Renewing the Call to Reform the Federal Employee Complaint, Appeal and Grievance Systems

By
Lance Edmond Freeman
B.A., May 1999, Emory University
J.D., May 2002, Regent University School of Law

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Charles B. Craver
Freda H. Alverson Professor of Law

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Abstract

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With the passage of the Civil Service Reform Act of 1978 (CSRA), the current federal employee complaint, appeal, and grievance systems were implemented. Although the reform was significant and had much promise, it has developed into a lengthy and complex process. This paper is divided into seven parts. Part I is an introduction of the problem. Part II is an historical overview of the federal employee complaint, appeal, and grievance systems leading up to the CSRA. Part III is an overview of the systems established by the CSRA. Part IV is a discussion of the problems with the systems implemented by the CSRA. Part V considers four proposals for reforming the systems. Part VI makes additional recommendations for reform. Part VII is a brief conclusion with a call to action.

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I. INTRODUCTION

It has been said that "civil service reform is *always* necessary."[1] In his 1978 State of the Union address, President Carter went so far as to state "civil service reform was 'absolutely vital.'"[2] The Civil Service Reform Act of 1978 (CSRA)[3] was passed by Congress and signed into law by President Jimmy Carter on October 13, 1978. The federal employee complaint, appeal and grievance systems were implemented by the CSRA. The same systems implemented by the CSRA still exist some 33 years later. Although the CSRA was passed with the best of intentions, two scenarios really illustrate why the systems that govern the federal complaint, appeal, and grievance processes need to be reformed. The first scenario was part of a statement by William L. Bransford, General Counsel of the Senior Executives Association, to Congress during a House Committee hearing on government reform.

> Assume a manager wants to give a lowered performance appraisal with some negative comments because that manager in good faith believes the employee's performance is substandard. That manager risks the employee's visit to the EEO officer to complain about discrimination, which could result in a complaint naming the manager as a responsible management official, a complaint that could eventually continue on for years, tying the manager's hand with the threat of a reprisal complaint if the manager proceeds with further action.
>
> Alternatively, the employee can file a union grievance that the union can take to arbitration for those employees in a bargaining unit. A third possibility is for the employee to claim that a performance appraisal is

[1] David T. Stanley, *Civil Service Reform, Then and Now: A Sojourner's Outlook in* LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978 258, 258 (Patricia W. Ingraham & Carolyn Ban eds., 1984).
[2] Patricia W. Ingraham, *The Civil Service Reform Act of 1978: Its Design and Legislative History in* LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978 13, 15 (Patricia W. Ingraham & Carolyn Ban eds., 1984).
[3] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

> whistleblower reprisal if the employee has had a past disagreement with a supervisor that the employee calls a protected disclosure. This would then go to the Office of Special Counsel, and the employee could eventually appeal to the Merit Systems Protection Board. All of these avenues are readily available, and often are used for just one performance appraisal.
>
> If the manager decides that the same employee is performing or behaving so poorly that he or she should be disciplined, the appeals process becomes even more complicated. The employee can appeal directly to the Merit Systems Protection Board if the proposed discipline is removal, demotion or a suspension of more than 14 days. At the MSPB, the employee can raise EEO defenses in what is called a mixed case. As an alternative, the employee can choose to utilize the agency EEO process with an eventual appeal on an adverse action to the MSPB. The employee can then go to federal court or to the EEOC. Or, if the employee does not go through the agency EEO process, but claims discrimination, the employee can still go to the EEOC and to federal district court after the MSPB. Again, whistleblower reprisal claims can go [to] the Office of Special Counsel or to the MSPB directly for a covered adverse action. Employees in a bargaining unit can choose to go to the MSPB or, with the consent of their labor union, to arbitration.[4]

Another scenario amplifies the issues and was presented in an article by David L. Feder, who at the time was an Assistant General Counsel at the Federal Labor Relations Authority (FLRA). His scenario follows.

> An agency gives notice to the exclusive representative that it is planning to implement a reduction in force (RIF). The union requests bargaining and submits bargaining proposals. The parties' contract contains a clause requiring a notice period prior to the issuance of a notice of a RIF but is silent as to other matters, such as competitive areas.
>
> The parties meet, negotiate, agree on some proposals, and disagree on others. The agency also asserts that some of the union's proposals are nonnegotiable and implements the RIF prior to an agreement. The union files a negotiability appeal with the FLRA, challenging the agency's declaration of nonnegotiability. The union also files a ULP alleging that the agency implemented a RIF without fulfilling its statutory bargaining obligations, such as negotiating the competitive areas. The union also

[4] *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court, Hearing Before the H. Subcomm. on the Fed. Workplace and Agency Org. of the H. Comm. on Gov't Reform*, 109th Cong. 18 (2005) (statement of William L. Bransford, Gen. Couns. of the Senior Executives Association).

> alleges in a separate ULP that the agency held formal discussions regarding the RIF with employees without giving the union an opportunity to be present. The union also files a request for assistance with the FMCS and the FSIP to resolve the impasse over some of the union's proposals.
>
> In addition, the union files a grievance under its negotiated agreement alleging that the agency did not adhere to the notice provision prior to implementing the RIF. Individual employees challenge the procedures utilized to implement the RIF by filing an appeal of their reduction in grade or termination with the MSPB. Oh yes, a couple of employees allege in separate ULP charges and some by grievances filed by themselves as individuals that they were specifically targeted for a RIF due to their protected union activities and "set up" with lower performance appraisals. A couple of other employees allege that they were targeted by the furlough on a discriminatory basis, either their race, color, religion, sex, national origin, age, handicap condition, marital status, or political affiliation. A few file grievances under the negotiated contract. Others elect to raise these allegations in a mixed case before the MSPB, and possibly the EEOC and the Special Panel.
>
> An employee not in the bargaining unit challenges the RIF under the agency's administrative grievance procedure. Yet a few others go directly to the Office of Special Counsel … and request a stay. One employee even requests the Special Counsel to take corrective action against a supervisor for sexual harassment associated with the RIF…. The entire dispute involves a RIF by an agency impacting on unit employees and their representative. [5]

According to the 1978 Senate Report, the CSRA was promoted as a promising change to "the lengthy and complex appeals processes" in existence prior to the CSRA that adversely affected both employees and managers.[6] It was thought that the CSRA would "accelerate the personnel action process while protecting employees' rights to fair treatment."[7] The procedures would now be simpler and more expedient.[8]

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[5] David L. Feder, *"Pick A Forum – Any Forum": A Proposal for A Federal Dispute Resolution Board*, LAB. L. J., MAY 1989, at 268, 269-270.
[6] S. REP. NO. 95-969, at 9 (1978).
[7] *Id*. at 10.
[8] *Id.*

However, when thinking about the current federal employees complaint, appeals, and grievance systems established by the CSRA words like "simply, expedient, and accelerated" don't come to mind. Words like "lengthy and complex" are more like it. Almost since the passage of the CSRA, there has been a persistent call for change. While there have been ideas for change, the fortitude to take meaningful action by those empowered to act has been lacking. For the better of federal employees and supervisors, the status quo must change.

The focus of this paper will be on the federal employee complaint, grievance, and appeal systems. Unfortunately, as the scenarios above demonstrate it is possible for disputes out of the same set of facts to be pending before more than one forum. To that end, this paper attempts to shed light on the viewpoints that have been raised over the years calling for reforming the system and adds the author's own view on what reform should look like. Although informative, the author acknowledges that neither the viewpoints nor the issues are meant to be exhaustive, rather the author is merely attempting to conjure up new interests in a reoccurring concept, civil service reform.

This paper is divided into seven parts. Parts II and III provide background on the past and present. Part II is an historical overview of the federal employee complaint, appeal, and grievance systems leading up to the CSRA. Part III is an overview of the systems established by the CSRA. Part IV is a discussion of the problems with the federal employee complaint, appeal and grievance systems that were implemented by the CSRA. Part V considers four proposals for reforming the systems. Part VI makes additional recommendations for reform. Part VII is a brief conclusion with a call to action.

II. HISTORICAL OVERVIEW

A. Before The Pendleton Act of 1883

Following America's independence, during the administrations of Presidents George Washington[9] and John Adams, there was not much controversy over the civil service.[10] At this time the civil service was in its infancy, there were not many holdovers, and most appointments went to Federalists.[11] This changed as the civil service grew with subsequent administrations into a "spoils system."[12]

"[F]ollowing the Civil War civil service reform became one of the key national political issues of the time."[13] Debate over reforming the civil service continued into the 1880s, when an assassin's bullet mobilized public opinion towards legislation.[14] The "disappointed office seeker" shot President James Garfield on July 2, 1881 and he died on September 19, 1881.[15] Between the time when President Garfield was shot and died, reformers found "two consolations."[16]

> First, the world would see the "corruptness" of New York state politics out of which Vice-President Arthur had emerged. Second, the need for civil service reform would be emphasized by showing "that it will not do to

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[9] H. Manley Case, *Project on the Merit Systems Protection Board: The Civil Service Reform Act of 1978: Article: Federal Employee Job Rights: The Pendleton Act of 1883 to The Civil Service Reform Act of 1978*, 29 HOW. L. J. 283, 284 & n.8 (1986) ("President Washington is said to have appointed not those merely fit, but those most fit; did not practice preference for revolutionary war veterans; considered relationship an absolute bar to appointment; and refused to make 'public office a bounty.' His guide for selection was superior efficiency.") (citing to C. FISH, THE CIVIL SERVICE AND PATRONAGE 1 (1920)).
[10] *Id*. at 284.
[11] *Id*.
[12] *Id*. at 284-85 ("The practice of making wholesale appointments based on patronage.").
[13] *Id*. at 285.
[14] *Id*. at 285-87.
[15] *Id*. at 287 & n. 20.
[16] ROBERT G. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW 1 (1976).

> lead great hordes of shiftless half-cracked ne'er-do-wells to look to the Government for a living when their friends get tired of supporting them."[17]

Once President Garfield died, reformers now had "a single, emotion-packed illustration . . . [t]he spoils system equaled murder." [18]

B. The Pendleton Act of 1883

Chester Arthur was now president. Although a "spoilsman," President Arthur advocated reform.[19] He supported Senator George H. Pendleton's bill. President Arthur signed the Pendleton Act[20] into law on January 16, 1883.[21] The Pendleton Act spurred the replacement of the spoils system.[22]

With passage of the Pendleton Act, also known as the Civil Service Act of 1883, the competitive federal service was established. [23] The modern civil service was born.[24] The Pendleton Act called for creating a Civil Service Commission with a goal of creating a neutral civil service.[25] The appointment of three civil service commissioners was authorized.[26] The Commission's duties included implementing a merit system to regulate appointments by providing competitive examinations and using those results to fill

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[17] *Id*. (citation omitted).
[18] Case, *supra* note 9, at 287 (citing to A. HOOGENBOOM, OUTLAWING THE SPOILS 6 (1961).
[19] *Id*.
[20] The Pendleton Act, 47 Cong. Ch. 27, 22 Stat. 403 (1883) (current version at 5 U.S.C. § 1101).
[21] Case, *supra* note 9, at 288.
[22] *Civil Service Reform I: NPR and The Case for Reform: Hearing Before the Subcomm. On Civil Service of the H. Comm. on Government Reform and Oversight*, 104th Cong. 66 (1995) (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues, General Government Division, United States General Accounting Office).
[23] *Id.* at 66.
[24] VAUGHN, *supra* note 16, at 1.
[25] Case, *supra* note 9, at 287-88.
[26] The Pendleton Act, § 1.

vacancies.[27] The Commission was also responsible for preventing the use of the civil service for political purposes.[28] Employees were forbidden from coercing others into political acts.[29] Also, the practice of assessments was prohibited through penalty provisions.[30] Investigatory powers were given to the Commission "to insure that political influence would be eliminated from the competitive service."[31]

When it came to removals, except for cases where employees refused to engage in political activity, the Pendleton Act lacked protections, in either process or review, against employees being removed.[32] The Pendleton Act failed to deal with the important question of how to rid the service of incompetent personnel while protecting those who were competent.[33] Oddly enough, management's desire for absolute removal authority was openly supported by reformers.[34] Although the early Civil Service Commission investigated alleged political removals, assessments, and cases involving illegal political action, presidential support dictated whether enforcement was successful.[35] There was not a required removal process for appointing officials to follow.[36] Nevertheless, "the front door of federal employment practices had [now] been screened."[37]

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[27] William V. Luneburg, *The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*, 78 Ky. L. J. 1, 6 (1990).
[28] *Id.*
[29] Case, *supra* note 9, at 287-88.
[30] *Id*.
[31] The Pendleton Act, § 2.
[32] Luneburg, *supra* note 27, at 7.
[33] VAUGHN, *supra* note 16, at 17.
[34] Luneburg, *supra* note 27, at 7; *See also*, Case, *supra* note 9, at 288.
[35] Case, *supra* note 9, at 288-89 (citing to P. VAN PIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 19 (1958).
[36] *Id*. at 289.
[37] *Id*. at 288.

C. Executive Orders

With President William McKinley's Executive Order of July 27, 1897, regulations were imposed on the removal process.[38] Executive Order No. 101 required "just cause" removal for employees in the classified service with the reasons for removal in writing.[39] Employees were also afforded an opportunity to reply in writing.[40] However, the Executive Order lacked the right to a hearing and the courts did not rule one was required.[41]

During Theodore Roosevelt's presidency the removal policy reverted to one of little control.[42] Subsequently, President William Taft, on the threat of legislative action, reinstated a process allowing for minimal procedure.[43]

D. The Lloyd-LaFollette Act of 1912

In 1912, Congress took action to protect employees by passing the Lloyd-LaFollette Act.[44] Under Section 6, no removals of classified service personnel were permitted "except for such cause as will promote the efficiency of said service."[45] Reasons for removal were required in writing.[46] Although hearings were not required, employees were "allowed a reasonable time for personally answering the [reasons] in

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[38] *Id*. at 289.
[39] Luneburg, *supra* note 27, at 7 (citation omitted).
[40] *Id*. at 7-8 (citation omitted).
[41] Case, *supra* note 9, at 287-88; *See* United States *ex rel.* Taylor v. Taft, 203 U.S. 461 (1906).
[42] Case, *supra* note 9, at 289.
[43] *Id*. at 289.
[44] Lloyd-LaFollette Act, ch. 389, 37 Stat. 539 (1912) (current version at 5 U.S.C. § 7511).
[45] *Id*. §6, at 555
[46] *Id.*

writing; and affidavits in support."[47] Additionally, employees were given unfettered rights to petition Congress on labor conditions and affiliate with approved unions.[48] The Act also required records of reasons for removals and reductions in rank or pay be kept and provided upon request to both the employee and the Civil Service Commission. [49] Therefore, Section 6 incorporated "the removal protections of the original McKinley order … in an enlarged fashion …."[50]

E. Board of Appeals and Review

Although the Civil Service Commission, under the Lloyd-LaFollette Act, was able to review records of removals, the Commission believed its authority was limited to procedural review of removal actions.[51] As a result, the Commission worked towards creating

> a statutory board or 'court of appeals' with power to hear and determine final appeals of employees in the classified service who have been reduced in salary, rank, or grade, suspended from duty, or dismissed from the service . . . a decision of such court or board to be binding upon the department or office concerned. [52]

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[47] *Id.*
[48] *Id.*; *See also* Luneburg, *supra* note 27, at 8 & n.14 ("This provision negated President Theodore Roosevelt's so-called 'gag orders,' 'executive orders in 1902 and 1904 that forbade federal employees, on pain of dismissal, to seek pay increases or to attempt to influence legislation before the Congress, either as individuals or as members of organizations, except through the heads of their departments.'") (citing to JAY M. SHAFRITZ, THE DORSEY DICTIONARY OF AMERICAN GOVERNMENT AND POLITICS 239 (1988)).
[49] Lloyd-LaFollete Act, §6, 37 Stat. 555.
[50] Case, *supra* note 9, at 290.
[51] Egon Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U. L. REV. 323, 332 (1970).
[52] *Id*. at 323 (quoting from 48 UNITED STATES CIVIL SERVICE COMMISSION ANNUAL REPORT 41 (1931)).

However, on November 26, 1930, while waiting for Congressional action on its request for a "statutory board or court of appeals" the Commission took matters into its own hands and administratively created a Board of Appeals and Review.[53] The Board of Appeals and Review's stated purpose included serving as an independent tribunal reviewing the merits of personnel actions.[54]

Even though viewed as management oriented, the Board of Appeals and Review served as the avenue for administrative appeals for federal employees from 1930 until 1979.[55] During this time the Board of Appeals and Review functioned as the supreme tribunal and operated over regional appeals offices, which served as trial level tribunals; however, the Commission retained "ultimate decisional authority."[56]

F. The Veterans Preference Act

In 1944, federal employees who were also veterans received additional protections with the Veterans Preference Act.[57] Under Section 14, federal employees who were veterans received procedural rights that exceeded those provided to other federal employees under Section 6 of the Lloyd-LaFollette Act.[58] For instance, veterans could not be "discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation or debarred from future appointment except for such

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[53] *Id*. at 323.
[54] *Id*. at 323-34.
[55] Case, *supra* note 9, at 290 (citing to Civil Service Reform Act of 1978, § 905, 92 Stat. at 1224; Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36,037 (1978), *reprinted in* 92 Stat. 3783; Exec. Order No. 12,107, 44 Fed. Reg. 1055, 3 C.F.R. 264 (1978)).
[56] *Id*. at 290.
[57] Veterans Preference Act, ch. 287, 58 Stat. 387 (1944), amended by Act of June 22, 1948, ch. 602, 58 Stat. 575; Act of June 10, 1948, ch. 447, 58 Stat. 354; Act of March 30, 1966, 80 Stat. 94 (codified as amended in scattered sections of 5 U.S.C.)).
[58] Case, *supra* note 9, at 291.

cause as will promote the efficiency of the service and for reasons given in writing."[59]

Section 14 also provided appeal rights, which required "at least thirty days advance written notice stating the reasons in detail, a reasonable time to answer both personally and in writing and to furnish affidavits in support of the answer, and the right to appeal on the merits to the Civil Service Commission."[60] Upon appealing to the Commission the employee could appear personally or through a representative in accordance with applicable regulations.[61] Following its investigation and review of the evidence, the Commission "shall submit its findings and recommendations to the proper administrative authority and shall send copies of same to the appellant or his designated representative."[62] While responsibility for appellate review was delegated to the Board of Appeals and Review by the Commission, the Commission retained enforcement power. [63] Subsequent amendments extended the Commission's authority by requiring agencies to take corrective action it recommends and awarding back pay to prevailing employees.[64] With the Veterans Preference Act, department heads and their assistants now had to be aware that dismissal action might have to be justified before neutral third parties or face reversal.[65]

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[59] Veterans Preference Act, §14, 58 Stat. at 390.
[60] Luneburg, *supra* note 27, at 8 (citing to Veterans Preference Act, §14, 58 Stat. at 390.
[61] Case, *supra* note 9, at 291 (citing to Veterans Preference Act, §14, 58 Stat. at 390-91.
[62] Veterans Preference Act, §14, 58 Stat. at 391.
[63] Case, *supra* note 9, at 291 (citing to Guttman *supra* note 51, at 337).
[64] *Id*. at 290 & n.42 (citing to Pub. L. 80-325 (Aug. 4, 1947) and Pub. L. 80-741 (June 22, 1948) required compliance by agencies with Commission recommendations. Pub. L. 80-623 (June 10, 1948) and Pub. L. 89-380 (March 30, 1966) provided back pay remedies).
[65] Luneburg, *supra* note 27, at 9.

As of 1961, the Veterans Preference Act applied to veterans and the Lloyd-LaFollette Act applied to non-veterans.[66] Veterans also fell under the Lloyd-LaFollette Act if a suspension action was for 30 days or less.[67] Under the Veterans Preference Act, appellate review extended to substantive aspects of an action. [68] However, under the Lloyd-LaFollette Act only procedures received appellate review. [69]

G. Executive Orders & Appellate Review

Following congressional pressure, President John F. Kennedy extended to all federal employees the protections of the Veterans Preference Act with Executive Order 10,988.[70] On January 17, 1962, President Kennedy also issued Executive Order 10,987.[71] Executive Order 10,987 required agencies to establish appeals systems in accordance with regulations issued by the Civil Service Commission.[72] Probationers and non-veterans in the excepted service were excluded from the substantive and procedural protections.[73]

Under the appeals system, covered employees had two options for appealing adverse actions. [74] The employees could either appeal to his agency's first level appellate office or to one of the first level Commission appeals office located throughout

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[66] Case, *supra* note 9, at 292.
[67] *Id.*
[68] *Id*.
[69] *Id*.
[70] Luneburg, *supra* note 27, at 9 (citing to Exec. Order No. 10,988, 3 C.F.R. 521 (1956-1963)).
[71] Exec. Order No. 10,987, 3 C.F.R. 519 (1956-63).
[72] *Id.*
[73] Luneburg, *supra* note 27, at 9-10.
[74] Case, *supra* note 9, at 292-93.

the country.[75] However, submitting an appeal to one of these offices only begun the appellate process. After submitting the first level appeal, the appellate process really turned into a choose your own adventure.

When an employee chose to appeal to his agency's first level appellate office and was unsuccessful, he had the option of then appealing to either the Commission's first level appeals office or his agency's second level appellate office.[76] If the employee chose to appeal to his agency's second level appellate office, his administrative remedies were exhausted once that office ruled on his appeal.[77] On the other hand, when the appeal was filed with a Commission first level appeal office, which was available out of the gate or after appealing to the agency's first level appeal office; the employee could maximize their appellate avenues.[78] An unsuccessful appeal before the Commission's first level office could be appealed to a second level Commission appellate office, which was the Board of Appeals and Review.[79] The employee's administrative remedies were then exhausted with The Board of Appeals and Review decision.[80] In order to maximize appellate options, most employees who appealed choose to appeal to the first level agency appellate office, then to the first level Commission appellate office, and finally to the Board of Appeals and Review.[81] However, the Commission never relinquished the authority to reopen the decisions of the Board of Appeals and Review.[82]

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[75] *Id.*
[76] *Id*. at 293.
[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] *Id*.
[82] Luneburg, *supra* note 27, at 10.

Despite multiple layers of appellate review, neither the Commission nor the appeals system escaped criticism.[83] "The decision making process within this structure was understood by few, suspected by many, and unsatisfactory to most."[84] Among the criticism leveled against the Commission was that even though it was a regulatory body, it became a regulator.[85] The Commission was established to guard "the front door to the federal workplace" by measuring the merit and fitness of potential federal employees.[86] However, it became known for guarding "the back door of the federal workplace" because its duties grew to include determining whether removal or disciplinary actions against federal employees were substantively and procedurally adequate.[87] Between the two, the Commission's regulatory authority reached "into almost every conceivable phase of the body of federal personnel operations."[88] Essentially, over time the perception of the Commission shifted from a "regulator protecting employee rights" to "the federal government's central personnel agency"[89] Criticisms also included the following points:

> the appeals function needed complete organizational independence from the Civil Service Commission's general organizational structure (to neutralize the influence of the Commission's now dominant role as a management advisor); hearing procedures and hearing officers needed to

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[83] Case, *supra* note 9, at 294 & n.48 (citing to Guttman, *supra* note 43, at 323-366; ROBERT VAUGHN, THE SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM (1975); Administrative Conference of the United States, Recommendation 72-8, *Adverse Actions Against Federal Employees*, (December 15, 1972); and *Design and Administration of the Civil Service Commission's Adverse Action and Appeals Systems Need To Be Improved*, B-1798101 (1974)); *See also* Richard A. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196 (1973)).
[84] Case, *supra* note 9, at 293.
[85] *Id*.
[86] *Id*. at 293-94.
[87] *Id*. at 294.
[88] *Id*. at 294 & n.47 (citing to 5 C.F.R. (1978)).
[89] *Id*. at 294.

have more judicial/legalistic orientation; the appeals function should perform no advisory services; decisions should be guided by the general body of the law and make reference to it; and the Commission needed to report its decisions. [90]

H. Reorganization of the Commission Appellate Structure

Responding to criticism, the Commission reorganized its appellate structure in 1974. [91] The Commission established the Federal Employee Appeals Authority (FEAA) comprised of regional headquarters and appellate offices throughout the country.[92] Although the FEAA was functionally independent, its director still reported to the three Commissioners.[93]

At this time, the BAR was renamed the Appeals Review Board (ARB).[94] Like the FEAA, the ARB was also given functional independence.[95] The ARB's authority included correcting errors and mistakes made by field offices, along with original jurisdiction for some cases.[96] Despite the independence, the Commission still retained the authority to reopen ARB decisions at its discretion.[97]

With the new Commission structure for appeals,[98] President Richard Nixon abolished agency appellate offices with Executive Order 11,787.[99] Under the new

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[90] *Id*. at 294-95.
[91] Luneburg, *supra* note 27, at 10.
[92] *Id*.
[93] Case, *supra* note 9, at 295.
[94] *Id*.
[95] *Id*.
[96] Luneburg, *supra* note 27, at 10.
[97] *Id*.
[98] Case, *supra* note 9, at 295 & n.54 ("FEAA and ARB did not have completely concurrent subject matter jurisdiction as ARB had certain exclusive jurisdictions, such as 'legal' retirement matters and insurance matters. 5 C.F.R. § 772.301(b) (1978). In addition, certain 'appeals' were retained within the Commission's regular organization, such as rating and examining disputes and job classification appeals. However, these

appellate structure, appellate review shrunk "from the old agency/Commission level review procedures with as many as three 'bites of the apple' to a 'one shot' review before FEAA, with a right only to request further consideration on limited grounds."[100] With less appellate review, adverse action regulations were expanded.[101]

Despite the changes to the Commission's appellate structure, criticism was steady.[102] Foremost, the Commission was criticized for retaining the appellate review function.[103] Other factors receiving criticism included:

> the FEAA's reliance on the regular Commission organization for position classification "advisory" opinions which were obtained outside the adversarial scope of the appeal hearing; the fact that neither the FEAA nor the ARB published opinions; and the observation that the hearing procedures and the decision making process were still too informal.[104]

It was suspected that the revision made by the Commission ultimately related to style and form, but not substance.[105] With the Commission's growth into "the central personnel agency for government,"[106] concern intensified over whether it was adequate or advisable to retain with in one agency "the power to both regulate federal employees' conduct and adjudicate appeals from disciplinary actions taken against them, and also the lack of formality in the hearing procedures and the decision-making process."[107]

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functions related to the Commission's 'front door' responsibilities and its management responsibility over the federal work force, not as a regulator of removal and major disciplinary actions.").

[99] *Id*. at 295 & n.55 (citing to Exec. Order No. 11,787, 39 Fed. Reg. 20,675 (June 11, 1974)).

[100] *Id*. at 296.

[101] *Id*.

[102] Luneburg, *supra* note 27, at 11.

[103] Case, *supra* note 9, at 296.

[104] *Id*.

[105] *Id*.

[106] *Id*.

[107] Luneburg, *supra* note 27, at 11.

I. Grievance Procedures

Executive Order 10,988, issued on January 17, 1962, also discussed labor relations in the federal sector.[108] Pursuant to the executive order, grievance procedures were authorized in collective bargaining agreements.[109] Employees were usually given "a choice between negotiated procedures and agency-established procedures."[110] Adverse actions were still appealed through the Commission appellate structure.[111] When disputes over interpreting and applying the collective bargaining agreement were not satisfactorily resolved through the grievance process arbitration was available; however, arbitration determinations were subject to agency head approval.[112]

Following the persistent push by federal unions, President Nixon issued Executive Order 11,491[113] limiting grievants to the negotiated grievance procedures when specified in bargaining agreements.[114] As a result, arbitration awards were now "final and binding subject to review by the Federal Labor Relations Council (FRLC)."[115] The statutory appeal procedures still applied to adverse actions.[116]

Through Executive Order 11,616[117] in 1971 and Executive Order 11, 838[118] other changes were made.[119] For instance, negotiated grievance procedures were left to the

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[108] Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963).
[109] Luneburg, *supra* note 27, at 11.
[110] *Id*.
[111] *Id*.
[112] *Id*.
[113] Exec. Order No. 11,491, 34 Fed. Reg. 17,605, 3 C.F.R. 861 (1966-1970).
[114] Luneburg, *supra* note 27, at 11-12.
[115] *Id*. at 12.
[116] Justin C. Smith & Craig Paul Wood, *Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?*, 31 HASTINGS L.J. 855, 860-61 (1980)).
[117] Exec. Order No. 11,616, 3 C.F.R.605 (1971-1975)).
[118] Exec. Order No. 11,838, 3 C.F.R. 957 (1971-1975).
[119] Luneburg, *supra* note 27, at 12.

parties with civil service requirements no longer applicable.[120] In cases where the employee did not choose to represent himself or herself, the union or an approved representative would represent the employee.[121] Also, the aggrieved employee could no longer invoke arbitration.[122] As with other executive orders, statutory appeal procedure continued to apply to adverse actions. [123]

The negotiated grievance/arbitration system was not without criticism.[124] Criticisms included the lack of "an 'independent, impartial' body to oversee various aspects of the federal sector labor-management program, the exclusion from the negotiated procedures of matters subject to statutory appeals, and the limitation on arbitrators' authority to fashion remedies."[125]

J. Discrimination

Until the Equal Employment Opportunity Act of 1972,[126] federal employees were not covered by the protections of Title VII of the Civil Rights Act of 1964.[127] In accordance with the Act, "[a]ll personnel actions affecting employees or applicants for employment … shall be made free from any discrimination based on race, color, religion, sex, or national origin."[128] Under the Equal Employment Opportunity Act, "[t]he Civil Service Commission was given the "authority to enforce the [nondiscrimination in

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[120] *Id*. & n.39 (citing to Exec. Order No. 11,616, 3 C.F.R. at 606-07).
[121] *Id*. & n.40 (citing to Exec. Order No. 11,616, 3 C.F.R. at 607).
[122] *Id.* at 12.
[123] Smith & Wood, *supra* note 116, at 861-62.
[124] Luneburg, *supra* note 27, at 12.
[125] *Id*. & n.42 (citing to Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1976*, 17 SAN DIEGO L. REV. 857, 861-862 (1980)).
[126] Equal Employment Opportunity Act, 86 Stat. 103 (1972) (codified throughout sections of 5 U.S.C. and 42 U.S.C.).
[127] Luneburg, *supra* note 27, at 13.
[128] Equal Employment Opportunity Act, § 705, 86 Stat. at 111.

federal government employment] provisions through appropriate remedies, including reinstatement or hiring of employees with or without back pay … and [to] issue [appropriate] rules, regulations, orders and instructions…."[129]

In accordance with its authority, the Civil Service Commission implemented a four part Equal Employment Opportunity (EEO) complaint process.[130] The four parts consisted of the following: pre-complaint counseling; complaint investigation; hearing and final agency decision; and an optional appeal to the Commission's ARB.[131]

Subsequently, the Age Discrimination in Employment Act was amended in 1974 to cover federal employees.[132] The Act provided that "[a]ll personnel actions affecting employees or applicants for employment … shall be made free from any discrimination based on age" if over age forty.[133] Under the Act, "[t]he Civil Service Commission was given the "authority to enforce the [nondiscrimination on account of age in federal government employment] provisions through appropriate remedies, including reinstatement or hiring of employees with or without back pay … and [to] issue [appropriate] rules, regulations, orders and instructions…."[134] However, although notice of intent to sue was required, there was no requirement to exhaust administrative remedies.[135]

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[129] *Id*.
[130] Charles Stephen Ralston, *The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws*, 10 GA. L. REV. 717, 724-25 (1975-76).
[131] *Id*. at 725.
[132] Fair Labor Standards Amendments of 1974, § 15, 88 Stat. 74 (1974) (codified at 29 U.S.C. § 633a (1982))
[133] *Id*. §15(a), 88 Stat. at 75.
[134] *Id*. §15(b), 88 Stat. at 75.
[135] *Id*. §15(d), 88 Stat. at 75.

The Rehabilitation Act of 1973 was amended in 1978 forbidding "discrimination under any program or activity conducted by any executive agency or the United States Postal Service" against any "otherwise qualified handicapped individual."[136] "The remedies, procedures, and rights established by the 1972 Equal Employment Opportunity Act, including both the exhaustion requirement and the right to *de novo* review, were made applicable in the case of handicap discrimination."[137]

K. The Civil Service Reform Act of 1978

By 1977, dissatisfaction with the federal employee complaint, appeal, and grievance systems was no secret.[138] During his election campaign, President Carter promised reorganization.[139] To that end, the Personnel Management Project was established in the summer of 1977.[140] The concerns behind reorganization had more to do with the belief that "the government employer had inadequate procedures for ridding itself of incompetents and that performance was not given a sufficient role in rewarding federal employees" than with protecting federal employee's rights.[141] The existing systems were viewed as "confusing, complex, and time-consuming."[142]

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[136] Luneburg, *supra* note 27, at 14 (citing to Act of Nov 6, 1978, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794)).
[137] *Id*. (citing to 29 U.S.C. § 794(a)(1) (1982)).
[138] *Id*. at 15.
[139] Case, *supra* note 9, at 297.
[140] Luneburg, *supra* note 27, at 15.
[141] *Id.* & n.57 (citing to H. COMM. ON POST OFFICE AND CIVIL SERVICE (SUBCOMM. ON POSTAL PERSONNEL AND MODERNIZATION), 96TH CONG. 1ST SESS., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978,* 623 (Comm. Print. 96-7, 1979). "The message of the President transmitting to the Congress a comprehensive Civil Service Reform program stated, in pertinent part, '. . . the system (Civil Service) has serious defects, it has become a bureaucratic maze which neglects merit, tolerates poor performance . . . and mires every personnel action in red tape, delay and confusion.'").

In particular, "the wide range of appealable actions, the large number of appellate units and their unclear jurisdictional scheme, and finally, the possibility of pursuing certain actions in more than one forum" were viewed as too complex. [143] As a result, the general view was that employees were intimated by the processes and might not exercise their rights.[144] There was also a view that managers might decide against taking disciplinary or discharge actions against employees because they were "confronted by a system that imposed a burden to show an acceptable basis for an action in the context of proceedings that might drag on for years."[145] Another concern was the dual hatted nature of the Civil Service Commission who provided instruction and advice to managers while also serving as the appellate function for employees.[146]

The end result was the Civil Service Reform Act (CSRA) of 1978, which President Carter signed into law on October 13, 1978.[147] The CSRA was hailed as "the most comprehensive reform of the federal civil service since the Pendleton Act."[148] The CSRA brought about reorganization, new agencies, and statutory changes. [149] It established the Office of Personnel and Management (OPM),[150] the Merit Systems

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[142] *Id.* (citing to 1 President's Personnel Management Project, Final Staff Report 1, 58 (Dec 1977)).
[143] *Id*. (citing to Final Staff Report, at 58).
[144] *Id*. at 15-16.
[145] *Id.* at 16 (citing to Final Staff Report, at 41).
[146] *Id.* (citing to Final Staff Report, at 53, 73).
[147] Civil Service Reform Act of 1978, §907, 92 Stat. at 1217.
[148] LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978, 1 (Patricia W. Ingraham & Carolyn Ban eds., 1984).
[149] Case, *supra* note 9, at 297.
[150] Civil Service Reform Act of 1978, § 1101, 92 Stat. at 1119.

Protection Board (MSPB),[151] the Office of the Special Counsel (OSC),[152] and the Federal Labor Relations Authority (FLRA).[153]

The CSRA along with Reorganization Plan Number 2, proposed replacing the Civil Service Commission with the OPM and the MSPB.[154] The administrative functions of the Civil Service Commission were transferred to the OPM giving it responsibility for "executing, administering, and enforcing the Civil Service rules and regulations … and the statutes governing the same, and other activities except such functions … vested in the Merit Systems Protection Board … or transferred to the Special Counsel…."[155] With its' "multifarious and far-reaching authority and responsibilities [OPM was] the most powerful of the institutions created in 1978."[156] Aside from its administrative functions, the Director of OPM was authorized to petition for judicial review of MSPB final decisions in federal court.[157] To counter what was seen as a failure of the Civil Service Commission "OPM's role as monitor and evaluator, rather than as a day-to-day manger" was emphasized through its "broad authority to delegate many functions … to the individual agencies."[158]

The Civil Service Commission was re-designated the MSPB.[159] The MSPB was established, at least in part, in response "to concerns regarding the conflicting roles of the former Civil Service Commission as both management agent for the President and

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[151] Civil Service Reform Act of 1978, § 1201, 92 Stat. at 1121.
[152] Civil Service Reform Act of 1978, § 1204, 92 Stat. at 1122.
[153] Civil Service Reform Act of 1978, § 7104, 92 Stat. at 1196.
[154] Ingraham, *supra* note 2, at 13.
[155] Reorganization Plan No. 2 of 1978 §§ 102, 104; Exec. Order No. 12,107, 3 C.F.R. 264.
[156] Luneburg, *supra* note 27, at 16-17.
[157] Civil Service Reform Act of 1978, § 7703(d), 92 Stat. at 1144.
[158] Ingraham, *supra* note 148, at 17.
[159] Reorganization Plan No. 2 of 1978, § 201(a); Exec. Order No. 12,107, 3 C.F.R. 264.

protector of the merit system from abuse."[160] With the re-designation, the hearing, adjudication, and appeals functions of the Civil Service Commission transferred to the MSPB.[161]

The OSC was specifically created to protect "employees "who 'blew the whistle' on inefficiency and mismanagement."[162] The authority to investigate violations of political activities and public information were also transferred to the OSC.[163] The OSC was also authorized to investigate prohibited personnel practices.[164] If warranted, the OSC would then prosecute violations before the MSPB.[165]

The FLRA was created in 1978 in response to many concerns, "including the need for an impartial body to oversee federal labor-management relations and to eliminate the existing fragmentation of authority between the Department of Labor and the Federal Labor Relations Council."[166] It was modeled after the National Labor Relations Board (NLRB).[167] With the establishment of the FLRA,[168] an Office of General Counsel was created.[169] The duties of the General Counsel included "the investigation of unfair labor practice complaints, making final decisions as to which cases to prosecute before the

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[160] Luneburg, *supra* note 27, at 17 (citing to S. Rep. No. 95-696, at 5.
[161] Reorganization Plan No. 2 of 1978, § 202; Exec. Order No. 12,107, 3 C.F.R. 264.
[162] Ingraham, *supra* note 148, at 3.
[163] Reorganization Plan No. 2 of 1978, § 204(b); Exec. Order No. 12,107, 3 C.F.R. 264.
[164] *Id*. at § 204(c); Exec. Order No. 12,107, 3 C.F.R. 264.
[165] *Id*. at §§ 204(d), (e); Exec. Order No. 12,107, 3 C.F.R. 264.
[166] Luneburg, *supra* note 27, at 22 (citing to S. Rep. No. 95-696, at 7-8).
[167] Donald F. Parker, Susan J. Schurman, & B. Ruth Montgomery *Labor-Management Rules Under CSRA: Provisions and Effects in* LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978 161, 164 (Patricia W. Ingraham & Carolyn Ban eds., 1984). The NLRB "administers the private sector's industrial relations system."
[168] Reorganization Plan No. 2 of 1978, § 301; Exec. Order No. 12,107, 3 C.F.R. 264.
[169] *Id*. at § 302; Exec. Order No. 12,107, 3 C.F.R. 264.

FLRA, and the actual prosecution."[170] The Federal Service Impasses Panel (FSIP) previously established by Executive Order 11,491[171] continued within the FLRA as an independent entity.[172] Its' functions included "resolving negotiation impasses between agencies and unions."[173] The functions of the Federal Labor Relations Council, the Civil Service Commission, and the Assistant Secretary of Labor for Labor-Management Relations specified in Executive Order 11,491 were transferred to the FLRA.[174]

The EEOC predates the CSRA. In accordance with Reorganization Plan No. 1 of 1978, enforcement of Title VII and other anti-discrimination statutes transferred to the Equal Employment Opportunity Commission (EEOC).[175] Thus, pursuant to the CSRA, most of the functions of the Civil Service Commission were divided amongst the OPM, the MSPB, the OSC, the FLRA, and the EEOC.

III. AN OVERVIEW OF THE CURRENT SYSTEMS

The current federal personnel complaint, appeal and grievance systems are primarily ran by these agencies – the OPM, the MSPB, the OSC, the EEOC, and the FLRA. A brief overview of how the processes these agencies are charged with function will be useful in discussing the problems.

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[170] Parker, *supra* note 167, at 165.
[171] Exec. Order No. 11,491, 3 C.F.R. 861.
[172] Reorganization Plan No. 2 of 1978, § 303; Exec. Order No. 12,107, 3 C.F.R. 264.
[173] Parker, *supra* note 167, at 165.
[174] Reorganization Plan No. 2 of 1978, § 304 (The Assistant Secretary of Labor for Labor-Management retained "functions related to alleged violations of the standards of conduct for labor organizations."); Exec. Order No. 12,107, 3 C.F.R. 264.
[175] Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978), *reprinted in* 92 Stat. 3781; Exec. Order No. 12,106, 44 Fed. Reg. 1053, 3 C.F.R. 263 (1978).

A. The Office of Personnel Management (OPM)

Having absorbed the Civil Service Commission's administrative functions, OPM is now the management agency for the federal government.[176] In accordance with 5 U.S.C. § 1103(a)(5), as the management agency, the responsibilities of OPM include "executing, administering, and enforcing the civil service rules and regulations … and the laws governing the civil service; and the other activities of the Office … except with respect to functions for which the Merit Systems Protection Board or the Special Counsel is primarily responsible."[177]

Aside from its administrative functions, OPM can also act in an appellate capacity. In accordance with 5 U.S.C. 7703(d), OPM can petition the United States Court of Appeals for the Federal Circuit for review of a final order or decision of the MSPB "if the Director determines, in his discretion, that the [MSPB] erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[178] In essence, OPM petitions for review on behalf of agencies. Of course, judicial review is granted at the Court of Appeals discretion.[179]

B. The Merit Systems Protection Board (MSPB)

The MSPB is a three-member board with each member appointed by the President to serve a seven year term subject to the advice and consent of the Senate and no more

[176] Luneburg, *supra* note 27, at 16-17.
[177] 5 U.S.C.S § 1103(a)(5) (LexisNexis 2011)
[178] 5 U.S.C.S. § 7703(d) (LexisNexis 2011)
[179] *Id.*

than two members being from the same political party.[180] The MSPB is an independent, quasi-judicial agency with the authority to "hear, adjudicate, or provide for the hearing or adjudication within [its original or appellate] jurisdiction…."[181] The MSPB's original jurisdiction is limited and includes actions brought by the Special Counsel; Senior Executive Service performance deficiencies removals; and actions taken against administrative law judges.[182] The MSPB's appellate jurisdiction is extensive and includes, but is not limited to, the following adverse actions: removal; a suspension for more than 14 days; a reduction in grade or pay; and a furlough of 30 days or less.[183]

The MSPB has subject matter jurisdiction is limited to those matters over which it has been granted jurisdiction by statute or regulation.[184] Employees or applicants for employment have the later of "30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision" to file an appeal with an extension to 60 days if the parties agree to try alternative dispute resolution first.[185] Appeals are heard either before the MSPB or referred to a MSPB administrative law judge located at regional offices through the United States.[186] The MSPB prescribes procedures for appellate cases that include, but are not limited to, the following: required content for an appeal and the agency response; when intervenors are allowed; conditions for party substitution; when appeals will be consolidated or joined;

[180] 5 U.S.C.S. §§ 1201, 1202(a) (LexisNexis 2011).
[181] 5 U.S.C.S. § 1204(a)(1) (LexisNexis 2011).
[182] 5 C.F.R. § 1201.2 (LexisNexis 2011).
[183] 5 C.F.R. § 1201.3 (LexisNexis 2011).
[184] 5 U.S.C. §§ 7701(a)(1)-(2) (LexisNexis 2011).
[185] 5 C.F.R. § 1201.22(b)(1) (LexisNexis 2011).
[186] 5 U.S.C. § 7701(b).

evidence rules; discovery rules; requests for subpoenas; prohibition on *ex parte* communications; and final decisions.[187]

Once an initial decision is issued, a petition for review to the full Board must be received within 35 days.[188] Either the appellant, agency, or in some cases the Director of OPM, the Special Counsel, or a permissive intervenor may petition for review.[189] Petitions for review are generally granted where "[n]ew and material evidence is available that, due diligence, was not available when the record closed; or [t]he decision of the judge is based on an erroneous interpretation of statute or regulation."[190] Otherwise, a final order or decision is issued.[191]

Petitions for judicial review of a MSPB final order or decision is available in the United States Court of Appeals for the Federal Circuit for employees or applicants, if filed within 60 days of the final order or decision, unless the case involves alleged discrimination.[192] On appeal, Board action is upheld unless the Court finds the Board's action to be either

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence except that in the case of discrimination brought under any section is referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.[193]

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[187] *See* 5 C.F.R. §§ 1201.11-1201.113 (LexisNexis 2011).
[188] 5 C.F.R. § 1201.114(d) (LexisNexis 2011).
[189] 5 C.F.R. §§ 1201.114(a), (g).
[190] 5 C.F.R. § 1201.115(d) (LexisNexis 2011).
[191] 5 C.F.R. § 1201.113.
[192] 5 U.S.C. §§ 7703(a)(1), (b)(1); § 7703(d) (OPM petitions for judicial review on behalf of agencies).
[193] 5 U.S.C. §§ 7703(c).

When the appeal contains an allegation of discrimination, it is called a "mixed case."[194] An appellant can seek review of a MSPB determination on the discrimination issues by the EEOC within 30 days following the Board decision.[195] EEOC will review and either agree or disagree with the MSPB within 60 days.[196] If the EEOC agrees with the MSPB,[197] the decision of the MSPB is final and the decision is judicially reviewable in United States District Court.[198]

However, if the EEOC disagrees with the MSPB, it will send the case back to the MSPB with its own decision or with a determination the decision is not supported by the evidence.[199] The MSPB will either accept or reject the EEOC's review within 30 days of the EEOC's decision.[200] If the MSPB accepts the EEOC's decision, the MSPB decision is final and the decision is judicially reviewable in United States District Court.[201] If it rejects the EEOC's decision,[202] the case is sent to a Special Panel[203] made up of members from the EEOC and the MSPB.[204] Special Panel decisions are required within 45 days

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[194] 5 U.S.C.S. § 7702 (LexisNexis 2011); 5 C.F.R. §§ 1201.151-1201.175 (LexisNexis 2011).
[195] 5 U.S.C.S. § 7702(b)(1).
[196] 5 U.S.C.S. § 7702(b)(3).
[197] 5 U.S.C.S. § 7702(b)(3)(A).
[198] 5 U.S.C.S. § 7702(b)(5)(A); 5 C.F.R. § 1201.161.
[199] 5 U.S.C.S. §§ 7702(b)(3)(B); 5(B).
[200] 5 U.S.C.S. § 7702(c).
[201] 5 U.S.C.S. § 7702(c)(1); 5 C.F.R. §§ 1201.161, 1201.175.
[202] 5 U.S.C.S. § 7702(c)(2); *See* Ignacio v. United States Postal Serv. Agency, 30 M.S.P.R. 471, 486 (Spec. Pan. 1986) (The MSPB cannot require the Special Panel to review a decision of the EEOC merely because the MSPB disagrees on the discrimination law "[u]nless an EEOC decision depends upon civil service law for its support, or is so unreasonable that it amounts to a violation of civil service law…."); *See also* Arnold v. Dep't of the Air Force, 89 M.S.P.R. 421, 423 (M.S.P.B. 2001).
[203] Ignacio, 30 M.S.P.R. at 476 ("The purpose of the Special Panel is to resolve disputes between the MSPB and the EEOC concerning cases with mixed civil service law and discrimination law issues that have been initially appealed to the MSPB.").
[204] 5 U.S.C.S. § 7702(d).

from receipt.[205] Decisions of Special Panel are binding upon both the EEOC and MSPB and are judicially reviewable in United States District Court.[206]

C. The Office of Special Counsel (OSC)

With passage of the CSRA, the Office of the Special Counsel was established to protect whistleblowers.[207] However, Congress passed the Whistleblower Protection Act of 1989[208] "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government…."[209] Pursuant to the Act and 5 U.S.C. § 1212(a), protecting employees, former employees, and applicants, in general, but whistleblowers,[210] specifically, from "prohibited personnel practices"[211] is the OSC's primary role.[212]

The OSC receives and investigates allegations of prohibited personnel practices[213] and other matters within its jurisdiction.[214] The OSC can also initiate investigations on

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[205] 5 U.S.C.S. § 7702(d)(2)(A).
[206] *Id.*; 5 C.F.R. §§ 1201.161, 1201.175.
[207] Civil Service Reform Act of 1978, 92 Stat. at 1125.
[208] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989).
[209] *Id.* at § 2(b), 103 Stat. at 16.
[210] *See* 5 C.F.R. § 1800.1(a)(8) (LexisNexis 2011) (Whistleblowing includes "the disclosure of information about a Federal agency by an employee or applicant who reasonably believes that the information shows a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety.").
[211] *See* 5 U.S.C.S. §§ 2302 (b)(1)-(b)(12) (LexisNexis 2011); *See also* 5 C.F.R. §§ 1800.1(a)-(b).
[212] Whistleblower Protection Act of 1989, § 2(b)(2)(A), 103 Stat. at 16; 5 U.S.C. § 1212(a) (LexisNexis 2011).
[213] 5 U.S.C.S. § 1214(a)(1)(A) (LexisNexis 2011).
[214] 5 U.S.C.S. § 1216(a) (LexisNexis 2011).

its own.[215] Although the EEOC is primarily responsible for investigating discrimination complaints, the OSC can also investigate discrimination allegations.[216]

Under 5 U.S.C.S. Section 1214, the OSC seeks corrective action.[217] If the OSC finds a need for corrective action, it petitions the MSPB to take corrective action.[218] If the OSC declines to pursue corrective action and 60 days have not passed an appeal can be made directly to the MSPB.[219] An appeal can be also be made to the MSPB, if the OSC has not acted on a request within 120 days.[220] Disciplinary action by the OSC is brought under 5 U.S.C.S. Section 1215.[221] The OSC presents request for disciplinary action to the MSPB.[222] The MSPB's final order or decision in case of either correction action or disciplinary action is subject to judicial review by petition to the United States Court of Appeals for the Federal Circuit.[223]

D. The Equal Employment Opportunity Commission (EEOC)

The EEOC enforces Title VII and other anti-discrimination statutes.[224] When a federal employee believes he or she has been "discriminated against on the basis of race, color, religion, sex, national origin, age, disability, or genetic information," the employee initiates the pre-complaint or informal complaint process by first consulting with his or her agency's EEO counselor within 45 days of the alleged discrimination or personnel

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[215] 5 U.S.C.S. § 1214(a)(5).
[216] 5 U.S.C.S. § 2302(b)(1) ; *See also* 5 C.F.R. § 1810.1 (LexisNexis 2011).
[217] 5 U.S.C.S. § 1214.
[218] 5 U.S.C.S. § 1214(b)(3).
[219] 5 U.S.C.S. § 1214(a)(3)(A).
[220] 5 U.S.C.S. § 1214(a)(3)(B).
[221] 5 U.S.C.S. § 1215 (LexisNexis 2011).
[222] 5 U.S.C.S. § 1215(a)(1).
[223] 5 U.S.C.S. § 1214(a)(3); 5 U.S.C.S. § 1215(a)(4); 5 U.S.C.S. § 7703(b).
[224] Reorganization Plan No. 1 of 1978, 92 Stat. at 3781-82.

action.[225] The 45 day time limit can be extended where any of the conditions listed in 5 C.F.R. Section 1614.105(a)(2) are met.[226] At the initial counseling session, the EEO counselor will explain the complainant's rights and responsibilities.[227] Within 30 days of the initial counseling session, the agency must inquire into the allegations and conduct a final interview with the complainant, unless the individual agrees to an extension.[228] An extension can be granted for up to 60 days by agreement with the complainant or 90 days if the complainant agrees to participate in alternative dispute resolution.[229] If the matter is not resolved within the allotted time frame, the EEO counselor must also notify the complainant of their right to file a discrimination complaint.[230]

Following the end of the 30 days or the expiration of any extended period, the complainant must file their complaint with the agency within 15 days of receiving the notice of right to file a complaint.[231] Upon receiving a proper complaint, the agency has 180 days to investigate the complaint.[232] The time period can be extended by the agency unilaterally for 30 days or with agreement by complainant for up to an additional 90 days.[233] Based on whether the complainant amended the complaint, the timeframe for completion of the agency investigation could be extended to 360 days from when the original complaint was filed.[234] However, in the case of an extension, once 180 days

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[225] 29 C.F.R. §§ 1614.105(a), (a)(1) (LexisNexis 2011).
[226] 29 C.F.R. § 1614.105(a)(2).
[227] 29 C.F.R. § 1614.105(b)(1).
[228] 29 C.F.R. § 1614.105(d).
[229] 29 C.F.R. §§ 1614.105(e), (f).
[230] 29 C.F.R. §§ 1614.105(d), (e), (f).
[231] 29 C.F.R. §§ 1614.106(a), (b) (LexisNexis 2011).
[232] 29 C.F.R. §§ 1614.106(e)(2); *see also* 29 C.F.R. §§ 1614.108(e) (LexisNexis 2011).
[233] 29 C.F.R. §§ 1614.108(e).
[234] 29 C.F.R. §§ 1614.106(e)(2); 29 C.F.R. §§ 1614.108(f).

have elapsed, the complainant can request a hearing through the EEOC by an administrative judge.[235]

Upon completion of the agency's investigation and receipt thereof, the complainant is notified that within 30 days he or she can either request a final decision from the agency or request a hearing and decision before an EEOC administrative judge.[236] When there is final agency action without a hearing, the agency will issue its final decision within 60 days.[237] Upon receiving the final agency action, the complainant can appeal to the EEOC Office of Federal Operations (OFO) within 30 days.[238] Following the EEOC/OFO decision, reconsideration can be requested within 30 days.[239]

On the other hand, within 180 days of receipt of the complaint file from the agency, the administrative judge issues a decision on the complaint.[240] In cases of discrimination, the administrative judge will also order appropriate remedies and relief.[241] Upon receipt of the administrative judge's decision, the agency must take final action within 40 days or notify the complainant of their options to appeal to the EEOC/OFO or file suit in United States District Court.[242] The agency can also appeal the administrative judge's decision to the EEOC/OFO.[243] When appeal is made to the EEOC/OFO, reconsideration can be requested within 30 days of the EEOC's appellate decision.[244]

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[235] 29 C.F.R. §§ 1614.106(e)(2); 29 C.F.R. §§ 1614.108(g).
[236] 29 C.F.R. § 1614.109(a) (LexisNexis 2011); 29 C.F.R. § 1610.110(b) (LexisNexis 2011).
[237] 29 C.F.R. § 1610.110(b).
[238] 29 C.F.R. § 1610.402(a) (LexisNexis 2011).
[239] 29 C.F.R. § 1610.405(b) (LexisNexis 2011).
[240] 29 C.F.R. § 1614.109(i).
[241] *Id*.
[242] 29 C.F.R. §1610.110(a).
[243] 29 C.F.R. § 1610.403(e) (LexisNexis 2011).
[244] 29 C.F.R. § 1610.405(b).

A lawsuit can be pursued in United States District Court under the following conditions:

> a) Within 90 days of receipt of the final action on an … complaint if no appeal has been filed; (b) After 180 days from the date of filing an … complaint if an appeal has not been filed and final action has not been taken; (c) Within 90 days of receipt of the [EECO's] final decision on an appeal; or (d) After 180 days from the date of filing an appeal with the [EEOC] if there has been no final decision by the [EEOC].[245]

Of course, there are a few anomalies in the EEOC process, of which we will discuss the following: relationship to a negotiated grievance process and mixed case complaints. If there is a negotiated grievance procedure that applies to allegations of discrimination, the complainant must either pursue the alleged discrimination through the negotiated grievance procedure or EEOC procedures, but not both.[246] If the complainant elects to use the EEOC procedures a complaint is filed.[247] However, if the complainant pursues the allegation of discrimination through the negotiated grievance procedure, the complainant files a grievance and can later appeal the final decision to the EEOC.[248]

The other anomaly is the mixed case. A mixed case cannot be filed in both the MSPB and EEOC as a matter of first course.[249] As with the MSPB, mixed cases can originate in the EEOC and follow the procedures identified for informal and formal complaints above.[250] However, a final decision is required within 120 days with appeal to either the MSPB or civil action in United States District Court.[251]

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[245] 29 C.F.R. § 1614.407 (LexisNexis 2011).
[246] 29 C.F.R. § 1614.301 (LexisNexis 2011).
[247] 29 C.F.R. § 1614.106(a).
[248] 29 C.F.R. §§ 1614.301; 29 C.F.R. § 1614.401(d).
[249] 29 C.F.R. § 1614.302(b) (LexisNexis 2011).
[250] 29 C.F.R. § 1614.302(d).
[251] 29 C.F.R. §§ 1614.302(d)(1)(i); 1614.310(g) (LexisNexis 2011).

If the complainant pursues an appeal with the MSPB, the appeal must be filed within 30 days.[252] Following the MSPB decision on appeal, the complainant can petition for review with the EEOC on the discrimination allegations.[253] Within 30 days, the EEOC will decide whether to grant review of the MSPB decision.[254] If the EEOC grants the request for review, the EEOC will either concur with the MSPB decision or differ and refer the case back to the MSPB within 60 days.[255] If the EEOC concurs with the MSPB decision, the complainant may file suit in United States District Court within 30 days.[256] If the MSPB reaffirms its decision the matter is sent to the Special Panel.[257] Upon the decision of the Special Panel, the complainant may file suit within 30 days in the United States District Court.[258]

E. The Federal Labor Relations Authority (FLRA)

The FLRA is an independent agency that administers labor-relations under the Federal Service Labor-Management Relations Statute.[259] The FLRA has three distinct components – the Authority, The Office of the General Counsel, and the Federal Services Impasses Panel.[260] Like the MSPB, the Authority has three-members no more than two who are from the same party.[261] Each member is appointed by the President subject to

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[252] 29 C.F.R. §§ 1614.302(d)(1)(ii).
[253] 29 C.F.R. § 1614.303(a) (LexisNexis 2011).
[254] 29 C.F.R. § 1614.305(b) (LexisNexis 2011).
[255] 29 C.F.R. §§ 1614.305(c)-(e).
[256] 29 C.F.R. § 1614.310(d).
[257] 29 C.F.R. § 1614.306 (LexisNexis 2011).
[258] 29 C.F.R. § 1614.310(f).
[259] *See* The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (LexisNexis 2011).
[260] *See* FLRA, http://www.flra.gov/FLRA_about_administration-structure (last visited June 8, 2011).
[261] 5 U.S.C.S. § 7104(a), (b).

the advice and consent of the Senate and serves for a 5 year term.[262] The duties of the FLRA include, but are not limited to, the following:

> determin[ing] the appropriateness of units for labor organization representation … supervis[ing] or conduct[ing] elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit … resolv[ing] issues relating to the duty to bargain in good faith … conduct[ing] hearings and resolv[ing] complaints of unfair labor practices … and resolv[ing] exceptions to arbitrator's awards….[263]

The General Counsel's specific duties include investigating unfair labor practice allegations.[264] If a complaint is issued, an administrative law judge of the Authority will hold a hearing to consider the complaint unless the parties are able to resolve the matter.[265] A complaint for an unfair labor practice will generally not be issued if the alleged unfair labor practice is over 6 months old.[266] If an unfair labor practice is found by a preponderance of evidence, the outcome of the hearing could include, but not limited to, an order "to cease and desist" the unfair labor practice, to "renegotiate a collective bargaining agreement" and give it retroactive effect, or to reinstate an employee with backpay.[267] If necessary to enforce an order, the Authority can petition a United Stated Court of Appeals.[268] Within 60 days of the Authority's order, an aggrieved person can petition the applicable United States Court of Appeals for review.[269]

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[262] 5 U.S.C.S. § 7104(b), (c).
[263] 5 U.S.C.S. § 7105(a)(2).
[264] 5 U.S.C.S. § 7118(a)(1).
[265] 5 U.S.C.S. § 7118(a)(6); *see also* 5 C.F.R. § 2423.1 (LexisNexis 2011).
[266] 5 U.S.C.S. § 7118(a)(4)(A); *but see* 5 U.S.C. § 7118(a)(4)(B).
[267] 5 U.S.C.S. § 7118(a)(7).
[268] 5 U.S.C.S. § 7123(b).
[269] 5 U.S.C.S. § 7123(a).

The Authority can also be called upon to resolve exceptions to arbitration awards arising from grievances filed by unions, employees, or agencies.[270] Exception to an arbitrator's award must be filed within 30 days following service of the award on the party.[271] The Authority will only take action on the exception if it "finds that the award is deficient … (1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations."[272] If no exception is filed or the exception is not timely, "the award shall be final and binding."[273] Once an award is "final and binding," the agency must take any required action dictated by the award.[274] Judicial review is unavailable following any action taken by the Authority concerning an arbitrator's award unless an unfair labor practice is involved.[275]

There are also several matters under the jurisdiction of the FLRA that present interrelationships with the MSPB, the EEOC, and the OSC. These areas concern unacceptable performance and serious adverse actions,[276] discrimination cases under Title VII of the Civil Rights Act of 1964,[277] mixed cases,[278] and prohibited personnel practice cases.[279]

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[270] 5 U.S.C.S. § 7105(a)(2); *see also* 5 U.S.C.S. § 7122(a).
[271] 5 U.S.C.S. § 7122(b).
[272] 5 U.S.C.S. § 7122(a).
[273] 5 U.S.C.S. § 7122(b).
[274] *Id*.
[275] 5 U.S.C.S. § 7123(a).
[276] *See* 5 U.S.C.S. § 7121(e), (f).
[277] *See* 5 U.S.C.S. § 7121(d).
[278] *See* 5 U.S.C.S. § 7116(d).
[279] *See* 5 U.S.C.S. § 7121(g).

Unacceptable performance[280] and serious adverse action[281] matters usually fall under the MSPB.[282] When these matters also are covered by the negotiated grievance procedure (NGP), the employee may choose to proceed under the MSPB or the NGP.[283] If the employee proceeds under the NGP, the arbitrator is governed by the MSPB standards.[284] Therefore, any appeal of the arbitrator's award will bypass the Authority and go to the United States Court of Appeals for the Federal Circuit.[285]

Discrimination cases are usually filed with the EEOC.[286] It is not unusual for prohibited personnel practice claims to be coupled with allegations of discrimination. When the prohibited personnel practice claims, also involving allegations of discrimination, are covered by the NGP, the employee may choose to proceed under the EEO process or the NGP, but not both.[287] Even if the employee chooses the NGP, the final decision can still be reviewed by the MSPB in accordance with its mixed case provisions.[288] On account of the discrimination allegation, the employee could seek review of the result of the NGP final decision through the EEOC, instead of the MSPB.[289] However, if the NGP is pursued and an arbitrator's award resolves allegations of discrimination, any appeal is to the Authority.[290]

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[280] 5 U.S.C.S. § 4303 (LexisNexis 2011).
[281] 5 U.S.C.S. § 7512 (LexisNexis 2011).
[282] 5 U.S.C.S. § 7701(c).
[283] 5 U.S.C.S. § 7121(e)(1).
[284] 5 U.S.C.S. § 7121(e)(2). *See also* 5 U.S.C.S. § 7701(c)(1).
[285] 5 U.S.C.S. § 7703.
[286] *See* 29 C.F.R. § 1614.105(a), (a)(1)
[287] 5 U.S.C.S. § 7121(d).
[288] *Id*.; *see also* 5 U.S.C.S. § 7702.
[289] 5 U.S.C.S. § 7121(d).
[290] *See* 5 U.S.C.S. § 7122(a).

In a straight prohibited personnel practice case covered by the NGP, the employee may pursue remedies through either the NGP, an appeal to the MSPB, or the OSC.[291] Choosing one precludes recourse under the other two procedures.[292] However, if the NGP is chosen, the arbitrator can stay personnel actions in accordance with MSPB procedures.[293] The arbitrator can also order disciplinary action by an agency in accordance with MSPB procedures.[294] Unless the prohibited personnel practices involve unacceptable performance and serious adverse actions, appeal is to the Authority.[295]

IV. THE PROBLEMS

> Public personnel systems, no matter how efficient or how reformed, may make only marginal improvements because other influences – frequently political – have greater impact.[296]

The CSRA was sold on two fronts: Congress and the public.[297] To sell the reform to Congress, "the Carter Administration emphasized the need to improve management efficiency and to enhance political control."[298] To sell the reform to the public, "the Administration played to stereotypes of bureaucratic inefficiency, emphasizing the punitive aspects of the Act, especially the provisions for firing unproductive employees."[299] Because Congress failed to completely understand the reform components, it was more involved with implementing the reform than anticipated.[300]

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[291] 5 U.S.C.S. § 7121(g).
[292] 5 U.S.C.S. § 7121(g)(4).
[293] 5 U.S.C.S. § 7121(2)(A)(i).
[294] 5 U.S.C.S. § 7121(2)(A)(ii).
[295] *See* 5 U.S.C.S. § 7122(a).
[296] Ingraham, *supra* note 148, at 5.
[297] *Id*. at 4.
[298] *Id*.
[299] *Id*.
[300] *Id*. at 5.

Congress' extra involvement may have contributed to at least some of the problems identified throughout the rest of this part.

A. Too many pursuits

The complexity inherent in the federal employee complaint, appeal and grievance systems may have been created primarily because of the "simultaneous pursuit of three rather straightforward concerns: adequate protection of employees from discrimination of various types, uniformity in federal personnel management, and solidifying and expanding the place of arbitration as a mechanism to resolve federal employee grievances."[301]

First, in passing the CSRA, Congress was concerned with ensuring the "protection against employment discrimination of the types forbidden by federal law in the private sector" could be obtain by federal employees.[302] Thus, in 1978, the EEOC inherited must of the authority of the Civil Service Commission for administration and enforcement of anti-discrimination statues."[303] Also, bargaining unit employees could either choose the statutory process or the grievance/arbitration process for discrimination claims. [304] If the employee chose the NGP route, review of the arbitration result was available through the EEOC.[305] Whether the statutory process or grievance/arbitration process was pursued by the employee, Congress also provided "a right to a trial *de novo* on discrimination claims in the United States district courts."[306]

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[301] Luneburg, *supra* note 27, at 28.
[302] *Id*.
[303] *Id*.
[304] *See* 5 U.S.C. § 7121(d) (1982)).
[305] *See id*.
[306] Luneburg, *supra* note 27, at 28.

A second concern, although not pursued as aggressively, was "uniformity in personnel management."[307] Thus, Congress saddled "overall responsibility for the execution, administration, and enforcement of civil service statutes and rules" with the OPM.[308] Of course, Congress also gave OPM the authority "to delegate many of its important functions to agency heads."[309] Because of its overall responsibility, unlike other federal agencies, OPM can, within limits, petition "the federal courts to overturn an administrative or arbitral order in a personnel case."[310] OPM must be able to assert that "the administrative or arbitral decision involves an error in the interpretation of civil service law that may have system-wide impact."[311]

Unfortunately, the third congressional concern which was a "desire to provide a firm statutory basis for, and expand the role of, collectively-bargained grievance processes in federal work-place dispute resolutions" compromised "[t]he goal of uniformity in personnel administration."[312] These grievance processes were given a broad scope.[313] The scope included not only "major performance and disciplinary actions" but also "discrimination claims (though granting the employee the option to eschew these processes for the MSPB and the EEOC)."[314]

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[307] *Id*. at 29.
[308] *Id*. (citing to 5 U.S.C. §§ 1103(a)(5), 1104(b)-(c) (1982)).
[309] *Id*. (citing to 5 U.S.C. § 1104(a) (1982)).
[310] *Id*.
[311] *Id*. (citing to 5 U.S.C. § 7703(d) (1982)).
[312] *Id*. at 32.
[313] *Id*.
[314] *Id*. (citing 5 U.S.C. § 7121(d)-(e)). For performance and disciplinary actions, appeals from arbitrator awards were to the United States Court of Appeals for the Federal Circuit after 1982. The new FLRA reviewed other arbitrator awards. If neither a discrimination claim nor a ULP were alleged, then the decision by the FLRA was final.

Therefore, "disuniformity" was tolerated throughout the statute.[315] First, in looking at MSPB and arbitration cases, it was virtually impossible to ensure uniformity because the arbitral process was informal by nature and the MSPB was less so.[316] As a result, there was a virtual guarantee that different results would occur in MSPB and arbitral cases.[317]

Second, the United States Court of Appeals for the Federal Circuit approach towards arbitration awards resembles that made by courts who review private sector arbitral awards.[318] The deference has spilled over to the review of arbitral results in discrimination cases reviewed by the MSPB and EEOC.[319] On the other hand, when the FLRA has the final say in arbitral awards it has been less differential by not beholding itself to outside determinations.[320] As a result, personnel law approaches have resulted in inconsistencies.[321]

B. "A Byzantine Maze of Appellate Routes"

Agency regulations, which have elaborated on the statutory structures established by the CSRA, have resulted in "a Byzantine maze of appellate routes."[322] As a result, several factors have developed: "delay in the final resolution of cases, confusion for managers, employees, and even the agencies responsible for administering the various

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[315] *Id*.
[316] *Id*.
[317] *Id*.
[318] *Id*.
[319] *Id*. (citing to *See, e.g., Carr v. Dept. of the Air Force,* 32 M.S.P.B. 665 (1987); *Robinson v. Dept. of Health & Human Services,* 30 M.S.P.B. 389 (1986); and *Denson v. Veteran's Admin.*, 30 M.S.P.B. 383 (1986)).
[320] *Id*. (citing to *Cornelius v. Nutt*, 472 U.S. 648, 661 (1985)).
[321] *Id*.
[322] *Id*.

processes, and more than a little cynicism regarding the statutory product."[323] Structural reform might not be enough because it is still up to agencies to perform.[324]

C. Imbalanced Processes

The history of the civil service in Part II demonstrates that change is nothing new because the evolution of the civil service has occurred from its creation.[325] Put another way, "the civil service has never stood still."[326] Even though the CSRA "is widely recognized as a landmark in civil service reform," its accomplishments are suspect.[327] For example, "the redress system provides extensive protections for employees but is complex, time-consuming, and expensive; the poor performers issue remains a frustration."[328] Unfortunately, despite some tinkering here and there with the CSRA, "the civil service system as a whole is still viewed by many as burdensome to managers, unappealing to ambitious recruits, hidebound and outdated, overregulated, and inflexible."[329]

There is a consensus that processes are unbalanced, favoring protection for employees over "a streamlined, inexpensive system for handling employee

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[323] *Id*. at 33.
[324] *Id*.
[325] *Civil Service Reform: Changing Times Demand New Approaches: Hearing Before the Subcomm. on Civil Service, H. Comm. on Gov't Reform and Oversight*, 104th Cong.1 (1995) (statement of L. Nye Stevens, Director, Federal Management and Workforce Issues General Government Division, United States General Accounting Office).
[326] *Id.* at 2.
[327] *Id.*
[328] *Id.*
[329] *Id.*

complaints."[330] More balance is obviously needed. [331] Ultimately, it will be up to Congress and the President to find the happy medium."[332]

D. Overlapping Jurisdiction

In an employment relationship the potential for disputes are numerous and those disputes can lead to action taken against an employee that may or may not be warranted. Nevertheless, these controversies in federal employment are handled in a framework "characterized by overlapping jurisdiction among various agencies -- specifically, the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority (FLRA), and the Equal Employment Opportunity Commission (EEOC) -- and the employee's ability to choose from more than one remedial route."[333]

E. Too political

Unfortunately, as noted by David Dillman, "politics is an enduring part of the reform process."[334] A good example of this is "[t]he labor-management relations provisions of the [CSRA]," which "demonstrates the role of a small, but powerful, group of special interests."[335] When the original reform was sent to Congress, the section of the CSRA covering labor-management relations did not exist."[336] Subsequently, this part was sent to the Congress to be added to the package. [337] Thus, Title VII was made part of

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[330] *Id.*
[331] *Id.* at 5.
[332] *Id.* at 5.
[333] Luneburg, *supra* note 27, at 5.
[334] Stanley, *supra* note 1, at 258.
[335] Ingraham, *supra* note 148, at 4.
[336] *Id.*
[337] *Id.*

the CSRA, to garner support for the whole CSRA from an employee's union."[338] With Title VII, the FLRA was created as an independent entity; however, Title VII "did little to clarify the scope and meaning of other labor-related components of the legislation, such as the scope of bargaining."[339]

This could also be said for hearings the House Subcommittee on the Federal Workforce and Agency Organization held in 2005 and 2006 pertaining to civil service reform. At the 2005 hearing, Cari M. Dominguez, Chair at the EEOC, testified that,

> We recognize that reform of the Federal EEO system is warranted. Indeed, the Federal EEO process has been perennially criticized as too slow, too cumbersome, too expensive, and subject to perceived or real conflicts of interest. Many of the critics of the system consider the current arrangement under which the same agency accused of discrimination investigating itself has a conflict of interest. The EEO process is also sometimes used to address workplace disputes that belong in another forum. Clearly, these issues raise the question as to whether agencies, employees and taxpayers are being well served. In my view, what is needed is a better model and a more flexible system. It is critical that sufficient resources be devoted to those cases where it is likely that discrimination has occurred.[340]

Apparently Congress has heard the problem and even possible solutions, but isn't very interested in making progress on a solution.

F. Varied Relief

In reviewing the performance and accountability reports for the EEOC and MSPB, one can easily see that the MSPB usually decides most cases within required time

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[338] *Id.*

[339] *Id.* (citing to Toni Marzotto, Charles Gossett and Carolyn Ban, "Civil Service Reform and the Scope of Bargaining in Federal Labor Relations," unpublished paper, 1983).

[340] *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court, Hearing Before the H. Subcomm. on the Fed. Workplace and Agency Org. of the H. Comm. on Gov't Reform*, 109th Cong. 37 (2005) (statement of Cari M. Dominguez, Chair, U.S. Equal Employment Opportunity Commission).

frames and the EEOC struggles. Admittedly the EEOC has made improvements, but the numbers can hardly justify the status quo. In the fiscal year 2009 EEOC Performance and Accountability Report,[341] the average processing time for a merit decision on an EEO case was the 451 days when no EEOC judge is involved.[342] For 2005, the number was 479 days.[343] If you count cases withdrawn, dismissed, or settled, the average for all federal EEO complaints not referred to an administrative judge in 2009 was 344 days.[344] The number was 411 days for 2005.[345] In 2009, a case that was referred to an EEOC judge took an average of 185 days to complete the investigation within the required 180 days.[346] In 2005, the number was 237 days. [347] Obviously, fiscal year 2009 was an improvement for the EEOC but a 180 days metric still seems like a long time when that time frame does even get you to the merits. You basically have a person waiting 6 months, not including the 30 days for the required informal process, and this is early in the EEOC process.

In the 2010 MSPB Performance and Accountability Report, the average case processing time for initial decisions was 89 days.[348] In 2006, the number was 89 days as well.[349] The required processing time is 120 days, but the MSPB has imposed a goal of 90 days.[350] Therefore, the MSPB has not only met their goal, but exceeded the 120 day

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[341] 2009 EEOC PERFORMANCE AND ACCOUNTABILITY REP. is the latest report available for the EEOC to date.
[342] 2009 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 386.
[343] 2005 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 298.
[344] 2009 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 376.
[345] 2005 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 290.
[346] 2009 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 332.
[347] 2005 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 270.
[348] 2010 MSPB PERFORMANCE AND ACCOUNTABILITY REP. 22.
[349] *Id.*
[350] *Id.*

requirement with no problem. In 2010, the MSPB was able to complete petitions for review on average in 134 days.[351] In 2006, the number was 154 days[352]. The target time frame is 150 days or less.[353] The MSPB has shown a consistent ability keep time standards. Of course, when compared to EEOC processing time there is no question that the MSPB is more efficient.

G. Complicated Systems

As is clear from the CSRA's legislative history, "from a procedural standpoint, … the law is a hodgepodge of preexisting systems melded into a 'reform law' that may have changed the names of the agencies, but only further complicated the system."[354] Bottom line, "the system does not work well enough."[355] It is probably best characterized as "wasteful," "duplicative," and "costly."[356] Also, "there are inherent institutional delays, and [the systems are] confusing to utilize."[357]

Fortunately, over the years the various agencies have been aware of some of the procedural difficulties posed by the systems."[358] For example, when a labor organization files "an unfair labor practice charge and a negotiability petition involving the same

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[351] *Id.*
[352] *Id.*
[353] *Id.*
[354] Feder, *supra* note 5, at 268-269 (citing to H. COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978 (Comm. Print 1979); *See* FEDERAL CIVIL SERVICE LAW AND PROCEDURES, A BASIC GUIDE, (Ellen M. Bussey ed., BNA 1984), which provides a comprehensive review of the rights, obligations, procedures, and appeal routes established in the CSRA. See also, U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-84-17, SURVEY OF APPEALS AND GRIEVANCE SYSTEMS AVAILABLE TO FEDERAL EMPLOYEES (1983).
[355] Feder, *supra* note 5, at 269.
[356] *Id.*
[357] *Id.*
[358] *Id.* at 270.

matter" FLRA regulations require the labor organization to select which procedure it wants to proceed under.[359] Also, where a case is pending before the FSIP under the same issue for which an unfair labor practice charge has been filed it is the policy of the Office of the General Counsel of the FLRA "to defer processing unfair labor practice charges" while the matter is pending before the FSIP.[360] In a similar fashion, if a matter is pending before another CSRA agency and it is under consideration by the OSC, the OSC will defer to the other agency.[361] While "the CSRA agencies, by regulation and policy, have made an effort to make sense of the CSRA scheme," a potential bigger problem has been exposed.[362]

Because of these overlapping procedures among the agencies involved in the federal employee complaint, appeal, and grievance systems,[363] "one federal agency is making substantive decisions that impact upon the procedures, rights, and remedies emanating from other CSRA agencies."[364] What is more amazing is that while "the drafters of the CSRA were well aware of the multiplicity of forums created in the law," not much thought was put into what effect that would have on the systems.[365] For instance, in mixed cases Congress was said to have set up "simplified" procedures, "which inform federal employees of their very important rights to appeal decisions adverse to them."[366]

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[359] *Id.* (citing to 5 CFR §§ 2423.5 and 2424.5 (1988)).
[360] *Id.* (citation omitted).
[361] *Id.* (citing to 5 U.S.C. § 1206(e)(2) and 5 CFR § 1251.2 (1988)).
[362] *Id.*
[363] *Id.* at 271.
[364] *Id.*
[365] *Id.*
[366] *Id.* at 272. (citing to the H. SUBCOMM. ON POSTAL PERSONNEL AND MODERATION OF THE COMMITTEE ON POST OFFICE AND CIVIL SERVICE, LEGISLATIVE HISTORY OF THE

V. FOUR PROPOSALS FOR REFORM

Having laid out the problems, we must ascertain what to do about them. As Mr. Feder stated in 1989, "the time has come to abandon the current system and create a better and simpler way of resolving disputes in the federal workplace."[367] This part will present proposals previously offered for reforming the federal employee complaint, appeal, and grievance systems. In choosing these proposals I am not suggesting that others do not exist. The authors of these proposals are Professor William V. Luneburg,[368] Mr. David L. Feder,[369] Mr. William L. Bransford,[370] and Mr. Peter Broida.[371] However,

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FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, 767 (Comm. Print 1979).

[367] *Id.*

[368] Professor William V. Luneburg is a Professor of Law at the University of Pittsburgh School of Law. His proposals originate from an article based on a report he prepared as a consultant to the Administrative Conference of the United States (ACUS). The Article was subsequently published in the Kentucky Law Journal and is cited in this paper. *See* Luneburg, *supra* note 27.

[369] Mr. Feder was the Assistant General Counsel for Legal Policy and Field Management within the Office of the General Counsel of the Federal Labor Relations Authority at the time he wrote the referenced article. His article is cited at Feder, *supra* note 5.

[370] William L. Bransford is a partner in the law firm of Shaw, Bransford & Roth, P.C. where he has practiced since 1983. His practice is concentrated on the representation of federal executives, managers, and employees before the United States District Courts, the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel, Offices of Inspector General, and with offices that adjudicate security clearances. Mr. Bransford is also currently General Counsel and lobbyist for the Senior Executives Association. He also advises several small federal agencies on matters pertaining to federal personnel and employment law and represents private sector employers and employees on employment law issues.

[371] Peter Broida has been a solo practitioner since 1993. He represents employees and unions in federal sector cases and also provides occasional counsel to or representation of federal agencies needing specialized counsel. Most of Mr. Broida's litigation is before the MSPB and the United States Court of Appeals for the Federal Circuit. He also provides representation before EEOC, FLRA, labor arbitrators, and other federal district and circuit courts of appeals. Most of his cases involve appeals from terminations of employment, with some related EEO matters and Equal Pay Act litigation. Mr. Broida also writes the annual editions of A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW

these proposals offer a good overview for solutions to the problems with the federal employee complaint, appeal, and grievance systems. Professor Luneburg's proposal does a good job of dissecting the process, so his proposal will be used to look at different areas for reform. The other proposals follow his proposal.

A. Modest Changes

In his 1990 article,[372] Professor William V. Luneburg suggested modest changes to the federal employee complaint, appeal, and grievance systems. Professor Luneburg believed the proposals for change, such as those advocated by Mr. Feder below are "radical"[373] because the system is "working reasonably well."[374]

Among the reasons cited by Professor Luneburg for only modest changes included costs, manager and employee familiarity with the current systems, and the "political capital" of federal unions.[375] In advocating modest changes or no change at all, Professor Luneburg looks at the negotiated grievance process and the FLRA and then the appeal routes with suggestions for improvement within each.[376]

Within the NGP and the FLRA, although Professor Luneburg acknowledges the process is working, he believes there is room for some change.[377] For instance, because the MSPB, EEOC, and FLRA share jurisdiction, in some cases, over discrimination cases

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AND PRACTICE and A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE, along with other related books on civil service litigation.

[372] Luneburg, *supra* note 27.
[373] *Id*. at n3.
[374] *Id*. at 4.
[375] *Id*. at 93.
[376] *Id*. at 93-128.
[377] *Id*. at 94.

it is possible that the "applicable personnel rules" might confuse managers.[378] There is also the potential for "forum shopping by employees for favorable personnel law."[379] To discourage such practice, Professor Luneburg advocates providing for "direct judicial enforcement of grievance arbitral awards in the federal courts."[380]

As for the judicial review of arbitral awards, Professor Luneburg sees an argument for imposing "a uniform scope of review" applicable to all arbitration awards.[381] Therefore, the scope of judicial review for Chapters 43 and 75 matters would be the same as the scope of judicial review in non-Chapters 43 and 75 matters."[382] He supports this approach because it promotes "uniformity between the MSPB and arbitral processes with regard to the statutorily mandated procedures and the [application] of substantive rules."[383] Although he does not advocate it, Professor Luneburg acknowledges that the role of the FLRA could diminish if "review and enforcement proceedings [were consolidated] in the same judicial forum and [occurred] at the same time" in order to "expedite final resolution of arbitrated controversies."[384]

Professor Luneburg also discusses the various appeal routes, whether change is warranted and, if so, where change is warranted.[385] For the most part he supports continued choice where it exists.

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[378] *Id*. at 95 & n.488 ("Not knowing whether discrimination will be raised may cause a manager to pause where there is differing MSPB/FLRA precedent.").
[379] *Id*. at 95.
[380] *Id*. at 96.
[381] *Id*. at 98.
[382] *Id*.
[383] *Id*.
[384] *Id*. at 97.
[385] *Id*. at 99-128.

Professor Luneburg supports the continued choice between the NGP and MSPB process for Chapters 43 and 75 actions on several grounds.[386] First, the MSPB process is needed for non-bargaining unit employees and for bargaining unit employees where Chapters 43 and 75 matters are excluded from the NGP in the collective bargaining agreement.[387] Second, employees who are members of bargaining units likely prefer the MSPB process over the NGP.[388] Third, having options insulates the union to some degree from liability from employees against allegations such as of "lack of fair representation."[389] Fourth, Professor Luneburg fears that if the MSPB were the only option it would be tantamount to union busting because employees would not vote for union representation.[390]

Regarding the choice between the NGP and the statutory process for discrimination complaints, Professor Luneburg is in favor of preserving the unit employee existing choices.[391] If those choices are not preserved, he is concerned that employees alleging discrimination in their Chapters 43 and 75 actions will be restricted to "the NGP with a right to trial *de novo* in the district courts" while those not alleging discrimination could "choose the NGP or the MSPB process.[392] If the choice is not

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[386] *Id*. at 99-101.
[387] *Id*. at 99.
[388] *Id*. at 100 ("The likely reasons for this preference suggest that the statutory choice continues to make sense from an employee's point of view: the union controls access to arbitration; arbitral proceedings do not always have the same "procedural protections and opportunities (such as discovery) found at the Board; and unit employees who are not dues-paying members of the union (and even some that are) may not entirely trust the union to faithfully protect their interests in what are, after all, the principal adverse personnel actions.").
[389] *Id*. at 101.
[390] *Id*.
[391] *Id*. at 103.
[392] *Id*. at 102.

preserved, he thinks it was would be viewed as a veiled attempt to discourage discrimination claims.[393] Instead Professor Luneburg without specification favors "[f]uture improvements of the EEO process in terms of quality and expedition of decision-making."[394]

As for appeals from the NGP in discrimination cases, Professor Luneburg supports eliminating the right to appeal from the NGP to either the MSPB or EEOC in order to avoid discrepancies in appellate routes.[395] As things stand, in discrimination cases, when employees opt for the NGP the benefits of EEO, except counseling, are lost, unless the collective bargaining agreement says otherwise.[396] However, under the NGP the right to sue *de novo* in federal court would still exist.[397] Also, Professor Luneburg recommends that Congress statutorily mandate that collective bargaining agreements require "investigation and mediation by third-party neutrals at the request of the employee at the pre-arbitration stage" if the NGP includes discrimination claims.[398]

Speaking of the right to trial *de novo* in discrimination cases, Professor Luneburg favors more clarity in the process.[399] He believes federal employees should not be entitled to two *de novo* hearings even if one is adjudicatory plus[400] and the other is in United States District Court for two primary reasons. First, because private and public sector employee enjoy similar anti-discrimination protections, federal employees should

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[393] *Id*. at 102-03.
[394] *Id*. at 103.
[395] *Id*. at 104-05.
[396] *Id*. (citing to 29 C.F.R. § 1613.219(b) (1988)).
[397] *Id*.
[398] *Id*. at 104.
[399] *Id*. at 106-08.
[400] *Id*. at 106 ("In mixed cases, an employee may avail himself or herself of a full trial-type hearing at the MSPB (including subsequent EEOC and Special Panel review….).

not be entitled to two full hearings on a discrimination claim when private sector employees are not as well.[401] Second, as Professor Luneburg explains "two full hearings on the same claim" is counter to "the common law doctrines of claim preclusion" but also adds costs to the parties, the judicial system, and other resources and congests the dockets of both administrative and judicial systems. [402] To bring clarity to the process, Professor Luneburg recommends that Congress amend the relevant statutes for mixed cases to allow the employee to choose between either "an MSPB hearing or a judicial trial *de novo* but not both."[403]

For mixed cases particularly, Professor Luneburg suggests modifications to both the administrative and judicial processes. As far as judicial review in mixed cases, Professor suggests modifying the process to discourage forum shopping and bring the MSPB, arbitral, and district court processes closer to the uniformity envisioned by the CSRA.[404] To that end, Professor Luneburg suggests the following:

> where an employee has chosen not to have an MSPB hearing, the type of bifurcated review prevailing at the district court level can be abandoned. Where any available NGP process has not been invoked, the district court should hold a fully *de novo* proceeding, applying MSPB substantive law on the personnel side and the type of procedural rules pertaining to such matters as burden of proof that are demanded by discrimination law. If the discrimination issue is disposed of unfavorably to the employee, the personnel aspect of the case should be analyzed as consistently as possible with the burdens of persuasion that would otherwise apply in an MSPB proceeding, e.g., a lesser burden on the agency in a Chapter 43 action. If, however, the NGP has been invoked and there has been an arbitral award, the district court should give as much deference to the arbitral findings on

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[401] *Id*.
[402] *Id*. at 106 & n.521.
[403] *Id*. at 107 & n.525 (Professor Luneburg says Congress has done this in other context. For instance, under the Fair Housing Amendment Act of 1988, Pub. L. No. 100-430, § 8, 102 Stat. 1629-34 (1988), for housing discrimination practice claims complainants can choose either an administrative hearing or a district court proceeding but not both).
[404] *Id*. at 110.

> the personnel side as is appropriate without undercutting the plaintiff's right to a full *de novo* proceeding on the discrimination issue. At least in Chapters 43 and 75 actions, MSPB substantive rules should control on the personnel side.[405]

Regarding administrative jurisdiction in mixed cases, Professor Luneburg suggests three potential forum options for mixed cases to help combat delay and process confusion.[406] First, give the Merit Systems Protection Board exclusive jurisdiction because it has shown it can adequately protect EEO goals.[407] Second, give the Merit Systems Protection Board and the Equal Employment Opportunity Commission concurrent jurisdiction.[408] He does not favor concurrent jurisdiction between the MSPB and EEOC because it would do little to combat the delay and confusion that plague the process.[409] It would also expand the authority of the EEOC beyond what Congress intended in 1978.[410] This option could also lead to forum shopping, if one agency is viewed more favorably over the other.[411]

The third option would be to give the EEOC exclusive jurisdiction.[412] However, Professor Luneburg does not favor this option because of the delays in the EEOC process and a lack of resources.[413] Instead, Professor Luneburg prefers giving the MSPB "exclusive adjudicatory jurisdiction in mixed cases."[414] The MSPB "is faster, independent of the employing agency, and the judicialized procedures protect the

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[405] *Id*.
[406] *Id*. at 112-16.
[407] *Id*. at 112-14.
[408] *Id*. at 114-16, 118-19 ("The Special Panel apparatus was originally put in place to insure some adjudicatory role for the EEOC in mixed cases….").
[409] *Id*. at 112-13.
[410] *Id*. at 114.
[411] *Id*. at 116.
[412] *Id*. at 116-18.
[413] *Id*. at 116.
[414] *Id*. at 117.

employee."[415] Overall Professor Luneburg believes it would better to rid the mixed case administrative process of the plaguing delays and confusion, than it would be to retain employee's right to a trial *de novo* to the United States District Court after going through the administrative process.[416]

The Special Panel is the other piece of the mixed case process. The Special Panel is viewed as too "complex" and "convoluted" and smells of "political compromise."[417] However, he believes the Special Panel can be retained with changes. Congress should abolish the restrictions against the Special Panel making "a decision on the merits" as established by *Ignacio v. United States Postal Service*.[418] Congress should also amend 5 USC Section 7702 to specify that

> the EEOC can accept a petition only if it believes (1) that the case presents an important legal issue of discrimination law or the relationship between civil service and discrimination law, and (2) that the MSPB was incorrect in its disposition of this legal issue. On reference back, the MSPB should be able to disregard the EEOC decision and certify the matter to the Special Panel only if it believes that the EEOC was incorrect in resolving an issue of civil service law or the relationship of civil service and discrimination law.[419]

Furthermore, he believes Special Panel rulings should be "explicitly binding on both the MSPB and the EEOC absent either judicial reversal on direct appeal or rejection of the Special Panel's resolution by the Supreme Court in other cases or the 'overwhelming'

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[415] *Id*. at 113.
[416] *Id*. at 112-13.
[417] *Id*. at 119.
[418] *Id*. at 49-50, 119. *See* Ignacio v. United States Postal Serv. Agency, 30 M.S.P.R. 471, 486 (Spec. Pan. 1986) (the MSPB held that "[t]he Panel will reach a decision addressing the merits of the case only where: (a) the decision of the MSPB that the EEOC decision incorrectly applied a provision of civil service law, rule, regulation or policy directive is correct, and (b) the decision of the EEOC that the MSPB, in its initial decision, incorrectly interpreted and applied discrimination law is correct….").
[419] *Id*. at 119.

weight of circuit court precedent.[420] He also believes Special Panel decisions should be subject to limited review at the United States Court of Appeals for the Federal Circuit.[421]

Professor Luneburg also recommends making changes to the ability of the government to seek judicial review in discrimination cases.[422] As Professor Luneburg notes, "when an agency loses a case involving allegations of discrimination before the MSPB, EEOC, the Special Panel, an arbitrator, or the FLRA, its procedural opportunity to obtain judicial reversal is, at best, very limited."[423] Often the government must refuse "to comply with administrative or arbitral determinations … before review can be requested."[424] In his view this is "inefficient" and "casts a pale of illegitimacy over what may be an entirely justifiable claim of legal error."[425]

Professor Luneburg recommends that Congress extends OPM's ability to request judicial review to both discrimination cases and those cases where the Director "believes that a decision of the MSPB, EEOC, FLRA (assuming its arbitral review jurisdiction is retained), or an arbitrator constitutes an incorrect interpretation of civil service law that may have a substantial impact."[426] More specifically, he calls for allowing the United States Court of Appeals for the Federal Circuit to hear all appeals by OPM.[427]

In the area of agency administrative grievance systems, Professor Luneburg proposes that these systems can be improved by utilizing outside neutrals for

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[420] *Id*. at 120 & n.570.
[421] *Id*. at 120.
[422] *Id*. at 120-23.
[423] *Id*. at 120.
[424] *Id*. at 122.
[425] *Id*.
[426] *Id*. at 122-23.
[427] *Id*. at 123.

investigations, who would then recommend a decision.[428] He believes such improvements could inject more trust in the process which could help take pressure of the EEO framework and help resolve disputes quicker.[429]

Professor Luneburg finds the Office of the Special Counsel "one of the most problematic areas for potential reform" because of its role "to protected employees, especially whistleblowers, from prohibited personnel practices."[430] If there is a problem with the Office of Special Counsel, Professor Luneburg believes it lacks the resources both in terms of finances and personnel to adequately accomplish its mission.[431]

If nothing else, Professor Luneburg believes better communication between all parties could do wonders for the system by alleviating "the costs of parallel, duplicative proceedings in the MSPB, the EEO framework, and/or the NGP."[432]

Of all the proposals listed in this part, Professor Luneburg's is the most detailed. While Professor Luneburg's proposal recommends some simplification of the process, the proposed simplifications are inadequate. The strengths of Professor Luneburg's proposal include, but are not limited to, a call for "a uniform scope of review" for all arbitration awards,[433] the elimination of two *de novo* hearings in discrimination cases,[434] and giving the MSPB "exclusive adjudicatory jurisdiction in mixed cases."[435] Many of the recommendations by Professor Luneburg would simplify parts of the process, but not the process as a whole, which is the glaring weakness of Professor Luneburg's proposal.

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[428] *Id*.
[429] *Id*. at 123-24.
[430] *Id*. at 124.
[431] *Id*. at 124-27.
[432] *Id*. at 127.
[433] *Id*. at 98.
[434] *Id*. at 107.
[435] *Id*. at 117.

Most notably among the weaknesses of Professor Luneburg's proposal is retention of the Special Panel for mixed case complaints/appeals because the Special Panel is too "complex" and "convoluted."[436]

In the end, I would not recommend blanket acceptance of Professor Luneburg's proposal because it is too much of the current process. A process that is problematic at best. The next proposal is the "radical" proposal of Mr. Feder, per Professor Luneburg's description.[437]

B. The Federal Dispute Resolution Board

Mr. David L. Feder's reform proposal actually predates Professor Luneburg and is a stark contrast. Mr. Federal proposes a new administrative agency he calls "The Federal Dispute Resolution Board (FDRB)" to remedied numerous problems including mixed cases, costs of the current system, inconsistencies in awarding attorney fees, and FLRA and MSPB overlap.[438]

To form the FDRB, Mr. Feder proposes consolidating the following agencies or parts thereof

> the FLRA, MSPB, OSC, offices and divisions of the EEOC involved in processing federal employee EEO complaints and overseeing the federal EEO program, those resources of the FCMS designated to mediating federal sector bargaining disputes, and those divisions of the DOL mandated to monitoring the internal operations of federal sector labor organizations."[439]

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[436] *Id*. at 119.
[437] *Id*. at n.3.
[438] Feder, *supra* note 5, at 268-276.
[439] *Id*. at 276.

Naturally, the FDRB would take over the responsibilities currently exercised by these agencies.[440] The FDRB would be "composed of five members and a General Counsel appointed by the President with the advice and consent of the Senate."[441]

Mr. Feder believes his proposal will cut down on "repetitive litigation in different forums," create "a unified, simplified procedure," uphold "substantive rights under the current systems," "better promote the policy of the United States … expressed in Section 3 of the CSRA,"[442] and increase efficiency with a reduction in federal budget expenditures.[443]

In all Mr. Feder makes twenty suggestions for the formulation of the FDRB.[444] The first four describe how the FDRB would look and function, most of which have been mentioned above.[445] Regarding the five members of the FDRB, decisions by the FDRB would be rendered by a three member panel or by one member with the right to request "reconsideration by the entire FDRB."[446] The resources of the merged agencies would be utilized to staff, fund, and house the FDRB.[447] A particular dispute would not dictate a particular procedure, time limits or filing requirements, instead the same procedure, time limits, and filing requirement would apply to all disputes.[448]

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[440] *Id*.
[441] *Id*.
[442] Civil Service Reform Act of 1978, § 3, 92 Stat. at 1112-13.
[443] Feder, *supra* note 5, at 276.
[444] *Id*. at 277-280.
[445] *Id*. at 277.
[446] *Id*.
[447] *Id*.
[448] *Id*.

Because one procedure would be utilized, Mr. Feder calls for the elimination of four procedures.[449] First, Mr. Feder would eliminate "[t]he negotiability procedure for processing labor-management bargaining disputes."[450] Second, "[t]he exception to arbitration award procedure" would be eliminated.[451] Instead of these two procedures, either the union or the agency could file a ULP for the other's failure to bargain or non-compliance with an arbitrator's award.[452]

The third procedure Mr. Feder would eliminate concerns impasses.[453] Impasses would be resolved by the FDRB instead of through the Federal Service Impasses Panel's "dispute resolution procedures."[454] To resolve disputes, the FDRB would "utilize its field structure to hold hearings, conduct mediation-arbitration, etc. to resolve bargaining disputes…."[455] Under the FDRB's guise, "all issues could be resolved at the same time in the same forum."[456] The Special Panel is the fourth procedure Mr. Feder would eliminate.[457] He summarizes that eliminating the Special Panel would help avoid "the conflict and never ending litigation which is possible under the CSRA."[458]

With a one forum concept, Mr. Feder explains that "all allegations pertaining to [a] dispute" would be resolved in the same proceeding.[459] Thus, you would no longer

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[449] *Id*. at 277-78.
[450] *Id*. at 277 (citing to 5 U.S.C. § 7117).
[451] *Id*. (citing to 5 U.S.C. §7122).
[452] *Id*.
[453] *Id*.
[454] *Id*. (citing to 5 U.S.C. §7119).
[455] *Id*.
[456] *Id*. at 277-78.
[457] *Id*. at 278.
[458] *Id*.
[459] *Id*.

have the situation where the same dispute or at least allegations out of the same dispute are pending before several forums.[460]

Mr. Feder would create an Office of Settlement and Adjustment in the FDRB, which would be responsible for attempting to resolve all disputes before the case moved to a litigation phase.[461] To avoid a rush to litigation, Mr. Feder proposes that the Office "establish standards and procedures to ensure that all efforts to resolve the dispute at the lowest possible level have been explored prior to the initiation of a formal process."[462] Mr. Feder believes "similar dispute resolution techniques could be utilized in resolving alleged prohibited personnel practices, adverse actions, prohibited discrimination, and ULPs."[463] For other disputes not mentioned above, Mr. Feder recommends modifying and expanding the informal EEO complaint procedure.[464]

Two other areas are addressed with Mr. Feder's FDRB proposal. One concerns investigating the merits of allegations. The other concerns the area of temporary relief. Under the investigation procedures, the procedures for some allegations would increase to the benefit of the federal employee.[465]

First, Mr. Feder proposes using a procedure similar to those employed by the FLRA General Counsel and the OSC to attempt to resolve disputes that the Office of Settlement and Adjustment is unable to resolve.[466] Under this process, if the Office of Settlement and Adjustment is unable to resolve disputes the FDRB General Counsel

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[460] *Id*.
[461] *Id*.
[462] *Id*.
[463] *Id*.
[464] *Id*.
[465] *Id*. at 278-79.
[466] *Id*. at 278.

could investigate the allegation for merit through the Regional Directors.[467] A formal proceeding would only occur if it is determined an allegation has merit and the parties do not settle.[468]

If a formal hearing is held before the FDRB and the General Counsel's investigation determined the adverse action was "unwarranted," the employee could either be represented by the General Counsel or represent himself or herself.[469] On the other hand, if the General Counsel's investigation does not find that the adverse action was unwarranted, the employee could either represent himself or herself at the hearing or obtain his or her own representative.[470] Those alleging discrimination would still retain their right to seek recourse through United States District Court.[471]

As Mr. Feder explains, the investigation component enhances the MSPB procedure.[472] The General Counsel's responsibilities under the procedure would also enhance the EEO process.[473] Mr. Feder also believes that retaining the right to proceed on a discrimination claim in United States District Court will encourage the parties to settle.[474] He also believes the procedure will help conserve resources by routing out meritless claims.[475]

To ensure cooperation in investigations, Mr. Feder believes the exclusive recognition status of agencies, employees, and unions should depend on whether they

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[467] *Id.*
[468] *Id.*
[469] *Id.*
[470] *Id.*
[471] *Id.*
[472] *Id.*
[473] *Id.*
[474] *Id.*
[475] *Id.*

fully cooperate throughout the process.[476] As Mr. Feder explains, there is some history of agencies failing to cooperate in the investigation of ULPs[477].

Under this proposal, full cooperation would include disclosing "all documents upon which a formal action initiated by the General Counsel of the FDRB is based."[478] Mr. Feder also believes that proceedings would move quicker if time limits and parameters were placed on additional discovery.[479]

Mr. Feder also proposes that the FDRB include an Appeals Office.[480] If after the General Counsel's investigation, the General Counsel determines the allegation(s) lack merit the Regional Director would dismiss the allegation.[481] Upon dismissal, the complainant could appeal to the Appeals Office.[482]

Mr. Feder also makes a number of proposals pertaining to temporary relief, the use of administrative law judges (ALJs), appellate review of FDRB decisions, and class actions, and OPM jurisdiction.[483] First, he proposes allowing the FDRB General Counsel to file for temporary relief from the FDRB prior to a formal hearing "to stay any agency or union conduct during the dispute resolution procedure."[484] Second, allow the FDRB to utilize administrative law judges or non-administrative law judges at its discretion for hearings.[485] Third, judicial review of FDRB decision would be by petition only to the United States Court of Appeals for the Federal Circuit because it "would create the

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[476] *Id*. at 279.
[477] *Id*.
[478] *Id*.
[479] *Id*.
[480] *Id*.
[481] *Id*.
[482] *Id*.
[483] *Id*. at 279-80.
[484] *Id*. at 279.
[485] *Id*.

expertise, consistency, and continuity required to avoid proliferating disputes and resolve conflicts at the lowest level at the earliest opportunity."[486] Fourth, Mr. Feder proposes incorporating existing class action into the new procedure. He also proposes allowing the General Counsel to initiate action on his or own accord similar to what is permitted by OSC procedures.[487] Fifth, Mr. Feder proposes keeping OPM jurisdiction to initiate statutory appeals.[488]

Like Professor Luneburg's proposal, Mr. Feder's proposal is also fairly detailed. The biggest strength of Mr. Feder's proposal is his call for a single forum,[489] which would help move the systems towards a less complicated structure. Other strengths associated with the single forum proposed by Mr. Feder include the opportunity to dictate the same procedure, time limits and filing requirements for all disputes.[490] For example, Mr. Feder's proposal would eliminate four current procedures: the separate procedure for "labor-management disputes;"[491] "[t]he exception to arbitration award procedure;"[492] impasses being resolved by a separate body, the FSIP;[493] and the Special Panel.[494]

Among the weaknesses inherent in Mr. Feder's proposal is the central role to be taken by the General Counsel in the investigation and prosecution of adverse actions.[495] For one thing, the idea of having the prosecutorial and adjudicatory functions in the same agency raises questions of objectivity. Another weakness is retaining the option for

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[486] *Id*. at 279-80.
[487] *Id*.at 280. *See also* 5 C.F.R. 1201.123.
[488] Feder, *supra* note 5, at 280 & n.85.
[489] *Id.* at 276.
[490] *Id*. at 277.
[491] *Id*.
[492] *Id*.
[493] *Id*.
[494] *Id*. at 278.
[495] *Id*.

discrimination cases to proceed to United States District Court.[496] By retaining an exception to his proposed single forum process, Mr. Feder undermines the concept of his proposal.

I would not adopt Mr. Feder's proposal because I think his proposal is too FLRA centric. In other words, the FLRA is the wrong framework for a single forum. As it currently exists, the FLRA has two too many functions (the Authority, the General Counsel, and the FSIP) all with different, but important, responsibilities in the federal employee complaint, appeals, and grievance systems. Following Mr. Feder's proposal is a proposal by a practitioner with many years of experience litigating before the MSPB, EEOC, FLRA and the United States Court of Appeals for the Federal Circuit.

C. Federal Employment Commission & Court of Appeals for Federal Employees

In 2002, Peter Broida suggested reforming the current federal employee complaint, grievance, and appeal systems at the United States Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference.[497] In Mr. Broida's view, the problems with the current systems lie "in overwrapping, confusing and conflicting jurisdictions of the principal and secondary tribunals, the lack of uniformity of adjudicative procedures among those tribunals, and the want of any effective appellate review process for some groups of federal employees."[498] To alleviate these problems, Mr. Broida proposes a single administrative tribunal with intermediate review and

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[496] *Id*.
[497] 217 F.R.D. 548, 710-717 (2002).
[498] 217 F.R.D. at 712.

appeals to the United States Court of Appeals for the Federal Circuit.[499] A summary of his proposal follows.

His first suggestion is to form "a single [unified] administrative tribunal."[500] The tribunal would use existing ALJs from the current federal employee complaint, appeal and grievance systems and recruit others.[501] It would be necessary for ALJs to be proficient in both administrative litigation and the substantive law.[502] "[A]ll disputed personnel, labor relations, and equal employment claims" would be decided by the tribunal, which he calls the Federal Employment Commission.[503]

Mr. Broida proposes intermediate review by an Article I Court.[504] The court would resemble the Court of Appeals for Veteran's Claims.[505] Standing to bring appeals would be available for "agencies, unions, and employees."[506] The decisions of the Court of Appeals for Federal Employees (CAFE) would be precedential.[507] The Court could also decide cases by "summary affirmation."[508] Representation before the court would not be restricted to attorneys.[509] Petitions for judicial review of CAFE decisions would be submitted to the Federal Circuit.[510]

Compared to the current systems, Mr. Broida believes "[t]he unified administrative review for new authority and specialized employment and labor court

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[499] 217 F.R.D. at 716.
[500] 217 F.R.D. at 712.
[501] 217 F.R.D. at 712-13.
[502] 217 F.R.D. at 713.
[503] *Id*.
[504] *Id*.
[505] *Id*.
[506] *Id*.
[507] *Id*.
[508] *Id*.
[509] *Id*.
[510] *Id*.

would offer certainty in substance of the law, expertise in its development, and an end to the multiple and conflicting or confusing administrative and judicial review options that we currently face."[511] Furthermore, Mr. Broida believes cost savings could be realized by reducing "the number of current administrative tribunals and their associated duplicative operating, maintenance, and capital costs."[512]

One of the strongest points of Mr. Broida's proposal is the concept of "a single administrative tribunal" to hear all claims without exception because it relieves "constant conflicts between the precedents and jurisdiction over claims appealed to and between the MSPB and EEOC, and lesser jurisdictional and doctrinal differences among the FLRA, MSPB, and EEOC."[513] Additionally, Mr. Broida's proposal for a single court to hear all appeals from the tribunal would help provide uniformity at that important stage of any dispute.[514] Thus under his proposal, the process would be streamlined under one system without apparent alternatives or exceptions.

Weaknesses with Mr. Broida's proposal include a lack of clarity or specificity concerning evidentiary standards, investigative functions, and the role, if any, of alternative dispute resolution. Therefore, in its current form, I would not adopt Mr. Broida's proposal.

D. Federal Employee Appeals Court

More recently in 2005 in a hearing before the Subcommittee on the Federal Workforce and Agency Organization of the Committee on Government Reform in the

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[511] *Id*.
[512] *Id*.
[513] *Id*. at 712.
[514] *Id*. at 713.

House of Representatives, William L. Bransford, General Counsel to the Senior Executives Association[515] suggested reforming the current systems that govern federal employee complaints, appeals and grievance.[516] He also calls for a single forum, but his proposal offers an administrative, judicial hybrid.

His proposal on behalf of the SEA centers on the need to remedy "a complicated and mostly broken appeals mechanism that allows employees numerous bites of the apple, a multitude of different paths to pursue, and the ability to tie up management for years with frivolous complaints."[517] The SEA also views the current systems as "wasteful and unnecessary to have so many lengthy and redundant processes."[518] An overview of his proposal is detailed below.

The SEA proposes "an independent Federal Employee Appeals Court" to take over the investigative and adjudicative duties belonging to the MSPB, the FLRA, federal sector EEO, the OPM, and the OSC – "complete jurisdiction over Federal employee workplace issues".[519] The SEA contends that the new court will "provide a simple and expeditious mechanism, resulting in protection of the merit system by resolving employee concerns with relative speed, impartiality and fairness, while preserving all employee appeal rights."[520] Like the United States Tax Court, the proposed court would

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[515] *See Hearings, supra* note 4 (statement of William Bransford) ("[T]he Senior Executives Association (SEA) is a professional association that represents the interests of career federal executives in the Senior Executive Service and those in Senior Level, Scientific and Professional, and equivalent positions."
[516] *Hearings, supra* note 4, at 13 (statement of William Bransford).
[517] *Id.* at 17.
[518] *Id.*
[519] *Id.* at 13, 17.
[520] *Id.* at 17.

be an Article I Court.[521] As with other Article I Court judges, the judges would be appointed by the President and confirmed by the Senate.[522] For more routine matters, the SEA proposes hiring hearing examiners.[523]

A key feature of the new court would be that the process happens only once with appellate review to the United States Court of Appeals for the Federal Circuit.[524] By limiting all actions to one court and all appeals to one court, the SEA believes "a uniform body of rules of the workplace" will be created which will aid federal managers in the performance of their duties.[525] Even though there would be one avenue, the SEA believes "all substantive appeal and complaint rights, including jury trials and compensatory damages for EEO cases would be preserved." [526]

As for the framework of the new Court, the Senior Executive Association believes the MSPB provides a good blueprint because it is able to process cases rapidly[527] and is focused on "the statutory standard of efficiency of the service and the merit system."[528] In filling out the "investigative and dispute resolution functions" of the new Court, the SEA believes employees from the agencies to be consolidated would make good candidates.[529] With experience dealing with discrimination claims, MSPB and EEOC

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[521] *Id.*. at 13, 21.
[522] *Id.* at 21.
[523] *Id.*
[524] *Id.* at 21-22.
[525] *Id.* at 22.
[526] *Id.* at 13.
[527] *See Id.* at 19 ("In most years the MSPB … decides most cases in less than 100 days.").
[528] *Id.* at 14.
[529] *Id.* at 13.

judges and other professional would be especially helpful in building a foundation in the new Court for considering discrimination cases."[530]

To avoid repeating the problems of the past with agencies such as the EEOC, the SEA believes the new Court could do a better job of getting rid of frivolous complaints and dealing with discrimination.[531] For example, the Court could more easily dismiss meritless complaints and thoroughly investigate and adjudicate viable cases.[532]

Concerning labor arbitration specifically, those matters would also be under the Court's jurisdiction with this proposal.[533] However, collective bargaining rights would neither be eliminated nor reduced with the new court.[534] Also, while the NGP for dealing with workplace issues would remain, matters presented for arbitration would be handled by the new Court.[535] Resolving ULPs and other dispute between labor and management would also be the new court's responsibility.[536] For the SEA, there is not a good reason to continue the status quo on labor arbitration "if an independent and specialized court can hear and decide all federal employee issues."[537] The SEA believes that with the MSPB framework, the new court will be able to adequately and expeditiously adjudicate matters current handled through arbitration.[538] Furthermore, the SEA contends that the

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[530] *Id.* at 20.
[531] *Id.* at 14.
[532] *Id.*
[533] *Id.* at 20.
[534] *Id.*
[535] *Id.* 20 ("This would include matters now referred to the Federal Services Impasses Panel to resolve collective bargaining impasses.").
[536] *Id.*
[537] *Id.* at 21.
[538] *Id.*

MSPB is "generally perceived as impartial, comprehensive, fair, reasonably predictable and supportive of the merit system and the efficiency of the service."[539]

Understanding that a new court could take time to implement, to deal with the here and now, the Senior Executive Association requests that Congress "make the manager more a part of the EEO process" by requiring agencies to do the following:

> to advise management of the filing of a complaint, to provide managers with relevant documents and the right to representation during meetings and investigations, to be consulted before a case is settled, and to be reconsidered for lost awards, lowered performance ratings and other negative personnel actions that occurred because of an EEO complaint if the EEO complaint is eventually found to be without merit.[540]

At the very least, the SEA believes the current system needs to be examined for reform in order to get rid of waste.[541]

One of the strengths of Mr. Bransford's proposal is similar to the two preceding proposals by Mr. Feder and Mr. Broida – a single forum.[542] Another strong point of this proposal is the opportunity to develop "a uniform body of rules of the workplace" with not only a single forum at the complaint stage, but also a single forum at the appellate stage with review to the United States Court of Appeals for the Federal Circuit.[543]

Several weaknesses in Mr. Bransford proposal were identified by Congresswoman Eleanor Holmes Norton.[544] She pointed out that currently at the administrative level most employees precede without an attorney; however, if you now

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[539] *Id.*
[540] *Id.*
[541] *Id.* at 14.
[542] *Id*. at 13, 17.
[543] *Id*. at 22.
[544] *Justice Delayed is Justice Denied: A Case for a Federal Employees Appeals Court, Hearing Before the H. Subcomm. on the Fed. Workplace and Agency Org. of the H. Comm. on Gov't Reform*, 109th Cong. 71-72 (2005) (statement of Del. Eleanor Holmes Norton, Member, H. Subcomm. on the Fed. Workplace and Agency Org.).

create a court process at the first step most employees might feel the need to hire an attorney.[545] Another weakness in Mr. Bransford proposal is that the proposed Court will share both investigate and adjudicative duties.[546] As with Mr. Feder's proposal, the idea of having the prosecutorial and adjudicatory functions in the same agency raises questions of fairness[547] and objectivity. Those questions are probably more pertinent when the investigative and adjudicative duties are being performed by an Article I Court.

Another weakness of the proposal is the concept of taking an administrative agency blueprint, the MSPB in this proposal, and structuring that into a court.[548] Although a desire to incorporate the MSPB timelines is understandable, it is also probably unrealistic if the Court will function more like a court and less like an administrative tribunal. In fact, it would be hard to justify giving an administrative tribunal Article I Court status.

Despite the concerns mentioned about the proposals by Professor Luneburg, Mr. Feder, Mr. Broida, and Mr. Bransford , each proposal is a step in the right direction when compared to the current process. In Part VI below, I offer my own thoughts for meaningful reform of the system.

VI. OTHER RECOMMENDATIONS

Throughout the history of the civil service system there appears to have been a move towards more protection for employees and there is nothing wrong with that as an

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[545] *Id.*
[546] *Hearings*, *supra* note 4, at 22 (statement of William Bransford).
[547] *See Hearing*, *supra* note 544, at 72 (statement of Del. Eleanor Holmes Norton).
[548] *See Hearings, supra* note 4, at 19 (statement of William Bransford).

ideal. However, the result is that the process, the avenue from which employees take advantage of these protections has become muddled.

Call it a variation on a theme if you will, but I think if the powers that be were serious about giving federal employees and their managers/supervisors a system that worked, the legislative and executive branch would take seriously these proposals or come up with its own. So, in the interests of reform, below are my recommendations for changing the landscape of the federal employee complaint, appeal, and grievance systems.

A. EEOC and MSPB Consolidation

I do not think, in the proverbial sense, that "just anything different" is better than the existing system. However, with the political landscape in mind and the clear resistant to change that has occurred over the years, I believe the most palatable solution was mentioned by Professor Luneburg.[549]

A good solution to the dilemma that is the current federal employee complaint, appeals, and grievance systems would involve a partial consolidation of the federal sector EEO process with the MSPB process.[550] By consolidating the federal sector EEO process with the MSPB process, you would get rid of the mixed case complaint/appeal issue because there would be a single forum for discrimination cases that can be brought in either the EEOC or MSPB. Therefore, there would also no longer be a need for the Special Panel to settle disputes between the MSPB and EEOC in mixed cases.

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[549] *See* Luneburg, *supra* note 27, at 113-14.
[550] *See id.*

The mixed case complaint/appeal problem has been around since implementation of the CSRA, so the MSPB is used to considering discrimination cases. Therefore, the MSPB has demonstrated the aptitude to not only review cases, but to review mixed appeals in a timely fashion. More to the point, from fiscal year 2006 through fiscal year 2010, the average case processing times for initial decisions at the MPSB was 87 days.[551] The MSPB target goal is 90 days for initial decisions, even though the required standard is 120 days.[552] Over this time frame, at no time did their average case processing time for any year exceed 89 days.[553]

While the EEOC has certainly improved their timing, their structure makes it difficult, if not impossible to hear cases as expeditiously as the MSPB. Obviously, if the federal sector EEO were consolidated with the MSPB, there would be some question of what to do with personnel. In 2009, almost 17,000 federal employment complaints were filed with the EEOC. Also, there were more than 39,000 completed counseling by the EEOC.[554] Necessarily, the workload of the MSPB would increase. Therefore, the operations of the MSPB would need to expand and personnel from the federal sector EEO could fill those positions.

While I certainly think this solution is workable, I do not believe that it does enough to combat the complexity identified in the system throughout this paper. For instance, there is overlap between the FLRA process and MSPB process that would not be addressed by this proposal. Chapter 43 and 75 matters usually are adjudicated at the MSPB; however, if the matters are covered by a NGP, the MSPB might not retain

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[551] 2010 MSPB PERFORMANCE AND ACCOUNTABILITY REP. 22.
[552] *Id.*
[553] *Id.*
[554] 2009 EEOC PERFORMANCE AND ACCOUNTABILITY REP. 34.

jurisdiction.[555] The employee could proceed through either the MSPB or under the NGP.[556] MSPB standards would apply because the case involves unacceptable performance and/or serious adverse actions, with the arbitrator governed by MSPB standards.[557] Therefore, I believe there is a better solution.

B. EEOC, MSPB, and FLRA Consolidation

The better solution would be to consolidate the federal sector EEO, the MSPB, and the FLRA into a single Board. First and foremost, a single Board would bring simplicity to the federal employee complaint, appeal and grievance systems. The two scenarios, mentioned in the Introduction, would be prevented because all disputes would come before one forum instead of multiple forums.

The Board would have the option of consolidating multiple claims arising out of the same dispute. Why should employees have to choose among various forums wondering which one is best suited for resolving their complaints, appeals or grievances? If there was one forum that worked, there would be no wondering whether the right path was chosen. Also, as Mr. Broida suggested in his proposal, by consolidating different agencies into one there would be some cost savings.[558]

To allow for the swiftest transition to a single forum the EEOC, the MSPB, or the FLRA should be used for the framework of the new Board because unions, employees, and agencies are familiar with their operations. However, I believe the MSPB offers the best framework because they have shown the ability to expeditiously adjudicate cases.

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[555] *See* 5 U.S.C.S. § 4302; 5 U.S.C.S. § 7512; 5 U.S.C.S. § 7701(c); 5 U.S.C.S. § 7121(e)(1).
[556] 5 U.S.C.S. § 7121(e)(1).
[557] *See* 5 U.S.C.S. § 7121(e)(2); *see also* 5 U.S.C.S. § 7701(c)(1).
[558] 217 F.R.D. at 713.

Furthermore, in 2010, 92% of the MSPB's decisions were unchanged on review by the United States Court of Appeals for the Federal Circuit.[559] I would not use the EEOC as a basis for the framework because the EEOC process takes too long. It could take 210 days or more from the informal complaint process through the investigation of a formal complaint before a hearing occurs.[560] I would not choose the FLRA as a framework either because under this proposal both the General Counsel and FSIP would be unnecessary.

Unlike the proposals of Mr. Feder,[561] Mr. Broida, and Mr. Bransford neither OPM nor the OSC would be consolidated into the Board. As for OPM, as the current management agency[562] it conducts important functions including those under 5 USC Section 1103 and 5 USC Section 7703 that should be kept independent from the new Board. First, as specified in 5 USC Section 1103(a)(5), the Director of OPM is charged with "executing, administering, and enforcing the civil service rules and regulations of the President and the Office and the laws governing the civil service."[563] Therefore, if OPM were consolidated along with the EEOC, MSPB, and FLRA, there would not be a viable agency to fulfill its "personnel management and agency advisory functions."[564] Second, in accordance with 5 U.S.C. Section 7703(d), the Director of the OPM may petition for judicial review "if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel

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[559] 2010 MSPB PERFORMANCE AND ACCOUNTABILITY REP. 20.
[560] *See* 29 C.F.R. § 1614.105(d); 29 C.F.R. § 1614.106(e).
[561] *See* Feder, *supra* note 5, at 476 (Under Mr. Feder's proposal the OSC, but not OPM would be consolidated with the MSPB, EEOC, and FLRA).
[562] Luneburg, *supra* note 27, at 16-17.
[563] 5 U.S.C. § 1103(a)(5).
[564] Ingraham, *supra* note 2, at 17.

management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[565]

I also would not consolidate the OSC into the new board. However, I would increase the OSC's area of responsibility. As we know the OSC was first and foremost established to protect whistleblowers.[566] The OSC is already "an independent federal investigative and prosecutorial agency."[567] Therefore, it makes sense to expand their operations and resources to take over these types of investigate/prosecutorial functions now exercised within the FLRA and EEOC. For example, the FLRA General Counsel's duties include "investigat[ing] alleged unfair labor practices … fil[ing] and prosecut[ing] complaints … and exercis[ing] such other powers of the Authority as the Authority may prescribe."[568] Under the consolidation, with the General Counsel eliminated, the OSC would now perform the duties previously performed by the FLRA General Counsel. The "prosecutorial" function should be kept separate from the adjudicatory function.

The name of the Board is secondary at this point. However, it could be called the Federal Labor Employment Board. Obviously though, with the expanded functions of the Board the Merit Systems Protection Board would no longer adequately describe the agency.

To continue the push for the use of alternative dispute resolution under the current systems the NGP and agency administrative grievance procedures should be utilized for dispute resolution. If the employee is a union member, the NGP would be their exclusive alternative dispute resolution route for all matters subject to the NGP by the collective

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[565] 5 U.S.C.S. § 7703(d).
[566] Reorganization Plan No. 2 of 1978, § 202.
[567] OSC, http://www.osc.gov/index.htm (last visited June 8, 2011).
[568] 5 U.S.C.S. § 7104(f)(2).

bargaining agreement. For all other matters, the union member could utilize the agency administrative grievance procedures. For non-union employees, agency administrative grievance procedures would be used for alternative dispute resolution. The parties could be subject to alternative dispute resolution either voluntarily, in accordance with a collective bargaining agreement, or by Board order.

Representation before the Board should be as expansive as possible. Currently, before the MSPB, "a party may choose any representative as long as that person is willing and available to serve" and there is no "conflict of interest or conflict of position."[569] The MSPB representation rule should continue for the proposed Board.

Regarding burden and degrees of proof, there should be a substantial evidence standard for complainants. In accordance with 5 C.F.R. Section 1201.56, substantial evidence is "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree."[570] Preponderance of evidence is defined as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." [571] The substantial evidence standard is obviously a lower standard of proof than the preponderance of evidence standard. Given the more expedient time frame for adjudicating all cases under the Board and considering that employees and other eligible individuals may not have all the facts, the lower standard of substantial evidence would provide a good balance for starting the process. All cases would go to the Board, even

[569] 5 C.F.R. § 1201.31(b) (LexisNexis 2011).
[570] 5 C.F.R. § 1201.56(c)(1) (LexisNexis 2011).
[571] 5 C.F.R. § 1201.56(c)(2).

discrimination cases. Therefore, for discrimination cases judicial review would no longer be available in United States District Court.

As for what the intermediate court should look like, Mr. Broida suggested the United States Court of Appeals for Veterans Claims as a possibility.[572] Mr. Bransford suggested the United States Tax Court as a possibility.[573] However, there are two other possibilities that should be explored - the United States Court of International Trade and the United States Court of Federal Claims. Each of these courts hears cases pertaining to specialized areas of law and have developed their own precedential case law. Therefore, these courts are the ideal types of court to consider in deciding on a court of intermediate review for federal labor and employment law.

On a purely Board to Court path, as suggested by Mr. Broida the United States Court of Appeals for Veterans Claims is the most similar since it hears cases from the Board of Veterans' Appeals.[574] To ease the burden of representation on employees, employees should be allowed to be represented by non-attorneys before the intermediate review court similar to what is allowed for veterans in the United States Court of Appeals for Veterans Claims.[575] Also, as suggested by Mr. Broida, the right to review should be expansive.[576]

Although the Court is likely to be headquartered in Washington, D.C., as with other Article I courts, it should be established as an Article I Court of national jurisdiction without geographical limits. Beyond review at the intermediate court, further judicial

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[572] 217 F.R.D. at 713.
[573] *Hearings*, *supra* note 4, at 13 (statement of William Bransford).
[574] *See* 217 F.R.D. at 711-13.
[575] *See* USCS VETERANS APP R 46 (LexisNexis 2011).
[576] *See* 217 F.R.D. at 713.

review should be to the United States Court of Appeals for the Federal Circuit and then the Supreme Court.

Ultimately, it is far easier to deal with the complexities of the process than it is to solve how long it takes the process to run its course even with time requirements. There is just no guarantee that the timeline problem can be brought under control as easily as simplifying the process.

Furthermore, under a more simplified process, it is quite possible that more employees who at one time viewed the complexities of the system as prohibitive might now be more willing to file a complaint. With a quicker, more consolidated process more managers/supervisors might also be willing to initiate disciplinary action against employees.

However, the MSPB has shown the ability to adjudicate cases in a reasonable amount of time. The MSPB generally has a time frame of 90 days for most cases and 120 days for mixed appeals. While there is certainly a possibility that a simplified, consolidated process could increase the length of time for case to be adjudicated, 120 days seems like a reasonable amount of time because the MSPB has been using that standard in an efficient and expedient manner to adjudicate cases.

Whatever time requirements you put on the process for the process to work as intended, complainants/appellants must utilize the process appropriately, the process cannot be unnecessarily delayed, and adjudicators must properly balance timeliness with due process.

VII. CONLCUSION

No person has the golden idea for reforming the federal employee complaint, appeal and grievance systems into an efficient and simpler process for both the employee and manager/supervisor. But there a lot of good ideas and some have been presented here. Many of the ideas proposed by me and others "will require legislation; other reforms may be possible through Executive orders or regulations."[577] "However, all will require close collaboration and coordination with the White House, the Office of Management and Budget, Congress, federal employees, veteran service organizations, union representatives, managers, and other key stakeholders."[578] These proposals and recommendation should be more than enough to get them started. If the ideas presented above are taken seriously there can be meaningful reform, otherwise the status quo or worse is assured.

[577] Kay James Cole, *OPM's Guiding Principles for Civil Service Transformation*, 10 (2004).
[578] *Id*.