appealed that ruling to the BIA, stressing her evidence—from the two Salvadoran officials—that gangs had coordinated the recent attacks. That evidence, she urged, showed a 'systematic strategy of targeting' police officers' relatives, and that this strategy had materially altered conditions in El Salvador. . . . The BIA affirmed. Refining the I.J.'s reasoning, the Board observed that the petitioner had shown, at most, an 'incremental increase in violence in El Salvador since 2006.' And under *Singh*, the Board explained, mere 'continuance' of violence in a place . . . does not prove 'a material change' in conditions there. Likewise, though the threats against Martinez-Guevara's relatives altered 'her personal circumstances,' they did not reflect a dramatic nationwide shift. The BIA thus dismissed Martinez-Guevara's appeal."); *see also* Martinez v.

There has been little discussion of the policy behind this provision,[214] but courts do seem to agree that it is an attempt to balance finality with protection of newly-vulnerable individuals.[215] Additionally, regardless of the size of the group considered when evaluating changed country conditions, what the court is essentially doing is determining how dangerous it would be for this particular individual to return to their home country.[216]

It seems reasonable, then, to consider changes entirely outside of the applicant's control. There is already a restriction that the changes must be based at least in part in the home country—that part is explicit in the statute.[217] In the absence of additional restrictions it seems most consistent with the concept of asylum to at least allow applicants the opportunity to make their case.[218]

Garland, No. 20-60228, 2021 U.S. App. LEXIS 32458, at *3–4 (5th Cir. 2021) ("Moreover, even if the BIA accepted that Martinez's wife's family in Yoro, Honduras, was the victim of threats and extortion in late 2017, Martinez did not demonstrate that those 'individual incidents' were connected to a 'larger material change' in the country conditions of Honduras since 2005. *See Nunez*, 882 F.3d at 509. Rather, as the IJ pointed out, the experiences of his wife's family amount to a change in personal circumstances."); Hossain v. Sessions, 689 F. App'x 311, 312 (5th Cir. 2017) ("[T]he threats made against Hossain and his family amount to changes in personal circumstances that do not constitute changes in country conditions."); Molina v. Barr, 952 F.3d 25, 31 n.4 (1st Cir. 2020) ("The declarations provided by Molina's family detailing recent threats only bear on our analysis should we reach the question of Molina's prima facie eligibility for relief, as 'a significant change in . . . personal circumstances' is 'relevant only to the extent that [a petitioner] can demonstrate that conditions have worsened generally' in the country for a particular social group.").

214 Philip M. Cooper, Comment, *Changed Countries, Changed Circumstances: Reopening Removal Proceedings Under 8 U.S.C. § 1229a*, 83 U. CHI. L. REV. 2071, 2091 (2016) ("Indeed, there seems to be no clear legislative purpose informing this statutory provision . . . .").

215 *See id.* at 2093 ("Supreme Court precedent on immigration law further indicates that courts consider finality interests to be overcome only when doing so will not open the door to evasion and manipulation."); *see, e.g.*, Xue Xian Jiang v. U.S. Attorney General, 568 F.3d 1252, 1257 (11th Cir. 2009) (holding that the individual's newly founded pregnancy was a sufficient factor to balance against the finality requirement); Yaner Li v. U.S. AG, 488 F.3d 1371, 1375 (11th Cir. 2007) ("[B]ut she argues that she presented evidence of changed circumstances that was not available at her original removal proceedings. We agree. Li submitted her own affidavit in which she attested to a fear of persecution based on second-hand reports of a policy of sterilization in her home province.").

216 Forced sterilizations within a country constitutes danger. *See Yaner Li*, 488 F.3d at 1375 ("She also presented her mother's affidavit that local officials in her hometown had begun recently to sterilize forcibly women with two or more children.").

217 *See* 8 U.S.C. § 1229(a)(C)(ii).

218 That does not mean the applicant would be successful, but they would at least feel that they had been fairly heard. For instance, in *Barros v. U.S. Attorney General*, the court denied the existence of changed country conditions because "the only new evidence presented by Barros—threats by his wife's family member—is a change in personal circumstances, which alone is not sufficient to show a change in country conditions." 781 F. App'x 934, 937 (11th Cir. 2019). Allowing him the opportunity to make his case would still require that he demonstrate that this was due to a protected ground (likely his family) and that the government

ii. The Move to Restrict the Use of New Evidence in Social Security Hearings

If an individual seeking social security disability benefits is unsuccessful before the Administrative Law Judge then they can petition for review before the Appeals Council.[219]

With certain limitations, they can also submit new evidence. The relevant section (hardly a model of clarity) states that the Appeals Council will consider evidence that is "new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision."[220]

"New," as used here, means that there must be a good reason the material was not available when the matter was before the ALJ.[221] The requirement that the material relate to the hearing period before the ALJ is understandable because that is the period of time being examined.

"Material" is not defined in the regulation and instead has long been defined through caselaw as "relevant and probative so that there is a reasonable possibility that it would change the administrative result."[222]

So, the first three requirements say that the material must have been unavailable, relate to the relevant time period, and have a reasonable probability of changing the outcome.[223]

But the Social Security Administration has also added a requirement that the material will only be considered if "there is a reasonable probability that the additional evidence would change the outcome of the decision."[224]

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was unwilling or unable to control that. All this Article argues is that he should have the opportunity to make the argument.

219 The Appeals Council will review an individual's case if the Administrative Law Judge exhibited "an abuse of discretion." *See* 20 C.F.R § 416.1470(a)(1) (2020).

220 *Id.* § 416.1470(a)(5).

221 *Id.* § 416.1470(b) (requiring the applicant to provide a reason why the new evidence was not available for the hearing before the ALJ). This was added as an attempt to force applicants to seek all available material before the ALJ hearing. Ensuring Program Uniformity, *supra* note 188, at 90991 ("[W]e expect the final rule will help to ensure that evidentiary records are more complete at the time of the scheduled hearing.").

222 McCullars v. Comm'r, SSA, 825 F. App'x 685, 692 (11th Cir. 2020) (quoting Hyde v. Bowen, 823 F.2d 456, 459 (11th Cir. 1987)).

223 *See* 20 C.F.R. § 416.1470 (2020) (describing the relevancy and probability requirement); *see also* Xian Jiang v. U.S. Attorney General, 568 F.3d 1252, 1256 (11th Cir. 2009) (holding that the evidence must have been unavailable at the initial proceeding).

224 20 C.F.R. § 416.1470(a)(5) (2020).

Although this additional requirement may seem redundant, it is not. The probability requirement is a higher standard than the possibility requirement that was already inherently read into the regulation.[225]

There will certainly be situations where the new evidence is so obviously important that it meets both tests, but what about the situations that fall short, meeting the possibility requirement but not the probability requirement (in other words, where it just might change the outcome)?[226]

This material should also be considered. Remanding for consideration of the additional evidence does not mean the claimant will win—only that they will be sure their entire case was considered.[227] Increasing the standard in this way reduces a small amount of administrative work while serving only to frustrate individuals with few resources experiencing hardship. It does not even necessarily reduce the workload as the individual can refile the claim with the new evidence, but subject to a later application date. Although uncommon, there are cases where the change makes a difference, like in *Fletcher v. Saul*. In *Fletcher*, the matter was remanded by the court for further consideration because the Appeals Council erred by applying the probability rather than possibility standard before the new higher standard's effective date.[228] Finding that the material at issue did, in fact, have a reasonable possibility of changing the outcome, the court remanded.[229] Thus, the standard should be returned to the possibility standard.

iii. The Final Case Study - Veteran's Disability Benefits and New Evidence

Veterans are also entitled to disability benefits for service-connected disabilities.[230] In some ways, these can be easier to obtain than standard disability benefits because the individual is not required to prove they are completely

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225 *See* Marie C. v. Kijakazi, No. 22-1097-JWL, 2023 U.S. Dist. LEXIS 61186, at *21 (D. Kan. Apr. 6, 2023) (discussing the difference).

226 "Might" was previously understood as the standard. *See* Pollard v. Halter, 377 F.3d 183, 194 (2d Cir. 2004) (describing evidence that "might" have persuaded the ALJ to find differently).

227 20 C.F.R. § 404.977(a).

228 Fletcher v. Saul, No. 18-2085-KHV, 2019 U.S. Dist. LEXIS 134015, at *18 (D. Kan. Aug. 9, 2019).

229 *Id.* ("Plaintiff has shown a reasonable possibility that Dr. Garton's opinion regarding plaintiff's mental RFC would have changed the outcome and thus that the Appeals Council should have considered it in deciding whether to review the ALJ's decision.").

230 *Eligibility for VA Disability Benefits*, VA.GOV (Aug. 15, 2023), https://www.va.gov/disability/eligibility/.

disabled.[231] However, the individual must prove not only the disability, but that it is service-connected (either originating or worsened by).[232]

The fact finder in a veteran's disability determination is supposed to work more actively on behalf of the veteran to help them make their case[233] than the fact finder in social security, even though that, too, carries an exception of assistance when needed.[234] This supposedly veteran-friendly approach, however, does not seem to be followed when evaluating the use of new evidence.

The Court of Appeals for Veterans' Claims was asked to interpret a statutory provision regarding appeals where the claimant selected the "additional evidence option." 38 U.S.C. § 7113(c) reads:

> The evidentiary record before the Board for [additional evidence option cases] shall include each of the following, which the Board shall consider in the first instance:
>
> (A) Evidence submitted by the appellant and his or her representative, if any, with the notice of disagreement.
>
> (B) Evidence submitted by the appellant and his or her representative, if any, within 90 days following receipt of the notice of disagreement.

In *Cook v. McDonough*, Cook, an Air Force veteran, received a rating decision in June 2019 that assigned him a zero-percent disability rating for one of his claimed disabilities and failed to find a service connection for his other claimed disabilities.[235] In response, Cook submitted new evidence in July and September 2019.[236] In October 2019, he filed a notice of disagreement in which he elected the new evidence track for his appeal.[237] At this time, however, he did not resubmit the new evidence from July and September.[238] The Board of Veteran's Appeals denied the appeal, refusing to

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231 *Information for Military & Veterans*, SOC. SEC. ADMIN., https://www.ssa.gov/people/veterans/ (last visited Apr. 6, 2024) (providing a chart with quick points of comparison for the two systems).

232 *See* 38 C.F.R. § 3.310(a)–(b) (2013).

233 38 U.S.C. § 5103A(a)(1) ("The Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary.").

234 Sheryl C. v. Kijakazi, No. 1:20-cv-20151, 2023 U.S. Dist. LEXIS 43466, at *18 (D.N.J. Mar. 15, 2023) ("'An ALJ owes a duty to a *pro se* claimant to help him or her develop the administrative record. When a claimant appears at a hearing without counsel, the ALJ must scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" (quoting Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003))).

235 Cook v. McDonough, 36 Vet. App. 175, 180 (Vet. App. 2023).

236 *Id.*

237 *Id.*

238 *Id.*

consider the new evidence submitted in July and September. The Board stated in the response letter that it had not considered evidence that was submitted past the ninety-day mark in the statute and told Cook that he could file a new claim if he wanted this additional evidence considered.[239] However, in fact, the Board had not considered the evidence Cook submitted before he submitted the notice of disagreement.[240]

On appeal, the Court of Appeals for Veteran's Claims was asked to determine whether the Board erred in failing to consider this evidence.[241] The court held the Board had not erred and that the statutory text was clear. The Board was to consider only the evidence submitted with the notice of disagreement and that was submitted within ninety days after the notice of disagreement—not evidence submitted between the initial determination and the notice of disagreement.[242]

This is a ludicrous way to operate a system supposedly intended to assist veterans in obtaining benefits due to them. As the concurrence noted, the Department of Veteran's Affairs ("VA") did nothing to notify Cook that the evidence he had already submitted would not be examined, and merely told him he had ninety days from the notice of disagreement to file any new evidence.[243]

Although the court claims this is a plain reading of the statute, it is neither the only required reading nor the one that provides the broadest use of new evidence or the reading that most supports veterans—which is particularly important given the goal of the veteran's disability process.

Evidence "submitted with" the notice of disagreement could easily be read to include all documents submitted up to the point of the notice of disagreement. And that appears to be how it was read by those who created the notice to let veterans know the next step after an unfavorable determination.[244]

Reading the statute in this way would not only comport with the understanding of a reasonable veteran, but would follow the statutory mandate that the "Secretary shall make reasonable efforts to assist a claimant in obtaining evidence necessary to

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239 *Id.* at 181 ("Evidence was added to the claims file during a period when new evidence was not allowed—after the 90 days following the election of the Evidence appeal lane. As the Board is deciding the claims herein, it may not consider this evidence in its decision.").

240 *Id.*

241 *Id.*

242 *Id.* The court did, however, remand to the Board since it had not correctly stated the reason it failed to consider the evidence, as the problem was not that it had been submitted after the submission window but before the Board considered the window to have opened. *See id.* at 189–90.

243 *Id.* at 192 (Jaquith, J., concurring).

244 *Id.* at 191–92 (Jaquith, J., concurring) ("The notice [of the initial determination] told Mr. Cook how to respond to VA with evidence to support his claim—suggesting uploading correspondence as the fastest way, but also providing the address to mail correspondence and a toll-free fax number to transmit correspondence. Within a month, the veteran's representative responded by faxing certified statements by the veteran and his sister to the number VA provided for disability compensation claims. Six weeks later, the veteran's representative faxed VA a medical evaluation report by a private physician board certified in internal medicine and psychiatry.").

substantiate the claimant's claim for a benefit under a law administered by the Secretary."[245] It would seem to fall within the "reasonable effort" standard to include evidence the veteran had actively submitted on their behalf before the true statutory deadline—the ninety days after submitting the notice of disagreement. Otherwise, the Board is effectively creating a secret new evidence donut-hole-filing period, one unwary veterans will fall into, forcing them to start the process from the start.

V. CONCLUSION

The government's interest in administrative finality is important but should not prevent the consideration in appropriate cases of new evidence and changed circumstances. Allowing affected individuals the opportunity to present such documentation not only increases their chance of reviewing critical government benefits, but it can improve the general public's confidence in the government by demonstrating that the government is interested in the correct result rather than merely bureaucratic efficiency.

[245] 38 U.S.C. § 5103A(a)(1).