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**REVIEWING THE MAGIC PIPES: *ANGELEX LTD. v. UNITED STATES*, OILY WATER SEPARATORS, AND CONSTITUTIONAL REVIEW OF COAST GUARD ACTION**

Benjamin Abel\*

INTRODUCTION

In April, 2013, the *M/V Antonis G. Pappadakis* arrived in port in Norfolk, Virginia.<sup>1</sup> While conducting a Port State Inspection of the vessel, the United States Coast Guard collected evidence suggesting that the *Pappadakis*' crew employed a "magic pipe."<sup>2</sup> A magic pipe allows a vessel to bypass its oily water separator and pump contaminated waste water directly over the side, in violation of international treaty and United States law.<sup>3</sup>

Having concluded that the *Pappadakis*' crew had used a magic pipe, the Coast Guard requested that United States Customs and Border Patrol put a hold on the vessel, effectively detaining the *Pappadakis* in place.<sup>4</sup> The *Pappadakis*' owner paid for the costs associated with keeping the *Pappadakis* at the dock out-of-pocket.<sup>5</sup> Having failed to come to a bond agreement to secure the release of the vessel, the *Pappadakis*' owner brought an emergency action in the Eastern District of Virginia, Norfolk Division to compel the Coast Guard to come to a bond agreement with the owners.<sup>6</sup> The district court held that the Coast Guard had abused its discretion by charging an unreasonable bond amount, and that the Coast Guard violated the *Pappadakis*' owner's due process rights.<sup>7</sup> The district court also ruled that it held admiralty jurisdiction over the proceeding.<sup>8</sup>

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See *infra* Part I.

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See *infra* Part I.

<sup>5</sup> See *infra* Part IV.

<sup>6</sup> See *infra* Part I.

<sup>7</sup> See *infra* Parts IV, VI.

<sup>8</sup> See *infra* Part VI.

In reversing the district court, the Fourth Circuit Court of Appeals held that the district court held no jurisdiction over the Coast Guard's actions.<sup>9</sup> The Fourth Circuit held that the district court did not possess admiralty jurisdiction over the controversy and that the Coast Guard's actions were unreviewable by the district court.<sup>10</sup> Finally, the Fourth Circuit held that the owner's constitutional claims did not provide the courts with jurisdiction.<sup>11</sup>

This Paper argues that the courts should have jurisdiction to review the vessel's owner's constitutional claims.<sup>12</sup> After providing background, the Paper first argues that both the Supreme Court and the Fourth Circuit have held there to be jurisdiction over constitutional questions regarding agency action even when the action is unreviewable on other grounds.<sup>13</sup> Next, this Paper argues that the constitutional argument was properly raised by the vessel's owner.<sup>14</sup> The Paper then argues a potentially troubling court split has developed over constitutional review of Coast Guard action in this area.<sup>15</sup> Finally, this Paper argues that constitutional review of Coast Guard action is needed given how quickly the Coast Guard brings magic pipe enforcement actions and the increasing worry that whistle-blowers will fabricate information.<sup>16</sup> This Paper does not discuss in detail the Fourth Circuit's holdings on the Coast Guard's alleged abuse of discretion nor its possession of jurisdiction over an admiralty claim.

#### I. BACKGROUND OF *ANGELEX LTD. v. UNITED STATES*

On April 14, 2013, the *M/V Antonis G. Pappadakis*, a Greek-flagged ocean-going bulk cargo carrier, arrived in port in Norfolk, Virginia.<sup>17</sup> The *Pappadakis* was owned by Angelex Ltd. and operated by Kassian Maritime, Ltd., a Greek company.<sup>18</sup> Importantly, the *Pappadakis* was Angelex's only income-earning asset.<sup>19</sup> That day, the

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<sup>9</sup> See *infra* Part VI.

<sup>10</sup> See *infra* Part IV.

<sup>11</sup> See *infra* Part VI.

<sup>12</sup> See *infra* Part V.

<sup>13</sup> See *infra* Part V.

<sup>14</sup> See *infra* Part VI.

<sup>15</sup> See *infra* Part VIII.

<sup>16</sup> See *infra* Part IX.

<sup>17</sup> *Angelex Ltd. v. United States*, No. 2:13cv237, 2013 U.S. Dist. LEXIS 65846, at \*4 (E.D. Va. May 8, 2013); see also Robert McCabe, *Federal Indictments Handed Down in Coal-Ship Case*, THE VIRGINIAN PILOT (May 24, 2013), <http://hamptonroads.com/2013/05/federal-indictments-handed-down-coalship-case>; Mark M. Murakami, *Coast Guard—You Want Your Boat Back? We Set Bond Amount—Angelex v. US*, HAWAIIOCEANLAW.COM (July 25, 2013), <http://www.hawaiiocelaw.com/hawaiiocelaw/2013/07/coast-guard-you-want-your-boat-back-we-set-bond-amount-angelex-v-us.html>; Michael Welles Shapiro, *Judge to Ship Owner, Coast Guard: Compromise*, DAILY PRESS (May 6, 2013), [http://articles.dailypress.com/2013-05-06/business/dp-nws-ports-coal-ship-detention-0507-20130506\\_1\\_coast-guard-ship-oily-bilge-water](http://articles.dailypress.com/2013-05-06/business/dp-nws-ports-coal-ship-detention-0507-20130506_1_coast-guard-ship-oily-bilge-water).

<sup>18</sup> *Angelex Ltd. v. United States*, 723 F.3d 500, 503 (4th Cir. 2013).

<sup>19</sup> *Id.*

*Pappadakis* took on a load of coal at the Norfolk Southern Terminal in Norfolk that was scheduled for delivery to a Brazilian customer.<sup>20</sup> The next day, the United States Coast Guard boarded the *Pappadakis* to conduct a Port State Control Inspection of the vessel, a routine vessel inspection.<sup>21</sup>

During the Coast Guard's inspection, one of the *Pappadakis*' crew members passed a note to an inspector stating that the *Pappadakis*' oily water separator had been bypassed and that the *Pappadakis* had been pumping contaminated bilge water overboard.<sup>22</sup> Knowingly bypassing a vessel's oily water separator constitutes a violation of international treaty and is a Federal Class D felony.<sup>23</sup> The Coast Guard inspectors investigated further and found the *Pappadakis*' oily water separator inoperable, as well as other "evidence suggesting the possible discharge of oily bilge water overboard."<sup>24</sup> The crew member also showed the inspector the *Pappadakis*' oily water separator's pumps and hoses, which the inspector seized.<sup>25</sup>

The crew member's note also claimed that the *Pappadakis*' crew had not recorded the discharges overboard in the vessel's Oil Record Book.<sup>26</sup> Foreign-flagged vessels over a certain tonnage are required to maintain an Oil Record Book, which allows the Coast Guard to "monitor and prevent pollution from oil discharges."<sup>27</sup> Improperly maintaining a vessel's Oil Record Book is a violation of the Act to Prevent Pollution from Ships.<sup>28</sup> An inspection of the *Pappadakis*' Oil Record Book "allegedly revealed significant discrepancies in the amounts of oily bilge mixtures produced and the amounts contained in the bilge water holding tanks, suggesting that the oil record book was incomplete or falsified."<sup>29</sup> Taking all of this information together, the Coast Guard delivered to the *Pappadakis*' port agent a letter on April 19, 2013 stating that the Coast Guard requested that the United States Customs and Border Protection Agency withhold clearance of the *Pappadakis*' departure.<sup>30</sup> The Coast Guard also sent its findings to the Department of Justice for review and possible prosecution.<sup>31</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* During a Port State Control Inspection, the Coast Guard "verif[ies] that foreign vessels are complying with conventions governing safety, pollution, cargo, and labor." *United States v. Taohim*, No. 12-14316, 2013 U.S. App. LEXIS 15437, at \*3 (11th Cir. July 30, 2013).

<sup>22</sup> *Angelex*, 2013 U.S. Dist. LEXIS 65846, at \*4-5.

<sup>23</sup> *Id.* at \*3.

<sup>24</sup> *Id.* at \*6.

<sup>25</sup> *Id.*

<sup>26</sup> *Angelex*, 723 F.3d at 503.

<sup>27</sup> *United States v. Jho*, 534 F.3d 398, 401 (5th Cir. 2008).

<sup>28</sup> See 33 C.F.R. § 151.25(a) (2013) ("Each oil tanker of 150 gross tons and above, ship of 400 gross tons and above other than an oil tanker, and manned fixed or floating drilling rig or other platform shall maintain an Oil Record Book Part I (Machinery Space Operations). An oil tanker of 150 gross tons and above or a non oil tanker that carries 200 cubic meters or more of oil in bulk, shall also maintain an Oil Record Book Part II (Cargo/Ballast Operations).").

<sup>29</sup> *Angelex*, 2013 U.S. Dist. LEXIS 65846, at \*6.

<sup>30</sup> *Id.* The Coast Guard may make such requests pursuant to 33 U.S.C. § 1908(e) (2012).

<sup>31</sup> *Angelex*, 723 F.3d at 503.

The Coast Guard and the attorneys for the *Pappadakis*' owner, Angelex, subsequently began negotiating a security agreement that would allow the *Pappadakis* to leave Norfolk.<sup>32</sup> Initially, the Coast Guard demanded \$3 million in a security bond from Angelex.<sup>33</sup> Following a counter-offer from Angelex, the Coast Guard reduced its demand to \$2.5 million.<sup>34</sup> Angelex again countered, offering to either post \$750,000 in a cash bond or \$1.5 million in a surety bond.<sup>35</sup> \$750,000 constituted almost all of Angelex's available cash-on-hand.<sup>36</sup>

Not only did the Coast Guard propose \$2.5 million in security, but it also required Angelex to comply with a number of drastic, non-monetary concessions.<sup>37</sup> Specifically, the Coast Guard's proposal required that Angelex:

- (1) make the Pappadakis crewmembers and other employees available for legal proceedings, including travel arrangements to facilitate court appearances and meetings with counsel or with law enforcement;
- (2) encourage the crewmembers to cooperate with investigators;
- (3) refrain from taking disciplinary or other adverse action against crewmembers who cooperate;
- (4) prevent certain material witnesses from leaving with the vessel;
- (5) take custody of these material witnesses' passports for safekeeping and notify counsel for the government if requested to return them;
- (6) stipulate to certain incontrovertible facts, such as ownership and operation of the vessel and authenticity of documents and other items taken from the ship;
- (7) authorize counsel to accept service of correspondence and legal papers;
- (8) enter an appearance in federal district court to answer any criminal charges that are filed;
- (9) assist in effecting service of process on foreign crewmembers; and
- (10) return crewmembers to their home countries when their presence in the United States is no longer needed for anticipated criminal proceedings.<sup>38</sup>

Angelex objected to the Coast Guard's demands on a number of grounds and, on April 25, 2013, filed an emergency petition in the Eastern District of Virginia, Norfolk Division.<sup>39</sup> On May 6, 2013, Senior Judge Robert Doumar held a hearing on Angelex's

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<sup>32</sup> *Angelex*, 2013 U.S. Dist. LEXIS 65846, at \*6.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*6–7.

<sup>36</sup> *Id.* at \*6.

<sup>37</sup> *Id.* at \*6–8.

<sup>38</sup> *Id.* at \*7–8.

<sup>39</sup> *Id.* at \*8–9.

petition.<sup>40</sup> During the hearing, Judge Doumar recessed in the hopes that the Coast Guard and Angelex could work out an agreement.<sup>41</sup> During that time, the parties apparently did come to an agreement, wherein Angelex would deposit \$1.5 million in bond and agree to other non-monetary obligations.<sup>42</sup> However, the deal was conditioned on approval by Coast Guard headquarters in Washington, D.C.<sup>43</sup> When Judge Doumar reconvened the hearing, the Coast Guard's counsel informed the Court that Coast Guard headquarters rejected the proposed deal and that "the Coast Guard firmly refuse[d] to accept less than the \$2.5 million bond it had previously offered. That was that, and nothing else was acceptable."<sup>44</sup>

## II. MARPOL AND STATUTORY BACKGROUND

Maritime pollution is governed internationally through a series of international treaties and regimes.<sup>45</sup> The most important of these is the International Convention for the Prevention of Pollution (MARPOL).<sup>46</sup> International maritime pollution was first seriously discussed at 1972's Stockholm Conference on the Human Environment.<sup>47</sup> The first MARPOL Convention occurred in 1973 and the second occurred in 1978,<sup>48</sup> resulting in a combined protocol known as MARPOL 73/78.<sup>49</sup> MARPOL is divided into five annexes, and the first two became compulsory with the convention's ratification.<sup>50</sup> The first, Annex I, deals with the regulation of oil pollution, and the second, Annex II, governs noxious liquid substances.<sup>51</sup> The International Maritime Organization (IMO), an agency of the United Nations, is responsible for MARPOL's

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<sup>40</sup> *Id.* at \*9.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*10. It is clear from Judge Doumar's opinion that the court was incredibly displeased with Coast Guard headquarters' refusal of the proposed deal. *See id.* at \*9–10. Judge Doumar apparently demanded from the Coast Guard's present counsel the name of the Coast Guard officer who refused the deal at headquarters, and it took "the prodding of the Court, and . . . some recesses" for the Coast Guard's counsel to identify the individual who refused the deal. *Id.* In fact, Judge Doumar goes so far as to name the individual in his opinion: Captain Melissa Bert, Chief of the Maritime and International Law Division. *Id.* at \*9.

<sup>45</sup> *See* Emeka Duruigbo, *Reforming the International Law and Policy on Marine Oil Pollution*, 31 J. MAR. L. & COM. 65, 68 (2000).

<sup>46</sup> Eric B. Rothenberg & Robert S. Nicksin, Recent Development, *Latest Developments in International Maritime Environmental Regulation*, 33 TUL. MAR. L.J. 137, 138 (2008).

<sup>47</sup> *History of MARPOL*, INT'L MAR. ORG., <http://www.imo.org/KnowledgeCentre/ReferencesAndArchives/HistoryofMARPOL/Pages/default.aspx> (last visited Mar. 11, 2015).

<sup>48</sup> *Id.*

<sup>49</sup> Duruigbo, *supra* note 45, at 70.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

administration.<sup>52</sup> IMO is comprised of representatives from 152 nations, including the United States.<sup>53</sup> Ratifying nations are responsible for enforcing MARPOL.<sup>54</sup>

In the United States, MARPOL is enforced through the Act to Prevent Pollution from Ships (APPS).<sup>55</sup> Congress passed the APPS following its ratification of MARPOL on July 2, 1980.<sup>56</sup> The APPS “applies to all U.S.-flagged ships anywhere in the world and to all foreign-flagged vessels operating in [the] navigable waters of the United States or while at port under U.S. jurisdiction.”<sup>57</sup> The APPS assigns enforcement of MARPOL’s Annex I to the United States Coast Guard,<sup>58</sup> and violations of the APPS can result in either civil or criminal penalties.<sup>59</sup> Not only can such penalties be enforced against the violating vessel’s owner in personam, but penalties can also be enforced against the vessel itself in rem.<sup>60</sup> The Coast Guard can enforce the APPS in any United States judicial district where the ship may be found.<sup>61</sup>

The APPS gives the Coast Guard a number of powers in investigating possible MARPOL violations. These powers include: (1) the ability to detain or revoke clearance of a vessel not in compliance, (2) the ability to request that the United States Customs and Border Protection detain a foreign-flagged vessel not in compliance, and (3) the ability to release a previously detained vessel who has filed a satisfactory bond or other surety.<sup>62</sup>

In recent years, the Coast Guard has stepped up its pursuit of vessels violating the APPS.<sup>63</sup> Because of this increased enforcement, “as well as heightened security after the events of September 11, 2001, ‘the U.S. Coast Guard has undertaken a comprehensive program of boarding foreign flag-state vessels calling U.S. ports.’”<sup>64</sup> The increased scrutiny has resulted in “a rash of vessel and crew detentions, as well as

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<sup>52</sup> Rothenberg & Nicksin, *supra* note 46, at 138.

<sup>53</sup> CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 32450, CRUISE SHIP POLLUTION: BACKGROUND, LAWS AND REGULATIONS, AND KEY ISSUES 7 (2008).

<sup>54</sup> Rothenberg & Nicksin, *supra* note 46, at 138.

<sup>55</sup> 33 U.S.C. §§ 1901–15 (2012).

<sup>56</sup> Marjorie A. Shields, Annotation, *Construction and Application of Act to Prevent Pollution from Ships (APPS)*, 33 U.S.C.A. §§ 1901 et seq., 38 A.L.R. Fed. 2d 565, 572 (2009).

<sup>57</sup> COPELAND, *supra* note 53, at 8.

<sup>58</sup> Rothenberg & Nicksin, *supra* note 46, at 139.

<sup>59</sup> Shields, *supra* note 56, at 574.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Benedict S. Gullo, *The Illegal Discharge of Oil on the High Seas: The U.S. Coast Guard’s Ongoing Battle Against Vessel Polluters and a New Approach Toward Establishing Environmental Compliance*, 209 MIL. L. REV. 122, 142 (2011).

<sup>63</sup> Robert B. Parrish et al., *Criminalization of Maritime Casualties Circa 2013*, 87 TUL. L. REV. 995, 1009 (2013).

<sup>64</sup> *Id.* (quoting *U.S. Authorities’ Investigation and Prosecution of Alleged By-Passing of Oily Water Separation Systems*, CHALOS O’CONNOR, LLP, 1, <http://codus-law.com/pdf/us-authorities-investigate-prosecution.pdf>).

criminal allegations and charges against vessel owners, operators, managers, officers, and crews.”<sup>65</sup>

Administrative action is governed by the Administrative Procedure Act (APA).<sup>66</sup> Adopted in 1946, the APA “is the most important federal statute of general applicability to modern administrative agencies.”<sup>67</sup> Under the APA, agency action is subject to judicial review.<sup>68</sup> There are two important exceptions to the APA’s general deference to judicial review: when a statute precludes judicial review or when agency action is committed to the agency’s discretion by law.<sup>69</sup>

### III. OILY WATER SEPARATORS AND MAGIC PIPES

Ships are like floating bath tubs. As a vessel operates at sea, water collects in the bottom of the ship and has nowhere to go. There, the water mixes with oil, dirt, sludge, and other pollutants that have similarly settled in the bottom of the vessel. This oily water mix is typically stored in bilge water holding tanks in the vessel until the crew can dispose of the mix.<sup>70</sup>

One way of disposing of the oily water mix consists of using an oily water separator onboard the vessel. An oily water separator “is self-describing and is designed to separate the waste oil from the water. If maintained and used properly, the Oil Water Separator discharges clean bilge water overboard and retains the separated oily water and sludge on board for burning in the ship’s incinerator or for disposal on shore . . . .”<sup>71</sup> Although technically complicated, the oily water separator, ideally, allows bilge water to be pumped overboard at MARPOL-compliant pollution levels.<sup>72</sup>

Oily water separators themselves are expensive, but not prohibitively expensive for many vessels to have.<sup>73</sup> Maintenance, repair, cleaning, and crew training add to these costs for a vessel owner employing an oily water separator.<sup>74</sup> Adding to these

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<sup>65</sup> *Id.* at 1009–10.

<sup>66</sup> 5 U.S.C. § 551 (2012).

<sup>67</sup> STEIN ET AL., ADMINISTRATIVE LAW § 1.01(3) (2014).

<sup>68</sup> 5 U.S.C. § 704 (2012).

<sup>69</sup> 5 U.S.C. § 701(a)(1)-(2) (2012).

<sup>70</sup> Gullo, *supra* note 62, at 128.

<sup>71</sup> R. Michael Underhill, *Dumping Oil, Cooking the Books, and Telling Lies: The False Statements Act as Applied to Marine Pollution*, 15 U.S.F. MAR. L.J. 271, 276 (2002–03).

<sup>72</sup> For a detailed description of the specifications of an oily water separator and how one works, see Gullo, *supra* note 62, at 130.

<sup>73</sup> *Id.* at 131 (“[N]ew and larger vessels can easily cost over \$100 million to build . . . . A new [oily water separator] ranges from \$10,000 to \$100,000, depending on the complexity of the model purchased and whether it has the capacity to self-clean.”).

<sup>74</sup> *Id.* (“[C]apital, maintenance, and repair costs for an [oily water separator] quickly add up. . . . Additionally, the cost of training crew members to operate an [oily water separator] system ranges from \$3,000 to \$5,000 per year. Finally, [oily water separator] maintenance costs, to include periodic checks, washings, and filter replacements, fall between \$3,000 to \$15,000 per year.” (footnote omitted)).



monetary costs are the manpower costs associated with running and maintaining an oily water separator. Operation of an oily water separator generally requires at least one crew member during an eight-hour watch,<sup>75</sup> and more crew members for rigorous maintenance of the oily water separator.<sup>76</sup>

Because of these costs, the crews of vessels often seek to bypass the oily water separator so as to pump their oily water mix directly overboard. One way to bypass the oily water separator is with a “magic pipe.”<sup>77</sup> The magic pipe is simply a hose fitted to the oily water separator system that allows for the oily water mix from the bilge to bypass the oily water separator and be pumped straight overboard.<sup>78</sup> “Magic pipes are typically designed to be easily installed at sea, then uninstalled and concealed when approaching port,”<sup>79</sup> and “[t]he use of a [magic] pipe is normally accompanied by a falsification of the MARPOL-required oil record book,”<sup>80</sup> a violation of the APPS in its own right that “compounds a vessel owner’s potential liability.”<sup>81</sup> More sophisticated crews build a more permanent magic pipe that appears to be a part of the actual oily water separator itself.<sup>82</sup>

#### IV. ANGELEX AND ABUSE OF DISCRETION

In his emergency order, Judge Doumar conceded that the APPS does commit decision-making to agency discretion.<sup>83</sup> Even still, Judge Doumar contends, agency discretion is reviewable if that discretion is abused by the agency.<sup>84</sup> According to Judge Doumar’s opinion, the Coast Guard did abuse that discretion in this instance in two ways.<sup>85</sup> First, Judge Doumar held that the Coast Guard’s requirements included non-monetary obligations not designed to ensure the easier payment of any fines, but rather to make the Coast Guard’s potential prosecution of the *Pappadakis* and Angelex

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<sup>75</sup> *Id.*

<sup>76</sup> Underhill, *supra* note 71, at 276.

<sup>77</sup> Andrew W. Homer, Comment, *Red Sky at Morning: The Horizon for Corporations, Crew Members, and Corporate Officers as the United States Continues Aggressive Criminal Prosecution of Intentional Pollution from Ships*, 32 TUL. MAR. L.J. 149, 151 (2007).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Parrish et al., *supra* note 63, at 1009.

<sup>81</sup> *Id.*

<sup>82</sup> Gullo, *supra* note 62, at 135.

<sup>83</sup> *Angelex Ltd. v. United States*, No. 2:13cv237, 2013 U.S. Dist. LEXIS 65846, at \*19–20 (E.D. Va. May 8, 2013) (“Section 1908(e) commits to the discretion of the Secretary of Homeland Security the determination of whether a ‘bond or other surety’ offered as a condition for obtaining departure clearance is ‘satisfactory’ . . . She, in turn, appears to have delegated this discretionary authority to the Coast Guard, a component agency of the Department of Homeland Security.” (citation omitted)).

<sup>84</sup> *Id.* at \*20.

<sup>85</sup> *Id.* at \*24–28.

easier.<sup>86</sup> Such demands are not within the statutorily granted discretion to “condition a vessel’s departure clearance on the filing of a bond or other surety for the purpose of assuring payment of any fine or civil penalty that might be incurred by the vessel [in rem] upon the completion of criminal or civil proceedings.”<sup>87</sup> The Coast Guard’s requirement that certain crew members of the *Pappadakis* remain in the Eastern District of Virginia held no relation to the payment of a civil penalty.<sup>88</sup>

More importantly to Judge Doumar, the Coast Guard abused its discretion in setting an unreasonable bond.<sup>89</sup> In deciding that the Coast Guard set unreasonable bond, Judge Doumar held that “[t]he record before the Court includes persuasive evidence that a \$2.5 million bond—or fine for that matter—is simply beyond the financial wherewithal of the petitioners, and that the continued detention of the vessel by withholding its departure clearance will rapidly bankrupt the vessel’s owner.”<sup>90</sup> And, Judge Doumar noted that “under the sentencing guidelines, any fine that might be imposed upon conviction in the anticipated criminal proceeding would be limited so as to avoid ‘substantially jeopardizing the continued viability of the organization.’”<sup>91</sup> Since the Court could not impose a fine that would potentially ruin Angelex, Judge Doumar reasoned that the imposition of a bond that did the same would be an abuse of discretion.

The Fourth Circuit disagreed with Judge Doumar, ruling that the Coast Guard did not abuse the discretion given to it under the APPS.<sup>92</sup> First, the Fourth Circuit noted that it had previously held that decisions committed to absolute agency discretion are still reviewable in limited circumstances.<sup>93</sup> In this instance, though, the Coast Guard did not overstep its bounds. First, the Fourth Circuit held that “[Angelex] cannot with a straight face argue that the Coast Guard has acted outside the bounds of [the APPS]. Indeed, those bounds are quite limitless. The Coast Guard may demand a low bond, a high bond, or may refuse to grant clearance altogether.”<sup>94</sup> In making this determination, the Fourth Circuit relied heavily on the APPS’s language that clearance “may” be granted by the Secretary.<sup>95</sup>

The Fourth Circuit also held that the APPS held a protection against abuses of discretion by the Coast Guard in such instances. “[The] APPS contains a built-in

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<sup>86</sup> *Id.* at \*24.

<sup>87</sup> *Id.* at \*23.

<sup>88</sup> *See id.* at \*24.

<sup>89</sup> *Id.* at \*24–28.

<sup>90</sup> *Id.* at \*26.

<sup>91</sup> *Id.*

<sup>92</sup> *Angelex Ltd. v. United States*, 723 F.3d 500, 508 (4th Cir. 2013).

<sup>93</sup> *Id.* (“[E]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations, but they may not review agency action where the challenge is only to the decision itself.” (citing *Elecs. of N.C., Inc. v. Se. Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985))).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (citing 33 U.S.C. § 1908(e) (2012)).

safeguard to governmental abuses. . . . In addition to the criminal and civil penalties that [the] APPS authorizes the United States to seek, [the] APPS provides for compensation for loss or damage as a result of unreasonable detention by the Coast Guard.”<sup>96</sup> Since this “after-the-fact” remedy was available to Angelex, Angelex’s desired injunctive relief proved unauthorized.<sup>97</sup>

Reliance on the APPS seems entirely inappropriate in this case. As Judge Doumar notes throughout his opinion, Angelex was in a precarious financial position prior to the Coast Guard’s detention of the *Pappadakis*. Keeping the *Pappadakis* at the dock in Norfolk cost Angelex approximately \$120,000 a month, or roughly \$4,000 a day.<sup>98</sup> The *Pappadakis* typically earned \$12,000 a day for Angelex, and as Angelex’s only income-earning asset, Angelex had no discernible income.<sup>99</sup> Judge Doumar also noted that the *Pappadakis* was subject to a mortgage that totaled twice as much as its present-day value.<sup>100</sup> In fact, Judge Doumar noted that if Angelex auctioned off the *Pappadakis* and recovered her fair market value (roughly \$6.5 million), there would still be no money left after payment of any penalties and satisfaction of outstanding liens on the vessel.<sup>101</sup> There, therefore, was no guarantee that there would even be an Angelex at the end of the process to take advantage of the APPS’s after-the-fact remedies.

#### V. PRESUMPTION OF CONSTITUTIONAL REVIEW

Even in instances where the Court declines jurisdiction to review agency action, the Court has allowed review of constitutional claims against agencies.<sup>102</sup> In *Webster v. Doe*, the plaintiff, a former employee of the Central Intelligence Agency, alleged that the Agency fired him for being a homosexual.<sup>103</sup> The relevant statute committed the decision to terminate employees of the Central Intelligence Agency to the Director of Central Intelligence’s discretion.<sup>104</sup> The employee challenged the Agency’s

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<sup>96</sup> *Id.* at 508–09.

<sup>97</sup> *Id.* at 509.

<sup>98</sup> *Angelex Ltd. v. United States*, No. 2:13cv237, 2013 U.S. Dist. LEXIS 65846, at \*14–15 (E.D. Va. May 8, 2013).

<sup>99</sup> *Id.* at \*14–15.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at \*16.

<sup>102</sup> Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 701–02 (1990) (“Courts rarely pronounce an action ‘unreviewable’ without adding that they would, nevertheless, entertain a challenge under limited circumstances—for example, if the action were alleged to be unconstitutional.”).

<sup>103</sup> 486 U.S. 592, 595–96 (1988).

<sup>104</sup> *Id.* at 594 (“[T]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States[.]” (quoting 50 U.S.C. § 403(c))).

termination of his employment on a number of procedural grounds.<sup>105</sup> The employee also challenged his termination by the Director on constitutional grounds.<sup>106</sup> Both the district court and the Court of Appeals for the District of Columbia found both the procedural and constitutional claims against the Central Intelligence Agency to be reviewable.<sup>107</sup>

The Supreme Court reversed the lower courts, holding that the Central Intelligence Agency's actions were not reviewable on procedural grounds given that employment decisions were statutorily committed to the Director of Central Intelligence's discretion.<sup>108</sup> The Court then turned to the employee's constitutional claims and stated that it was confused as to exactly what those constitutional claims were.<sup>109</sup> Despite not understanding the precise nature of the employee's constitutional claims, the Court held that the constitutional claims were reviewable by the courts.<sup>110</sup>

In deciding that the employee's constitutional claims were reviewable by the courts, the Court relied on prior jurisprudence which held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear."<sup>111</sup> The Court held "this heightened showing[,] in part[,] . . . avoid[s] the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial

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<sup>105</sup> *Id.* at 596 ("[The employee] alleged that the Director's decision to terminate his employment violated the Administrative Procedure Act . . . because it was arbitrary and capricious, represented an abuse of discretion, and was reached without observing the procedures required by law and CIA regulations.").

<sup>106</sup> *Id.* ("[The employee] also complained that the Director's termination of his employment deprived him of constitutionally protected rights to property, liberty, and privacy in violation of the First, Fourth, Fifth, and Ninth Amendments. Finally, he asserted that his dismissal transgressed the procedural due process and equal protection of the laws guaranteed by the Fifth Amendment.").

<sup>107</sup> *Id.* at 597–98 ("The [district] court determined that the APA provided judicial review of [the Central Intelligence Agency's] termination decisions made under . . . the [National Security Act] . . . . The Court of Appeals first decided that judicial review under the APA of the Agency's decision to terminate [the employee] was not precluded by [the Administrative Procedure Act].").

<sup>108</sup> *Id.* at 601 ("We thus find that the language and structure of [the National Security Act] indicate that Congress meant to commit individual employee discharges to the Director's discretion, and that [the Administrative Procedure Act] accordingly precludes judicial review of these decisions under the APA. We reverse the Court of Appeals to the extent that it found such terminations reviewable by the courts.").

<sup>109</sup> *Id.* at 602 ("We share the confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims. It is difficult, if not impossible, to ascertain . . . whether [the employee] contends that his termination, based on *his* homosexuality, is constitutionally impermissible, or whether he asserts that a more pervasive discrimination policy exists in the CIA's employment practices regarding *all* homosexuals.").

<sup>110</sup> *Id.* at 603–04 ("[W]e believe that a constitutional claim based on an individual discharge may be reviewed by the District Court.").

<sup>111</sup> *Id.* at 603 (citing *Johnson v. Robinson*, 415 U.S. 361, 373–74 (1974)). The Court also cited *Weinberger v. Salfi* as affirming its holding in *Johnson*. *Id.* (citing 422 U.S. 749 (1975)).

forum for a colorable constitutional claim.”<sup>112</sup> As a result, the Court dismissed the employee’s procedural claims, but remanded the employee’s constitutional claims.<sup>113</sup>

The *Webster* Court did not claim that the employee’s constitutional claims “furnished ‘law to apply,’” but rather, “the Court relied on a purely judicial intervention: a superstrong presumption against preclusion of constitutional claims.”<sup>114</sup> Whatever the Court’s reasoning, the lower courts have followed *Webster*’s presumption in favor of constitutional review of agency action.<sup>115</sup>

The Court’s strong presumption towards judicial review of constitutional claims regarding agency actions extends further than just review. In *Mathews v. Eldridge*, the plaintiff claimed that his Fifth Amendment Due Process rights were violated when the Social Security Administration cancelled his disability benefits without affording him an evidentiary hearing.<sup>116</sup> Instead of making his constitutional claim within the Social Security Administration’s administrative process, the plaintiff filed his challenge in federal court.<sup>117</sup> The Social Security Administration claimed that the courts could not review the plaintiff’s constitutional claims because the plaintiff had not exhausted the administrative process.<sup>118</sup> The Court, however, held that the plaintiff did not have to exhaust the available administrative processes before bringing a constitutional claim in federal court.<sup>119</sup>

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<sup>112</sup> *Id.* (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

<sup>113</sup> *Id.* at 605.

<sup>114</sup> Levin, *supra* note 102, at 730–31.

<sup>115</sup> *Id.* (“To date, however, the presumption invoked in [*Webster v. Doe*] has been virtually an article of faith in the lower courts.” (citing in support *Marozsan v. United States*, 852 F.2d 1469, 1471 (7th Cir. 1988); *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir. 1987); *Padula v. Webster*, 822 F.2d 97, 100–01 (D.C. Cir. 1987); *Bartlett v. Bowen*, 816 F.2d 695, 699 (D.C. Cir. 1987); *Paluca v. Sec’y of Labor*, 813 F.2d 524, 526 (1st Cir. 1987))).

<sup>116</sup> 424 U.S. 319, 323 (1976).

<sup>117</sup> *Id.* at 324–25 (“Instead of requesting reconsideration [the plaintiff] commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability.”).

<sup>118</sup> *Id.* at 325 (“The Secretary moved to dismiss on the grounds that [the plaintiff] . . . had failed to exhaust available remedies.”); *see also* *Califano v. Sanders*, 430 U.S. 99, 109 (1977) (“Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”). The “rule of exhaustion” typically requires that litigants exhaust all administrative review mechanisms before initiating judicial review. *See, e.g., Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 767 (1947), *cited in* *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008) (“The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.”).

<sup>119</sup> *Mathews*, 424 U.S. at 329–30 (“The fact that [the plaintiff] failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling. . . . It is unrealistic

In *Flemming v. Nestor*, a deported immigrant lost his Social Security old-age benefits as a result of his deportation.<sup>120</sup> The immigrant challenged his loss of benefits within the administrative appeals process, but he was unsuccessful in having his benefits restored.<sup>121</sup> Following the failure of his administrative appeal, the immigrant challenged the loss of his benefits in federal court, alleging that the loss of his benefits violated the Fifth Amendment's Due Process Clause by depriving him of an accrued property right.<sup>122</sup> Like in *Mathews*, the Social Security Administration claimed the immigrant needed to bring any constitutional challenge within the established administrative review process.<sup>123</sup> The Court held that the federal courts held jurisdiction over the immigrant's constitutional claim even though he had previously brought a claim within the administrative process.<sup>124</sup>

The Fourth Circuit's own jurisprudence recognizes the Court's strong presumption for the reviewability of constitutional claims over agency action. In *Electricities of North Carolina, Inc. v. Southeastern Power Administration*, the Fourth Circuit discussed in detail the presumption for review of agency action on constitutional grounds.<sup>125</sup> First, the Fourth Circuit cited to Justice Brennan's concurrence in *Heckler v. Chaney*: "For example, an agency decision that violates a statutory or constitutional command or is prompted by a bribe is not immune from judicial review even when a lawful exercise of an agency's discretion has that immunity."<sup>126</sup> The Fourth Circuit then made reference in *Electricities of North Carolina* to its own jurisprudence and the Fourth Circuit's presumption that jurisdiction exists for federal courts to review constitutional claims regarding agency action.<sup>127</sup> Finally, in *Electricities of North*

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to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.").

<sup>120</sup> 363 U.S. 603, 605–06 (1960).

<sup>121</sup> *Id.* at 606.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 606–07 ("The preliminary jurisdictional question is whether [the relevant statute establishing a three judge panel for administrative review of such administrative action] is applicable, and therefore required that the case be heard below before three judges, rather than by a single judge, as it was.").

<sup>124</sup> *Id.* at 607–08 ("Under the decisions of this Court, this . . . action could, and did, draw in question constitutionality of [the relevant statute]. . . . We hold that jurisdiction over the action was properly exercised by the District Court, and therefore reach the merits.").

<sup>125</sup> 774 F.2d 1262, 1267 (4th Cir. 1985) (quoted in *Angelex Ltd. v. United States*, 723 F.3d 500, 508 (4th Cir. 2013)).

<sup>126</sup> *Id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 839 (1985) (Brennan, J., concurring)).

<sup>127</sup> *Id.* ("[E]ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations,' but they 'may not review agency action where the challenge is only to the decision itself.'" (quoting *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981), *cert. denied*, 454 U.S. 1153 (1982))).

*Carolina*, the Fourth Circuit cited to two decisions from sister circuits that also allowed for judicial review of agency action on constitutional grounds.<sup>128</sup>

## VI. ANGELEX AND CONSTITUTIONAL REVIEW

In its *Angelex* opinion, the Fourth Circuit block-quoted its own presumption of constitutional review of agency action from *Electricities of North Carolina*.<sup>129</sup> Despite block-quoting its own strong presumption of constitutional reviewability, in the very next sentence of its opinion, the Fourth Circuit denied Angelex any constitutional review of the Coast Guard's actions.<sup>130</sup>

In fact, the Fourth Circuit stated, on the *same page* its presumption of constitutional reviewability: "Angelex's attempt at turning this matter into a constitutional challenge does not make the matter reviewable and thus, vest the district court with jurisdiction."<sup>131</sup> The Fourth Circuit based this radical departure from its prior block-quoted jurisprudence on its belief that Angelex's constitutional claim was really a thinly veiled attempt to get the Fourth Circuit to review the Coast Guard's actions on the merits of those actions.<sup>132</sup> Because the Fourth Circuit believed that Angelex's constitutional claim was really an end-run attempt to get the Fourth Circuit to review the Coast Guard's actions on the actions' merits, it denied that there was even jurisdiction to hear the claim.<sup>133</sup> Since the Coast Guard rigidly adhered to the requirements of the APPS in setting the *Pappadakis*' proposed bond, jurisdiction did not exist for a federal court to review the Coast Guard's actions, even over a constitutional claim.<sup>134</sup>

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<sup>128</sup> *Id.* (citing *Ness Inv. Corp. v. U.S. Dep't of Agric.*, 512 F.2d 706, 714 (9th Cir. 1975); *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970)).

<sup>129</sup> *Angelex Ltd. v. United States*, 723 F.3d 500, 508 (4th Cir. 2013) ("We are cognizant of this court's declaration, [']ven where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations, but they may not review agency action where the challenge is only to the decision itself.[']" (quoting *Elecs. of N.C.*, 774 F.2d at 1267)).

<sup>130</sup> *Id.* ("Nonetheless, we disagree with [Angelex's] characterization of the Petition as an attack on the statutory authority or constitutionality of the Coast Guard's actions.").

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* ("Specifically, Angelex asserts that the government violated its due process rights by indefinitely detaining the Pappadakis. This attempt at bypassing the reviewability exception in [the Administrative Procedure Act] falls flat. As [the government] observed, Angelex's case is 'nothing more than a direct review of the specific conditions sought by the Coast Guard in order to allow departure.'").

<sup>133</sup> *Id.* ("[W]e 'may not review agency action where the challenge is only to the decision itself[.]'" (quoting *Elecs. of N.C.*, 774 F.2d at 1267)).

<sup>134</sup> *Id.* ("In short, the Coast Guard's stringent conformity to [the APPS] simply does not give rise to a reviewable claim.").

The Fourth Circuit dispatched Angelex's constitutional claim with a scant few sentences. Such quick work of a claim that, by its own admission via its block-quoting of *Electricities of North Carolina* in the *Angelex* opinion, would typically be granted jurisdiction suggests that the Fourth Circuit did not view Angelex's constitutional claim as one made with any seriousness. However, the briefs submitted to the Fourth Circuit by both parties extensively discussed Angelex's constitutional claims. In its brief in support of its appeal to the Fourth Circuit, the government noted that the courts held jurisdiction to review "whether the agency has violated its own regulations, or the Constitution, or strayed so far beyond its statutory authority that its action is not authorized by statute at all."<sup>135</sup> However, the government contended that the Coast Guard's actions were not reviewable by federal courts because such actions were committed to agency discretion.<sup>136</sup>

In its brief to the Fourth Circuit, Angelex devoted significant argument to its constitutional claims. Angelex argued that "[t]he government's argument is that the end justifies the means, and the Coast Guard should be permitted to exceed its statutory authority."<sup>137</sup> Angelex argued that "[t]o give effect to the government's interpretation of the statute is to impose a pre-judgment, non-recourse penalty on the vessel owner and operator which is not countenanced by the Constitution, this statute, or any other statute."<sup>138</sup> Angelex next recounted the case law conferring jurisdiction on the federal courts to review agency action on constitutional grounds.<sup>139</sup>

In response to the government's argument that none of the jurisdictional grounds for review of the Coast Guard's actions existed, Angelex wrote that the government's argument "is simply incorrect, as the very purpose for Angelex's pursuit of judicial intervention—and a significant basis for the District Court's decision—was the Coast Guard's actions beyond its statutory authority and its violation of Angelex's constitutional due process rights."<sup>140</sup> Angelex argued that its constitutional claim provided a manageable standard for judicial review.<sup>141</sup> Angelex continued, arguing that, "in

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<sup>135</sup> Brief for the United States at 41, *Angelex Ltd.*, 723 F.3d 500 (No. 13-1610).

<sup>136</sup> *Id.* ("None of these considerations applies in this action, which alleges that specific surety conditions, proposed by the Coast Guard for the PAPPADAKIS, are unreasonable. Those conditions, however, all relate to the ability of the United States to prosecute offenders and secure the payment of fines, as well as provide for the well-being of the crewmembers. They fall well within the scope of the statutory discretion Congress committed to the agency.")

<sup>137</sup> Brief for Petitioners-Appellees at 10, *Angelex Ltd.*, 723 F.3d 500 (No. 13-1610).

<sup>138</sup> *Id.* at 10 n.9.

<sup>139</sup> *Id.* at 19, 32.

<sup>140</sup> *Id.* at 32–33.

<sup>141</sup> *Id.* at 33 ("However, as this Court has noted, 'it is well settled that even if agency action is committed to its discretion by law, a court may still determine whether the action is constitutional. . . . This is because the Due Process Clause provides a manageable standard for review.'" (quoting *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 347 (4th Cir. 2001))); see *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981). Angelex cited two other cases in support of its argument that the Due Process Clause conferred manageable standards for the Fourth



this matter, the indisputable existence of specific statutory construction issues, various violations of its due process rights, and other constitutional concerns as a result of the Coast Guard's overreaching of its statutory authority, provide the District Court (and this Court) with a manageable standard for review."<sup>142</sup> Finally, Angelex argued that the government's interpretation of the APPS meant that vessel owners would have no place to bring a constitutional claim.<sup>143</sup>

In its brief in reply, the government again addressed Angelex's constitutional claims in detail. First, the government argued that Angelex's claim that the government was proposing a statutory interpretation precluding judicial review was misplaced.<sup>144</sup> The government then reiterated its argument that Angelex was attempting to get review on the merits of the agency action by making a constitutional claim.<sup>145</sup>

The government finally argued that Angelex did not properly plead its due process claim.<sup>146</sup> Despite that, the government argued again that Angelex's constitutional claim was without merit.<sup>147</sup>

Not only did the parties argue the Angelex's constitutional claims in depth in their briefs to the Fourth Circuit, but Judge Doumar similarly devoted much of his district court opinion to the constitutional issues raised by the Coast Guard's actions. First, Judge Doumar held that the government's argument that the Coast Guard's actions were committed to absolute agency discretion were at odds with the Fourth Circuit's

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Circuit. *Id.* at 33–34 (citing *Sackett v. EPA*, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>142</sup> *Id.* at 36.

<sup>143</sup> *Id.* at 37–38 (“[T]he government is arguing, without citation to any authority, that once Coast Guard Headquarters dictates the terms and conditions of the release of a vessel, there is neither meaningful (*i.e.* non-futile) administrative appeals review, nor is there judicial review. Under the government's interpretation, the Coast Guard would have unilateral and unreviewable discretion to demand any terms and conditions, no matter how repugnant to due process and the Constitution.”).

<sup>144</sup> Reply Brief for the United States at 8, *Angelex Ltd.*, 723 F.3d 500 (No. 13-1610) (“Angelex instead attempts to invoke the principle that even actions committed to the agency's discretion may be reviewed if they are far outside the scope of the agency's statutory authority, or are unconstitutional. But while this exception makes clear that Angelex's hypothetical situations of a supposed ‘logical extreme’ would not necessarily be immune from judicial review, that exception plainly is inapplicable here.” (citations omitted)).

<sup>145</sup> *Id.* (“Notwithstanding the lofty principles Angelex seeks to invoke, this case is nothing more than a direct review of the specific conditions sought by the Coast Guard in order to allow departure—and the district court's decision to usurp the Coast Guard's authority with a new set of departure conditions imposed by the court.”).

<sup>146</sup> *Id.* at 9 (“Finally, Angelex's attempt to hinge a right to review on a supposed due process argument overlooks the fact that Angelex did not assert a due process claim in its petition for review in the district court.”).

<sup>147</sup> *Id.* (“In any event, the argument is meritless; among other things, a Coast Guard offer of security conditions, which is entirely discretionary, cannot create a property right entitled to due process protection.”).

jurisprudence.<sup>148</sup> As a result, Judge Doumar held that the district court possessed jurisdiction to review the Coast Guard's actions.<sup>149</sup>

In the district court decision, Judge Doumar held that the Coast Guard abused its discretion under the APPS in a number of ways.<sup>150</sup> As part of the district court's analysis of the Coast Guard's abuse of its discretion, Judge Doumar also ruled on the constitutionality of the Coast Guard's actions.<sup>151</sup> Judge Doumar held that "[t]he record before the Court includes persuasive evidence that a \$2.5 million bond—or fine for that matter—is simply beyond the financial wherewithal of the petitioners, and that the continued detention of the vessel by withholding its departure clearance will rapidly bankrupt the vessel's owner."<sup>152</sup> Judge Doumar held that the ability of the Coast Guard to put Angelex out of business without any review of the Coast Guard's action clearly violated the Constitution.<sup>153</sup> Judge Doumar went so far as to hold that "[i]n more than thirty years on the bench, this Court can recall seeing no greater disregard for due process, nor any more egregious abdication of the reasonable exercise of discretion."<sup>154</sup> As a result, the district court ordered the release of the *Pappadakis* following Angelex's posting of appropriate security.<sup>155</sup>

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<sup>148</sup> *Angelex Ltd. v. United States*, No. 2:13cv237, 2013 U.S. Dist. LEXIS 65846, at \*17–18 (E.D. Va. May 8, 2013) (“[T]his holding appears to be at odds with Fourth Circuit precedent, which holds to the contrary that, even if a statute confers absolute discretion upon an agency, the federal courts retain jurisdiction to review discretionary agency actions for abuse of discretion.” (citing *Elecs. of N.C., Inc. v. Se. Power Admin.*, 744 F.2d 1262, 1267 (4th Cir. 1985); *Littell v. Morton*, 445 F.2d 1207, 1211 (4th Cir. 1971); *Shipbuilders Council of Am., Inc. v. U. S. Dep’t of Homeland Sec.*, 673 F. Supp. 2d 438, 448 (E.D. Va. 2009))).

<sup>149</sup> *Id.* at \*18 (“Thus, [the APA] does not provide a jurisdictional bar to review in this case. Accordingly, the Court finds that it has subject matter jurisdiction under the APA.”).

<sup>150</sup> *Id.* at \*24–25 (“In this case, the Coast Guard seeks to impose several conditions designed not to assure payment of any fines or civil penalties, but to facilitate the prosecution of criminal or civil proceedings against the petitioners. In so doing, the Coast Guard has exceeded its legal authority and abused its discretion. Moreover, in refusing to set a reasonable bond amount, insisting that no less than a \$2.5 million bond is ‘satisfactory’ to assure the payment of potential fines and civil penalties in this case, the Coast Guard has also abused its discretion.”).

<sup>151</sup> *Id.* at \*26–27.

<sup>152</sup> *Id.* at \*26.

<sup>153</sup> *Id.* at \*27 (“The idea that by imposition of an unreasonable bond demand, the Coast Guard might accomplish what it cannot do through prosecution of the underlying criminal offense—the extinguishment of a lawful business, to the detriment of its principals, its employees, its creditors, and its customers, but to the advantage of no one—without due process is simply repugnant to the Constitution.”).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at \*28 (“For the foregoing reasons, the Court finds that it has subject matter jurisdiction, that the Coast Guard abused its discretion in demanding a \$2.5 million bond as a condition for granting departure clearance to the *Pappadakis* and in demanding the imposition of additional non-monetary conditions unrelated to assuring payment of any fines or civil penalties, and that [the vessel owners] have an absolute right to release of the vessel upon posting of adequate security.”).

VII. THE NEED FOR CONSTITUTIONAL REVIEW IN *ANGELEX*

The Fourth Circuit's decision in *Angelex* to deny subject matter jurisdiction over a claim for constitutional review of agency action is in stark contrast with the Supreme Court's strong presumption in *Webster* and other cases. In *Webster*, the Court admitted to not even knowing the exact nature of the complaining employee's constitutional claim.<sup>156</sup> The Court also held in *Webster* that all of the employee's procedural grievances were unreviewable since they were committed to agency discretion.<sup>157</sup> Even still, despite dismissing all of the employee's other claims, and after admitting that the Court did not even understand the nature of the employee's constitutional claim, the Court still held that federal courts possessed jurisdiction to review the employee's claims.<sup>158</sup> Cases like *Mathews* and *Flemming* further underscore the Court's strong presumption that constitutional claims against agency action have jurisdiction.<sup>159</sup>

Unlike *Webster*, *Angelex*'s constitutional claim should not have been a mystery to the Fourth Circuit. Both parties briefed the constitutional issue extensively for the Fourth Circuit.<sup>160</sup> Not only was the Fourth Circuit briefed on the issue by both litigants, but the district court devoted a significant portion of its opinion to the constitutional claim against the Coast Guard.<sup>161</sup> While Judge Doumar discussed the constitutional claim in terms of it being an abuse of discretion, the lower court invoked due process violations as one of the grounds for the court's finding that the Coast Guard abused its discretion.<sup>162</sup>

Despite having a clearer idea of what exactly the constitutional claim was than the Supreme Court had in *Webster*, the Fourth Circuit still denied jurisdiction for a federal court to review *Angelex*'s constitutional claim.<sup>163</sup> Such a holding seems incompatible with *Webster*, the Fourth Circuit's own jurisprudence in cases like *Electricities of North Carolina*, and the "virtual[] . . . article of faith" that lower courts have in holding that constitutional claims over agency action are reviewable by the courts.<sup>164</sup>

The Fourth Circuit's decision to deny jurisdiction entirely is even more confounding when one considers the procedural outs available to the Fourth Circuit if the court was set on dismissing *Angelex*'s claim. The government, in its briefs, first alleged that *Angelex* did not comply with the requirements of the APPS in bringing a claim for judicial review of the Coast Guard's actions.<sup>165</sup> Second, the Coast Guard

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<sup>156</sup> *Webster v. Doe*, 486 U.S. 592, 602 (1988).

<sup>157</sup> *Id.* at 601.

<sup>158</sup> *Id.* at 603.

<sup>159</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Flemming v. Nestor*, 363 U.S. 603, 608 (1960).

<sup>160</sup> *See supra* notes 135–47 and accompanying text.

<sup>161</sup> *See supra* notes 148–55 and accompanying text.

<sup>162</sup> *See supra* notes 150–55 and accompanying text.

<sup>163</sup> *Angelex Ltd. v. United States*, 723 F.3d 500, 502 (4th Cir. 2013).

<sup>164</sup> Levin, *supra* note 102, at 730–31.

<sup>165</sup> Brief for the United States, *supra* note 135, at 26–27.

alleged that Angelex did not properly plead a constitutional cause of action in its initial Emergency Order.<sup>166</sup> Both claims seem to have at least some merit to them, and yet, the Fourth Circuit made no mention of either theory in its opinion.<sup>167</sup> Instead of dismissing Angelex's complaint on procedural grounds, the Fourth Circuit went further and held that Angelex simply could not bring a constitutional claim for review of the Coast Guard's actions.

What is most troubling about the Fourth Circuit's opinion, however, is that the circuit effectively barred Angelex, or any similarly situated vessel owner, from ever getting constitutional review of the Coast Guard's actions in a magic pipe or APPS case. The Coast Guard afforded Angelex no formal administrative review process.<sup>168</sup> Instead, the Coast Guard put its foot down at \$2.5 million and refused to budge.<sup>169</sup> The Fourth Circuit, then in turn, said the federal courts did not even have jurisdiction to entertain such a claim from a vessel owner.<sup>170</sup> Where, then, could a vessel owner like Angelex ever bring a constitutional claim? Not in an administrative proceeding. Not in a federal court.

The Fourth Circuit seemed to answer this charge by claiming that Angelex could bring a civil action, at the end of all the proceedings against it and the vessel, to recover damages if the Coast Guard ended up being wrong.<sup>171</sup> However, the Fourth Circuit did not discuss the major concern of the district court: giving the Coast Guard unchecked discretion very likely meant there would be no Angelex remaining to take advantage of such a remedy.<sup>172</sup> With no place to bring its constitutional claim,

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<sup>166</sup> Reply Brief for the United States, *supra* note 144, at 9.

<sup>167</sup> See generally *Angelex*, 723 F.3d 500.

<sup>168</sup> *Id.* at 502.

<sup>169</sup> *Id.* Even if the Coast Guard had provided Angelex with an internal administrative review process, the Supreme Court's jurisprudence makes it clear that an administrative proceeding would be an inappropriate forum for a claim for constitutional review of agency action. An administrative review process does exist for APPS claims, though the Coast Guard's take-it-or-leave-it posturing makes it unclear whether that process was available to Angelex. See generally *Watervale Marine Co. v. U.S. Dep't of Homeland Sec.*, No. 12-cv-0105, 2014 U.S. Dist. LEXIS 97819, at \*16 (D.D.C. July 18, 2014) ("The Coast Guard's administrative appeal process has four stages: (1) a request for consideration at the Coast Guard Sector level; (2) appeal to the District Commander; (3) appeal to the Area Commander; and (4) appeal to the Coast Guard Assistant Commandant for Prevention.").

<sup>170</sup> *Angelex*, 723 F.3d at 503.

<sup>171</sup> *Id.* at 508–09 ("Finally, APPS contains a built-in safeguard to governmental abuses, which further convinces us that Angelex's Petition is out of place and time. In addition to the criminal and civil penalties that APPS authorizes the United States to seek, APPS provides for compensation for loss or damage as a result of unreasonable detention by the Coast Guard. . . . This provision is, as the government asserts, an 'after-the-fact damages remedy against the United States for unreasonable detention or delay.' This safeguard gives [Angelex] a remedy, distinct from the unauthorized injunctive relief they now seek." (citation omitted)).

<sup>172</sup> *Angelex Ltd. v. United States*, No. 2:13cv237, 2013 U.S. Dist. LEXIS 65846, at \*16 (E.D. Va. May 8, 2013) ("Fourth, any administrative remedies would be inadequate. By the time an administrative appeal is resolved, Angelex would be out of business, its employees out of work,

there remained a very real possibility that the Coast Guard's actions could destroy Angelex, and there would be absolutely no review of such actions.

#### VIII. A DEVELOPING COURT SPLIT

Two other cases have dealt with due process claims regarding Coast Guard action under the APPS. The court in *Giuseppe Bottiglieri Shipping Co. v. United States* encountered facts very similar to the facts encountered by the courts in *Angelex*.<sup>173</sup> In *Bottiglieri*, the Coast Guard boarded and inspected a foreign-flagged and foreign-owned cargo vessel at the Port of Mobile, Alabama.<sup>174</sup> Having conducted interviews with the vessel's master and crew, the Coast Guard concluded the vessel's crew had employed a magic pipe.<sup>175</sup> Like in *Angelex*, the Coast Guard requested that Customs and Border Patrol put a hold on the vessel.<sup>176</sup> Once Customs and Border Patrol put a hold on the vessel, the Coast Guard and the vessel's owner negotiated over a bond for the vessel's release, but the parties were unable to come to an agreement on the bond amount or on other non-monetary terms.<sup>177</sup> Following the parties inability to come to an agreement on the Coast Guard's bond conditions, the vessel owner filed an emergency action in the district court for a judicial resolution of the stalemate between the Coast Guard and the vessel owner.<sup>178</sup> The vessel owner's action included procedural claims and a claim that "the Coast Guard [was] violating the Constitution

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and its creditors, including the United States, unable to obtain full satisfaction."); *see also id.* at \*14–15 ("Angelex has only one income-producing asset, the Pappadakis, burdened by a mortgage that exceeds its present value by nearly double. In a tough economy for shipping, the company has been surviving in recent years on a narrow margin. With the Pappadakis idle, the vessel produces no income . . . and Angelex continues to expend approximately \$120,000 per month (about \$4,000 per day) just to maintain the vessel's crew. With thin margins and an overwhelming debt load, the extensive delay inherent in the Coast Guard's administrative appeals process likely would be a death knell for this company.").

<sup>173</sup> 843 F. Supp. 2d 1241, 1243 (S.D. Ala. 2012).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* ("[The Coast Guard] interviewed the ship's master and crew members concerning possible violations of the Act to Prevent Pollution from Ships. . . . During those interviews, Coast Guard officials were allegedly informed that the Vessel was equipped with a 'magic pipe' for the unlawful discharge of machinery space waste, and that [the] chief engineer . . . had directed the crew on at least six occasions since December 2011 to utilize the 'magic pipe' to discharge such waste directly into the sea, without first passing it through required pollution prevention equipment.").

<sup>176</sup> *Id.* at 1244.

<sup>177</sup> *Id.* ("[T]he parties disagreed as to the amount of the bond itself, with the Owner offering \$500,000 and the Coast Guard demanding \$750,000 . . . [Later], the Coast Guard reduced its bond demand to \$700,000, which the Owner promptly rejected as a 'non-starter.' Second, the parties could not reach an accord on provisions for the eight crew members whose presence in Mobile the Coast Guard requires as its APPS investigation proceeds." (citations omitted)).

<sup>178</sup> *Id.* at 1242.

by requiring ‘a waiver of rights and defenses’ and ‘infring[ing] upon the rights and liberties of foreign seafarers.’<sup>179</sup>

The district court first dismissed the vessel owner’s procedural claims as “[y]ing] outside the scope of the Administrative Procedure Act, inasmuch as the Coast Guard’s actions are ‘committed to agency discretion by law.’”<sup>180</sup> The district court then turned to the vessel owner’s constitutional claims.<sup>181</sup> Despite ultimately holding that jurisdiction did not exist to review the Coast Guard’s action,<sup>182</sup> the district court seemed to review the vessel owner’s constitutional claim on its merits.<sup>183</sup> The district court also held that the vessel owner’s due process rights had not been violated by the Coast Guard since the vessel owner had not availed itself of the administrative review process.<sup>184</sup> According to the district court, since the vessel owners declined to bring their procedural grievances within the administrative process, the vessel owner’s due process rights had not been abridged, though the court couched this holding in terms of denying jurisdiction.<sup>185</sup>

In *Wilmina Shipping AS v. United States Department of Homeland Security*, the Coast Guard conducted an inspection of a Norwegian-flagged vessel while the vessel was docked in Corpus Christi, Texas.<sup>186</sup> While aboard the vessel, the Coast Guard found “certain of the ship’s pollution control devices to be inoperable or disarmed in violation of U.S. laws and international treaties.”<sup>187</sup> Instead of putting a customs hold

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<sup>179</sup> *Id.* at 1250 n.16 (second alteration in original).

<sup>180</sup> *Id.* at 1249 (“There is no law to apply and no meaningful standard against which to judge the Coast Guard’s exercise of its discretion . . . in setting terms for a surety agreement under which customs clearance would be granted to the Vessel; therefore, that decision is not subject to judicial review under the APA, and the APA cannot provide a jurisdictional basis for the Emergency Motion and Petition.”).

<sup>181</sup> *Id.* at 1250.

<sup>182</sup> *Id.* at 1253.

<sup>183</sup> *Id.* at 1250 (“[P]etitioners argue that ‘the District Court is empowered to act to prevent a manifest injustice or the abridgment of Petitioner’s due process rights.’ There is no indication of ‘manifest injustice’ here. The Coast Guard and the Owner have attempted to negotiate a surety agreement. The Owner has declined the Coast Guard’s final offer, although it could decide otherwise if it chooses.” (citation omitted)).

<sup>184</sup> *Id.* (“Petitioners enjoy a due process right to seek reconsideration or bring an administrative appeal of the Coast Guard’s decision concerning surety agreement terms, and to potential judicial review (at a minimum, in the form of an action for damages arising from unreasonable detention or delay of the Vessel). To date, however, they have attempted to circumvent these procedures by filing a lawsuit targeted outside the APPS administrative and judicial review scheme.”).

<sup>185</sup> *Id.*

<sup>186</sup> 934 F. Supp. 2d 1, 2 (D.D.C. 2013).

<sup>187</sup> *Id.*; see also *id.* at 4 (“The deficiencies cited in the report included the facts that: the ship’s oily water separator . . . was inoperable; a discharge pipe, which was supposed to run between the oily water separator and through the ship’s hull, had been removed; and parts of the oily water separator were found in a chemical locker. . . . Finally, [the Coast Guard] found that the ship failed to maintain proper records in its oil record book.”).

on the vessel like in *Angelex* and *Giuseppe Bottiglieri*, the Coast Guard revoked the paperwork necessary for the vessel to operate in United States waters and ordered that the vessel could not enter United States waters for three years or until it came up with an environmental plan and passed a year's worth of audits.<sup>188</sup> The Coast Guard possessed the ability to ban the vessel from United States waters under the APPS.<sup>189</sup>

As a result of the Coast Guard's actions, the vessel owners alleged that the Coast Guard lacked the authority to act as it did and that the Coast Guard did not provide the vessel owners with due process.<sup>190</sup> The district court held that the Coast Guard had the statutory authority under the APPS to exclude the vessel from United States waters, but that the Coast Guard erred in not providing the vessel owners a path for reinstatement within the first three years.<sup>191</sup>

The district court then turned to the vessel owners' constitutional claims and judged them on their merits, implying that the district court had jurisdiction to adjudicate the claims in the first place.<sup>192</sup> On the merits, the district court held that "[t]o prevail on their due process claim, [the vessel owners] must demonstrate that they possessed a constitutionally protected property or liberty interest and that they were deprived of that interest without sufficient legal process."<sup>193</sup> The district court held that the vessel owners possessed the requisite property interest,<sup>194</sup> but that the vessel owners were not entitled to a hearing before the Coast Guard revoked the vessel's certificate because the vessel owners could have appealed the decision within the Coast Guard.<sup>195</sup> Since the vessel owners had not availed themselves of the appeals process, the district court held that the vessel owners' due process rights had not been violated by the Coast Guard.<sup>196</sup>

Three federal courts have dealt with due process claims relating to the Coast Guard's magic pipe enforcement under the APPS.<sup>197</sup> Those three courts have

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<sup>188</sup> *Id.* at 2.

<sup>189</sup> *Id.* at 9.

<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.* at 20 ("[T]he Court rules that the Coast Guard had the authority to revoke the [vessel's] certificate and to impose as conditions for its reissuance the submission of a satisfactory environmental plan and a year of successful audits. But it did not have the authority to ban the ship from entering U.S. waters for a term of three years, and that term of the Order is hereby declared invalid.").

<sup>192</sup> *Id.* at 15–20. The district court did not analyze whether it held jurisdiction to review the constitutional claim.

<sup>193</sup> *Id.* at 15.

<sup>194</sup> *Id.* at 17 ("[T]he Court holds that [the vessel owners] have a constitutionally protected property interest in the [vessel's] certificate of service . . .").

<sup>195</sup> *Id.* at 17–19 ("All that is required before the deprivation of a protected interest is 'notice and opportunity for hearing appropriate to the nature of the case.' . . . The Coast Guard's appeals process provides opportunity for reconsideration of an order, two levels of further appeal within the agency with the opportunity for plaintiffs to provide documentation and evidence as well as rebuttal materials, and a final appeal decided on the record.").

<sup>196</sup> *Id.* at 3.

<sup>197</sup> See *Angelex Ltd. v. United States*, 723 F.3d 500 (4th Cir. 2013); *Wilmina Shipping*, 934

inconsistently held that federal courts have jurisdiction to hear such claims in the first place.<sup>198</sup> The Fourth Circuit in *Angelex* held that the courts did not have jurisdiction to entertain a constitutional challenge of the Coast Guard's actions under the APPS.<sup>199</sup> The district court in *Giuseppe Bottiglieri* held that it also did not possess jurisdiction, but actually seemed to evaluate the vessel owner's constitutional claim on the merits.<sup>200</sup> Finally, the district court in *Wilmina Shipping* adjudicated the vessel owners' constitutional claim on the merits without devoting any discussion to its jurisdiction to engage in such an analysis.<sup>201</sup>

A fourth court, in dicta, suggested that the *Angelex* court was mistaken in its refusal to grant subject matter jurisdiction to Angelex's constitutional claims.<sup>202</sup> In *Watervale Marine Co. v. United States Department of Homeland Security*, the Coast Guard placed customs holds on multiple vessels owned by the plaintiffs for unspecified violations of the APPS.<sup>203</sup> Unlike Angelex and other vessel owners in the aforementioned cases, the vessel owners in *Watervale Marine Co.* paid the bond requested by the Coast Guard and agreed to the required security agreements.<sup>204</sup> Following the release of the vessels, the owners then challenged the Coast Guard's bond requirements through the Coast Guard's administrative review process and then the owners brought an action in the district court alleging, among other claims, that the Coast Guard abused its discretion under the APPS and that the Coast Guard acted arbitrarily and capriciously.<sup>205</sup>

The district court ultimately concluded that the Coast Guard's actions were procedurally unreviewable by the court.<sup>206</sup> However, the court noted that, even when it could not review the Coast Guard's actions procedurally, it could still review Coast Guard action for constitutional violations: "[T]here is nothing to prevent a court from considering constitutional challenges to the Coast Guard's departure clearance demands."<sup>207</sup> The court continued, holding that "judicial review of a constitutional

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F. Supp. 2d 1; *Giuseppe Bottiglieri Shipping Co. v. United States*, 843 F. Supp. 2d 1241 (S.D. Ala. 2012).

<sup>198</sup> *Angelex*, 723 F.3d at 502 (no jurisdiction); *Wilmina Shipping*, 934 F. Supp. 2d 1 (did not rule on a jurisdiction issue); *Giuseppe Bottiglieri*, 843 F. Supp. 2d 1241 (no jurisdiction but evaluated constitutional claims).

<sup>199</sup> *Angelex*, 723 F.3d at 502.

<sup>200</sup> *Giuseppe Bottiglieri*, 843 F. Supp. 2d at 1249–50.

<sup>201</sup> *Wilmina Shipping*, 934 F. Supp. 2d at 3.

<sup>202</sup> *Watervale Marine Co. v. U.S. Dep't of Homeland Sec.*, No. 12-cv-0105, 2014 U.S. Dist. LEXIS 97819, at \*39–41 (D.D.C. July 18, 2014).

<sup>203</sup> *Id.* at \*4.

<sup>204</sup> *Id.* at \*15.

<sup>205</sup> *Id.* at \*15–19.

<sup>206</sup> *Id.* at \*71–72 ("[The] statute makes clear that the Coast Guard 'may' release the vessel upon the posting of such a bond, and does not provide any standards for this Court to apply when evaluating the Coast Guard's decision not to grant departure clearance even if a bond is posted without satisfaction of other conditions.").

<sup>207</sup> *Id.* at \*67 (citing *Webster v. Doe*, 486 U.S. 592, 603–04 (1988)).



due process claim that challenges unconscionable clearance conditions as wholly unconscionable would prevent absurd results.<sup>208</sup> The court concluded, holding that the availability of constitutional review of the Coast Guard's actions provided a necessary check on overreaching by the Coast Guard.<sup>209</sup> If anything, the court seemed miffed as to why the plaintiffs in *Watervale Marine Co.* did not bring a constitutional claim.<sup>210</sup>

A court split across multiple federal districts and circuits is especially troubling in the area of international shipping. In *Angelex, Giuseppe Bottiglieri, and Wilmina Shipping*, the vessels were foreign-flagged and held by foreign corporations.<sup>211</sup> Inconsistent rulings depending on the jurisdiction a vessel is in would make it tough for foreign corporations to effectively assert their rights. Complicating this is the fact that vessels often make multiple ports-of-call in the United States, and depending on where the Coast Guard decides to enforce the APPS determines whether the shipping companies have jurisdiction to bring a constitutional claim.<sup>212</sup>

#### IX. THE NEED FOR CONSTITUTIONAL REVIEW IN MAGIC PIPE CASES

The need for courts to find jurisdiction for constitutional claims in magic pipe cases is amplified by two other factors: the Coast Guard's zeal to institute actions under the APPS on very little evidence and the possible payday available to magic pipe whistle-blowers. In recent years, the Coast Guard has dramatically increased its enforcement of regulations against foreign-flagged vessels.<sup>213</sup> This increased enforcement by the Coast Guard "has led to a rash of vessel and crew detentions, as well as criminal allegations and charges against vessel owners, operators, managers, officers, and

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<sup>208</sup> *Id.* at \*67–68 (citing *Estate of Phillips v. District of Columbia*, 455 F.3d 397, 403 (D.C. Cir. 2006)).

<sup>209</sup> *Id.* at \*68 ("Thus, a finding that this Court can review Plaintiffs' APA claim is not necessary in order to avoid the agency overreach that the Plaintiffs fear."). The *Watervale Marine Co.* Court, therefore, held it proper for a vessel owner to use constitutional review in the exact way *Angelex* attempted to use constitutional review.

<sup>210</sup> *Id.* at \*68 n.16 (noting that while the plaintiff's complaint alleged a constitutional violation by the Coast Guard, "Plaintiffs have not stated a claim directly under any constitutional provision").

<sup>211</sup> See *Angelex Ltd. v. United States*, 723 F.3d 500, 503 (4th Cir. 2013); *Wilmina Shipping Co. v. U.S. Dep't. of Homeland Sec.*, 934 F. Supp. 2d 1, 2 (D.D.C. 2013); *Giuseppe Bottiglieri Shipping Co. v. United States*, 843 F. Supp. 2d 1241, 1243 (S.D. Ala. 2012).

<sup>212</sup> Compare *Angelex*, 723 F.3d at 502 (stating there was no jurisdiction to bring claim in Fourth Circuit), with *Wilmina Shipping*, 934 F. Supp. 2d at 3 (stating there was jurisdiction to evaluate claim in the District of Columbia).

<sup>213</sup> Parrish et al., *supra* note 63, at 1009 ("The United States has become increasingly aggressive in pursuing violators of APPS, especially as it relates to the bypassing of a vessel's oily water separator. . . ."); see also *id.* ("As a result of aggressive federal enforcement, as well as heightened security after the events of September 11, 2001 . . . [there] has been a significant increase in the scrutiny with which vessels and the vessels' records and logs are being inspected.").

crews.”<sup>214</sup> The Coast Guard has almost exclusively enforced the APPS against foreign corporations.<sup>215</sup>

Not only has the Coast Guard increased its enforcement of the APPS with regard to magic pipes, but it has often done so with scant evidence.<sup>216</sup> “Due to the zealotness of prosecutors and the steadily increasing weight of criminal penalties, some within the maritime industry have categorized DOJ prosecutions . . . as a ‘witch-hunt.’”<sup>217</sup> This has led the Department of Justice to “currently average[] approximately two to four new vessel pollution cases per month.”<sup>218</sup>

The increase in the number of APPS cases also results from the potential payday the law affords whistle-blowers. Under the current scheme, crew members who blow the whistle on their vessel’s APPS violations may be awarded up to half of any criminal fine paid by the vessel owner.<sup>219</sup> Rewards for whistle-blowers under the APPS can be substantial. For instance, in *United States v. Overseas Shipholding Group, Inc.*, the district court awarded \$437,500 to each of the twelve whistle-blowers involved in an APPS case.<sup>220</sup> In reviewing the district court’s ruling, the Court of Appeals for the First Circuit also awarded a total sum of \$50,000 in attorney’s fees to two of the whistle-blowers.<sup>221</sup> As a result of the large potential payday available to magic pipe whistle-blowers, “[a]pproximately one-third of new vessel pollution prosecutions brought by the Department of Justice are now initiated by crew members recounting illegal discharge activity to port authorities.”<sup>222</sup> The possible rewards available to whistle-blowers under the APPS have been well publicized within the maritime community.<sup>223</sup>

Given the potentially huge paydays awaiting APPS whistle-blowers, fact finders have grown increasingly skeptical of magic pipe claims made by crew members. In

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<sup>214</sup> *Id.* at 1009–10.

<sup>215</sup> Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1826 (2011) (“APPS cases typically have been brought against foreign ship owners. Only two out of forty-three of the APPS convictions located involved domestic firms and the forty-one others were foreign. After all, few commercial shipping concerns flag or register their vessels in the United States.”).

<sup>216</sup> Parrish et al., *supra* note 63, at 1010 (“[E]ven when pollution is not discovered, the Coast Guard and federal prosecutors, upon the mere discovery of a flexible hose or other suspicious looking equipment in the engine room, may well commence a grand jury investigation seeking to prosecute an alleged illegal bypassing of the [oily water separator] system and/or the presentation of an oil record book containing false entries.”).

<sup>217</sup> Homer, *supra* note 77, at 156.

<sup>218</sup> Garrett, *supra* note 215, at 1827.

<sup>219</sup> 33 C.F.R. § 151.04(c)(2013) (“In the discretion of the Court, an amount equal to not more than one-half of the fine may be paid to the person giving information leading to conviction.”).

<sup>220</sup> 625 F.3d 1, 6 (1st Cir. 2010).

<sup>221</sup> *Id.* at 15.

<sup>222</sup> James D. Oesterle, “Citizen Rewards” to Promote Environmental Crimes Prosecutions, 23 NAT. RESOURCES & ENV’T 46, 46 (2009).

<sup>223</sup> *Id.* at 48 (“Seafarer’s unions and trade publications have reported on past cases and informed their members of the prospect for rewards.”).

the criminal trial of an engineer accused of employing a magic pipe on his vessel, the district court found that at least one of the whistle-blowers was motivated by the possible reward and made false statements as a result.<sup>224</sup> The engineer was acquitted by the court on all three felony charges.<sup>225</sup> Other courts have similarly found whistle-blowers incredible.<sup>226</sup>

Combined with the Coast Guard's eagerness to institute APPS proceedings at the drop of a hat and the personal motivations for whistle-blowers to bring suspect claims, the Fourth Circuit's denial of jurisdiction in *Angelex* creates a perfect storm for vessel owners going forward. As in *Angelex*, the vessel owner may be forced to pay thousands of dollars after the Coast Guard places a hold on the company's vessel based on little evidence, or worse, fabricated evidence by a whistle-blower, and the vessel owner has no forum to challenge the action. The Coast Guard, in *Angelex*, made it incredibly clear it was unwilling to negotiate on the bond amount to release the *Pappadakis*, and the Fourth Circuit denied that a constitutional claim could even be brought to challenge the action. Vessel owners are therefore left without a forum to contest even frivolous actions. While the vessel owner in *Angelex* ultimately stayed in business, given the seeming inability for a vessel owner to bring a claim anywhere, it appears a distinct possibility that the Coast Guard has absolute free reign to bankrupt a company absent any judicial intervention.

#### CONCLUSION

The final result in the *Angelex* litigation drives home the dangers of refusing to grant vessel owners jurisdiction for constitutional challenges to the Coast Guard's actions in magic pipe cases. The criminal trial related to the *Pappadakis*' alleged magic pipe concluded on September 13, 2013.<sup>227</sup> After two full days of deliberations, the jury returned a verdict finding both the *Pappadakis*' owner and operator not

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<sup>224</sup> See Appellant's Brief at 36–37, *United States v. Taohim*, No. 12-14316 (11th Cir. July 30, 2013), 2012 WL 5457601 (describing *United States v. Georgakondis*, 2:07-cr-00024-DLJ-2 (E.D. Cal. 2007), a case where the judge found at least one whistle-blower to be untrustworthy and noting how such a reward was a motivation to lie).

<sup>225</sup> *Id.*

<sup>226</sup> See, e.g., *Greek Chief Engineer Acquitted in Texas Magic Pipe Pollution Trial*, MARITIME EXECUTIVE (May 6, 2010), <http://www.maritime-executive.com/article/2010-5-6-greek-chief-engineer-acquitted-texas-magic-pipe-pollution-trial/> (“Council [sic] for [the charged chief engineer of a vessel] demonstrated the crew misled the government about the chief engineer's involvement in return for grants of immunity. The jury found the crew members were not credible.”).

<sup>227</sup> Robert McCabe, *Engineer Guilty in Dumping; Coal Ship May Soon Depart*, THE VIRGINIA PILOT (Sept. 14, 2013), <http://hamptonroads.com/2013/09/engineer-guilty-dumping-coal-ship-may-soon-depart>.

guilty on all charges.<sup>228</sup> The *Pappadakis*' chief engineer, however, was convicted of seven charges, but was acquitted of a charge of conspiracy.<sup>229</sup> The court released the chief engineer on bond until his sentencing.<sup>230</sup> On October 2, 2013, the *Pappadakis* finally left Portsmouth.<sup>231</sup>

While the result of the criminal trial undoubtedly led to some nervous times for the *Pappadakis*' former chief engineer, the vessel ultimately left Hampton Roads without having to pay any fines related to the magic pipe on board.<sup>232</sup> Yet, the months of litigation hardly seem to justify the result. The *Pappadakis* was not allowed to leave without posting millions of dollars in bond, but her chief engineer, the only person who was found guilty of any wrongdoing, was immediately released on bond upon his conviction.<sup>233</sup>

The Supreme Court created a strong presumption of judicial review of agency action over constitutional claims. Despite that longstanding presumption, the Fourth Circuit in *Angelex* refused to even grant jurisdiction to hear a constitutional challenge to the Coast Guard's actions. At no point was the Coast Guard required to demonstrate to a court why its effective detention of the *Pappadakis* was necessary. And, ultimately, a jury held the detention was not warranted. Had the Fourth Circuit simply exercised the jurisdiction over *Angelex*'s constitutional claim, much of that unnecessary expense could have been spared.

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<sup>228</sup> *Id.* (“A jury in a federal criminal trial found two corporate defendants, the owner and operator of the Maltese-flag vessel Antonis G. Pappadakis, not guilty Friday on eight charges related to the dumping of oily wastewater at sea and the failure to keep an accurate account of the ship’s oil discharges.”).

<sup>229</sup> *Id.* (“The chief engineer on the ship, however, was convicted on seven of the eight charges, including falsification of records and obstruction of justice. He was acquitted of a conspiracy charge.”).

<sup>230</sup> *Id.* (“Lambros Katsipis, 59, of Greece was released on bond and will be sentenced Dec. 16. He faces up to three years in prison.”).

<sup>231</sup> *Detained Coal Ship Departs Portsmouth After Trial*, WVEC.com (Oct. 3, 2013, 6:00 AM), <http://www.13newsnow.com/story/news/2014/09/10/14831388>.

<sup>232</sup> See McCabe, *supra* note 227.

<sup>233</sup> *Id.*

