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The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*

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INTRODUCTION

During the first two years of the Carter administration, the executive and legislative Branches engaged in the most systematic governmental review and revision of the federal civil service system since the enactment of the Pendleton Act in 1883. The result was the Civil Service Reform Act of 1978 (CSRA), which created new institutions and processes for personnel management.

Early judgment on the successes and failures of such a significant restructuring of governmental organization likely guarantees deeply flawed impressions. Federal managers and employees who must work under the newly established systems, administrators charged with responsibility for breathing life into the bare bones frameworks created by Congress, and the courts responsible for discovering, extrapolating, and protecting the congressional design must have time to adjust to the new environment that faces them and, where discretion exists, experiment in ways necessary to carry out the purposes that animated the movement for reform. However, a decade has passed since the CSRA became law. Sufficient experience does exist that can reliably form the basis for conclusions regarding whether further legislative or regulatory changes are necessary at this time. Within the limited compass of this study, the basic finding is that the system is working reasonably well, though some modifications should be considered by both administrators and legislators.

This report focuses exclusively on the processes now in place for adjudicating a wide variety of disputes between federal managers and their employees. The occasions for such disputes are

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3 See infra notes 482-600 and accompanying text. For more radical proposals for statutory change, see Feder, “Pick A Forum—Any Forum”: A Proposal for A Federal Dispute Resolution Board, 39 LAB. L.J. 268 (1989).
multifarious, including dismissal from federal employment, reduction in pay or grade level, denials of promotion or within grade increases, and decisions concerning various benefits and awards. The framework for handling these controversies is 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. Further complications are introduced by the fact that the availability and nature of administrative relief vary depending on the employee's status and the type of personnel action taken by management. This elaborate framework of inclusion and exclusion has created much litigation regarding the availability of extra-statutory judicial remedies, including a considerable number of recent Supreme Court and court of appeals opinions.

While a detailed examination of each of the processes available to protest an action taken by management that directly impacts an individual employee would doubtless be illuminating, this article concentrates on the principal structural issues that are presented by the existing system for handling personnel complaints, grievances, and appeals. These issues include the following: Is the negotiated grievance process available to employees included in collective bargaining units working acceptably well? Should employees retain the number of choices they now have among appeal routes for certain types of matters? Should they be able to pursue more than one avenue of relief, as is currently the situation regarding cases raising claims of discrimination? Can the multiple levels of review available in cases of discrimination that prolong and complicate cases be justified? Should the MSPB be given exclusive jurisdiction in certain types of cases raising claims of discrimination? Should the FLRA retain jurisdiction to review arbitral awards in personnel actions? Does the Office of Personnel Management have sufficient access to the reviewing courts in cases raising important issues of personnel law? Various limitations on this study and the reasons for them are noted at several points in the narrative.

In approaching the federal personnel complaint, grievance, and appeal system in this fashion, it is essential to realize that two factors powerfully shaped the basic contours of the legal topography created by the 1978 CSRA. First of all, there was concern that the responsibility for implementing and safeguarding federal
sector equal employment opportunity programs be placed securely in the hands of an institution sympathetic to those statutes. Second, statutory recognition and expansion of the rights of federal unions and those they represented were crucial to the 1978 reform effort. In the political environment thus created, simplicity of process design and implementation of a unified federal personnel law did not prove to be legislative goals that were pursued uncompromisingly. Moreover, despite the passage of a decade, it is unlikely that the continued importance of the forces that shaped the 1978 legislation can be discounted by anyone proposing changes to the current system, at least if the proponent expects some success in his or her efforts at reform.

This article moves from descriptions of the evolution prior to 1978 of the framework for handling federal employee complaints and the principal features of the 1978 CSRA that create the structural issues under examination, to a discussion of empirical data and other information that fleshes out the actual workings of the various appeal routes and identification of the potential problems in the system, and finally to some proposed recommendations for statutory and regulatory reform.

I. HISTORICAL ANTECEDENTS AND THE GROUNDWORK FOR REFORM

A. The Civil Service Commission and the Merit System

The history of the federal civil service system to 1978 has been exhaustively described elsewhere. For present purposes, only a brief synopsis is necessary. The Pendleton Act of 1883 established a merit system to regulate the appointment of personnel. The newly created Civil Service Commission was directed to provide competitive examinations, fill vacancies on the basis of the results of those examinations, and insure that civil service was not used for political purposes.

The reformers tended to think that if the front door, or entrance to civil service, was protected from political influences, then the back door, or the question of removals, would take care

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5 The Civil Service Act of 1883, supra note 1.
of itself. Theoretically, there would be no incentive for a politically appointed or elected executive to remove an otherwise competent employee if he or she could not be replaced by a political cohort. Accordingly, the Pendleton Act of 1883 contained no protections against removals except in the case of the refusal of an employee to engage in political activity. The reform movement leaders actually supported quite openly management's absolute prerogative of removal. George William Curtis, one of the founders in 1881 and later the president of the National Civil Service Reform League, was supportive of management's unimpaired discretion. In commenting upon removal restrictions, he declared that

it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetence, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before [an] . . . incapable clerk can be removed.  

Viewed historically, the persistent abuse of management's prerogative of removal led to its curtailment. The new federal civil service law was hardly in effect when it became obvious that removals were being made for partisan reasons. The Civil Service Commission reported that it was common for employees of one political faith to be dismissed for offenses that were allowed to pass unnoticed or with a slight reprimand when committed by employees of the opposite party. In addition, there developed the increasingly common practice of removals based upon secret charges, especially in the post office department. This led the highly influential National Civil Service Reform League, in 1886, to advocate placing the reasons for all removals in the public record.

However, it was not until July 27, 1897, that an Executive Order of President McKinley provided that removals of employees in the classified service were not to be made except for "just cause." In addition, covered employees had to be afforded a written statement of the reasons for the action and the right to

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6 P. VAN Riper, supra note 4, at 102.
9 UNITED STATES CIVIL SERVICE COMMISSION ANNUAL REPORT XVIII, 282 (1901).
make a written reply.\textsuperscript{10} In 1912, Congress both enacted these protections into law and expanded them in the Lloyd-LaFollette Act.\textsuperscript{11} Henceforth, classified service personnel could not be removed "except for such cause as will promote the efficiency of the service."\textsuperscript{12} The act further provided for a written notice of reasons, a reasonable time to reply, and the opportunity to submit affidavits in support of the reply.\textsuperscript{13} Moreover, employees were expressly permitted to petition Congress directly\textsuperscript{14} on employment conditions and their right to affiliate with approved unions was recognized.

Under this statutory scheme, the Civil Service Commission initially conducted a procedural review, at most, of the removing officer's decision.\textsuperscript{15} However, in 1930, it created a Board of Appeals and Review that ultimately assumed an expanded jurisdiction to review the merits of significant personnel actions.\textsuperscript{16}

In 1944, the Veterans Preference Act\textsuperscript{17} gave veterans statutory protections that went beyond those of the Lloyd-LaFollette Act. Covered 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 cause as will promote the efficiency of the service."\textsuperscript{18} The employee was to have 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. In addition, the veteran was to have the right to make a personal appearance or an appearance through his or

\begin{itemize}
  \item \textsuperscript{10} 15 CSC Report 70 (1897-1898) (Rule II, Sec. 8).
  \item \textsuperscript{12} Id. at 555.
  \item \textsuperscript{13} \textsuperscript{15}Id.\textsuperscript{16} at 332-34.
  \item \textsuperscript{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." J. SHAFRITZ, THE DORSEY DICTIONARY OF AMERICAN GOVERNMENT AND POLITICS 239 (1988).
  \item \textsuperscript{16} Id. at 332-34.
  \item \textsuperscript{18} Veterans Preference Act, 58 Stat. 390.
\end{itemize}
her representative before the Commission. After investigation and consideration of the evidence, the Commission was to submit its findings and recommendations to the proper administrative officer.\textsuperscript{19} Subsequently, the Act was amended to require agencies to take the corrective action recommended by the Commission and to give back pay to prevailing employees.\textsuperscript{20}

Since more than half of the postwar federal service consisted of veterans, this changed the whole nature of removal proceedings. According to the second Hoover Commission, the impact of the Veteran’s Act “was to close the ‘open back door’ which had always existed in the Federal Civil Service System.”\textsuperscript{21} For the first time department heads and their assistants had to approach dismissal actions with the thought that they might have to justify such actions to neutral third parties or to have their actions reversed.

As things stood in 1961, competitive (formerly classified) service employees who were not veterans were entitled only to the protections of the Lloyd-LaFollette Act and procedural review by the Civil Service Commission. Removals, including suspensions without pay for any period, were within the purview of that statute. Veterans in the competitive service were entitled to the same protections for the types of personnel actions not governed by the Veterans Preference Act, e.g., suspensions for thirty days or less. Regarding the types of personnel actions listed by the Veterans Preference Act, the veteran (whether competitive service or excepted service) was entitled to the procedural and substantive protections of the 1944 Act. In short, the type of procedural protection and appeal rights turned not only on the type of employee but also on the type of action taken.

As a result of congressional pressure, Executive Order 10,988 of January 17, 1962, extended the protections of the 1944 Veterans Preference Act to all federal employees in the competitive service.\textsuperscript{22} At the same time, President Kennedy authorized an appeals system within federal agencies in accordance with regulations issued by the Civil Service Commission.\textsuperscript{23} The principal exclusions from the

\textsuperscript{19} Id. at 390-91.
\textsuperscript{20} Pub. L. 80-741 (June 22, 1948); see supra note 17.
\textsuperscript{22} Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63).
substantive and procedural protections were probationers and non-veterans in the excepted service.

A multi-level appellate system resulted. A competitive service employee or veteran in the excepted service could appeal the type of adverse action defined by the Veterans Preference Act to an agency first level appellate office or directly to the Commission's first level appeals office. If the employee elected to appeal to the first level agency appellate office, he or she then could appeal, if unsuccessful, to either the first level Commission office or the second level agency appellate office. If he or she went the latter route, there was no appeal to the Commission. If the appellant appealed from the first level agency appeals office to a Civil Service Commission first level office, he then could appeal, if unsuccessful, to the Commission's second level appellate office (the Board of Appeals and Review). An appellant could obtain a hearing before an appeals examiner at both the agency and the Commission's first level offices. The Commissioners retained the authority to reopen the Board of Appeals and Review decisions.24

The appeals system that had grown up over the years did not escape criticism.25 One of the most significant criticisms was the dual role assumed by the Commission as the federal government's central personnel agency and the guardian against improper removal and discipline of federal employees.26 In addition, critics argued that "hearing procedures and officers needed to have more a judicial/legalistic orientation", that "decisions should be guided by the general body of the law and make reference to it", and that the Commission's decisions should be reported.27

In response to criticism, the appellate structure was reorganized in 1974. A Federal Employee Appeals Authority was established, consisting of several regional headquarters and first level appeals offices. The Board of Appeals and Review was renamed the Appeals Review Board, with the authority to correct errors and mistakes in field office decisions and to handle certain original jurisdiction cases. The Commissioners, however, retained the discretion to act as the final level of review in those cases where they

27 See Case, supra note 24, at 294-95.
felt such action was warranted. Agency appellate offices were abolished.\textsuperscript{28}

Despite these and other modifications in the Commission's method of operation, criticism did not abate. Concern continued over the combination in one agency of 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.\textsuperscript{29}

\textbf{B. Labor Relations and the Grievance Process}

In 1962, the Presidential Task Force on Employee-Management Relations in the Federal Service recommended issuing an executive order granting federal employees limited bargaining rights.\textsuperscript{30} Executive Order 10,988, issued on January 17, 1962, laid down the parameters of labor-management cooperation in the federal sector.\textsuperscript{31} For present purposes, the most significant aspects of these administrative directives lie in their provision for negotiated grievance procedures and arbitration of employee complaints.\textsuperscript{32}

The 1962 executive order provided that collective bargaining agreements could contain provisions designating procedures for the consideration of grievances. For various matters, employees had a choice between negotiated procedures and agency-established procedures. However, adverse actions continued to be appealable to the Civil Service Commission. There was a provision for arbitration in those instances where the grievance process did not satisfactorily resolve the dispute. The results of arbitration were advisory only; all determinations were subject to the approval of the agency head. Moreover, arbitration was limited to the interpretation and application of the collective bargaining agreement.\textsuperscript{33}

Federal unions continued to press for limiting grievance resolution to the negotiated grievance procedures. In 1969, Executive

\textsuperscript{28} Id. at 295-96.
\textsuperscript{29} Id. at 296.
\textsuperscript{31} Exec. Order No. 10,988, supra note 22, at 525.
\textsuperscript{33} Smith & Wood, supra note 32, at 859-60.
Order 11,491\textsuperscript{34} provided that the negotiated procedure would be the exclusive procedure available to grievants when the bargaining agreement so specified. Arbitration was no longer advisory. Rather, an award was final and binding subject to review by the Federal Labor Relations Council (FLRC). The FLRC's rules indicated that an award would be overturned where it violated "applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."\textsuperscript{35} At the same time, adverse actions continued to be subject to the statutory appeals procedure.\textsuperscript{36}

Some further changes were introduced in 1971 by Executive Order 11,616\textsuperscript{37} and in 1975 by Executive Order 11,838.\textsuperscript{38} Henceforth, grievance procedures were to be negotiated entirely by the parties and were not subject to civil service requirements.\textsuperscript{39} The employee was to be represented by the exclusive union or someone approved by that union, unless the employee chose to represent himself or herself.\textsuperscript{40} Adverse actions, subject to statutory appeal procedures, continued to be excluded from the negotiated grievance process.\textsuperscript{41} Finally, arbitration could be invoked only by the agency-employer or the exclusive representative, not solely by the aggrieved employee.

The negotiated grievance/arbitration system that functioned under the aegis of these Executive Orders did not escape criticism. Concern was voiced over the absence 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.\textsuperscript{42}

C. Equal Employment Opportunity

Title VII of the Civil Rights Act of 1964 did not extend its protections to federal employees. However, Title VII did provide

\textsuperscript{34} Exec. Order No. 11,491, 3 C.F.R. §§ 861, 870 (1966-1970).
\textsuperscript{35} 5 C.F.R. § 2411.32 (1978).
\textsuperscript{36} See Smith & Wood, supra note 32, at 860-61.
\textsuperscript{39} Exec. Order No. 11,616, supra note 37, at 606-07.
\textsuperscript{40} Id. at 607.
\textsuperscript{41} See Smith & Wood, supra note 32, at 861-62.
\textsuperscript{42} See Comment, supra note 32, at 861-62.
that federal sector employment decisions were to be free from discrimination. Various executive orders to carry out this policy were issued, pursuant to which the Civil Service Commission established a regulatory system for considering complaints of discrimination. Still, "the availability of judicial remedies for discrimination in federal employment was doubtful because of the defense of sovereign immunity." In the Equal Employment Opportunity Act of 1972, Congress formally extended the protections of Title VII of the Civil Rights Act of 1964 to the federal government. All personnel actions affecting employees or applicants for employment were to be made "free from any discrimination based on race, color, religion, sex, or national origin." The House of Representatives bill would have given jurisdiction for administrative enforcement to the Equal Employment Opportunity Commission (EEOC). This was prompted by a perceived conflict if the Civil Service Commission was responsible for both implementing federal personnel policies and practices and deciding appeals concerning allegations that those same policies and practices were discriminatory. Ultimately, the House proposal was dropped because of Civil Service Commission opposition and concerns that the EEOC already had too great a work load. The Civil Service Commission was given authority to enforce the anti-discrimination provisions through appropriate remedies, including reinstatement or hiring of employees with or without back pay, and to issue implementing regulations. Within certain designated time frames, following agency action or inaction on a discrimination complaint, or Commission action on appeal from an agency decision, an aggrieved employee or applicant could bring a civil action for appropriate relief. In Chandler v. Roudebush, the Supreme Court held that,

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46 Id. at 141.
47 Laponsky, supra note 44, at 505-06.
48 See id.
50 Equal Employment Opportunity Act, supra note 45, at 111.
51 Id. at 112, § 717(c).
in such proceedings, federal employees were entitled to a trial _de novo_.

Under its authority to establish regulations to carry out the legislation, the Civil Service Commission created a four-step administrative complaint process: pre-complaint counseling, investigation of a complaint, hearing and final agency decision, and, finally, an optional appeal to the Appeals Review Board of the Commission. The investigators were employed by the agency, but complaints examiners, who made recommended decisions to the agency decision-maker, were employed by the Commission. In _Morton v. Mancari_, the Supreme Court held that the purpose of the 1972 Act was to make the substantive law of Title VII applicable to federal employment.

In 1974, the Age Discrimination in Employment Act was amended to encompass complaints of discrimination made by federal workers over forty years of age. As in the case of the 1972 Equal Employment Opportunity Act, the Civil Service Commission was given remedial and rulemaking authority to carry out the purposes of the legislation. Unlike the 1972 Act, there was no requirement of exhaustion of administrative remedies prior to filing a civil action to enforce the age discrimination protection.

In 1978, the Rehabilitation Act of 1973 was amended. Henceforth, no "otherwise qualified handicapped individual" was to be subjected to discrimination under any program or activity conducted by any executive agency or the United States Postal Service. 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.

The Civil Service Commission complaint process was also the object of some familiar criticism, some of which sounded a familiar note. Critics noted the apparently conflicting responsibilities of the Commission, the limited scope of the post-complaint inves-
igation, the lack of provisions for the appointment of counsel to assist employees, the complexity of the procedures, the fact that agencies were "judges in their own cases" following the required hearing, and various departures from Title VII law as applied by the courts. 61

D. The Personnel Management Project and the Enactment of the Civil Service Reform Act

By 1977, dissatisfaction with the personnel appeals, complaint, and negotiated grievance systems had a long history and similar problems infected each. In June 1977, President Carter established the Personnel Management Project to study the federal civil service system. The Project, while formally situated in the Civil Service Commission, made a decided effort to reach out to all federal agencies. There were a variety of study task forces, an Assistant Secretaries Advisory Group, public meetings, and a large number of informal meetings to which agency representatives were invited—all in an effort to maximize the involvement of career federal managers, representatives from the private sector, and academic specialists. Nevertheless, the actual drafting of proposed legislation was dominated by careerists under the direction of the Civil Service Commission leadership appointed by President Carter. 62

The result of this effort was a Final Staff Report issued in December 1977. 63 The Report reiterated many of the previously mentioned problems and identified others. For example, the Report emphasized the confusing, complex, and time-consuming nature of the existing procedures. 64 Sources of complexity were found to lie in 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. 65 The result was a network of processes seen as intimidating to employees who might, therefore, be discouraged or

61 See, e.g., Ralston, supra note 49, at 726-35.
63 1 President’s Personnel Management Project, Final Staff Report 1 (Dec. 1977) [hereinafter Final Staff Report].
64 Id. at 58.
65 Id.
defeated in the attempted exercise of their rights. Alternatively, 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, some managers might avoid taking necessary actions to discharge or discipline employees.66 The combination of functions of the Civil Service Commission as both the instructor and advisor of managers and the appellate organ for employee appeals was noted with concern.67 Focusing on the discrimination complaint process, the Project noted the inadequacy of resources devoted to the system, the susceptibility of the system to misuse for nondiscriminatory matters, and the need for low cost or subsidized representation during certain stages of the process.68

The Final Staff Report made various recommendations for change69 and President Carter sent Congress a proposed bill to amend the civil service laws in March, 1978. On October 13, 1978, he signed the Civil Service Reform Act of 1978. While there was substantial similarity to the proposals of the Personnel Management Project, the final legislation also differed in important ways.

II. THE STATUTORY AND REGULATORY FRAMEWORK FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT, GRIEVANCE, AND PERSONNEL APPEALS PROCESSES

A. The Institutions: Regulatory, Adjudicative, and Investigatory

1. The Office of Personnel Management

As the successor to the administrative functions of the Civil Service Commission, the Office of Personnel Management (OPM) has statutory responsibility for executing, administering, and enforcing civil service laws, rules, and regulations other than those under the jurisdiction of the Merit Systems Protection Board.70 OPM's multifarious and far-reaching authority and responsibilities

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66 Id. at 41.
67 Id. at 53, 73.
68 Id. at 53, 73.
69 2 President's Personnel Management Project, Final Staff Report 1, 19, 24 at Appendix IV (Dec. 1977).
70 Final Staff Report at 60-63.
make this agency the most powerful of the institutions created in 1978. For example, it adopts regulations for the release of employees in a reduction-in-force,\textsuperscript{71} prescribes the parameters for agency performance appraisal systems,\textsuperscript{72} and establishes the system for competitive examinations\textsuperscript{73} and appointments to positions in the civil service.\textsuperscript{74} The Office sometimes operates in an appellate capacity. It reviews classifications of positions on the request of agencies or employees,\textsuperscript{75} the termination of grade or pay retention benefits following a reduction-in-force,\textsuperscript{76} and examination ratings.\textsuperscript{77}

The OPM Director may petition the Court of Appeals for the Federal Circuit for review of a decision of the Merit Systems Protection Board "where the Director determines, in his discretion, that the Board 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."\textsuperscript{78} While OPM may petition for appeal, the granting of the petition is within the discretion of the Federal Circuit and the statute imposes no express limits on this discretion.\textsuperscript{79} As the practice has evolved, the Federal Circuit grants OPM petitions for review only where the court independently believes that the Director's determinations are correct.\textsuperscript{80} There is language in the legislative history to support the court's position.\textsuperscript{81}

2. \textit{The Merit Systems Protection Board}

Responding to concerns regarding the conflicting roles of the former Civil Service Commission as both management agent for the President and protector of the merit system from abuse,\textsuperscript{82} Congress established the three-member Merit Systems Protection

\textsuperscript{71} 5 U.S.C. § 3502 (1982).
\textsuperscript{72} 5 U.S.C. § 4302 (1982).
\textsuperscript{73} 5 C.F.R. § 2.1 (1988).
\textsuperscript{74} 5 C.F.R. § 2.2.
\textsuperscript{75} 5 C.F.R. § 511.603.
\textsuperscript{76} 5 C.F.R. §§ 536.101-536.307.
\textsuperscript{77} 5 C.F.R. §§ 300.101-300.707.
\textsuperscript{78} 5 U.S.C. § 7703(d) (1982).
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{See, e.g.,} Horner v. Garza, 832 F.2d 150 (Fed. Cir. 1987); Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983).
\textsuperscript{81} 1978 S. Report at 69.
\textsuperscript{82} 1978 S. Report at 5.
Board (MSPB)\(^8\) to function as an independent, quasi-judicial body adjudicating those matters placed within its jurisdiction by statute or regulation.\(^4\) Other than various cases falling within its original

\(^8\) 5 U.S.C. \$ 1201 (1982).
\(^4\) 5 U.S.C. \$ 1205(a)(1) (1982). Creation of the MSPB was not a sudden development. Demands for widespread reform had been growing since the 1930s when the President's Committee on Administrative Management chaired by Louis Brownlow made many recommendations for reform of the institutional structures of the federal civil service.

Overall, the Committee recommended a major reorganization of the executive branch. The President agreed, and appropriate legislation was submitted to the Congress in 1938. But the Congress, in the wake of the President's efforts to "pack" the Supreme Court and fearful of too much power in the Presidency, killed the bill. The President resubmitted a considerably modified reorganization bill the following year, and the Congress passed the Reorganization Act of 1939, authorizing the President, subject to congressional veto, to redistribute and restructure executive branch agencies. This allowed President Roosevelt to subsequently create the Executive Office of the President. For histories, see B.D. KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL (1963); R. POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939 (1966).

See President's Committee on Administrative Management, Report with Special Studies (1937). The Brownlow Committee's 1937 report was highly critical of the U.S. Civil Service Commission as a central personnel agency. After examining the Commission's various structural deficiencies, the Brownlow Committee recommended that

[t]he Civil Service Commission . . . be reorganized into a Civil Service Administration, with a single executive officer, to be known as the civil service administrator, and a nonsalaried Civil Service Board of seven members appointed by the president. This board would be charged not with administrative duties but with the protection and development of the merit system in the government. Id. at 9-10. While this proposal had the support of President Roosevelt, Congress would not adopt it until the same idea was resubmitted forty years later by President Carter.

What finally brought about this reform was a series of scandals during the latter part of the Nixon Administration that so discredited the U.S. Civil Service Commission that Congress was ready to act. It was demonstrated in a variety of congressional hearings that the Commission had presided over wholesale evasions of merit system requirements in order to make the federal civil service more politically responsive. See, e.g., Documents Relating to Political Influence in Personnel Actions at the General Services Administration. Subcommittee on Manpower and Civil Service, Print no. 93-22, 93rd Cong., 2nd Sess. (1974); Violations and Abuses of Merit Principles in Federal Employment Part I; Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-19, 94th Cong., 1st Sess. (1975); Violations and Abuses of Merit Principles in Federal Employment Part II. Hearings Before the Subcommittee on Manpower and Civil Service, Serial no. 94-20, 94th Cong., 1st Sess. (1975); Violations and Abuses of Merit Principles in Federal Employment. Hearing Before the Subcommittee on Manpower and Civil Service, Serial no. 94-48, 94th Cong., 1st Sess. (1975); Documents Relating to Political Influence in Personnel Actions at the Small Business Administration. Hearings Before the Subcommittee on Manpower and Civil Service, Print no. 94-4, 94th Cong., 1st Sess. (1975); Violations and Abuses of Merit Principles in Federal Employment. Hearing Before the Subcommittee on Post Office and Civil Service, Serial no. 94-49, 94th Cong., 1st Sess. (1975). Finally, the Commission's own internal investigation, known as the Sharon Report (after Milton I. Sharon, the investigation's team director) confirmed allegations "that high-ranking officials of the Commission had had prior knowledge that politically oriented employment systems were in operation and had done nothing to stop them." Merit Staffing Review Team, A Self-Inquiry Into Merit Staffing 2 (United States Civil Service Commission,
jurisdiction, the MSPB's "appellate" jurisdiction extends over the most significant types of personnel actions, including reductions in grade or removal for unacceptable performance, removal from the civil service or lesser sanctions for disciplinary reasons, and separations due to reductions-in-force.

To denominate the Board's jurisdiction as "appellate" may be somewhat misleading. It generally adjudicates cases coming to it on a *de novo* basis. Where an employee or applicant for employment is the subject of an action that is "appealable" to the Board under some statute or regulation, the "appellant" has the right to a hearing at which a transcript will be kept and to be represented by an attorney or other person. In the manner of a judicial body regulating the conduct of cases to come before it, the Board has prescribed its procedures for hearing "appeals" in elaborate detail. The statute authorizes it to generally refer cases to designated employees of the Board, now called administrative judges, for hearing. These administrative judges operate out of eleven regional offices, while the Board sits in Washington, D.C. The Board's rules prescribe the content of petitions for appeal and agency responses, lay down the conditions for intervention, consolidation of cases, and substitution of parties, authorize discovery of various kinds and impose limitations thereon, and prohibit *ex parte* communications.

If dissatisfied with the initial decision of the administrative judge, the employee or agency may petition the full three-member Board for review. While the Board may reopen and reconsider an initial decision on its own motion, the Board generally will grant petitions for review only when it has been established that

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May 1976). Of course, only a minority of individuals engaged in corrupt behavior, but that was enough to ruin a reputation. The Commission's "good name" could not be salvaged. "The stigma was so great that the reformers went so far as to formally assert that it was not the giant Office of Personnel Management that would be the successor agency to the Commission, but the little Merit Systems Protection Board. OPM would be a totally new entity—an organization without a history starting with a clean slate." J. SHAFRITZ, A.C. HYDE, D.H. ROSENBOOM, PERSONNEL MANAGEMENT IN GOVERNMENT 21 (3rd ed. 1986). Thus, the MSPB, which the good government reformers of the Brownlow Committee recommended be created, would not be born until the Civil Service Commission, by its ineptness and corruption, destroyed itself.

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84 For example, actions against administrative law judges under 5 U.S.C. § 7521 (1982).
85 See, e.g., 5 C.F.R. § 1201.3 (1988).
87 5 U.S.C. § 7701(b).
new and material evidence not available when the initial hearing record was closed has become available, or the decision of the administrative judge was based on an erroneous interpretation of statute or regulation.

Employees or applicants for employment adversely affected by a final order or decision of the Board may, except in cases involving alleged discrimination, obtain judicial review in the United States Court of Appeals for the Federal Circuit. That court may set aside Board action found to be arbitrary, capricious or an abuse of discretion, procedurally flawed, or unsupported by substantial evidence.

Cases otherwise within the Board's jurisdiction that involve discrimination of particular types are subject to special procedures that will be described more fully below.

3. The Office of Special Counsel

As specified in the Whistleblower Protection Act of 1989, the Office of Special Counsel (OSC), first created in 1978, has the primary role of protecting employees from "prohibited personnel practices" by seeking corrective actions and the discipline of employees who commit such practices. The OSC has a variety of statutory powers and duties. Only the most obviously relevant for current purposes will be discussed here.

The OSC must receive any allegation of a prohibited personnel practice and must investigate to the extent necessary to determine whether there are reasonable grounds to believe that such a practice has occurred, exists, or is to be taken. The Special Counsel can also, on his or her own initiative, institute such an investiga-

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91 See infra notes 277-78 and accompanying text.
93 5 U.S.C. § 7703(c).
94 See infra notes 198-202, 206-10, 218-79 and accompanying text.
96 Civil Service Reform Act of 1978, supra note 2.
97 The term "prohibited personnel practice" will be discussed infra, at notes 146-54 and accompanying text. For current purposes this can be taken to refer to various breaches of merit system principles.
98 See Whistleblower Act, supra note 95, at § 2(b)(2)(A), (b)(2)(C).
99 Id. at § 3(a)(11) (adding 5 U.S.C. § 1214(a)(1)(A)) (1982). Employees may be able to sue to force the OSC to conduct an "adequate" investigation. See, e.g., Barnhart v. Devine, 771 F.2d 1515, 1524-25 (D.C. Cir. 1985); Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 875-76 n.9 (D.C. Cir. 1982).
If the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, and corrective action is required, he or she must report that determination along with any findings or recommendations to the MSPB, the Office of Personnel Management, and the agency involved. If, after a reasonable time, the agency has not acted to correct the prohibited personnel practice, the OSC may request the MSPB to order corrective action. At that point, the Board can order corrective action it considers appropriate and adversely affected employees may obtain judicial review of the Board’s action in the Court of Appeals for the Federal Circuit. Where the Special Counsel terminates an investigation not of his or her own initiation, he or she must prepare and transmit to the person who made the allegation a written statement notifying that person of the termination of the investigation, summarizing the facts ascertained by the OSC and the reasons for the termination.

In addition, the OSC is directed to conduct an investigation of any allegation concerning “activities prohibited by any civil service law, rule, or regulation” and “involvement by an employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.” However, the obligation to investigate the latter is excused where the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure. The Special Counsel may seek corrective and disciplinary action from the MSPB based on the conduct investigated.

The Special Counsel may request from the MSPB a stay of a personnel action where there is reason to believe that the action was taken as a result of a prohibited personnel practice. Also, he or she may determine that disciplinary action is warranted.

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5 U.S.C. § 1214(b)(2)(B). See Barnhart, 771 F.2d at 1526 (“[There is] limited judicial review of the OSC’s determination that the complaint does not merit the Board’s consideration.”).
5 U.S.C. §§ 1214(b)(4)(A) and (C).
5 U.S.C. § 1216(b).
5 U.S.C. § 1216(c)(2).
against a federal employee for engaging in a prohibited personnel practice or violating other laws or regulations within OSC jurisdiction, in which case the Special Counsel must prepare a written complaint and present that to the MSPB. After a hearing before the Board, the MSPB may impose various sanctions including removal, reduction in grade, debarment from federal employment for up to five years, or a civil penalty. Judicial review of orders imposing disciplinary action are reviewable in the Federal Circuit.

4. The Federal Labor Relations Authority

Responding to a variety of 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, the Federal Labor Relations Authority (FLRA) was created in 1978. In many ways it was modelled on the National Labor Relations Board. Its responsibilities include determination of the appropriateness of units for labor organization representation, supervising and conducting elections to determine whether a labor organization has been selected as the exclusive representative by employees in a unit, resolving issues relating to the duty to bargain in good faith, conducting hearings and resolving complaints of unfair labor practices, and resolving exceptions to arbitration awards arising from disputes subject to negotiated grievance procedures.

The General Counsel of the FLRA is charged with the duty of investigating allegations of unfair labor practices, though he or she has the discretion whether to issue a complaint and proceed with a hearing before the FLRA. Where a complaint is filed, an adjudicatory hearing is held before an administrative law judge.

115 5 U.S.C. § 7118(a) (1982). See also American Federation of Government Employees v. FLRA, 842 F.2d 102 (5th Cir. 1988) (holding that a decision by the General Counsel not to issue an unfair labor practice complaint was not a final order of the Authority subject to judicial review).
that may result in a cease and desist order and a requirement to reinstate an employee with back pay. The FLRA is authorized, but not required, to petition a United States Court of Appeals for enforcement of its orders. Judicial review of the FLRA's orders takes place in the regional courts of appeal.

Employee grievances subject to negotiated grievance procedures contained in collective bargaining agreements may result in arbitration awards. Generally, any party to arbitration may file with the FLRA an exception to an award. Still, the award may be overturned only if the FLRA finds that it is contrary to "any law, rule, or regulation" or that it is deficient on "grounds similar to those applied by Federal courts in private sector labor-management relations." If no exception to an award is timely filed, it is "final and binding" and the agency must take the actions required by it. The FLRA's action with regard to an arbitration award is not subject to judicial review unless the order involves an unfair labor practice.

5. Equal Employment Opportunity Commission

Pursuant to Reorganization Plan No. 1 of 1978 and the 1978 Civil Service Reform Act, the Equal Employment Opportunity Commission (EEOC) inherited from the Civil Service Commission the responsibility for enforcing Title VII and other anti-discrimination statutes in federal employment.

Regarding personnel actions not appealable to the MSPB where discrimination is alleged, the EEOC regulations for processing

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119 5 U.S.C. §§ 7123(a), (b).
120 See infra note 193 and accompanying text. See also 5 U.S.C. § 7121 (1982).
123 5 U.S.C. § 7123(a). See also Griffith v. FLRA, 842 F.2d 501 (D.C. Cir. 1988) (finding preclusion of even district court review, though leaving open possibility of review of clear violations of statutory authority under Leedom v. Kyne, 358 U.S. 154 (1958) as well as of constitutional claims); Overseas Educ. Ass’n v. FLRA, 824 F.2d 61 (D.C. Cir. 1987) (focusing on the reviewability of FLRA orders involving unfair labor practices). If certain types of discrimination are alleged as the basis for the personnel action, judicial review may be available at the request of the employee.
125 Civil Service Reform Act of 1978, supra note 2.
complaints mirror to a great degree those of the former Civil Service Commission.\textsuperscript{127} Generally, a person who believes that he or she has been discriminated against because of race, color, religion, sex, national origin, age, or handicap condition must first consult with an EEOC counselor within his or her agency who will make whatever inquiry is deemed necessary, seek a solution on an informal basis, and advise the employee concerning "the issues in the matter."\textsuperscript{128} Following counseling, the employee may file a formal complaint with his or her agency,\textsuperscript{129} which may be rejected for various procedural reasons such as timeliness or the pendency of an identical complaint.\textsuperscript{130} The agency then must designate an employee or other person to conduct an investigation of the circumstances of the complaint.\textsuperscript{131} Following the completion of the investigation and the complainant's review of the investigation file, the agency must provide an opportunity for adjustment of the complaint on an informal basis.\textsuperscript{132} If no adjustment takes place, the complainant is informed of the proposed agency disposition of the complaint and of the right to a hearing and then a decision by an appropriate agency official.\textsuperscript{133} Any hearing is conducted generally by an administrative judge who is the employee of the EEOC.\textsuperscript{134} That presiding official is charged with determining whether further investigation is needed before a hearing is held and then with insuring that all pertinent facts are brought out at the hearing.\textsuperscript{135} If the administrative judge determines that there are no issues of material fact, he or she may decide the case without a hearing.\textsuperscript{136} The hearing officer recommends a decision that may be accepted or rejected by the agency head or his or her designee.\textsuperscript{137} Complaints are to be resolved within 180 days after their filing.\textsuperscript{138}

There is a right of appeal from the agency to the Office of Review and Appeals (ORA) of the EEOC, which also may remand

\textsuperscript{127} See Laponsky, supra note 49, at 506 n.21.
\textsuperscript{128} 29 C.F.R. § 1613.213 (1988).
\textsuperscript{129} 29 C.F.R. § 1613.214.
\textsuperscript{130} 29 C.F.R. § 1613.215.
\textsuperscript{131} 29 C.F.R. § 1613.216.
\textsuperscript{132} 29 C.F.R. § 1613.217(a).
\textsuperscript{133} 29 C.F.R. § 1613.217(c).
\textsuperscript{134} 29 C.F.R. § 1613.218.
\textsuperscript{135} Id.
\textsuperscript{136} 29 C.F.R. § 1613.218(g).
\textsuperscript{137} 29 C.F.R. §§ 1613.218(g), .221.
\textsuperscript{138} 29 C.F.R. § 1613.220.
a complaint to an agency for further investigation or rehearing. The regulations do not specify the scope of ORA review, though it appears to be de novo on the record made below. The Commissioners may reopen ORA decisions on their own motion or petition. Corrective action ordered by the ORA or the Commission is "mandatory and binding" on the agency, though the EEOC only has the statutory authority to notify the complainant of his or her right to file a civil action for enforcement of that decision.

Delays in processing complaints, as well as the completion of various stages in the administrative consideration of a complaint, activate the right to file a civil action in the United States district courts at various specified times. The above description of procedures does not apply to discrimination complaints that move through the negotiated grievance process or those presented in the context of actions appealable to the Merit Systems Review Board. These will be discussed later.

B. Prohibited Personnel Practices

The 1978 Act (supplemented by the Whistleblower Protection Act of 1989) proscribes certain types of conduct that were deemed so inimical to either the merit system or personnel management in general that their discovery and prosecution should be a matter of the gravest importance and result in important sanctions. These are the so-called "prohibited personnel practices." The first

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139 29 C.F.R. §§ 1613.231, .234.
140 29 C.F.R. § 1613.235.
141 29 C.F.R. § 1613.237(a).
142 29 C.F.R. § 1613.239(c).
143 29 C.F.R. § 1613.281.
144 See infra notes 198-202, 206-10, 218-79 and accompanying text. There are also procedures for class complaints, on which this article does not focus. See also 29 C.F.R. §§ 1613.601-.643 (1988).
145 Supra note 95.
146 5 U.S.C. § 2302 (1982). Employees with authority to take personnel actions of various types are forbidden in the exercise of that authority to:
   1. discriminate on the basis of race, color, religion, sex, national origin, age, marital status, political affiliation, or handicapping condition;
   2. solicit or consider recommendations with regard to employees under consideration for a personnel action unless the recommendations are based on first-hand knowledge and are directed to certain matters such as qualifications and character;
   3. coerce the political activity of employees;
   4. deceive any person with respect to the right to compete for employment;
prohibited practice, discrimination on various bases, largely mirrors the type of conduct that is within the EEOC's jurisdiction.\footnote{Discrimination on the basis of marital status and political affiliation does not fall under the jurisdiction of the EEOC. Many of the other prohibited personnel practices were a direct response to the scandals that the Civil Service Commission lived through during the early and mid 1970s—and the enormous notoriety of the "Malek manual," which openly advocated "the rape of the merit system."}

5. influence any person to withdraw from competition for a position in order to improve or injure the prospects of another for employment;
6. grant any preference or advantage not authorized by law to any employee or applicant in order to improve or injure the prospects of any particular person for employment;
7. engage in nepotism;
8. take reprisals for "whistleblowing," that is the disclosure of information by an employee who believes that the law is being violated or there has been gross mismanagement, gross waste of public funds, abuse of authority, or a substantial danger to the public;
9. take reprisals for an employee's exercise of appeal, complaint or grievance rights granted by law or regulation, testimony on behalf of or assistance to an employee in connection with such rights, disclosures to the Special Counsel, or refusing to obey an order requiring violation of the law;
10. discriminate against any employee or applicant on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others; and
11. take any other action if it would "violate any law, rule, or regulation implementing, or directly concerning, the merit system principles."


Let us assume that you have a career opening in your Department's personnel office for a Staff Recruitment Officer. Sitting in front of you is your college roommate from Stanford University in California who was born and raised in San Francisco. He received his law degree from Boalt Hall at the University of California. While studying for the bar he worked at an advertising agency handling newspaper accounts. He also worked as a reporter on the college newspaper. Your personnel experts judge that he could receive an eligibility rating for a GS-11.

The first thing you do is tear up the old job description that goes with that job. You then have a new one written, to be classified at GS-11, describing the duties of that specific Staff Recruitment Officer as directed toward the recruitment of recent law graduates for entry level attorney positions, entry level public information officers for the creative arts and college news liaison sections of your public information shop, and to be responsible for general recruiting for entry level candidates on the West Coast. You follow that by listing your selective
It is treated specially in those parts of the 1978 Act that establish a complex system of interjurisdictional appeals.  

The "personnel actions," as to which conduct thus defined is proscribed, include removals for performance or disciplinary reasons, promotions, appointments, transfers, decisions concerning pay, benefits and awards, and "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level." Positions covered by this part of the statute include, with limited exceptions, any position in the competitive service, career appointees in the Senior Executive Service, and positions in the excepted service.

With regard to enforcement of the prohibitions of Section 2302 of Title 5, several are of particular relevance here. As indicated previously, the Office of Special Counsel has the duty to investigate allegations of prohibited personnel practices and may ask the Merit Systems Protection Board for disciplinary and corrective action. Moreover, agency personnel actions involved in cases coming before the Merit Systems Protection Board, and

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criteria as follows: Education: BA and LLB, stating that the candidate should have extensive experience and knowledge by reason of employment or residence on the West Coast. Candidate should have attended or be familiar with law schools, and institutions of higher education, preferably on the West Coast. The candidate should also possess some knowledge by reasons of education or experience of the fields of college journalism, advertising, and law.

You then trot this candidate's Application for Federal Employment over to the Civil Service Commission, and shortly thereafter he receives an eligibility rating for a GS-11. Your personnel office then sends over the job descriptions (GS-11) along with the selective criteria which was based on the duties of the job description. When the moment arrives for the panel to "spin the register" you insure that your personnel office sends over two "friendly" bureaucrats. The register is then spun and your candidate will certainly be among the only three who even meet the selective criteria, much less be rated by your two "friendly" panel members as among the "highest qualified" that meet the selection criteria.

In short, you write the job description and selective criteria around your candidate's Form 171.

"There is no merit in the merit system!"


152 5 U.S.C. § 2302(a)(2)(B). See infra note 212. But see 5 U.S.C. § 2302(a)(2)(B)(i), (ii), and (C) for agencies and employees beyond the coverage of the section.
153 See supra notes 95-111 and accompanying text.
before arbitrators exercising authority pursuant to negotiated grievance procedures, cannot be sustained where the agency decision was based on a prohibited personnel practice.\textsuperscript{154}

\section*{C. A Thematic Overview of the Structure for Considering Employee Complaints, Grievances and Appeals}

Although an express purpose of the 1978 Act was to simplify the framework for disposition of employee complaints, grievances, and appeals,\textsuperscript{155} the complexity of the new structure is such that an evaluation of the success of the reform efforts in terms of that goal alone would result in a finding of abject failure on the part of Congress. Only close scrutiny of the statutory product discloses that the complexity was created in large part by 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. Their implementation in the real world of politics demanded a variety of compromises.

First of all, Congress wanted to insure that federal employees could obtain adequate protection against employment discrimination of the types forbidden by federal law in the private sector.\textsuperscript{156} As noted above, this suggested that, in 1978, the Equal Employment Opportunity Commission (EEOC) should inherit much of the authority of the Civil Service Commission regarding administration and enforcement.\textsuperscript{157} Moreover, bargaining unit employees were given the option of either eschewing the grievance/arbitration process in favor of the statutory processes for considering discrimination claims, or, following resort to the negotiated grievance process, obtaining EEOC review of the arbitration results.\textsuperscript{158} Finally, regardless of the non-judicial route initially chosen by the employee, Congress retained a right to a trial \textit{de novo} on discrimination claims in the United States district courts.\textsuperscript{159}

Procedurally, the 1978 Civil Service Reform Act insured that, in certain instances, federal employees have not less but more

\textsuperscript{154} 5 U.S.C. \textsection 7701(c)(2)(B) (1982).

\textsuperscript{155} See, \textit{e.g.}, 1978 S. Report at 9-10.

\textsuperscript{156} See generally Reorganization Plan No. 1 of 1978, S. Rep. No. 95-750, 95th Cong. 2d Sess. 6-7 (1978) [hereinafter 1978 \textit{SENATE REORGANIZATION REPORT}].

\textsuperscript{157} See \textit{supra} notes 124-26 and accompanying text.

\textsuperscript{158} 5 U.S.C. \textsection 7121(d) (1982).

\textsuperscript{159} \textit{But see infra} note 273.
protection than their counterparts in the private sector. Both types of employees may resort to the courts despite the presence and invocation of alternative remedies, whether administrative or arbitral. However, only federal employees have a federal statutory right to both a full trial-type administrative hearing (at the Merit Systems Protection Board (MSPB) with discretionary review of its decision by the EEOC) and a de novo hearing in a federal district court where certain types of important personnel actions (such as disciplinary or performance removals) are challenged. Moreover, the EEOC has direct authority to review and reverse various employment actions by agencies and give appropriate remedies to federal employees. In private sector cases, the EEOC may investigate and seek to eliminate an unlawful practice "by informal methods of conference, conciliation, and persuasion." Failing in that endeavor, it must resort to the federal courts to enforce the anti-discrimination statutes. However, parity in the treatment of federal and other employees is not always departed from to the advantage of the federal worker. For example, as noted previously, the EEOC has not been given power to sue on behalf of federal employees.

The second concern (though somewhat less aggressively pursued) was uniformity in personnel management. Congress created an Office of Personnel Management that, despite its authority to delegate many of its important functions to agency heads, was vested with overall responsibility for the execution, administration, and enforcement of civil service statutes and rules. Of federal agencies, only the Office of Personnel Management has direct access to the federal courts to overturn an administrative or arbitral order in a personnel case. This access, however, is limited to instances where the administrative or arbitral decision involves an error in the interpretation of civil service law that may have system-wide impact.

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161 See infra notes 198-202, 206-10 and accompanying text.
165 See supra note 142 and accompanying text.
167 5 U.S.C. §§ 1103(a)(9), 1104(b)-(c).
The MSPB’s independence was intended to guard against future politicization of the civil service and to counterbalance the increased discretion given federal managers and political appointees regarding personnel actions. For the principal performance-based and disciplinary actions against federal employees, there was a right (limited to certain employees) to appeal to the MSPB. This access was assured even where a collective bargaining agreement established a grievance/arbitration process to cover those types of actions. Furthermore, with regard to these cases, Congress expressly mandated certain procedural uniformity between the MSPB and the negotiated grievance process and seems to have intended that the same substantive rules apply in both fora, with the apparent expectation that the Board would hold the laboring oar in establishing the governing principles. In 1978, regional court of appeals review of the MSPB and arbitration decisions was seen as an adequate mechanism in enforcing uniformity of treatment of the major personnel actions. This goal was further assured through the creation in 1982 of the Federal Circuit vested with exclusive jurisdiction to review both MSPB and arbitral decisions in the principal performance and disciplinary cases outside the discrimination context.

In short, the mandated procedural and substantive uniformity in treatment of important personnel actions, vesting the Office of Personnel Management with the right to request judicial review in cases of system-wide importance, along with the creation of the Federal Circuit, represented in part Congress’ attempt to assure some degree of unity in personnel management. Such uniformity would reduce potential confusion by managers regarding limits on their discretion and distinctions in the legal treatment of employees subject to personnel actions, both of which might flow from the ability of some (but not all) employees to forum shop for favorable law.

The pursuit of uniformity proved to be a particular challenge in the case of those major performance and disciplinary actions.

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170 See 5 U.S.C. §§ 4303(e), 7513(d) (1982).
173 See infra notes 397-400, 414-16 and accompanying text.
174 See 1978 S. Report, supra note 70, at 52, 63, 111.
appealable to the MSPB also involving allegations of discrimination. These are known as mixed cases. The difficulty that they posed in 1978 and continue to create resides in the impossibility of always clearly separating pure "personnel law" issues from issues of discrimination. While the House in 1978 proposed giving the EEOC ultimate authority in these matters, the Senate feared that such a solution would severely weaken the newly-established MSPB by suggesting it was not to be trusted to fully protect employee rights under the anti-discrimination statutes.

The Senate also emphasized the need for consolidated treatment of mixed cases given the nature of the issues they presented and to avoid inconsistent decisions in similar matters. The solution devised to address these problems was to give the MSPB initial administrative jurisdiction (including appellate jurisdiction over mixed cases moving from the negotiated grievance process), to give the EEOC the right to review MSPB decisions from the point of view of discrimination law, and to refer disputes between the agencies to a Special Panel composed of three members (an outsider, a Board member, and an EEOC Commissioner).

This attempt to create unified treatment of the legal and factual issues of mixed cases stopped at the administrative border, however. Congress' decision to retain the right to a trial de novo in the district courts in mixed cases, following exhaustion of the administrative remedies, meant that the regional circuits would be confronted with issues of personnel law even after the creation of the Federal Circuit in 1982. Moreover, the government's ability to obtain direct judicial review of personnel law issues at its request was severely limited—and nonexistent in some cases—where alleged discrimination formed part of an employee's claim. This situation, in conjunction with the statutory rights of employees to choose among several appeal routes—both in mixed and pure discrimination cases—almost guaranteed that different legal rules might be applied in the various adjudicatory fora.

The goal of uniformity in personnel administration was compromised further by the third congressional concern: the desire to

176 See infra notes 220-24 and accompanying text.
177 See 1978 Senate Reorganization Report, supra note 156, at 11.
178 Id. at 11-13.
179 See infra notes 227-55 and accompanying text.
180 See infra notes 271-79 and accompanying text.
181 See infra notes 579-81 and accompanying text.
provide a firm statutory basis for, and expand the role of, collectively-bargained grievance processes in federal workplace dispute resolutions. Congress expressly sanctioned a broad scope for these processes, which included major performance and disciplinary actions as well as discrimination claims (though granting the employee the option to eschew these processes for the MSPB and the EEOC). While appeal from arbitrator decisions in performance and disciplinary actions generally lay in the courts of appeal and (after 1982) in the Federal Circuit, other arbitration awards were to be reviewed solely by the new Federal Labor Relations Authority, whose decision was final absent an unfair labor practice or discrimination.

Thus, several aspects of the statute tolerated disuniformity. In the case of the major performance and disciplinary actions, despite the express statutory requirement for some procedural uniformity and the implicit suggestion for uniformity in terms of the substantive rules applied, the informal nature of the arbitral process—including the lack of the type of procedural opportunities available in a judicialized process and its function as an extension of the collective bargaining process—practically guaranteed that the results in MSPB and arbitral cases would differ. Moreover, the Federal Circuit has tempered its approach to arbitration awards with much the same type of deference paid by courts reviewing arbitral awards in the private sector. This deference is also observed by the MSPB and the EEOC when reviewing the results of the arbitral process in discrimination cases.

Finally, regarding those arbitral awards where it has the final say, the Federal Labor Relations Authority has not deemed itself bound to MSPB precedent where similar legal issues arise, though it does take MSPB decisions into account in making its own determinations. Inconsistencies in the approach to personnel law have resulted, though to date they have been relatively minor.

The statutory structures created in 1978 and elaborated upon by agency regulation create a Byzantine maze of appellate routes.

183 See infra notes 401-12 and accompanying text.
184 See infra notes 422-23 and accompanying text.
185 See, e.g., Carr v. Dep't. of the Air Force, 32 MSPB 665 (1987); Robinson v. Dep't. of Health & Human Services, 30 MSPB 389 (1986); and Denson v. Veteran's Admin., 30 MSPB 383 (1986).
186 See infra note 460 and accompanying text.
187 See infra notes 461-63 and accompanying text.
The by-products have been delay in final resolution of cases, confusion for managers, employees, and even the agencies responsible for administering the various processes, and more than a little cynicism regarding the statutory product. While these and other concerns suggest that structural reform should be considered—even if it only clears away part of the complexity—such reform cannot be divorced entirely from judgments regarding past performance of the entities vested with the responsibility for administering these processes. To take perhaps the principal example of this, while most federal employees have the option to use the negotiated grievance process to contest the major performance and disciplinary actions, the MSPB appears to remain the adjudicatory "cornerstone" of the procedural reforms of 1978 in terms of its share of the docket load of these types of cases, even where discrimination is alleged. The ability to eliminate some of the complexity is, therefore, dependent upon the Board's performance in its role as independent adjudicator and the perceptions regarding its performance.

D. Roadmap for the Uninitiated (Also Perhaps Helpful for the Expert)

A brief summary of the complaint, grievance and appellate structure will assist those who are making their first acquaintance with this subject. It may even benefit those who deal with the system on a regular basis. At the same time, bearing in mind that simplicity of description can mislead in some respects, the following should appropriately be accompanied by a Surgeon General-type warning: "Taking this summary without a few grains of salt may be dangerous to your health."

For the purposes of the discussion, the following background notes and definitions are necessary:

1. "Discrimination" refers to discrimination on the basis of race, color, religion, sex, national origin, age, and handicapping condition.

2. "Chapter 75 action" refers to a removal, suspension for more than 14 days, reduction in pay or grade, or furlough for 30 days or less [with regard to certain covered employees] based on "the efficiency of the service."

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188 See infra notes 384-92 and accompanying text.

189 See infra notes 431-39 and accompanying text.

3. "Chapter 43 action" refers to a removal or reduction in grade [of certain covered employees] based on "unacceptable performance."\(^{191}\)

4. Prior to taking final action against an employee under Chapters 43 or 75, the agency must generally provide notice of the proposed action and some opportunity for response by the employee.\(^{192}\)

5. "Mixed cases" are those involving actions which are of the type appealable to the Merit Systems Protection Board and where discrimination is alleged as having been a basis for the action.

6. "Negotiated grievance procedure" (NGP) is the process established by collective bargaining agreement which incorporates the opportunity for the employee, union and agency to first resolve a controversy informally and, following an adverse agency decision on the grievance, submission by the union (not at the sole request of the employee) or agency of the dispute to binding arbitration.\(^{193}\)

7. "Agency administrative grievance system" is the internal agency process for considering employee complaints which do not fall within an NGP\(^{194}\) and which are not subject to other statutory or regulatory appellate and complaint systems (e.g., EEO complaints and MSPB appeals).\(^{195}\) Certain types of employees\(^{196}\) and certain types of employment actions\(^{197}\) are, however, exempt from coverage by these systems whose design is subject to OPM regulation.

EMPLOYEES NOT WITHIN BARGAINING UNITS OR ACTIONS EXCLUDED FROM THE SCOPE OF A NEGOTIATED GRIEVANCE PROCEDURE

Actions not involving alleged discrimination (Chart 1).

a. Chapters 43 and 75 actions (along with other matters within MSPB subject matter jurisdiction such as reductions-in-force) are adjudicated by the MSPB with the right of appeal to the Federal Circuit.

192 5 U.S.C. §§ 4303(b), 7513(b).
195 5 C.F.R. § 771.206(c)(1)(ii).
196 5 C.F.R. § 771.206(b).
197 5 C.F.R. § 771.206(c).
b. Other actions (e.g., award decisions and some removals of excepted service employees) *may* fall within the scope of agency administrative grievance systems. If not, no administrative remedies are available other than resort to the Office of Special Counsel.
(a) Limited to cases alleging prohibited personnel practices or other violations of civil service law. OSC investigates and may prosecute cases before MSPB.

(b) Implied rights of action for statutory and constitutional violations. These rights of action might be available to employees covered by any of the following charts, but for simplicity sake they are not referred to in those charts.

(c) There is (or maybe) a choice of going both routes.
Actions involving allegations of discrimination (Chart 2).

a. Chapters 43 and 75 actions (and other MSPB appealable actions) are adjudicated by the MSPB with the option to initially process these through a modified EEO process (the "mixed complaint" process\textsuperscript{198}) within the agency (with no right to a hearing before an EEOC administrative judge prior to the agency decision\textsuperscript{199}) and with potential review of the MSPB decision on matters of discrimination law by the EEOC and a Special Panel\textsuperscript{200} where the MSPB and EEOC differ.

b. Other actions not appealable to the MSPB (e.g., promotion decisions) fall within the EEO process which includes initial agency counseling, investigation, hearing, recommended and final decision and appeal to EEOC's Office of Review and Appeals.\textsuperscript{201}

c. Following exhaustion of administrative remedies, there is a right of the employee to a \textit{de novo} proceeding on the discrimination issues in federal district court. No Federal Circuit review is available at the employee's request if a discrimination issue remains in the case after any MSPB review.\textsuperscript{202}

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\textsuperscript{198} See 29 C.F.R. § 1613.401-.421 (1988).

\textsuperscript{199} 29 C.F.R. § 1613.405(e). With the issuance of the agency decision, the employee has the choice of suing immediately in federal district court on the discrimination claim or asking for a hearing at the MSPB. See 5 U.S.C. § 7702(a)(2) (1988).

\textsuperscript{200} See infra notes 227-35 and accompanying text.

\textsuperscript{201} See supra note 198.

That an employee's choices turn on the "MSPB appealability" of the underlying action raises the specter of a ping-pong match between the MSPB and the EEOC which could consume considerable agency and employee resources and time. The employee might file in the ordinary EEO process without regard to the MSPB appealability of his or her matter, only to be eventually told by the EEOC to start again before the MSPB. Conversely, the employee might file in the MSPB process and later find out that the underlying action was not appealable and the ordinary EEO process was the only route available. (These prospects assume filing deadlines are tolled in such instances.) These scenarios have in fact occurred, see, e.g., infra note 262, though their frequency is not documented statistically. Since outside the area of constructive discharge, the MSPB appealability of an action is generally clear as a legal matter, misfiling and/or incorrect processing would generally be attributable to employee or agency mistake. Whenever the differing jurisdictional prerequisites for several appeal routes make each the exclusive one for matters within their particular coverage, such confusion may arise.

\textsuperscript{202} See infra notes 277-78 and accompanying text.
(d) Where MSPB appealable action is taken through EEO process, no hearing at agency level is provided. Following agency decision, employee may opt for a hearing at the MSPB or sue directly in District Court.

(e) There is a choice of going either route.
EMPLOYEES WITHIN BARGAINING UNITS WHERE THE NEGOTIATED GRIEVANCE PROCEDURE COVERS THE ACTION AT ISSUE\textsuperscript{203}

Discrimination not alleged (Chart 3).

a. Chapters 43 and 75 actions may, at option of employee, be adjudicated by the MSPB with appeal to the Federal Circuit or processed through the negotiated grievance procedure, which includes arbitration at the option of the union and appeal of right by the employee to the Federal Circuit.\textsuperscript{204}

b. Other actions (e.g., within-grade denials) fall exclusively within the jurisdiction of the negotiated grievance process with a right of appeal to the FLRA but not judicial review of its decision unless an unfair labor practice is involved.\textsuperscript{205}

\textsuperscript{203} It is always possible, of course, that a personnel action, such as a removal, might be animated by anti-union animus or otherwise have the characteristics of an unfair labor practice as defined by the statute. Where there is a statutory appeals procedure available—as in the case of a Chapter 43 or 75 removal even where such an action may fall within the scope of an NGP—the matter may not be raised before the FLRA through the unfair labor practice proceedings. Rather the statutory procedure or, where applicable, the negotiated procedure are the only routes available. Where a statutory appeals procedure is not available (as where the personnel action at issue is not taken under the authority of Chapter 43 or 75 and no discrimination of the type within EEOC jurisdiction is alleged) an employee has the option of pursuing matters through the NGP or the FLRA procedures for remedying unfair labor practices, but not both. See 5 U.S.C. § 7116(d) (1988).

In Bodimus v. Dep't of the Treasury, 7 M.S.P.B. 385 (1981), the Board held that while it did not have jurisdiction over unfair labor practices so called, it could consider evidence of anti-union animus as proof of some prohibited personnel practices. In construing the word “matter” found in Section 7121(d) (which is also found in Section 7116(d)), the Authority has held that it refers to the personnel action involved, not the “issue” of discrimination. See U.S. Department of Justice, United States Marshalls Service and International Council of U.S. Marshalls Service Locals, AFGE, 23 F.L.R.A. No. 78 (1986).

Since agency actions cannot be sustained before the MSPB if “not in accordance with law,” see 5 U.S.C. § 7701(c)(2)(C) (1988), and since “grievances” which may be covered by an NGP include “any claimed violation . . . of any law,” 5 U.S.C. §§ 7701(c)(2)(C), 7103(a)(9)(C)(ii), an employee would appear to have available (absent a bargaining agreement to the contrary) as defensive matters whatever he or she could raise in an unfair labor practice proceeding on the argument that conduct constituting an “unfair labor practice’’ is by virtue of Section 7116 contrary to law.

\textsuperscript{204} See 5 U.S.C. § 7121(e), (f) (1988).

\textsuperscript{205} See 5 U.S.C. § 7123.
I. **Chapter 43 and 75 Actions**

- **Agency action**
  - Office of Special Counsel

II. **Others**

- **Agency action**
  - Office of Special Counsel
  - **negotiated grievance process**
  - **arbitration**
  - **FLRA**
Discrimination is alleged (Chart 4).

a. Chapters 43 and 75 actions may, at option of employee, be adjudicated by the MSPB or processed through the negotiated grievance procedure.206

1. Where the former (MSPB) is chosen, the employee may opt immediately for MSPB review or have his or her charge processed initially through the agency in a modified EEO procedure (the "mixed complaint" process) with the hearing after the agency decision at the MSPB. Following an MSPB decision, there may be EEOC and Special Panel review.

2. Where the latter (NGP) is chosen, the MSPB, the EEOC and Special Panel may review the arbitrator's resolution of the discrimination issue, though the MSPB restricts the scope of its review to matters of legal interpretation and not fact finding.207

3. Any judicial review of the administrative or arbitral determinations takes place not in the Federal Circuit but in the district courts.

207 See, e.g., Carr v. Dep't of Air Force, 32 M.S.P.B. 665 (1987); Robinson v. Dep't of Health and Human Services, 30 M.S.P.B. 389 (1986). Section 7121(d) of the statute speaks of MSPB "review" and this was, in part, the basis for the Board's decision regarding the scope of its examination.

The Board reviews the entire case, not just the allegations of discrimination and in doing so relies on Board precedent at least if the underlying action is a Chapter 43 or 75 matter. See Robinson, 30 M.S.P.B. 389.

Cases coming to the Board from the NGP may include Chapters 43 and 75 actions where FLRA review is not available so the last step before Board review will be arbitration. In other instances there may be an FLRA order. The Robinson case involved a Chapter 43 action where there is statutory option to proceed initially via the NGP or appeal to the MSPB. It was in this context that the Board held that it would rely on Board precedent, basing its reasoning on the statutory mandate of some uniformity between arbitration and Board proceedings in Chapter 43 matters. See infra notes 396-412 and accompanying text. Since the presence of alleged discrimination allows employees the initial choice of the statutory routes over the NGP for MSPB appealable actions even when Chapters 43 and 75 are not involved, the Board might rely on the need to avoid forum shopping to justify the application of Board precedent in all mixed cases coming from the arbitral process. Of course, because of the lack of de novo review of the arbitral award, forum shopping between the NGP and the statutory appeal process, instead of being motivated by differing bodies of "law," might instead be motivated by differing scopes of MSPB review. In mixed cases coming to the Board from the statutory route, the Board conducts a de novo review. (Some of the holdings of Robinson may need some modification where the MSPB gets the case following FLRA review.)

Appellants are not required to submit a transcript or verbatim record of the arbitration hearing with the request for review. See Denson v. Veterans Admin., 30 M.S.P.B. 383 (1986). Denson rejected the contention that lack of a transcript or tapes of the arbitration hearing entitled the appellant to a new hearing before the Board. The record thus submitted is similar to that used by the FLRA in reviewing arbitration awards. It is an interesting question whether the Board should, in the case of a mixed appeal from the FLRA, see itself as reviewing the FLRA's review of the arbitrator or as taking some other stance.
court in a *de novo* proceeding on the discrimination issues and an administrative record review on the personnel side.\(^{208}\)

b. Actions (other than those under Chapters 43 and 75) of the type which are within the jurisdiction of the MSPB (e.g., reductions-in-force) but fall within the scope of the negotiated grievance process are treated like Chapters 43 and 75 actions with the exception that if the negotiated grievance process is chosen, FLRA review of the arbitral award is available before any MSPB/EEOC/Special Panel review.

c. Actions which are not of the type appealable to the MSPB (e.g., promotion decisions) may, at the option of the employee, be processed through the ordinary EEO process with appeal of any agency decision to the EEOC Office of Review and Appeals.\(^{209}\) Alternatively, they may be processed through the negotiated grievance procedure with the opportunity to have the FLRA and EEOC review any arbitral award though that review is restricted largely to matters of legal interpretation.\(^{210}\) Following this there is a right (though disputed by some agencies) of the employee to a *de novo* proceeding in the district court regarding the discrimination issue.

\(^{208}\) See *infra* notes 271-79 and accompanying text.


\(^{210}\) 29 C.R.F. §§ 1613.219, 1613.231(b).
Chart 4

I. CHAPTER 43 AND 75 ACTIONS

- MSPB
  - Special Panel
    - U.S. District Court
  - EEOC
    - MSPB
      - Negotiated Grievance Process
        - Office of Special Counsel
          - Agency Action
            - Other MSPB Appealable Actions

II. OTHER MSPB APPEALABLE ACTIONS

- MSPB
  - Special Panel
    - U.S. District Court
  - EEOC
    - MSPB
      - Negotiated Grievance Process
        - Office of Special Counsel
          - Agency Action
            - Other MSPB Appealable Actions

III. OTHERS

- Agency Action
  - Negotiated
    - Office of Special Counsel
      - Agency Action
        - Other MSPB Appealable Actions
E. A Note on the Scope of Procedural Protections

The Civil Service Reform Act of 1978 followed the prior historical pattern of modulating the scope of the statutorily-guaranteed procedural protection accorded federal employees (both before and after the employing agency's decision to take a personnel action) according to:

1. the employee's position (e.g., competitive service, or senior executive service);
2. the characteristic of the incumbent (e.g., veteran or probationer); and
3. the type of personnel action (e.g., removal or suspension for fourteen days or less).

Generally, non-probationary competitive service employees and veterans in the excepted service receive the greatest degree of pre-action and post-action protection.

F. The Special Problem of the Mixed Case

In addressing actions alleging discrimination which would, absent that element, fall within the MSPB's jurisdiction, the House and Senate versions of the 1978 legislation differed substantially. The House bill allowed the EEOC to delegate to the MSPB authority to make a preliminary determination in an adverse action raising discrimination issues, but it directed the EEOC to make the final determination. The statute, as enacted, largely adopted

the Senate version, an approach dictated by the character of most mixed actions.

The Senate report explained:

In [personnel cases involving issues of discrimination law and pure personnel law] questions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question which must be considered together. Any provision denying the Board jurisdiction to decide certain adverse action appeals because discrimination is raised as an issue would make it impossible for the government to have a single unified personnel policy which took into account the requirements of all the various laws and goals governing Federal personnel management. In the absence of full Board jurisdiction, forum shopping and inconsistent decisions, perhaps arising out of the same set of facts, would result.

To create a system whereby an employee could successfully protest his or her removal to the EEOC on discrimination grounds and yet could lose before the Board when it considered only the performance aspects of the case would hardly have represented reform in a meaningful sense. But the problem of mixed cases is broader than this.

A simple example may help to bring this point home. Assume an employee is removed under Chapter 43 for allegedly inadequate performance. He or she argues that the real motivation behind the firing was racial discrimination. If the agency's proof of inadequate performance is particularly weak, the designated fact-finder reviewing the agency action permissibly could rely on this very weakness to suggest the presence of a discriminatory motive. This is analogous to the way a Title VII action is tried in the district courts. Following the plaintiff's prima facie case, the burden shifts to the government to articulate a legitimate reason for the firing; if the government fails, then the plaintiff prevails on the discrimination issue. In short, an adequate assessment of a personnel action allegedly involving discrimination requires a consideration of all the factual evidence if the goals of personnel and discrimination law are to be achieved.


However, it is not just at the factual level that mixed cases defy neat segregation into "personnel law" aspects and "discrimination" law aspects. This problem also appears at the level of legal doctrine. While in the abstract it might be easy in some cases to identify a particular statute or regulation as one of the "civil service" regime and another as one occupying the regime of "discrimination law," the actual interrelationship of the two bodies of law has hardly been comprehensively thought out by Congress. How are these two bodies of law to fit together? For example, in the handicap area, to what extent does the duty of "reasonable accommodation" cut into the discretion or lack thereof possessed by agency managers under "civil service" rules in choosing and structuring the nature of the work force under their control?222

This legal inseparability of mixed cases is particularly important from a "political" point of view. Since the meshing of discrimination statutes and civil service rules is largely a policy-making exercise, little constrained by express or conscious congressional design, the orientation of the entity having the last (or almost the last) word is of particular importance. To the extent that the EEOC was seen as insensitive to personnel management considerations, resistance to vesting final administrative control there in 1978 was to be expected. To the extent the MSPB was feared to be more "management oriented" or less concerned by nature with equal employment opportunity goals, opposition to MSPB control was a foregone conclusion. This was particularly true given MSPB's position as the inheritor of part of the authority of the former Civil Service Commission, which was not viewed as overly aggressive in the discrimination sphere.223

The Senate response to these tensions, a response that laid the foundation for the ultimate legislative compromise, was to create an administrative structure that would assure that:

[N]either the Merit Systems Protection Board, nor the Equal Employment Opportunity Commission, will be able to overrule the other. Instead, the powers of the Board and the Commission are carefully balanced one against the other. The committee felt that it was absolutely essential to the success of the overall civil service reform effort that there be this creative balance between

223 See Final Staff Report, supra note 63, at 237.
the authority of the Board and the Commission because of the unique nature of the issues involved.\textsuperscript{224}

Given this explanation for the background for the Special Panel procedures (Section 7702 of Title 5), the "uniqueness" of the resulting administrative scheme comes as no surprise.\textsuperscript{225}

1. \textit{The Statutory Provisions}

Mixed cases are funnelled to the MSPB prior to EEOC decisional involvement on the merits. If the case proceeds through the agency in the EEOC mixed complaint process, the agency must issue its decision within 120 days, but there is no requirement of appeal to the MSPB prior to filing a civil action in district court.\textsuperscript{226} If the action is filed initially with the MSPB, the MSPB must decide the case within 120 days.\textsuperscript{227}

Following a final MSPB decision, the employee may (but need not) petition the EEOC to consider the MSPB's decision.\textsuperscript{228} If the EEOC accepts the petition, it may supplement the record.\textsuperscript{229} In any event, within sixty days of its acceptance, it must either concur in the MSPB's decision or issue another decision differing from the MSPB's to the extent that the EEOC finds that the MSPB decision constitutes an incorrect interpretation of the discrimination statutes administered by the EEOC or that the MSPB decision involving such statutes is not supported by the record.\textsuperscript{230} If the EEOC does not concur, it must refer the matter to the MSPB, which, within thirty days, must either concur in the decision of the EEOC or find that that decision constitutes an incorrect interpretation of civil service law or is not, as to such law, supported by the record.\textsuperscript{231} If the MSPB does not concur, it must reaffirm its initial decision, with appropriate revisions.\textsuperscript{232} Such a reaffirm-

\textsuperscript{224} 1978 S. \textsc{report}, \textit{supra} note 70, at 52-53. \textit{See also} 1978 \textsc{conference report}, \textit{supra} note 219, at 139.

\textsuperscript{225} \textit{See generally} McCubbins, Noll \& Weingast, \textit{Administrative Procedures as Instruments of Political Control}, 3 \textit{J.L. Econ. \& Org.} 243, 255 (1987) ("[T]he coalition that forms to create an agency ... will seek to ensure that the bargain struck among the members of the coalition will not unravel once the coalition disbands").

\textsuperscript{226} 5 \textsc{u.s.c.} \textsection 7702(a)(2) (1982).

\textsuperscript{227} 5 \textsc{u.s.c.} \textsection 7702(a)(1).

\textsuperscript{228} 5 \textsc{u.s.c.} \textsection 7702(b)(1).

\textsuperscript{229} 5 \textsc{u.s.c.} \textsection 7702(b)(4).

\textsuperscript{230} 5 \textsc{u.s.c.} \textsection 7702(b)(3)(A), (B).

\textsuperscript{231} 5 \textsc{u.s.c.} \textsection 7702(b)(5), (c).

\textsuperscript{232} 5 \textsc{u.s.c.} \textsection 7702(c)(2).
ance by the MSPB results in mandatory certification of the matter to a Special Panel comprised of one EEOC member, one MSPB member, and a chairperson (an outsider), appointed by the President with the advice and consent of the Senate. This Special Panel is to review the record and decide the issues in dispute within forty-five days of the certification. It must "give due deference to the respective expertise of the Board and the Commission in making its decision."

The statutory provisions described above seem to draw a rabbit out of the hat. How can an EEOC decision constitute an incorrect interpretation of civil service law when a case is referred to the commission for its views on the meaning or applicability of discrimination law? The explanation is, of course, the close relationship between civil service law and discrimination law and their inseparability in many cases.

In this complicated fashion, EEOC involvement was insured as a hedge against the possibility that the MSPB might not be a sympathetic forum for discrimination claims on the facts or that the MSPB might fail to give appropriate consideration to discrimination law in its legal interpretations.

2. The Special Panel in Practice

To date, there have been only three Special Panel proceedings, none of which resulted from a case processed through the negotiated grievance procedure.

Seven years after the enactment of the 1978 Civil Service Reform Act, the first certification to the Special Panel occurred. The case, Ignacio v. United States Postal Service, involved the removal of an employee for unfitness for duty as a letter carrier. The dispute between the MSPB and the EEOC centered on an issue of law, not fact: whether an agency was required to consider reassignment of a handicapped employee as part of the "reasonable accommodation" to which the employee was entitled by law. In its final decision, the Special Panel accepted the EEOC's affirmative resolution of this question, and no further discussion of the merits is necessary here. Rather, Ignacio is important to

\[233\] 5 U.S.C. § 7702(d)(1), (6).
this study since, as the first proceeding of its type, the Panel felt obliged to construe Section 7702 and define (or create) various procedures to be applied in future Panel proceedings. In this regard, it would appear that complication breeds complication, for the rules adhered to by the majority of the Panel depart substantially from what a simple-minded (though not for that reason incorrect) reading of the statute suggests—"decide the issues [i.e., the merits] in dispute [one way or another] and issue a final decision" in accordance with that determination.

Since a dispositive treatment of the "law of the Special Panel" is not appropriate here, a brief summary of the rules established by the Ignacio majority is sufficient. The apparent purpose of the rules is to extricate the Special Panel from deciding the merits of the issues presented regarding civil service law and discrimination law unless it is absolutely necessary. This approach is curious, to say the least, in view of the congressional history behind the legislative compromise. Accordingly, the Special Panel will:

1. accept the EEOC's decision if the MSPB was wrong in its conclusion that the EEOC had misinterpreted civil service law and the EEOC's conclusion that the MSPB misinterpreted discrimination law is reasonable;
2. accept the MSPB decision on reference back from the EEOC where the MSPB was correct in its finding that the EEOC misinterpreted civil service law and the EEOC was "unreasonable" in its determination that the MSPB was incorrect in construing discrimination law; and
3. decide the "merits" of the case only where the MSPB was correct in its decision regarding EEOC's misreading of civil service law and the EEOC was correct in its finding that the MSPB was wrong on the discrimination law issue.
4. ask if the EEOC based its decision on civil service law "as the necessary premise for its conclusion" in determining whether the MSPB was correct in finding that the EEOC decision "constituted" an incorrect interpretation of civil service law.

The Panel found that the MSPB was wrong in finding that the EEOC decision constituted an incorrect reading of civil service law.

238 Id. at 483.
239 5 U.S.C. § 7702(d)(2)(A)(1979). This more straightforward approach seems to be the one that was advocated by the Chairman of the Panel, Herbert E. Ellingwood. See 30 MSPR 487-491.
240 30 M.S.P.R. at 483-86.
law (thereby resulting in an acceptance of the EEOC decision).\textsuperscript{241} A wag might observe that the first Special Panel thereby established that it should never have been empaneled to begin with and the weight of its decision should be determined accordingly.

A close reading of the \textit{Ignacio} rules discloses that they basically demand a reexamination of the required statutory findings that are conditions precedent to certification to the Panel. According to the \textit{Ignacio} Panel, the rules are designed "to prevent either agency from forcing a Special Panel review on the merits of issues in the other agency's area of primary expertise without a sufficient basis to do so."\textsuperscript{242} In other words, the underlying assumption is that if an agency cannot by itself have the authority to resolve all issues according to its own views, it will opt for a decision by a special body where it at least has some input by virtue of its membership. The role of the Special Panel is allegedly to restrict this option. Of course, if the \textit{Ignacio} majority is correct regarding the disposition of the agencies, it would be difficult to construct any statutory scheme to avoid attempts of overreaching.\textsuperscript{243} That such attempt should be assumed and dictate the complicated rules adopted by \textit{Ignacio} is debatable at best.\textsuperscript{244}

Moreover, the approach of the majority in \textit{Ignacio} overlooks the difficulty of clearly distinguishing the realm of civil service law from that of discrimination law. To take the position that the Panel will defer now to one agency and then to another based on its determination whether the MSPB was "correct" in some abstract sense that the EEOC's decision constituted a misinterpretation of civil service law is to avoid one of the central problems that called for an independent review by the Special Panel.\textsuperscript{245}

The delays involved in the \textit{Ignacio} case should not escape attention. Mr. Ignacio was removed by his agency in December 1980. In September 1983, the full Board issued its decision reversing the presiding official and sustaining the removal. The second Board decision, both differing with the EEOC decision and certifying the matter to the Special Panel, was issued in January 1985.

\textsuperscript{241} \textit{Id.} at 486.
\textsuperscript{242} 30 \textit{M.S.P.R.} at 483 n.11. \textit{See also id.} at 484.
\textsuperscript{243} There is some suggestion in the legislative record that at least the Senate had similar doubts. \textit{See} 1978 \textit{S. Report} at 59 (mandatory certification to the court of appeals).
\textsuperscript{244} In fact, the Senate's apparent concern for overreaching resulted not in a proposal to hedge the court of appeal's authority but rather to mandate jurisdiction in the case of disagreement. \textit{Id.}
\textsuperscript{245} This is basically Chairman Ellingwood's argument. \textit{See} 30 \textit{M.S.P.R.} at 488-491.
Finally, in February 1986, the Special Panel handed down its decision. 246

Stating that the statutory deadlines under section 7702 247 were missed is a gross understatement. The 1978 Conference report indicated that the deadlines were "to assure the employee the right to have as expeditious a resolution of the matter as possible" and that the Committee "expect[ed] the agencies to devote the resources and planning necessary to assure compliance with these statutory deadlines." 248 Of course, being the first case going the whole route, some delay might have been expected as the "kinks" in the system were "ironed out." However, as will be noted below, 249 delays have also affected subsequent proceedings.

Unfortunately, the second Special Panel proceeding, Lynch v. Department of Education, 250 was ill-starred as well. In early 1982, an employee was removed for inadequate performance. The action was affirmed by a presiding official of the MSPB. The EEOC accepted a petition to consider this decision. The EEOC’s subsequent opinion differed with the MSPB’s on the basis that the presiding official failed to analyze properly the issue presented (handicap discrimination). The EEOC offered what it considered to be the appropriate line of legal analysis without applying it to the facts of the case. On reference back, the Board agreed with the EEOC’s general statement of discrimination law but found that the presiding official should have sustained one of the performance-related charges. 251

In short, there was no dispute between the MSPB and the EEOC regarding the applicable law and there was no dispute between the two agencies regarding the law’s application since the EEOC did not apply the law to the facts. Of course, it was such disputes that the Special Panel was intended to resolve. Nevertheless, accepting the MSPB’s certification as binding on it, the Lynch Panel decided the case anyway, while admitting that its designed role was to resolve disputes between the MSPB and EEOC. 252 (The Panel decision was handed down in August 1986 after having been certified in January of that year, thus substantially missing the

246 Id.
247 See supra notes 228-35 and accompanying text.
248 1978 Conference Report at 141.
249 See infra notes 250-65.
250 31 M.S.P.R. 519 (Spec. Panel 1986).
251 Id. at 527-30.
252 31 M.S.P.R. at 525.
statutory forty-five day period for disposition.) The Panel viewed its role at this point as having to accept the MSPB decision if it was reasonable, which the panel found it was.\textsuperscript{253}

Almost a year later, the United States District Court for the District of Columbia vacated the decision of the \textit{Lynch} Special Panel and the MSPB decision that certified the case to the Panel.\textsuperscript{254} It did so on the basis that the Board lacked authority in the reference back to it from the EEOC to basically reopen the initial decision of the presiding employee and issue a new decision.\textsuperscript{255} In May 1988, on remand from the court, the Board determined that the employing agency had not made reasonable accommodation for Mr. Lynch's handicap and ordered his restoration and back pay.\textsuperscript{256} After the Board denied its petition for reconsideration in December 1988, the OPM petitioned the Federal Circuit for judicial review of the Board's decision. Thus, seven years after the employee's removal, a final disposition has yet to be achieved. Moreover, even after a Federal Circuit decision, the employee may sue \textit{de novo} in district court if the administrative process has not provided relief.

Encouragingly, the third Special Panel proceeding, \textit{Shoemaker v. United States Department of the Army},\textsuperscript{257} neither injected additional complications into the life of the administrative structure nor ended in total futility. Finding that the MSPB was indeed correct that the EEOC had misinterpreted a civil service rule, the Special Panel accepted the Board decision under the second rule of \textit{Ignacio}.\textsuperscript{258} Delay plagued this case, however, with the contested removal occurring in May 1983, and the Special Panel issuing its decision in September 1987 after an MSPB certification in April 1987.

On its apparent way to a Special Panel, another recent case, \textit{Gubisch v. Secretary of the Treasury},\textsuperscript{259} ran amuck. The case illustrates some additional confusion surrounding the application of Section 7702. An employee appealed his removal to the MSPB, expressly not raising an issue of handicap discrimination. He lost

\begin{itemize}
\item \textsuperscript{253} \textit{Id.} at 525.
\item \textsuperscript{255} \textit{Id.} at 66.
\item \textsuperscript{256} \textit{Lynch v. Dep't of Educ.}, 37 M.S.P.R. 12, 15 (1988).
\item \textsuperscript{257} 34 M.S.P.R. 597 (Spec. Panel 1987).
\item \textsuperscript{258} \textit{Shoemaker v. U.S. Dep't of the Army}, 34 M.S.P.R. 597, 602 (Spec. Panel 1987).
\item \textsuperscript{259} 36 M.S.P.R. 634 (Spec. Panel 1988).
\end{itemize}
his MSPB appeal. Soon after filing his appeal to the Board, he amended a pending EEO complaint to allege that his removal was based on discrimination. After the agency found no discrimination, an appeal was taken to the EEOC and, in addition, a petition under section 7702 was filed for EEOC consideration of the MSPB decision on the removal. The EEOC issued a decision finding a failure to afford the employee reasonable accommodation.

On reference back to the Board, the MSPB refused to consider the case under Section 7702 because it was allegedly improper for the employee to invoke mixed case procedures without having raised the issue of discrimination before the Board. Accordingly, the EEOC's acceptance of the petition for review was improper as was the EEOC's issuance of a decision on that petition. The Board reaffirmed its earlier decision upholding the employee's termination. The Board noted that the current EEOC mixed case regulations prevent the severing of issues that apparently were the cause of the parallel proceedings and confusion in this case. The EEOC later accepted that the Board was correct in its finding that the EEOC lacked jurisdiction to consider the employee's Section 7702 petition. The Commission reopened its previous decision on the EEO appeal from the agency decision on the removal and reversed its finding of discrimination. However, in April 1989, the United States District Court for the District of

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261 Id. at 636.

262 See also Davis v. Dep't of the Navy, 37 M.S.P.R. 120, 88 F.M.S.R. ¶ 885180 (June 3, 1988) (Gubisch extended to case where some discrimination claims, viz., race and age, were raised before MSPB but not the one at issue, i.e., handicapping; Evcic v. Department of the Navy, 37 M.S.P.R. 9 (1988) (Gubisch extended to waiver of discrimination claim initially raised before MSPB).

Compare O'Neal v. U.S. Postal Serv., 37 M.S.P.R. 125 (1988) (after initial MSPB decision rejecting handicap claim and EEOC decision accepting it, full Board decision, more than 3 years after the initial one, found that the underlying action was not MSPB appealable and therefore Section 7702 was inapplicable); Maiorana v. U.S. Postal Serv., 38 M.S.P.R. 665 (1988) (seven years after allegedly improper restoration and after EEOC, on appeal of an agency decision on EEO complaint, found that the personnel action was MSPB appealable, the Board dismissed the employee's appeal to it finding the action was not MSPB appealable and thus not a mixed case, and, in addition, that the EEOC/MSPB disagreement was on a matter of "jurisdiction" and not within the cognizance of the Special Panel). See also Marenus v. Dep't Health & Human Serv., 39 M.S.P.R. 498 (1989) (Board waives time limits for appeal from negotiated grievance procedure in a mixed case where appellant mistakenly filed appeal with EEOC first).

263 Gubisch, 36 M.S.P.R. at 638-39.

264 See supra notes 198-99 and accompanying text.

Columbia held that the EEOC could not reopen its prior decision and ordered full relief for the complainant.266

There is no indication in the EEOC’s second Gubisch opinion that, despite section 7702, the EEOC considered itself without the power—on direct appeal to it—to award relief to the employee, even though his termination was MSPB appealable. Nor did the district court opinion enforcing the result in the initial EEOC appeal question the agency’s authority in that regard. Other EEOC decisions suggest that the EEOC does consider it has the authority, at least in the absence of timely objection by the employing agency, to deal with MSPB appealable matters.

For example, in Saenz v. Baker267 an employee filed an EEO complaint stating that his retirement was the result of a reprisal against him for having filed two prior EEO complaints. The agency accepted the complaint and there was an investigation and hearing by an EEOC complaints examiner. The agency then rejected a proposed finding of discrimination. The decision was reversed on appeal to the EEOC, which ordered reinstatement.268 The agency requested that this decision be reopened on the basis that constructive discharge and the remedy of reinstatement made the case mixed and within the initial jurisdiction of the MSPB. The EEOC’s prior decision was, accordingly, said to be a violation of section 7702. The EEOC, in not deciding the merits of that argument, found that the jurisdictional objection was untimely and the agency itself had treated the matter as non-mixed. The Commission then left its previous decision in place.

Discussion of Ignacio and subsequent cases, including those mixed cases that never came before the Special Panel, illustrates several points regarding the administrative scheme for handling mixed cases: the potential for delay (despite the statutory commands to the contrary) while the cases move through the various steps;269 the conflict and confusion regarding the appropriate (i.e., the congressionally intended) role of the Special Panel and, on the part of those responsible for administering section 7702 (i.e., the

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267 EEOC Request No. 05870534 (June 9, 1988).
268 Id.
269 See, e.g., Gomez v. Dep’t Air Force, 869 F.2d 852 (5th Cir. 1989) (in absence of clear assertion of power by EEOC to sever discrimination claims in mixed cases, statutory time limits for commencing civil action in district court applied to EEOC disposition of entire case).
MSPB and EEOC), regarding when that provision applies and what their authority under it is; and confusion, or at least inattention, within the agencies in sorting out mixed from non-mixed cases for processing. These difficulties place in consideration the question of whether the costs justify the benefits achieved by retaining the current structure. Certainly, even if some form of Special Panel proceeding is retained, modifications—including statutory ones—are most assuredly required. In considering these matters, it should be noted that the Conference Committee in 1978 did not expect that a Special Panel proceeding would be a frequent occurrence. Fortunately, expectations of Congress have not been disappointed in that regard.

3. Judicial Review in Mixed Cases

The preceding discussion of mixed cases avoided the question of judicial review in instances where an employee is dissatisfied with the results of the administrative process. Both the statutory language and the legislative history unambiguously indicate the intent to preserve existing rights to a trial de novo in the United States District Courts. Where exhaustion of administrative remedies is required, actions may be brought after certain steps have been completed in the administrative processing of the mixed case or after the passage of various specified time intervals where the required administrative action has not occurred. The prevailing employee may obtain attorney’s fees. Moreover, the court has the authority to appoint an attorney to represent the

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270 1978 CONFERENCE REPORT, supra note 219, at 142.
272 See 1978 CONFERENCE REPORT, supra note 219, at 139, 141.
273 Apparently some agencies, including the Department of Health and Human Services, take the position that employees pursuing mixed cases through the negotiated grievance process waive a right to trial de novo. Since § 7121(d) clearly contemplates that mixed cases can be processed through the negotiated grievance process to the MSPB for review under § 7702, which is structured in many ways on the assumption that judicial review is available following the administrative process, it is difficult to accept an argument that would in essence put federal employees in a worse situation than employees of private employers who are not barred from trial de novo in the district courts following arbitration. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Cf. Atchison Topeka & S.F. Ry. v. Buell, 480 U.S. 557 (1987); Barrentine v. Arkansas Best Freight Sys., 450 U.S. 728 (1981).
275 In MSPB and EEOC processes, attorneys fees are also available. See 5 U.S.C. § 7701(g) (1982); 29 C.F.R. § 1613.271(d) (1988).
employee under appropriate circumstances. These statutory provisions may assist individuals who might otherwise bear the disadvantages of litigating pro se.

An employee may sue in the district court in a mixed case and argue that the agency action was not supported on the merits (i.e., the personnel side), and alternatively, that it was motivated by discrimination. The Federal Circuit has been found to lack jurisdiction over any part of a mixed case where the employee seeks to challenge the MSPB's decision on the discrimination issue. Presumably the lack of jurisdiction exists regardless of whether or not the MSPB alone, the MSPB and EEOC, or the Special Panel have issued decisions. All these decisions are expressly denominated judicially "appealable actions" by section 7702.

Curiously, the district court apparently is expected to conduct a "record" review on the personnel side of the case (assuming prior MSPB adjudication) using the deferential standards applicable in Federal Circuit review of the MSPB in non-mixed cases and a de novo review on the discrimination side. How this


277 See, e.g., Williams v. Dep't of the Army, 715 F.2d 1485 (Fed. Cir. 1983) (involving a case where the MSPB had made a decision); Doyle v. Marsh, 777 F.2d 1526 (11th Cir. 1985) (involving a case where the time limits for administrative processing had lapsed and the plaintiff filed in district court). But see Wall v. United States, 871 F.2d 1540 (10th Cir. 1989) (holding that Federal Circuit had exclusive jurisdiction to review an MSPB finding of lack of jurisdiction in a case where the claimant alleged but Board did not find an involuntary retirement and where that finding might, according to the court, in effect dispose of the discrimination claim on the merits).

It is not clear, however, what should happen if the employee appeals to the Federal Circuit solely on the personnel issue and then sues in District Court on the discrimination claim. The courts have not yet answered to what extent administrative findings that have been judicially reviewed are binding in the district court if preclusion would impact on the de novo hearing.

278 5 U.S.C. §§ 7702(a)(3), (b)(5)(A), (c), (d)(2)(A) (1982). An interesting question is whether, if there is a Special Panel, the OPM can obtain review of the results in the Federal Circuit. After the Panel issues its decision, the MSPB is required to order the employing agency to carry it out. Id. § 7702(c)(3). § 7703(d) authorizes the OPM to file a petition for judicial review in the Federal Circuit of "any final order or decision of the Board," that would seem to fit these cases, though the preconditions to filing, e.g., error of the Board, seem only awkwardly applicable to Special Panel proceedings. Since the reason that mixed cases end up in the district court is the statutory right to trial de novo of the employee, there would appear to be no reason why the Williams case should be applicable to OPM. Cf. Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986). See also infra text accompanying notes 575-78. Nevertheless, the statutory language of § 7703(d) may not be sufficient as a basis of OPM's authority to petition the Federal Circuit in these cases. This is merely one aspect of the broader issue of the government's right to judicial review in discrimination cases. See infra notes 572-79 and accompanying text.

operation is to proceed is one of the more problematic aspects of the mixed case phenomenon.

If the court first proceeds to conduct a typical limited record deferential review of the MSPB decision and sustains it, it will then proceed to the discrimination issue. In presenting its side of this matter, the plaintiff will attempt to establish that the real reason for the firing was discrimination and that the agency’s articulated reason was mere pretext. But here the court will be confronted by its prior finding that the agency in fact had a sustainable basis for the firing, including perhaps the necessary predicate that the MSPB resolution of the discrimination issue was, if not correct, at least permissible. Of course, notwithstanding that the agency may have had a legitimate basis for removing the employee, the real reason for its action may have been to discriminate on prohibited grounds. Nevertheless, a prior finding of adequate support for the administrative action must have some inhibiting effect on the court’s willingness later to make its own finding of discrimination. The upshot may be that the district court may proceed to the discrimination issue first where the record is made de novo. The agency is allowed to produce more material supportive of its action, to rebut the plaintiff’s attempt to prove pretext, than is contained in the administrative record allegedly supporting the personnel action. If the agency succeeds in defeating the plaintiff’s prima facie case on the discrimination issue, it is possible it will still lose on the personnel side because the administrative record may be weak, lacking the material that is before the court on the discrimination charge.

If a case proceeds not through the administrative process but through the negotiated grievance process with or without MSPB review of the arbitrator’s or FLRA’s decision, it is simply not clear how the district court is to conduct its review of the pure “personnel” aspects of the case. Presumably, some deference to the arbitral findings on the personnel side is required.

Anomalies abound with regard to mixed cases, so such problems may not be overly surprising. Again, the factual and legal relationship of the personnel aspects of a case and the discrimination aspects create real difficulties in case management.

G. The Role of the Office of Special Counsel and Extra-statutory Remedies

The complicated system of appellate routes, the availability of which is determined by the type of personnel action and type of
employee (including his or her inclusion or exclusion from a bargaining unit), requires careful scrutiny to determine what, if any, express statutory and regulatory procedures are available to a particular employee. The bargaining unit member must, in addition, consider the terms of the applicable collective bargaining agreement.

With respect to at least some types of actions, scrutiny will disclose that some employees are afforded only minimal protection. In the case of the probationary member of the competitive service, as an example, termination for inadequate performance or misconduct cannot, as a matter of law, be covered by the negotiated grievance process.\(^8\) If discrimination is not involved, the EEO process is unavailable. Neither is the agency grievance system available if removal is for unsatisfactory performance.\(^2\) Also, appeal rights to the MSPB are nonexistent for probationary employees except in very limited circumstances.\(^2\)

Employees in this or similar positions, as well as others who choose not to rely solely on the formal appeal routes, may be able to obtain some assistance through the Office of Special Counsel [OSC]. Pursuant to the powers and duties of the OSC,\(^2\) the Office is required to investigate allegations of prohibited personnel practices and other civil service law violations.\(^2\) The OSC may, in its discretion, seek both corrective action from the MSPB and disciplinary action against an employee engaged in that type of practice.\(^2\)

The 1978 Civil Service Reform Act specifically requires the Office to investigate prohibited personnel practices, including discrimination that falls within the jurisdiction of the EEOC.\(^2\) Notwithstanding that fact, the OSC’s regulations have consistently provided that, in view of the existence of the EEO administrative complaint process, the Office “will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation.”\(^2\)\(^7\) Deferral will not, how-

\(^{20}\) See U.S. Dep’t of Justice v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Nat’l Treasury Employees Union v. FLRA, 848 F.2d 1273 (D.C. Cir. 1988).


\(^{22}\) See 5 C.F.R. § 315.806 (discrimination for partisan political reasons or marital status; agency failure to comply with mandated procedures).

\(^{23}\) See supra notes 95-111 and accompanying text.

\(^{24}\) See supra notes 99-111 and accompanying text.

\(^{25}\) Id.

\(^{26}\) 5 U.S.C. §§ 1206(a), (c) and 2302(b)(1) [as amended by Whistleblower Act in 1989].

\(^{27}\) See 5 C.F.R. § 1251.3 (1988).
ever, occur "where it appears that the agency is not processing the complaint consistent with provisions of applicable statutes and regulations."\textsuperscript{288} The Office asserts that, where appropriate, in lieu of investigating, it will monitor the processing of a complaint.\textsuperscript{289} The legality of this policy remains to be determined.

Regarding the types of corrective action available, the existence of a prohibited personnel practice such as nepotism may not mean that the complaining employee or applicant will obtain the position or benefit that was denied as a result of the illegal conduct. The statute speaks only generally of corrective remedies and does not define the type that may be granted by the MSPB. Arguably, if the MSPB sustains a charge such as nepotism, the ordinary procedures for selection or promotion will be followed thereafter. The result may be that the complainant is still not chosen for the position.

Moreover, the scope of the OSC's authority to obtain corrective action from the MSPB is not unlimited: there must be an allegation of a prohibited personnel practice or a violation of other civil service laws.\textsuperscript{290} This scope of authority is sufficiently broad, however, to encompass most cases where an employee has been subject to a personnel action that he or she wants to contest.\textsuperscript{291} The proscription of prohibited personnel practices applies to positions in the competitive, excepted, and Senior Executive services\textsuperscript{292} and to a wide spectrum of significant personnel actions.\textsuperscript{293}

For example, take the classic case of the probationary member of the competitive service who is discharged. The employee is not protected by Chapters 43 or 75 procedures and appeals.\textsuperscript{294} It nevertheless is a prohibited personnel practice to "discriminate for or against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others."\textsuperscript{295} In this instance, the employee might

\begin{thebibliography}{99}
\item Id. at § 1251.3(a).
\item Id. at § 1251.3(b).
\item See supra notes 99-107 and infra notes 591-95 and accompanying text.
\item See Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983).
\item See supra notes 211-13 and accompanying text and supra notes 150-52 and accompanying text.
\item See supra note 149 and accompanying text.
\item See supra note 215 and accompanying text.
\end{thebibliography}
allege that the basis for the dismissal was his or her conviction of a crime such as reckless driving, purportedly having absolutely no bearing on his or her official duties. While the probationer has in these circumstances no right to resort to the MSPB, EEOC, or the negotiated grievance process (though the agency administrative grievance system may be available here), the employee can ask for the OSC’s assistance and perhaps obtain an MSPB order of reinstatement and back pay.

But what might happen if the employee asks for the OSC’s assistance, an investigation is conducted, and the OSC decides not to seek MSPB corrective action? One option is to seek judicial review of the OSC’s decision not to take the case to the MSPB, but, after Heckler v. Chaney 296 such a suit may be doomed to failure. 297

Another option for an employee—one that might be attempted regardless of whether or not the OSC and MSPB lack jurisdiction to provide any relief—is suit in federal district court seeking judicial review of the employing agency’s decision 298 under the Administrative Procedure Act. 299 Alternatively, the suit might invoke a so-called “implied right” of action theory based on the civil service statutes. 300 In fact, much litigation relying on these approaches has been brought since 1978.

The Supreme Court recently issued a decision that has profoundly affected this type of litigation. In United States v. Fausto, 301 a non-preference eligible member of the excepted service, suspended for misconduct, filed suit in the Claims Court under the Back Pay Act. 302 Justice Scalia, writing for the majority, took note of the absence in the Civil Service Reform Act of any provision expressly affording administrative or judicial review in the

296 470 U.S. 821 (1985) (agency’s decision not to take enforcement action unreviewable without congressional intent to circumscribe agency enforcement discretion).
297 See, e.g., Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (indicating that the only judicial review available relates to the OSC’s investigation and its adequacy).
298 In such a suit, the employee seeking declaratory and/or equitable relief may allege, for example, that the personnel action was “arbitrary” or “capricious” as a factual matter or “not in accordance with law” in the sense that it was infected by a “prohibited personnel practice.” See 5 U.S.C. § 706 (1982).
300 In such a suit, whether brought against the agency or agency officials individually, for declaratory, injunctive or monetary relief, the argument might be that the personnel decision was infected by a prohibited personnel practice.
circumstances and the "comprehensive nature" of the statutory scheme including the pattern of inclusion and exclusion of specific employee classes with regard to procedural protections.\textsuperscript{303} Justice Scalia concluded that the judicial remedy sought was unavailable in the plaintiff's case.\textsuperscript{304}

Earlier, Justice Scalia, as a member of the Court of Appeals for the District of Columbia Circuit, had authored the court's opinion in \textit{Carducci v. Regan}.\textsuperscript{305} In that case, an employee protested his reassignment through the agency grievance procedures and then to the Office of Special Counsel without success. He then sought APA review in the district court. The court of appeals rebuffed this attempt, relying on other cases arriving at similar results.\textsuperscript{306} The outcome of \textit{Carducci} and of many other appellate decisions indicates that the Office of Special Counsel may be the last (and, in some instances, the only) resort for an employee seeking to contest a personnel action.\textsuperscript{307}

An exceedingly clear statement by Congress that no rights and remedies exist outside of those expressly granted in the civil service law would, except in a case where such a preclusion is unconstitutional, settle these arguments once and for all. The likelihood

\textsuperscript{303} United States v. Fausto, 484 U.S. \textipa{--}, 108 S. Ct. 668 (1988); see also Webster v. Doe, 484 U.S. 439 (1988) (national security termination not subject to APA review on non-constitutional grounds). The extent of influence of \textit{Fausto} is seen, for example, in recent cases limiting extension of the NGP process to removals of non-preference eligible excepted service employees. See Dep't of Treasury v. FLRA, 58 U.S.L.W. 2170, No. 88-1159 (D.C. Cir. 1989). See also Karahalios v. Nat'l Federation of Fed. Employees, \textipa{--}U.S. \textipa{--}, 109 S. Ct. 1282 (1989) (no private cause of action by federal employees for breach of union's statutory duty of fair representation—relying in part on \textit{Fausto}).

\textsuperscript{304} \textit{Fausto}, 108 S. Ct. at 677.

\textsuperscript{305} 714 F.2d 171 (D.C. Cir. 1983).

\textsuperscript{306} Id. at 173, citing Borrell v. U.S. Int'l Communications Agency, 682 F.2d 981 (D.C. Cir. 1982), and Cutts v. Fowler, 692 F.2d 138 (D.C. Cir. 1982).

that Congress will be willing to do so in the near term at least is fanciful. At the same time, the potential existence of "implied" judicial remedies cannot be ignored in examining the overall structure of federal employee appeal rights. Judicial remedies impact both the managers' willingness to exercise their discretionary functions and the duties imposed on them by civil service law as well as increase the costs of governmental operation in numerous ways. Because of the lack of empirical and other evidence, this article can only mention the issue of extra-statutory remedies and urge that any statutory reform take those remedies into account.308

III. THE VARIOUS APPEAL SYSTEMS IN OPERATION

Statistics rarely tell the whole story but they cannot be ignored in judging the need for and feasibility of reform. The statistics reported herein were either contained in agency annual or special reports or furnished at the author's request by agency officials. Unfortunately, the statistical record is incomplete in a variety of arguably important respects. Much of the other information contained in this section was gleaned from interviews with agency and union officials, arbitrators, and private attorneys.

A. Merit Systems Protection Board

During the 1988 fiscal year, there were 6,402 initial appeals decided on procedural or substantive grounds by MSPB administrative judges.309 Fifty-two percent, or 3,348, involved adverse actions (basically Chapter 75 matters), and four percent, or 273, were Chapter 43 proceedings.310 During the six year period of 1983 to 1988, while the total number of initial appeals decided declined from 8,076 to 6,402, the percentage of adverse actions and performance-based actions decided by the Board remained largely stable.311

The settlement rate of initial appeals is very high indeed, partly in response to the Board's announced policy in favor of informal resolution of disputes. Since 1984, the rate has risen steadily from

308 See infra note 598 and following text.
310 Id. at 31.
six percent of cases that are not dismissed on procedural grounds to forty-eight percent in 1988.\textsuperscript{312} Settlements may include acceptance by the employee of his or her dismissal in return for cleansing the employment record of various particulars or mitigation of the initial agency-imposed sanction. In examining settlement rates for particular types of action, in fiscal 1987, forty-eight percent of adverse action appeals and fifty-six percent of performance actions were settled.\textsuperscript{313} In 1988, sixty-three percent of adverse action cases and sixty-seven percent of performance actions were settled.\textsuperscript{314}

Some private practitioners and agencies have been critical of the Board's emphasis on settlement. Critics believe that this emphasis has encouraged overly aggressive pursuit of pre-trial resolution by administrative judges.\textsuperscript{315} Those officials receive performance awards in part based on their respective settlement rate.

With regard to the cases that were not settled or dismissed but rather were adjudicated on the merits, the rates for initial decisions affirming employing agencies' actions remained relatively constant between fiscal years 1983 and 1988. The affirmation rates have ranged from a high of 80.3 percent in 1988 to a low of seventy percent in 1985.\textsuperscript{316} However, when all initial decisions issued are considered, thirty-two percent modified the agency action in some way.\textsuperscript{317} This appears to be in large part the result of the MSPB settlement initiative.\textsuperscript{318}

The MSPB has adopted a policy that all initial appeals (whether or not discrimination is alleged) be decided within 120 days from the date of filing.\textsuperscript{319} Given the pre-1978 history of delay in adjudication of employee appeals,\textsuperscript{320} Congress in the Civil Service

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\textsuperscript{312} 1988 MSPB ANNUAL REPORT, supra note 309, at 39.
\textsuperscript{313} 1987 MSPB CASE REPORT, supra note 311, at 9.
\textsuperscript{315} See, e.g., McCullough v. U.S. Postal Service, 40 M.S.P.R. 476, 89 F.M.S.R. ¶ 895158 (May 9, 1989) (in response to petition for review of initial decision, Board concluded that there was insufficient evidence to conclude that administrative judge coerced settlement).
\textsuperscript{316} 1988 MSPB ANNUAL REPORT, supra note 309, at 31; 1987 MSPB CASE REPORT, supra note 311, at 11.
\textsuperscript{317} 1988 MSPB CASE REPORT, supra note 314, at 13.
\textsuperscript{318} Id.
\textsuperscript{319} See, e.g., id. at 5.
\textsuperscript{320} See 1978 S. REPORT, supra note 70, at 10.
Reform Act required the Board to establish clear deadlines for case disposition.\textsuperscript{321} The act dictates that the deadlines are to be "consistent with the interests of fairness."\textsuperscript{322} As a result, the time to process an initial appeal has dropped from an average of 199 days in fiscal year 1983 to seventy-three days in fiscal year 1988.\textsuperscript{323} In 1988, 99.6 percent of initial appeals were decided within the 120 day period.\textsuperscript{324} This compared to 99.8 percent in 1987.\textsuperscript{325}

Some though not all private practitioners and even some agency officials interviewed found that the emphasis on the 120 day limit interferes with their ability to prepare for more complex cases.\textsuperscript{326} Mixed cases, requiring discovery and trial time to probe witnesses in order to present inferential proof of improper motive, would be an example of a complex case. Of course, with mixed cases the statute itself imposes a 120 day deadline for MSPB disposition.\textsuperscript{327} Violation of that deadline allows the appellant to file a suit in the District Courts under the anti-discrimination statutes.\textsuperscript{328} The point of some of the interviewees was, however, that if an employee wants to proceed through the administrative process, the Board and the presiding officials should be more flexible.

With regard to representation at the MSPB, \textit{pro se} appellants constitute a very significant portion of the total. For example, from January 1 to September 30, 1987, appellants were represented by private attorneys about thirty-one percent of the time and by unions about sixteen percent of the time. On the other hand, forty-five percent represented themselves and nine percent were represented by friends, family members, or co-workers with presumably little or no legal training.\textsuperscript{329} In 1988, only fifty-five percent of appellants were represented by an attorney, union

\textsuperscript{322} \textit{Id.}
\textsuperscript{324} 1988 MSPB ANNUAL REPORT, \textit{supra} note 309, at 30.
\textsuperscript{325} 1987 MSPB CASE REPORT, \textit{supra} note 311, at 12-13.
\textsuperscript{326} \textit{But see} U.S. GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD: CASE PROCESSING TIMELINESS AND PARTICIPANTS' VIEWS ON BOARD ACTIVITIES, GAO/GGD-87-97 at 22-23 (indicating some dissatisfaction with time limits but seeming to suggest that shorter rather than longer time limits were favored by most respondents to survey). \textit{See also} Biberstine \textit{v.} Dodds, DC 07528710301 (July 1, 1988) (granting a continuance that will cause a case to go beyond the 120 limit is not in itself reason to deny an otherwise proper continuance in a non-discrimination case).
\textsuperscript{328} 5 U.S.C. § 7702(e)(1)(B).
\textsuperscript{329} 1987 MSPB CASE REPORT, \textit{supra} note 311, at 14.
representative, or other person.\textsuperscript{330} The available statistics do not disclose the extent to which the percentage of pro se appearances varies depending on the type of case, e.g., adverse action versus a retirement decision, and the particular MSPB regional office, though there is some indication that such variances indeed occur. For example, apparently in the Washington, D.C. Regional Office, appellants in Chapters 43 and 75 actions are generally represented by counsel. It also appears that, for reasons now obscure, hearings are held in fewer cases where legal representation of the appellant is absent (twelve percent) than in others (thirty-one percent).\textsuperscript{331}

Regarding mixed cases, the available EEOC and MSPB statistics were, unfortunately, less than complete. Of the 6,512 initial MSPB appeals decided during fiscal 1987, there were 1,682 (twenty-six percent) where discrimination was alleged.\textsuperscript{332} During 1988, in 1,898 of the 6,402 initial appeals decided (thirty percent) there were allegations of discrimination.\textsuperscript{333} These figures apparently represent all of the mixed cases that came before the MSPB whether as mixed appeals or cases that originated with a mixed complaint in the EEO process.\textsuperscript{334} In 305 of the cases in 1987 and 945 of the cases in 1988, the allegations of discrimination were withdrawn.\textsuperscript{335} Of the 2,540 initial appeals not dismissed or settled in 1987, one percent (fifteen) of the cases involved reversal of agency action on the basis of a discrimination finding.\textsuperscript{336} During 1987, of the 1,377 initial appeals in which decisions were issued on allegations of discrimination, a finding of discrimination was issued in four percent (fifty-three) of the cases.\textsuperscript{337} In 1988, of the 2066 initial appeals not dismissed or settled, one percent (fifteen cases) involved reversal of the agency action on the basis of a discrimination finding.\textsuperscript{338} Of the 953 cases in which decisions were issued in 1988 on allegations of discrimination, a finding of discrimination was issued in two percent (22) of the cases.\textsuperscript{339}

\textsuperscript{330}1988 MSPB ANNUAL REPORT, supra note 309, at 31.
\textsuperscript{331}1988 MSPB CASE REPORT, supra note 314, at 19.
\textsuperscript{332}1987 MSPB CASE REPORT, supra note 311, at 13.
\textsuperscript{333}1988 MSPB CASE REPORT, supra note 314, at 17.
\textsuperscript{334}See supra notes 198-99 and accompanying text.
\textsuperscript{335}1987 MSPB CASE REPORT, supra note 311, at 13; 1988 MSPB CASE REPORT, supra note 314, at 17.
\textsuperscript{336}1987 MSPB CASE REPORT, supra note 311, at 8-9.
\textsuperscript{337}Id. at 13.
\textsuperscript{338}1988 MSPB CASE REPORT, supra note 314, at 10.
\textsuperscript{339}Id. at 16.
Almost seven hundred mixed case appeals were decided by Board presiding officials during the 1983 fiscal year, about 1250 in 1984, and over one thousand in 1985, with the processing time in the regions decreasing at a rate similar to that experienced in other categories of cases. Finally, in only fourteen instances in 1986, eight in 1987, and thirteen in 1988 did the Board review arbitration awards in mixed cases. Prior to 1986, no cases moved to the Board from the negotiated grievance process.

The other important statistics relating to mixed cases in the MSPB process relate to those that move from the MSPB to the EEOC and back again. The MSPB typically "sends" to the EEOC about 190 cases a year (161 in 1988). This number is approximately ten percent of the number of mixed cases decided by the MSPB in 1987. Generally, the EEOC accepts a petition absent procedural defects, despite the scope of discretion given the Commission under the statute not to accept a petition.

In 1983, eleven mixed cases and, in 1984, nine cases, were remanded by the Commission to the Board. In 1987, twenty-four cases and, in 1988, four cases were remanded. Estimated average processing time by the EEOC has been steadily reduced to an average of about eighty-two days in 1987. The cases where disagreement has been most likely to occur are in the handicap discrimination area.

In evaluating these statistics, it is important to note that the EEOC is not statutorily authorized to conduct a fully de novo review of MSPB decisions. The EEOC may differ with the Board only if the MSPB was incorrect in its interpretation of discrimination law (presumably de novo examination is available here) or if the MSPB decision on the facts with respect to the discrimination issue "is not supported by the evidence in the record as a whole." The latter standard is apparently construed by the EEOC to suggest a "substantial evidence" approach in the manner of Universal Camera Corp. v. National Labor Relations Board:

340 1987 MSPB CASE REPORT, supra note 311, at 26; 1988 MSPB ANNUAL REPORT, supra note 309, at 37.
341 1987 MSPB CASE REPORT, supra note 311, at 27.
343 MERIT SYSTEMS PROTECTION BOARD, 1983 ANNUAL REPORT at 23.
344 MERIT SYSTEMS PROTECTION BOARD, 1984 ANNUAL REPORT at 25.
345 1987 MSPB CASE REPORT, supra note 311, at 27.
346 1988 MSPB CASE REPORT, supra note 314, at 36.
could a "reasonable man" come to the conclusions on the facts reached by the MSPB, not whether the EEOC on its own would reach those same results. 349 No statistics are available indicating how often the EEOC differs with the MSPB on purely legal issues and how often on factual findings.

On reference back to the MSPB, the Board generally concurs with the EEOC's decision. For example, in 1987, the Board differed with the EEOC only once in the twenty-two cases decided that year. 350 In 1988, the Board adopted the EEOC finding in eight of the twelve cases decided. 351 Finally, as noted previously, there were only three certifications to Special Panels between 1979 and 1988.

B. Equal Employment Opportunity Commission

The statistics currently compiled by the Commission do not segregate mixed from non-mixed cases. Accordingly, at this time, it is impossible to determine with accuracy the frequency with which claimants use the mixed case complaint process in lieu of filing initially with the MSPB where the personnel action is MSPB appealable.

Quite a few interviewees felt that often the EEOC process acts as a catchall for complaints where discrimination is not really at issue but there is no other avenue through which the employee can obtain the intervention of a third party to express a judgment on the merits of his or her dispute with management or to otherwise become involved in the resolution of the matter. A similar perception existed in 1978. 352

The volume of claims moving through the EEO process is truly staggering. Table 1 presents statistics for 1986, 1987, and 1988 353

349 That EEOC review should be deferential is supported by the legislative history. See 1978 CONFERENCE REPORT, supra note 219, at 140:

In making a new decision the EEOC must determine that: (1) the MSPB decision constitutes an incorrect interpretation of any law, rule, or regulation, over which the EEOC has jurisdiction; or (2) the application of such law to the evidence in the record is unsupported by such evidence as a matter of law (emphasis added).

350 1987 MSPB CASE REPORT, supra note 311, at 27.

351 1988 MSPB CASE REPORT, supra note 314, at 36. In the remaining four, no certification to the Special Panel occurred because the Board found that the cases did not fall within the purview of § 7702.

352 See PRESIDENT'S PERSONNEL MANAGEMENT PROJECT, APPENDIX IV at 19.

353 The statistics for 1986 are from the EEOC's REPORT ON PRE-COMPLAINT COUNSELING AND COMPLAINT PROCESSING BY FEDERAL AGENCIES FOR FISCAL YEAR 1986 [hereinafter 1986
that, if not entirely typical, give a general sense of the movement through the system.

Where requested by the claimant, there is a hearing before an EEO administrative judge. The administrative judge recommends a decision for acceptance, modification, or rejection by the agency. During 1986, agencies acted on 1,405 recommended decisions, during 1987, 1,478 such decisions, and during 1988 2,068 such decisions. Of the 1,405 in 1986, there were 246 recommended findings of discrimination; in 1987, there were 244 recommended decisions finding discrimination; and in 1988, there were 323 recommended decisions finding discrimination. A recommenda-
tion by the administrative judge may be either in favor of or against a finding of discrimination. Between 1981 and 1988, when an administrative judge recommended a finding of discrimination, the agency acceptance rate varied from a high of 52 percent of these recommendations in 1988 to a low of 37.3% in 1987.\textsuperscript{358} When the presiding official recommended a finding of no discrimination, however, the acceptance rate varied from a low of 86.6 percent in 1986 to a high of 97.4 percent (1988).\textsuperscript{359}

In response to the latter figures, the EEOC noted in its 1986 report:

It is reasonable to expect some differences between the rate at which an agency accepts Recommended Decisions finding discrimination and the rate at which an agency accepts Recommended Decisions finding no discrimination. However, the disparities between the number and percentage of Recommended Decisions accepted where discrimination is found compared to a finding of no discrimination are too great.\textsuperscript{360}

It is interesting to note that the small rate of agency findings of discrimination has not changed much over the years. In 1974, under regulations similar to those currently in existence, federal agencies found discrimination in only one out of six cases.\textsuperscript{361}

A comparison of statistics with respect to MSPB findings of discrimination in initial appeals in mixed cases and findings of discrimination in EEOC recommended decisions is illuminating. In 1987, of the 1,377 cases in which initial decisions by the MSPB were issued on allegations of discrimination, there were findings of discrimination in four percent or fifty-three of the cases.\textsuperscript{362} For 1988, of the 953 cases in which decisions were issued on allegations of discrimination, a finding of discrimination was issued in two percent (22) of the cases.\textsuperscript{363}

\textsuperscript{360} 1986 EEOC Report, supra note 353, at 29. See also 1988 EEOC Report, supra note 353, at 36.
\textsuperscript{361} See President's Personnel Management Project, Appendix IV, at 19 (citing a congressional study).
\textsuperscript{362} 1987 MSPB Case Report, supra note 311, at 13. In only 15 of these cases did the finding of discrimination result in a reversal of the agency decision. Id. at 8. In the remaining 38 there may have been a settlement or reasons other than discrimination for the final MSPB action.
\textsuperscript{363} 1988 MSPB Case Report, supra note 314, at 16. In only 15 of these cases did the finding of discrimination result in a reversal of the agency action.
In 1986, there were 5,176 agency decisions disposing of EEO complaints other than by dismissal or settlement\(^{354}\) and only 1,405 EEOC recommended decisions on which agencies took action, of which 246 found discrimination.\(^{355}\) In 1987, there were 4,424 agency decisions disposing of EEO complaints other than by dismissal or settlement\(^{366}\) and only 1,478 recommended decisions on which agencies took action.\(^{367}\) Of these, 244 found discrimination.\(^{368}\) Finally in 1988 there were 4,794 such agency decisions,\(^{369}\) only 2,068 recommended decisions on which agencies took action,\(^{370}\) and 323 findings of discrimination.\(^{371}\) Recommended decisions need not be accepted by an agency. As noted above, recommended decisions are often rejected where a finding of discrimination is proposed.\(^{372}\) For current purposes, assume that all of the recommended decisions are accepted. (This assumption is supported by the fact that, to some unknown extent, an agency decision with or without a recommended decision might include a finding of discrimination and the EEOC does reject on appeal agency decisions finding no discrimination.) On this basis, of adjudicated EEO cases, in five percent there was a finding of discrimination in 1986, six percent during 1987, and seven percent during 1988.

The statistics suggest that a decision favorable to an employee on a discrimination claim is more likely—but not dramatically so—to be forthcoming in the EEO process than in the MSPB process. Aside from general questions of statistical significance, some care must be taken before a firm conclusion may be drawn. For example, the statistics regarding EEO cases include only those decided on the merits (not dismissed or settled). The MSPB figures are apparently more inclusive. The 1987 MSPB report, for instance, notes that while mixed cases constituted twenty-six percent (1,682) of the total (mixed and non-mixed) appeals decided (6,512),\(^{373}\) the Board's presiding officials decided on the merits only 2,540\(^{374}\) including both mixed and non-mixed. Unless mixed

\(^{354}\) 1986 EEOC REPORT, supra note 353, at A-12.
\(^{355}\) Id. at A-21.
\(^{366}\) 1987 EEOC REPORT, supra note 353, at A-12.
\(^{367}\) Id. at A-21.
\(^{368}\) Id. at A-22.
\(^{369}\) 1988 EEOC REPORT, supra note 353, at A-12.
\(^{370}\) Id. at A-22.
\(^{371}\) Id.
\(^{372}\) See supra notes 354-60 and accompanying text.
\(^{373}\) See 1987 MSPB CASE REPORT, supra note 311, at 13.
\(^{374}\) Id. at 9.
cases involve substantially lower dismissal and settlement rates than other cases, it would not be expected that the percentage of mixed cases decided on the merits would exceed fifty percent of all appeals decided on the merits when they compose only one quarter of all cases "disposed of."

Moreover, the types of cases coming through the EEOC process, which do not include the important performance and disciplinary actions, may be unique in ways that throw a different light on the meaning of the comparative figures. There may indeed be other reasons to question the current statistical base.

Following an agency decision on the merits of an EEO complaint, there is a right of appeal to the Commission itself in non-mixed cases. In 1986, there were 3,319 direct commission appeals, in 1987, 3,649, and, in 1988, 3,866. The EEOC may also be asked to review EEO cases that have been initially processed through the negotiated grievance process. In 1986, there were forty-five of these, in 1987, thirty-nine, and in 1988, forty-four. These numbers have remained relatively stable over the years.

The EEOC's Office of Review and Appeals' processing time for cases received dropped from 285 days in the first quarter of fiscal year 1988 to 140 days in the last quarter. Almost one half of the appeals in 1988 came from the Postal Service. In 1988, the EEOC issued decisions based on procedural grounds (improper rejection or inadequate investigation) in 3,880 cases. In 1454 cases (thirty-seven percent), the Commission reversed the agency. In 1988, the EEOC issued merits decisions in 1,881 cases. In 222 cases (twelve percent), the agency decision was reversed or modified.

One final note relates to the nature of employee representation in the EEO process. While there is a dearth of hard data in this area, the 1986 EEOC complaint processing report recognized that "[f]ederal complainants generally complete a complaint form or

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275 See supra notes 139-41 and accompanying text.
276 Telephone Interview with Ronald Copeland, Deputy Director Office of Review and Appeals of the EEOC (December, 1988).
277 OFFICE OF REVIEW AND APPEALS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FY 1988 ANNUAL REPORT.
278 Id.
279 Id.
280 Id.
281 Id.
282 Id.
letter without assistance from a person who has expertise in the area of EEO law. A lack of professional assistance at the counseling and filing stages of the process may contribute to the number of complaints that are rejected and cancelled. Interviews with private attorneys and agency officials, along with various other sources, also suggested that there is a very high percentage of federal employees who proceed through the process without either union representation (in the case of an employee in a bargaining unit) or their own attorneys. Unions sometimes do provide representation, at least to dues-paying members as is the case in the MSPB process.

C. The Negotiated Grievance Process

The relevant data relating to the use of the negotiated grievance process includes that data pertaining to the issuance of arbitration awards and reviews by the FLRA. The available information is skimpy and undetailed; only the general outlines of process flow can be ascertained with some degree of confidence.

The parties to bargaining agreements can limit the coverage by an NGP of personnel actions. The desire to limit coverage must be clearly stated by the parties. Thus, the dearth of particular types of matters processed through a negotiated grievance process might at first glance be attributed in part to exclusions from coverage and not employee (or union) choice in particular cases. At the same time, generally speaking, negotiated grievance processes do include EEO matters and Chapters 43 and 75 actions. Relevant OPM statistics are listed in Table 2.

Assuming coverage, a grievance can be disposed of at various stages. The grievance may be disposed of prior to arbitration or result in an arbitration award and/or the filing of exceptions with the FLRA, appeals to the EEOC or, in mixed cases, to the MSPB. There is simply no data regarding the number of pre-arbitration withdrawals, settlements, or other resolutions or the type of complaints disposed of in that manner.

OPM attempts to collect all arbitral awards, while estimating it may get seventy-five to eighty percent of them. OPM’s Labor

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383 1986 EEOC REPORT, supra note 353, at 13. See also 1987 EEOC REPORT, supra note 353, at 18.
385 Id.
Table 2
Statutory Exclusions: Negotiated Grievance Procedure

<table>
<thead>
<tr>
<th>Records</th>
<th>Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Totals on File</td>
<td>Total</td>
</tr>
<tr>
<td>2,283</td>
<td>—</td>
</tr>
<tr>
<td>1. Excludes Discrimination:</td>
<td>195</td>
</tr>
<tr>
<td>2. Excludes Discrimination &amp; 432:</td>
<td>18</td>
</tr>
<tr>
<td>3. Excludes Discrimination, 432 &amp; 752:</td>
<td>165</td>
</tr>
<tr>
<td>4. Excludes 432:</td>
<td>13</td>
</tr>
<tr>
<td>5. Excludes 752:</td>
<td>46</td>
</tr>
<tr>
<td>6. Excludes 432 &amp; 752:</td>
<td>11</td>
</tr>
<tr>
<td>7. Excludes Discrimination &amp; 752</td>
<td>85</td>
</tr>
<tr>
<td>Total Exclusions</td>
<td>533</td>
</tr>
</tbody>
</table>

Agreement Information Retrieval System (LAIRS) indicates the following numbers of awards per calendar year (including Chapters 43 and 75 actions but excluding awards in postal worker cases): 602 (1979); 790 (1980); 787 (1981); 731 (1982); 890 (1983); 772 (1984); 611 (1985); 595 (1986); 636 (1987); 480 (1988). In considering these figures, note that the awards do not necessarily represent the types of personnel actions that are the focus of this report. The NGP processes a variety of complaints of varying nature by either the individual employee or the union. Statistical information indicating the nature of the underlying disputes giving rise to these awards was not available in all instances from OPM.

1. Arbitration Awards in Chapters 43 and 75 Actions

OPM does maintain statistics relating to arbitration awards in Chapters 43 and 75 actions. The numbers with the results (percentage affirmed, mitigated, and reversed) of the arbitral decisions are listed in Table 3.

For comparative purposes, the statistics for the MSPB for 1986, 1987, and 1988 with regard to adjudicated cases (whether disposed of “on the merits” or procedures and whether or not involving claims of discrimination) are listed in Table 4.

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336 See, e.g., Horner v. Bell, 825 F.2d 382 (Fed. Cir. 1987).
338 1987 MSPB Case Report, supra note 311, at 10.
339 1988 MSPB Case Report, supra note 314, at 12.
Table 3**

<table>
<thead>
<tr>
<th>Year</th>
<th>Ch. 75</th>
<th>Ch. 43</th>
<th>Aff.</th>
<th>Mit.</th>
<th>Rev.*</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1984*</td>
<td>83</td>
<td>20</td>
<td>(75) 37.0</td>
<td>39.7</td>
<td>22.8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 50.0</td>
<td>15.0</td>
<td>35.0</td>
</tr>
<tr>
<td>FY 1985*</td>
<td>67</td>
<td>18</td>
<td>(75) 55.2</td>
<td>32.8</td>
<td>11.9</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 61.6</td>
<td>5.5***</td>
<td>33.3</td>
</tr>
<tr>
<td>FY 1986*</td>
<td>80</td>
<td>15</td>
<td>(75) 51.2</td>
<td>22.5</td>
<td>26.2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 53.3</td>
<td>6.6***</td>
<td>40.0</td>
</tr>
<tr>
<td>FY 1987*</td>
<td>48</td>
<td>13</td>
<td>(75) 54.1</td>
<td>33.3</td>
<td>12.5</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 53.8</td>
<td>15.3</td>
<td>30.7</td>
</tr>
<tr>
<td>FY 1988*</td>
<td>52</td>
<td>11</td>
<td>(75) 40.3</td>
<td>30.7</td>
<td>28.8</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 63.6</td>
<td>0.0</td>
<td>36.3</td>
</tr>
</tbody>
</table>

* The figures do not include awards in postal worker or TVA employee cases.
* These reversals are presumably merits and procedural reversals.
** The statistics do not disclose how many of these cases are "mixed."
*** Includes only one case. While agency penalties may be modified by the MSPB or arbitrators in Chapter 75 actions, an agency penalty imposed under Chapter 43 cannot be modified.386

Table 4

<table>
<thead>
<tr>
<th>Year</th>
<th>Ch. 75</th>
<th>Ch. 43</th>
<th>Aff.</th>
<th>Mit.</th>
<th>Rev.</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1986397</td>
<td>1,376*</td>
<td>Not Available</td>
<td>(75) 76</td>
<td>6</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(N/A)</td>
<td>(43) N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>FY 1987398</td>
<td>1,167</td>
<td>116</td>
<td>(75) 77</td>
<td>8</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 78</td>
<td>0</td>
<td>22</td>
</tr>
<tr>
<td>FY 1988399</td>
<td>876</td>
<td>78</td>
<td>(75) 75</td>
<td>9</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 78</td>
<td>0</td>
<td>22</td>
</tr>
</tbody>
</table>

* Includes 372 decisions in postal workers cases and nineteen in TVA employee cases in 1986. Similar statistics for 1987 were not available.

Prior to 1986, the MSPB statistics for Chapters 43 and 75 actions—which do not separate mitigations and reversals—were as listed in Table 5.

386 U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions for
Table 5

<table>
<thead>
<tr>
<th>Year</th>
<th>Ch. 75</th>
<th>Ch. 43</th>
<th>Rev./Mit. (percentages)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FY 1983</td>
<td>1,791*</td>
<td>N/A</td>
<td>(75) 16</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) N/A</td>
</tr>
<tr>
<td>FY 1984</td>
<td>1,869*</td>
<td>N/A</td>
<td>(75) 17</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) N/A</td>
</tr>
<tr>
<td>FY 1985</td>
<td>1,475*</td>
<td>214</td>
<td>(75) 22</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(43) 21</td>
</tr>
</tbody>
</table>

* Includes decisions in postal workers cases, which were 357, 440, and 388 in 1983-85, respectively, and TVA employee cases, which were thirty-five, thirty-eight, and nineteen in 1983-1985, respectively.

These statistics indicate a marked difference between the results of the MSPB and the arbitral processes, particularly with regard to mitigation in Chapter 75 actions. While some individuals interviewed indicated that they considered the MSPB process to be "management" oriented, others including some union officials did not share this opinion. There may, in fact, be a vicious circle involved to the extent the results of cases before the Board appear more adverse to the employee than the results of arbitration. If, as some people suggested, unions are more likely to take cases with good chances of success to arbitration because, among other things, they view the MSPB process as management oriented, then the higher agency affirmance rate and lower mitigation rate before the MSPB might be explained at least in part by the weaker nature of the employees' cases presented to the Board for decision. The

FY 1983, Appendix 1 (non-air traffic controller appeals). See also 1987 MSPB CASE REPORT, supra note 311, at 21, 23, 25.

391 See U.S. MERIT SYSTEMS PROTECTION BOARD, STUDY OF MSPB APPEALS DECISIONS FOR FY 1984, Appendix 2 (non-air traffic controller appeals). See also 1987 MSPB CASE REPORT, supra note 311, at 12, 14, 15.

392 U.S. MERIT SYSTEMS PROTECTION BOARD, STUDY OF MSPB APPEALS DECISIONS FOR FY 1985, Appendices 6, 9, 10 (non-air traffic controller appeals).

393 While there may be appeals from initial decisions to the full Board, of the cases appealed (one in five), the Board leaves the administrative judge's decision standing almost 90% of the time, see 1988 MSPB CASE REPORT, supra note 314, at 25, 28, and even where changes are made, they may be in favor of the agency. Id. at 28-30.

394 For a somewhat similar reflection of views, see U.S. GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD: CASE PROCESSING OF TIMELINESS AND PARTICIPANTS' VIEWS ON BOARD ACTIVITIES, GAO/GGD-87-97.
inevitable loss rate at the MSPB would then reinforce union and employee aversion to the Board process. By the same token, if management looks at the same statistics, it might conclude that arbitrators are "kinder" to the union than the Board and this could create hostility to arbitration on the basis of "union bias."

This is not to say, however, that misperception alone is accountable for the apparent widespread union aversion to use of the MSPB process and the differing statistics. The nature of arbitration itself, including its informality, the characteristics of arbitrators, and the fact that arbitration is intimately linked to the collective bargaining process and the evolving labor-management relationship, inevitably means that results are likely to differ from the legalistic process of the MSPB. The MSPB, as an agency, stands apart from direct involvement in the union-management dialogue. One prominent and well-respected federal sector arbitrator, during an interview, expressed his conception of his role as focusing on the facts of the particular case before him, while he saw the Board as more concerned with the development of legal doctrine. Since it would be difficult to argue that Congress in 1978 did not realize the way arbitration generally functions, an apparently divergent pattern of results between the MSPB and arbitrators in Chapters 43 and 75 actions does not by itself indicate that the arbitration system is going awry. Rather, it is likely operating in the fashion intended (or at least foreseen) by the authors of the 1978 CSRA.

Many interviewees, including those intimately involved with the negotiated grievance process, expressed the opinion that arbitrators, more often than not, "split the baby," giving something to both sides (e.g., a reprimand rather than removal). However, others noted that if an arbitrator was perceived as doing that consistently, ultimately he or she would be stricken from the lists because neither party would want their good cases compromised in that fashion.395

Ironically, the efforts at the MSPB to settle cases, which may often mean that agencies must accept results that only partially vindicate their positions, are likely bringing the MSPB process and

the arbitral process much closer together than the statistics relating to adjudicated cases suggest. If the results of the MSPB process are not viewed as compromising the vindication of merit system principles (a matter that is disputed), it is difficult to argue that arbitration is a worse offender in that regard even if in fact arbitrators are "splitting the baby" in a substantial number of instances by, for example, mitigating agency-imposed penalties.

2. Statutorily Mandated Uniformity Between the MSPB and Arbitral Processes in Chapters 43 and 75 Actions

In Chapters 43 and 75 actions that go to a hearing, where the statute attempts to assure some degree of uniformity between the MSPB process and arbitration, apparent differences in patterns of results may be attributable to several factors. For example, the difference may result from the divergent perspectives from which the purely factual elements are viewed. In other cases, one forum may apply a different procedural approach or legal principle. Regardless, this disuniformity may encourage forum shopping.

In *Cornelius v. Nutt*, the Supreme Court held that arbitrators must follow the statutory "harmful error" rule as interpreted by the MSPB. However, in dicta, the Court noted that "Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision" in order to promote consistency and to avoid forum shopping. This statement has provoked disputes regarding the extent to which the arbitral proceeding must be a mirror image of the Board's processes.

Exact congruence in all regards was certainly not intended by Congress in 1978. The fact that the CSRA expressly mentions certain procedures to be applied by both the MSPB and arbitrators suggests that arbitrators are free to depart from the MSPB format regarding matters not mentioned. The "consistency" referred to

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398 Pursuant to 5 U.S.C. § 7701(c)(2)(a), where an agency has sustained its burden of proof, its decision may not be upheld if the employee shows that harmful error occurred in the application of the agency's procedures in arriving at the decision.


in the legislative history is consistency in treatment of those aspects of procedure that the statute makes expressly applicable to both the MSPB and arbitration.\textsuperscript{401} As the Supreme Court acknowledged in \textit{Alexander v. Gardner-Denver Co.},\textsuperscript{402} it is the characteristic informality of arbitration that enables it to function in an efficient and expeditious fashion, though this very informality may mean that the results of a judicialized process and arbitration will differ.\textsuperscript{403}

Congress provided that judicial review of arbitration in Chapters 43 and 75 actions would be conducted "in the same manner and under the same conditions" as review of MSPB orders.\textsuperscript{404} In this fashion, "conformity between the decisions of arbitrators with those of the Merit Systems Protection Board"\textsuperscript{405} would allegedly be achieved. Thus, the same courts would review both and, pursuant to the same scope of review, examine the decision for arbitrariness, abuse of discretion, legal error, and lack of substantial evidence.\textsuperscript{406} However, since the general standard of "reasonableness" is the lodestar of review of agency fact-finding and law application under this type of scope of review,\textsuperscript{407} the CSRA allowed for a broad range of permissible decisions in Chapters 43 and 75 actions, thus leaving room for the development of patterns of different results in the MSPB and arbitral processes. As noted above, such a pattern has developed, particularly with regard to mitigation of agency-imposed sanctions in Chapter 75 actions.\textsuperscript{408} Moreover, since penalty determinations are generally reviewed with special deference to the agency,\textsuperscript{409} judicial review of mitigations under an abuse of discretion standard will inevitably establish a particularly expansive range for differences in sustainable results in the two processes. Finally, since the government's right to appeal from both the MSPB and an arbitrator in a Chapters 43 and 75 action is conditioned on the existence of an error in the interpretation of civil service law that will have substantial im-

\textsuperscript{401} See 1978 Conference Report, supra note 219, at 157.
\textsuperscript{402} 415 U.S. 36 (1974).
\textsuperscript{403} Id. at 58-9.
\textsuperscript{405} Id.; 1987 S. Report, supra note 70, at 111.
\textsuperscript{406} See 5 U.S.C. § 7703(c) (1982).
\textsuperscript{408} See supra notes 387-93 and accompanying text.
\textsuperscript{409} See, e.g., Miguel v. Dept. of Army, 727 F.2d 1081 (Fed. Cir. 1984).
pact, Congress further insulated from correction differing patterns of results in cases at the MSPB and before arbitrators where those are not traceable to errors of legal interpretation.

In short, it might be said that Congress in 1978 intended to attain as close a match in the end results of Chapters 43 and 75 adjudication as possible given the differing inherent natures of the MSPB process and arbitration. Yet the same substantive principles and statutorily prescribed procedures were also intended to ensure at least some basic uniformity. Uniformity in terms of the substantive rules applied is required in the principal performance-based and disciplinary actions by the need to avoid inequality in treatment at the level of legal doctrine on policy (though perhaps not constitutional) grounds.

3. Judicial Review to Enforce Uniformity

In 1978, the mechanism for enforcement of uniformity was to place reviewing authority with regard to both the MSPB and arbitrators in Chapters 43 and 75 actions in the same courts, viz., the Courts of Appeals and the Court of Claims, and subject decisions to the same scope of review. The Federal Courts Improvement Act of 1982 vested exclusive review authority in the Federal Circuit. The legislative history of the 1978 Act suggests that the Federal Circuit require that arbitrators follow MSPB substantive precedents. Given the institutional continuity of the Board and the fact that civil service issues are the Board's principal concern compared to the ad hoc involvement of individual arbitrators, there is a strong policy argument for deference to the Board. In fact, the Supreme Court opinion in Nutt supports such a general approach.

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411 Accord, e.g., Devine v. Sutermeister, 724 F.2d 1558, 1565 (Fed. Cir. 1983).
412 See also Devine v. Pastore, 732 F.2d 213 (D.C. Cir. 1984) (MSPB scope of review of agency penalty appealable to arbitrator).
413 See 1978 S. REPRT, supra note 70, at 111. The House bill was different. The Conference Committee accepted the Senate version. See 1978 CONFERENCE REPORT, supra note 219, at 153.
415 See 1978 S. REPRT, supra note 70, at 111: "The provision for judicial review is intended to assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board."
416 See Nutt, 472 U.S. at 659-62.
Where a Chapters 43 or 75 action involves various types of prohibited discrimination, matters become more complicated. In a case that goes to arbitration, direct review by the MSPB of the arbitrator’s decision may assure that the required uniformity is achieved. But what happens if, rather than invoking such review or following its completion, a dissatisfied employee sues in district court claiming a right to trial de novo under the discrimination laws? The Federal Circuit lacks jurisdiction over mixed cases, and the responsibility for ensuring that the mandated uniformity between Board and arbitral proceedings in terms of the substantive personnel law applied would devolve on the district court in reviewing the personnel side of the case. Similarly, compliance by the arbitrator with the statutorily required procedures, such as the harmful-error rule and the burdens of proof, must be enforced as to the purely personnel issues, though they must be jettisoned when the court deals with the discrimination issue. As noted before, this bifurcated approach presents various administrative and other difficulties which are hardly less when the decision being reviewed is that of an arbitrator and not the MSPB.

Where an agency loses at the Board or arbitral level in a Chapters 43 or 75 action (whether or not mixed), the ability of the government to command the Federal Circuit’s attention is limited to cases where the decision allegedly constitutes an erroneous interpretation of civil service law that will have a substantial impact. The court has rather consistently suggested that review of an award on OPM’s petition with respect to application of established rules is less appropriate under the statute than determining whether the arbitrator applied the correct legal principles, in part to recognize the traditional judicial deference to the results of arbitration.

417 See supra note 207 and accompanying text.
418 But see supra note 273.
419 See supra text accompanying note 277.
420 See supra text accompanying note 279.
421 See supra text accompanying notes 78-81.
422 See, e.g., Devine v. Sutermeister, 724 F.2d 1558, 1566 (Fed. Cir. 1983) (questioning whether the issue of an arbitrator’s balancing of the factors concerning mitigation of penalty is properly appealed by OPM). See also Devine v. White, 697 F.2d 441 (D.C. Cir. 1983); Feigenbaum, The Relationship Between Arbitration and Administrative Procedures in the Disciplining and Discharge of Federal Employees, LABOR L.J. 586 (Sept., 1983) ("[I]f the allegation is not that the arbitrator ignored the law or applied the wrong provision of the law but that arguably the arbitrator’s judgment in applying the law was incorrect, then no 'substantial impact' should be found.").
Recently, however, this narrow approach has been taken to an unfortunate and arguably incorrect extreme. In *Horner v. Bell*, the Federal Circuit applied *Nutt* to hold that, since the MSPB could not modify an agency penalty imposed under Chapter 43, neither could an arbitrator. Following this decision, however, in *Horner v. Garza*, the same court refused to review an arbitral award on the petition of OPM where the arbitrator clearly violated the non-mitigation rule. The explanation offered was that the clear circuit precedent of *Bell* and the fact (so the court assumed) that the award was *ultra vires* (presumably because it was contrary to *Bell*) and thus unenforceable meant that other arbitrators would not be encouraged to issue similarly infirm awards. Thus, the award at issue would be of no substantial impact on the civil service system. But if the Federal Circuit’s assigned role in the system does not include the responsibility to enforce, when asked, its view of the correct legal doctrine—at least in clear cases of violation—it is very likely that the uniformity on the level of legal doctrine between Board proceedings and arbitration will not be obtained in the manner and to the extent intended by Congress. If the Federal Circuit abstains, the only other authority likely to undertake vindication of applicable law is the FLRA. But that agency has to date enforced arbitration awards in unfair labor practice proceedings without scrutiny of their underlying legality except in a very narrow category of cases. If *Garza* impels it to reconsider that position, the ironic result will be to shift responsibility for uniformity between the MSPB and arbitration to the FLRA. In short, either arbitrators will not have to take the obli-
gation of uniformity seriously or the FLRA will have to fill a role for which it was not designed.

4. Choice of the MSPB Over the NGP Route in Chapters 43 and 75 Actions

At this point, we should turn to a comparison of the number of adverse action and performance-based actions that are decided by the MSPB and arbitrators. As indicated previously, employees may choose to take Chapters 43 and 75 actions to either the MSPB or the NGP. During the 1987 fiscal year, initial appeals at the MSPB in adverse actions totalled 3,303 and performance-based actions totalled 308 (including mixed cases in both). During 1988, the numbers were largely similar: 3,348 adverse actions and 273 performance actions (including mixed cases in both).

While the OPM figures cited above refer to cases resulting in awards, and not all matters processed through the NGP (many of which may be settled or dropped), it appears that many more Chapters 43 and 75 actions go the MSPB route—unless the pre-arbitration settlement rate is extraordinary. Is this because there is no choice by the employee, since the collective bargaining agreement excludes these types of actions (unlikely)? Is this because a large share of the MSPB actions relate to employees not included in bargaining units? Could it be that many are weak cases unions do not want to take to arbitration?

Or is it because the MSPB process is "free" while the union must pay some of the costs of arbitration and, given the size of the union treasury, opting for the perceived more favorable arbitration process is simply not feasible? Or because employees avoid the NGP since it is the union's and not the employee's choice to invoke arbitration and once a grievance is filed with an agency the statutory route is generally foreclosed? Is it due to the fact that the MSPB process, ironically enough, may be faster in some cases than arbitration despite the traditional wisdom that one of the benefits of arbitration is its expedition compared to that of a legalistic process? Or could it be the procedural protections of the

431 See supra text accompanying notes 204, 206.
432 See 1987 MSPB CASE REPORT, supra note 311, at 7.
434 See supra text preceding note 386.
435 This is true even if MSPB decisions in postal workers and TVA employee cases are disregarded on the basis that the OPM arbitration figures do not include such awards.
MSPB process? There may be other reasons, including the newness of the NGP route and the fact that, until 1978, the avenue familiar to federal workers was the administrative process for adverse actions. There are no statistics that clearly answer these questions. Common sense suggests that many of these elements in varying degrees result in the apparent disproportionate distribution of Chapters 43 and 75 actions between the NGP and MSPB processes.

5. Choice of the Statutory Over the NGP Route in Discrimination Cases

Similarly, EEO cases (whether or not mixed) proceed through the NGP route at a substantially lower rate than through the statutory processes. (As in the case of Chapters 43 and 75 actions, there is a statutory right to choose one route over the other despite the coverage of an NGP\(^4\)). Available statistics, along with the dearth of EEOC and MSPB reviews of arbitral awards in discrimination cases\(^5\) confirm this impression, which was gleaned from interviews with agency and union officials. The reason most often given for this apparent phenomenon is not that discrimination complaints do not fall within the scope of collective bargaining agreements. Rather, the cost-free nature of the EEO process from the union's point of view is an important consideration, as may perhaps be a perception that many EEO claims lack substance as discrimination matters. Table 6, which lists OPM statistics for 1979-89, illustrates the breakdown of reported arbitration awards that include an allegation of discrimination (including some types not of concern here such as marital status and whistleblowing).

Since discovery, which may be particularly valuable in cases of alleged discrimination, is not generally available in arbitration while in the EEO process both the agency investigator and the hearing officer have affirmative responsibilities to ferret out the facts, an employee may feel at a particular disadvantage in filing a grievance.\(^6\) Moreover, despite its problems—delay being one of the most evident—the EEO process, having existed prior to 1978, is familiar to most federal employees.

\(^4\) See supra text accompanying notes 206-10.
\(^5\) See supra text accompanying notes 340, 375-77.
\(^6\) Once an initial election of the NGP in an EEO case is made, the employee can only obtain a restricted EEOC or MSPB review of the merits of the award on the discrimination issue. See supra text accompanying notes 207, 210.
Employees may, in fact, not entirely trust the negotiated grievance process because EEO allegations may reflect on fellow bargaining unit members or even union officials. This suggests to the employee that his or her complaint will not be vigorously pursued. Also, there may be a concern that union representatives lack expertise in discrimination law.

Finally, there may be a sense that as between an arbitrator who sits on an ad hoc basis and the EEOC administrative judge, the latter is more likely to be both sympathetic to and knowledgeable about the nuances of discrimination law.439 EEOC review of the arbitral decision is very narrow and employees may be unaware of its availability because, for example, the arbitrator's award may not contain notice of the right to further appeals. These and other factors are likely all at work to some degree. Where the personnel action at issue presents a mixed case, there is no doubt a confluence of the factors present in straight Chapters 43 and 75 actions along with those peculiar to claims of discrimination that may point to the MSPB process.

6. Timeliness of Arbitration vs. MSPB Process

While no statistics are available regarding the timeliness of arbitration, many, if not most, interviewees suggested that the

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of All Awards</th>
<th>Awards Involving Discrimination Claim</th>
<th>Percentage of Awards Including Discrimination Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>1979</td>
<td>602</td>
<td>43</td>
<td>7</td>
</tr>
<tr>
<td>1980</td>
<td>790</td>
<td>24</td>
<td>3</td>
</tr>
<tr>
<td>1981</td>
<td>787</td>
<td>27</td>
<td>3</td>
</tr>
<tr>
<td>1982</td>
<td>731</td>
<td>27</td>
<td>4</td>
</tr>
<tr>
<td>1983</td>
<td>890</td>
<td>58</td>
<td>7</td>
</tr>
<tr>
<td>1984</td>
<td>772</td>
<td>55</td>
<td>7</td>
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<tr>
<td>1985</td>
<td>611</td>
<td>39</td>
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<td>1987</td>
<td>636</td>
<td>41</td>
<td>6</td>
</tr>
<tr>
<td>1988</td>
<td>480</td>
<td>31</td>
<td>6</td>
</tr>
</tbody>
</table>

current MSPB process, with its relatively strict 120 day limit for initial adjudication, is probably at least as expeditious as arbitration in most cases. However, appeal of an initial decision to the full Board, which occurs in about one out of five cases,\textsuperscript{440} extends the time of final disposition in the MSPB process, since it may take over 150 days on average for the Board to dispose of a petition for review.\textsuperscript{441}

**D. Federal Labor Relations Authority**

The FLRA received the following number of appeals of grievance arbitration awards: 60 (1979); 101 (1980); 153 (1981); 150 (1982); 223 (1983); 220 (1984); 210 (1985); 228 (1986); 221 (1987); and 204 (1988).\textsuperscript{442} Comparing these numbers with the OPM's statistics regarding the number of grievance arbitration awards in the federal sector,\textsuperscript{443} approximately thirty percent of the awards each year are taken to the FLRA on exceptions, a figure that is relatively close to the number of petitions for review filed annually with the full Board.\textsuperscript{444}

As in the case of the Board, the goal of expeditious resolution of matters presented to it has been a matter of high priority for the Authority, which has steadily reduced its backlog of pending cases. It has a six month processing goal applicable to matters filed with it. On October 1, 1983, its arbitration docket included 248 cases.\textsuperscript{445} Three years later, it included 71 cases.\textsuperscript{446} During the 1986 fiscal year, the average number of days to close an arbitration case was 189 as compared to 359 days during fiscal year 1984.\textsuperscript{447} In short, the Board and the Authority are very close in their times of disposition of appeals beyond the initial hearing stage.

Regarding the filing of exceptions and the results, certain statistics are significant. Between January 13, 1979, and December

\textsuperscript{440} See 1987 MSPB CASE REPORT, supra note 311, at 19.

\textsuperscript{441} Id. at 23. See also 1988 MSPB CASE REPORT, supra note 314, at 30 (average 184 days to process a petition for review in 1988).

\textsuperscript{442} 51 Fed. Reg. 45,754 (Dec. 22, 1986) (statistics provided as supplementary information and thus not codified).

\textsuperscript{443} See supra text accompanying notes 384-85. Between 1979 and 1988, there were a total of 1,770 arbitration appeals to the FLRA. OPM figures suggest at least 5,994 arbitration awards during this period in non-Chapter 43 and 75 actions (assuming 90 Chapter 43 and 75 actions per year, or 900 for 1979-88, which matters are not FLRA appealable).

\textsuperscript{444} 51 Fed. Reg. 45,754.

\textsuperscript{445} Id.

\textsuperscript{446} Id.

\textsuperscript{447} Id.
31, 1988, unions filed with the Authority exceptions in 912 (60.2 percent) cases, agencies filed 589 (38.8 percent), and employees filed fifteen (one percent). During that period, awards were sustained in over seventy percent of the cases filed by a union and in over forty-six percent of the cases filed by an agency. Awards were modified or set aside in 2.3 percent of the cases filed by the union and 44.5 percent of the cases filed by an agency. The Authority found that the exceptions were untimely in 19.2 percent of the union appeals and in only 4.9 percent of the agency appeals. Moreover, almost always, the ground for modification or setting aside was that the arbitrator’s award violated some law, rule, or regulation.

From these statistics, an observer might rush to conclude that the FLRA would not be viewed very favorably by unions, would be adored by management, and that arbitrators are doing a terrible job in knowing and applying, as they must, federal law in the course of disposing of cases. A closer scrutiny of the statistics, along with the interviews conducted as part of this study, dispels these impressions to some extent. For example, often agency officials representing management’s side seemed to have a less than charitable view of the substantive performance of the FLRA, though this may have been due in some cases to the recollection of a particular case or two that should have been won but was not.

With regard to the performance by arbitrators, it must be noted that of the 1,516 cases involving exceptions to arbitration awards disposed of by the FLRA between 1979 and 1988, the award was modified or set aside in 286 cases (18.9 percent).

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448 See Memorandum for DOD Component Labor Relations Offices, Decisions of the Federal Labor Relations Authority on Exceptions to Arbitration Awards Filed Under 5 U.S.C. 7122(a) (Jan. 6, 1988) [hereinafter DOD Arbitration Memorandum]. These statistics count a case with both union and agency filed exceptions as two cases. For some unknown reason, the DOD's figures for arbitration appeals (1,516) is less than numbers supplied by the FLRA (1,770).

449 Id.

450 Id.

451 Id.

452 Id. See supra text accompanying note 121.

453 This critical view has been expressed by courts and commentators. See Rosenbloom, The Federal Labor Relations Authority, 17 Pol'y Studies J. ____ (1988-89).

454 See supra note 448.
a large majority of these cases, the modification or set aside occurred on the basis of a violation of a law, rule, or regulation and involved agency filed exceptions.\textsuperscript{455} Given the newness of arbitration in the federal sector and the steep learning curve accordingly required of arbitrators, most of whom had not had experience prior to 1978 with the Federal Personnel Manual and other civil service regulations, this is a reasonably respectable record.\textsuperscript{456}

Moreover, the 286 cases must be compared to the arbitration awards issued between 1979 and 1988 that were appealable to the FLRA. OPM’s statistics suggest that a total of no less than 6,894 awards were issued during this period and that on an average less than ninety a year, or nine hundred for this ten year period, related to Chapters 43 and 75 actions that are not appealable to the Authority but rather to the Federal Circuit. This reduces the approximate number of FLRA appealable awards to 5,994. Assuming that an agency (or union) would appeal an award if clearly contrary to law, the record of arbitrators in generally following applicable federal law appears to be even better.\textsuperscript{457}

Of course, it might be argued that, in many of these 5,994 cases, the real dispute was over the facts and that the content of applicable legal principles was of minor concern. Accordingly, the

\textsuperscript{455} DOD Arbitration Memorandum, supra note 448.

\textsuperscript{456} In the private sector, less than one percent of arbitration awards are challenged and only a small fraction of these challenges are successful. See Nolan, \textit{Federal Sector Labor Arbitration: Differences, Problems, and Cures}, GRIEVANCE ARBITRATION IN THE FEDERAL SERVICE 10 (D. Reischl & R. Smith eds. 1987). As noted supra text accompanying note 443, 30\% of awards in non-Chapter 43 and 75 actions were challenged in appeals to the FLRA and approximately 18\% of these were set aside or modified. No statistics were available indicating how often Chapter 43 and 75 actions result in arbitral awards challenged and, when challenged, how many were reversed or modified by the Federal Circuit. Given the greater impingement on the federal arbitrator’s discretion imposed by external law as compared to the situation facing the private arbitrator, along with the fact that arbitration is only newly arrived in the federal sector and not fully “accepted” by at least some agencies, the disproportionate results in the public and private sector cannot, by themselves, show that arbitration is working poorly or should be abandoned. See id. at 10 (concluding that there are problems but also cures).

Of course, the ability of arbitrators to faithfully follow federal law is, to a great degree, dependent on the quality of the representation of both sides involved in the arbitral process. The parties should bring relevant authority to the arbitrator’s attention, though often they may fail to do so, not based on design, but ignorance of the relevant law.

\textsuperscript{457} Moreover, taking the FLRA reversal rate as indicative of “real” errors by arbitrators might be questioned on the basis of the FLRA’s own poor record of surviving appeals of its decisions (outside the arbitration context) in the regional courts of appeals. See Rosenbloom, supra note 453.
argument may go, the lack of appeals and/or reversals by the FLRA does not necessarily prove that arbitrators are doing well in determining and applying federal law. But to the extent that is true, opposition to arbitration in the federal sector cannot be heavily premised on the inability of federal arbitrators to know and apply the law.

In talking with various agency officials, it was apparent that, as a general matter, the more the agency and the union used an established panel of arbitrators who could thereby accumulate expertise in federal civil service law, the more likely there was a perception that arbitrators were adequately applying federal law.

Representation in arbitration varies for both sides. Sometimes a lawyer may represent the union or the agency or both and sometimes the representative may be a non-lawyer shop steward or a labor relations specialist. Some representatives, knowledgeable about the complicated system of legal regulation that must be considered by the arbitrator, present relevant statutes, rules, and cases to the arbitrator for consideration. On other occasions, the representatives, as well as the arbitrator, apparently work in blissful ignorance of controlling authority. At times, a knowledgeable party may "stonewall" by withholding relevant material at the hearing stage, only to introduce it before the FLRA and obtain a reversal.

Finally, similarities between the FLRA and MSPB jurisdictions should be noted. The MSPB may be required to construe collective bargaining agreements in those cases where appellants are bargaining-unit members who opt to go to the Board in Chapters 43 and 75 cases. The same provisions of those agreements may come before the FLRA in matters not appealable to the Board. Moreover, as to those personnel actions that might otherwise be appealable to the Board, such as denials of within-grade pay increases and reductions-in-force, the coverage of the action by a negotiated grievance process means that the FLRA is the reviewing authority; the FLRA's review searches for legal error based on many of the same sources that might be construed by the MSPB in similar actions not covered by an NGP. In addition, the existence of a prohibited personnel practice is a defense before the

458 Cf. e.g., Horner v. Schuck, 843 F.2d 1368, 1372-74 (Fed. Cir. 1988).
Board and may likewise be raised in FLRA review of an arbitration award.459

Neither any provision of the 1978 CSRA nor the reasoning in Nutt460 compels either arbitrators or the FLRA in non-Chapters 43 and 75 actions to adhere to Board precedent and procedures even where the matters might, absent coverage by an NGP, be appealable to the MSPB. The FLRA has acted consistent with this view. For example, with regard to the standard for judging within-grade pay increase denials, the FLRA has refused to hold arbitrators to the Board’s approach.461 Furthermore, unlike the situation involving the relationship between the EEOC and the MSPB, the 1978 Act established no mechanism to reconcile divergent MSPB/FLRA views with one possible exception: in a mixed case moving out of the arbitration process, the MSPB can review at employee request the matter and, as noted previously, it takes the position that it will apply Board precedent.462 Finally, judicial review of FLRA decisions regarding arbitral awards is largely unavailable.

In fact, however, the potential for substantial conflicting declarations regarding the interpretation of civil service law by the MSPB and the FLRA has not to date become a reality according to those persons interviewed as part of this study. Moreover, even where inconsistency exists (or may in the future arise), it might not create problems for managers in knowing what to do in a particular case. If the employee subject to the personnel action is in a bargaining unit whose NGP covers the matter, the manager can look to FLRA precedent as governing non-mixed non-Chapters 43 and 75 matters. However, a claim of discrimination allows an employee to opt out of the NGP initially or following arbitration and proceed to the Board where the personnel action at issue is MSPB appealable. A manager, thus, could be put in a quandary by inconsistent FLRA/MSPB positions due to the inability to

459 For example, an arbitral award might be seen as “contrary to law” where a prohibited personnel practice infects the personnel action and the arbitrator upholds the action.

460 See supra text accompanying notes 397-400. Nutt emphasized congressional concern for consistency and avoiding forum shopping in Chapter 43 and 75 actions that do not go to the FLRA. 472 U.S. at 661.

461 See Fishgold & Jacksteit, supra note 400, at 23-24. The FLRA has held that arbitrators need not apply the “substantial evidence” burden of proof here; see, e.g., Dep’t of Educ., Div. of Civil Rights and AFGE Local 3887, 17 F.L.R.A. 997 (1985), which the MSPB, by regulation, follows in its proceedings.

462 See supra note 207.
determine at the decisional stage whether a discrimination claim will later arise.463

E. Agency Administrative Grievance Systems

If statistics are relatively sparse regarding the negotiated grievance process, they appear to be largely absent when it comes to the agency administrative grievance systems and their workings. OPM supplied the author with very rough (and probably largely understated) estimates that for 1985, 1986, and 1987, the number of grievances filed was 4,260, 3,645, and 3,660 respectively. In talking with agency officials, little additional specific data regarding the usage and operation of this appeal route was revealed.

In its 1982 study of selected administrative grievance systems, the General Accounting Office noted as problems the untimely processing of grievances and the apparent lack of formal systematic methods (including data collection) to determine how well the systems operated. Only recently has OPM undertaken its own empirical study of these systems, examining both their design and operation.467

F. Office of Special Counsel

Since 1979, the Office of Special Counsel has worked with a staff of approximately eighty individuals and with an annual budget in the neighborhood of $4.5 million.468 During the 1985 fiscal year, the OSC received 1,280 complaints alleging prohibited personnel practices and other violations of civil service laws (excluding the Hatch Act). It completed 155 field investigations and filed approximately ten cases with the MSPB for disciplinary action based on prohibited personnel practices. During the 1986 fiscal year, it received 1,307 complaints, initiated

463 See infra text accompanying note 488.
465 Id. at 5.
466 Id. at 1.
467 OPM regulations indicate that the Office will review these systems to determine their compliance with its regulations. See 5 C.F.R. § 792.304 (1988).
468 See Office of the Special Counsel, A REPORT TO CONGRESS FROM THE OFFICE OF THE SPECIAL COUNSEL/FISCAL YEAR 1987 at 2 (draft).
469 Office of Special Counsel, A REPORT TO CONGRESS FROM THE OFFICE OF THE SPECIAL COUNSEL/FISCAL YEAR 1985 at 7, 11, 12.
470 Id. at 11.
approximately eight disciplinary actions before the MSPB, and completed 197 field investigations.471

During the 1987 fiscal year, the Office received 1,325 new allegations and complaints. The largest number (245) of allegations and complaints was related to reprisals for whistleblowing and the next highest number (234) was related to discrimination (where the Office usually defers to the EEO process).472 It completed 145 full investigations during the year, some of which had been initiated the prior year.473 Of the investigations closed during 1987, the Office initiated formal corrective or disciplinary action in eleven cases and sought or obtained informal corrective action in thirteen cases.474 Additionally, as a result of initial examination of complaints and full investigations conducted before or during 1987, the OSC initiated or obtained eight formal corrective actions (i.e., referral to agencies following a finding of a prohibited personnel practice with no need to ask the Board for assistance), thirty informal corrective actions, and nine disciplinary actions.475

Clearly, there is a consistent pattern of substantial winnowing out from the point of intake to final disposition. Lack of resources is not offered as an express reason for the failure to institute more investigations or to take more corrective or disciplinary actions.476 The judgment of the Office is that many complaints are either outside OSC jurisdiction or simply groundless determined on the basis of initial investigation.477

Recent judicial decisions that point to the OSC as the avenue of last (or only) resort for many federal employees,478 along with the Whistleblower Protection Act of 1989, which establishes that the primary role of the Office is the protection of individual employees,479 raise serious questions regarding whether the Office

471 Office of Special Counsel, A Report to Congress From the Office of the Special Counsel/Fiscal Year 1986 4, 7.
472 Office of Special Counsel, A Report to Congress From the Office of the Special Counsel/Fiscal Year 1987 (draft) at 18, 20.
473 Id. at 25.
474 Id.
475 Id. at 27.
477 Id.
478 See supra text accompanying notes 305-07.
479 See infra text accompanying notes 584-88.
can adequately perform its intended function. OPM statistics, for example, note that during fiscal years 1984 to 1987, 4,038, 4,717, 4,365, and 5,338 federal employees respectively were discharged where there were no appeal rights available. These figures do not cover the multifarious types of personnel actions where removal is not involved and there are no statutory appeals available. Even assuming that many allegations of prohibited personnel practices and other violations of civil service rules are groundless, the statute requires some type of investigation where allegations are presented. A substantial increase in allegations presented to the OSC in response to both the current judicial approach and the role of the Office envisioned by the 1989 whistleblower legislation will seriously tax the Office's ability to do an adequate investigatory job in view of the rather meager financial resources available. Clearly, if the Office goes beyond mere preliminary investigation to a full field investigation and institution of corrective and/or disciplinary action in many more cases than it does currently, its resources will be depleted long before many claimants receive satisfaction.

IV. General Conclusions and Recommendations

The Civil Service Reform Act of 1978 was motivated in part by a desire to simplify and expedite the procedures for handling federal employee appeals. While the MSPB, EEOC, and FLRA have over the years made substantial efforts—some successful, though ironically, also in part controversial—to speed up the process, simplicity is hardly a characteristic of the system as it currently exists. Nor is it likely that the flow charts now gracing federal personnel offices can be radically streamlined. A decade has not seen the passing of some of the fundamental concerns and political forces that were in large part responsible for the contours of the 1978 reforms. In addition, there is good reason to question the wisdom of certain possible ways to eliminate existing complications. For instance, despite its problems, the overall system is

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480 U.S. Office of Personnel Management, Summary of Selected Information on Discharges, Suspensions, and Changes to Lower Grade (July 1988).

481 See supra text accompanying notes 99, 105.

working reasonably well. Ten years have allowed at least some managers and employees to develop some familiarity with its "in's" and "out's." To start from a substantially new script will itself impose many costs. However, experience under the CSRA and close scrutiny may clear the way for some modest simplification.

Federal unions are, without doubt, wedded to arbitration as the means for solving workplace employee problems. Absent the substantial erosion of their political capital, elimination of the negotiated grievance process is not likely. Assuming adequate financial resources could be assured to the unions, the alternative of limiting bargaining unit members to the grievance process might be acceptable to many union officials. This type of change would certainly simplify matters. In addition, this alternative would possibly result in earlier settlements, expedite final resolution of those cases (particularly discrimination matters) that go to hearing, and reduce agency processing costs (e.g., in discrimination cases).

It is not clear, however, that federal employees would find this solution acceptable as long as the choice to go to arbitration lies in the hands of the union. Even if the choice were the employee's and unions could levy a service charge on bargaining unit members to defray the costs of the arbitral proceedings, would employees trust the unions to adequately protect their interests in all cases and would they trust the arbitral process in important performance and disciplinary actions where they lack the procedural protections of a quasi-judicial proceeding?

Such a change might increase individual agency expenses overall since agencies would presumably have to share some part of the cost of arbitration with the unions in all cases (not just EEO matters). It may also increase overall governmental expense for dispute resolution since the MSPB process would have to remain in place for non-unit members.

Allowing the MSPB to deal exclusively with mixed cases may be unpalatable to various groups because of distrust of the adequacy of its processes to faithfully vindicate the purposes of the anti-discrimination laws. It is not so much that the MSPB is perceived as hostile to equal employment opportunity. Rather, an alleged lack of knowledge of EEO law by the Board's presiding officials and a strong sense for the nuances of its application and the factual patterns that may suggest discrimination, a perceived

\[483\] See infra text accompanying notes 507-08.
focus on civil service rules and policies (narrowly conceived not to include discrimination law), and the current emphasis on avoiding delay, which may undercut the ability to develop an adequate case on the discrimination issues (among other factors) may combine to support continued EEOC involvement in mixed cases. It is clear that the dismantlement of the old Civil Service Commission and the vesting of its functions in two separate entities—the Board and the OPM—has not dispelled the view, in some quarters at least, that the MSPB is "management oriented" in ways that may undercut achievement of equal opportunity goals.

However, while the available statistics are not plentiful and their meaning might be disputed, the perceptions that the EEOC must be involved in mixed case processing in order to protect those goals must be carefully examined. This is particularly important in view of the costs occasioned by the delays and confusion that arise from the current structure of mixed case appeals. Vesting concurrent or exclusive jurisdiction in EEOC in these cases may only further complicate the system without creating off-setting benefits.

A. The Negotiated Grievance Process and the Federal Labor Relations Authority

As the discussion previously indicated, grievance arbitration is apparently functioning reasonably well in the federal sector. It is unlikely that its operation now departs substantially from what Congress in 1978 foresaw as the probable outcome of the CSRA.

From most reports, the negotiated grievance process offers a reasonably expeditious way of resolving disputes. Federal arbitrators are gaining a better grip on the complex rules and regulations that confine their discretion. Awards are afforded a degree of finality that, even if it is less than in the private sector, is still substantial. At least some agencies and unions are experimenting with ways to make the system work better, such as use of panels of arbitrators with more expertise in federal civil service law. Suggestions for change are not absent, however.

1. Judicial Review and Enforcement of Arbitral Awards

Outside the context of Chapters 43 and 75 actions, the FLRA has exclusive authority to review non-Postal Service federal sector grievance arbitral awards. Several unions favor vesting jurisdiction
to review these in the courts and not the FLRA along with direct judicial enforcement of awards. The first proposal is apparently fueled in part by the fact that the FLRA is generally unreviewable when it deals with arbitration awards. Perhaps related to this objection is a perception that the Authority has in the past been overly intrusive in its review (presumably in such cases sustaining agency objections) by reversing an arbitrator where his reasoning may be flawed but the bottom-line result is permissible. Statistics indicate that over the past ten years, unions have filed more exceptions to awards with the FLRA than agencies and yet their rate of success has been much worse. With regard to the second proposal, it is not clear how often agencies, which are bound by statute to give effect to unappealed awards, disregard their obligation in that regard.

From the management perspective, the view expressed by some that arbitrators are not sufficiently faithful to the demands of federal personnel law might suggest that all awards should be directly reviewable by either the MSPB or the courts. Alternatively, the OPM might be granted the right to appeal at least some FLRA decisions relating to arbitrations. Such proposals may be premised on a lack of confidence in the FLRA's ability or willingness to police compliance with applicable law as the Board interprets it, and the fact that arbitration decisions may present important issues of personnel law that require judicial consideration as well as uniformity of treatment. Moreover, the joint jurisdiction over discrimination cases of the MSPB, EEOC, and FLRA presents the potential for confusion by managers regarding applicable personnel rules and forum shopping by employees for favorable personnel law.

While some in management and some unions might find judicial involvement of some sort preferable to the current arrange-

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487 See supra text accompanying notes 448-52.

488 See supra note 463 and accompanying text. Not knowing whether discrimination will be raised may cause a manager to pause where there is differing MSPB/FLRA precedent.
ment whereby only Chapters 43 and 75 awards are reviewed outside the FLRA, it is not clear that both sides would agree which courts should have jurisdiction and under what circumstances, given the differences in their perspectives regarding the problems to be solved or avoided. For example, from the point of view of unity of personnel law, concentrating appeals in the Federal Circuit makes good common sense. To the extent that the focus is on the need to assure the final and binding nature of the results of arbitration, that there is an uneasiness regarding a perceived pro-management approach of the Federal Circuit to personnel and labor relations matters, or that there is a desire for a mechanism to permit development of divergent lines of legal authority so as to facilitate Supreme Court review, review in the district or regional courts of appeal would presumably be an acceptable and preferable approach.

Recognition that judicial review may provide some valuable benefits suggests that Congress should at least consider substituting judicial for FLRA review of grievance arbitral awards (at least where unfair labor practices are not alleged by the grievant, in which cases the FLRA has greatest expertise) or, alternatively, permitting limited judicial review of the FLRA’s disposition of those awards. Eliminating the FLRA from the review process (or adding judicial review on the top of a layer of administrative review), however, will have consequences that must be taken into account. For example, such changes may cause delays in the final resolution of controversies because of courthouse queues. In addition, litigation expenses will increase for all parties due, for example, to the requirement of legal representation in the courts where it does not now exist (as in the case of FLRA review). Agencies would lose the discretion which they now possess to seek review. Presumably, seeking judicial reversal of an arbitral award on behalf of the government will require the consent and participation of the Department of Justice as well as the OPM. Finally, it should be reiterated that available information does not demonstrate that disuniformity in governing legal principles is currently a significant problem created by the FLRA’s scope of jurisdiction, though it could become so in the future.

Related to the issue of judicial review of arbitration awards is the matter of enforcement of arbitral decisions. Under existing law, enforcement takes the cumbersome form of filing and adjudicating an unfair labor practice charge before the FLRA. This is the case even when the award relates to Chapters 43 and 75
actions. This method threatens significant delays when one of the important benefits of the arbitration process is expedition. Moreover, the FLRA is forced to divert resources from what are its principal functions: overseeing the representation and collective bargaining processes and adjudicating unfair labor practice complaints that impinge on the heart of those processes.

Therefore, Congress should provide for direct judicial enforcement of grievance arbitral awards in the federal courts. Uniformity in terms of federal personnel law would generally not be at risk at the enforcement stage considered in isolation. Going beyond this limited proposal, consolidation of review and enforcement proceedings in the same judicial forum and occurring at the same time might expedite final resolution of arbitrated controversies. In that case, transferring reviewing authority from the FLRA would seem to have additional support.

2. Scope of Judicial Review of Arbitral Awards in Non-Mixed Chapters 43 and 75 Actions

The Federal Circuit’s current narrow approach to granting OPM’s petitions for review of arbitral awards in Chapters 43 and 75 actions is conditioned in part on deference to the arbitration process. In effect, the court has applied a standard for review and reversal similar to the statutory standard applicable to FLRA examination of arbitral awards. The standard of review expressly established by the 1978 statute with regard to both the MSPB and arbitration—at least in the case of employee appeals—is largely similar to that contained in the Administrative Procedure Act. That standard is allegedly more intrusive than that generally applicable to the results of an arbitration proceeding. There is some reason to suggest, however, that a more deferential standard should be adopted in the case of employee appeals. As a matter of “procedural innovation”, imposing APA-type review on public sector labor arbitration creates an animal that is neither fish nor fowl. The courts are likely to ignore the express statutory phrases in favor of the traditional deferential approach to arbitration. Alternatively, they may be entirely confused by the role expected of them. The existing disparity of treatment of the government

490 Id. See also supra text accompanying notes 422-23.
and the employee might be seen as necessary to fully protect employee rights, including due process considerations. Yet the employee in a Chapters 43 or 75 action has the opportunity initially to choose between the MSPB and the NGP. His or her interests would appear to receive adequate protection given this option, even if the finality of the arbitral process is respected regardless of which party appeals.

It is unlikely that this change would either create substantial incentives for forum shopping or discourage use of the negotiated grievance process for informal resolution of workplace disputes. Given the deferential nature of the existing review of the MSPB, it would seem that employee choice of route would focus more on the structure and expected functioning at the initial hearing stage. While a more deferential scope of review creates the potential for more inconsistency between the results reached by the MSPB and by arbitrators, it is unlikely that the permissible range for inconsistency is increased substantially over that which already exists. Finally, to the extent the results in arbitration are more favorable to employees than those obtained before the MSPB, this additional isolation of the arbitrator from reversal is unlikely to adversely affect employees in a practical sense.

In short, a substantial argument exists in favor of amending the CSRA to impose a uniform scope of review applicable to arbitration awards, including Chapters 43 and 75 matters. That scope should be similar to that currently applied by the FLRA in non-Chapters 43 and 75 matters. Such a standard would not prevent the courts from enforcing uniformity between the MSPB and arbitral processes with regard to the statutorily mandated procedures and the substantive rules applied.

3. Judicial Review of Non-mixed Chapters 43 and 75 Arbitral Awards at Goverment Request

Judicial review at government request, whether of MSPB decisions or arbitral decisions, in Chapters 43 and 75 matters should be conditioned now and in the future on error in the interpretation of civil service law having a "substantial impact". This proposition is supported by a need for expedition and finality in resolving employee disputes. Because of potential constitutional problems, those needs cannot be achieved by a similar limitation when an

employee loses in the administrative process and seeks judicial intervention.

The "legal error/substantial impact" test is not always easy to apply, though it captures within its confines the appropriate type of case where judicial intervention is most defensible. The recent decision in *Horner v. Garza*, however, raises a crucial issue: how should the standard for review be construed to apply when the congressionally mandated uniformity between MSPB and arbitration processes is squarely at issue? As noted previously, the *Garza* court's refusal to grant an OPM petition, when an arbitrator has clearly not followed rules equally applicable to the MSPB and arbitration, will mean either that such uniformity may not be obtained or that only the FLRA will be in a position to do the job that Congress gave to the Federal Circuit. In short, either the Federal Circuit or Congress should expressly repudiate *Garza*.

**B. Appeal Routes**

1. *Choice Between NGP and MSPB Process*

As noted previously, with regard to Chapters 43 and 75 actions (even those not involving discrimination), a statutory right exists to avoid the negotiated grievance process and file an appeal directly with the Merit Systems Protection Board. One possible modification would be to eliminate this option. At the current time, however, this would be inadvisable for a variety of reasons.

First of all, it must be recognized that even if this choice were eliminated, it would not have an impact on employees who are not members of bargaining units or on employees whose collective bargaining agreements exclude Chapters 43 and 75 matters from the NGP. Thus, the MSPB process must be kept in place for these individuals.

With regard to unit members, the available statistics do not demonstrate exactly how many exercise their choice for the MSPB over the NGP process. All they show is that there are many more

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495 See supra text accompanying notes 430-31.
497 See supra text accompanying note 204.
Chapters 43 and 75 actions decided by the MSPB than are decided by arbitrators. Given the number of federal employees that belong to unions and the scope of most grievance procedures, and in view of the magnitude of the discrepancy between the numbers of Chapters 43 and 75 actions decided by arbitrators in the NGP each year and the volume adjudicated by the MSPB, it is probably true that the MSPB is the preferred route even for unit members. 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; the arbitral proceeding may often lack the 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.

The first two reasons implicate difficult and unresolved constitutional issues regarding the degree to which the federal government could consign exclusive adjudicatory responsibility in employee performance and disciplinary actions to the arbitral process as it is currently structured. Such problems might be solved, of course, but with the possibility of some serious consequences. For example, elimination of the union's right to choose whether or not to invoke arbitration could undercut the ability of the arbitral process to serve as an efficient and effective method of dispute resolution, as well as impose costs on unions that could only be met if Congress authorized imposition of a representation fee on employees included within bargaining units. Moreover, even if current arbitral procedures meet due process requirements, to provide employees in the arbitration arena procedural protections similar to those afforded by the MSPB may so change the nature of arbitration that it can no longer serve the function envisioned by Congress and union proponents in 1978. In the process, the overall cost of dispute resolution for all involved—employee, government and union—might increase sub-

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498 See supra text accompanying notes 384-92.  
499 See supra note 384.  
501 Comment, supra note 500, at 784.
stantially, particularly since the MSPB must remain in business for non-unit members.

It may, moreover, be a distinct advantage from the union's point of view for employees to have an option other than the NGP. With only one forum open to a unit member, a union might be particularly fearful that a refusal to take a case to arbitration would result in its own liability to the employee on the basis of lack of fair representation or otherwise. Further, would employees vote for union representation if it meant foreclosing appeal options, particularly since federal unions lack the power to bargain over such important issues as wages and thus do not offer some significant benefits in return for the surrender of procedural options?

2. Choice Between the NGP and the Statutory Process for Discrimination Complaints

In considering retention of the current right to opt out of the NGP in EEO matters at the beginning of a case (as opposed to the stage when an arbitral award has been entered) and pursue administrative statutory avenues, the existence of the right to trial de novo in the district courts, either as an alternative or as a supplement of non-judicial remedies must be considered at the outset. Such a right does not presently exist in cases where discrimination is not an issue, the administrative and arbitral remedies with limited judicial review being the only ones available.

Available statistics do not indicate clearly how often a federal employee resorts to the courts in order to vindicate his or her statutory rights to be free of discrimination in personnel matters, though there appear to be less than nine hundred of these cases filed each year. Despite the fact that the district court has the authority in these cases to appoint counsel for plaintiffs and award attorneys' fees, the judicial arena may appear intimidating to potential plaintiffs and the stakes at issue may not be that large in many cases. Accordingly, the option may only be theoretically available. The possibility that the non-judicial process is the only

502 In the federal sector, the Supreme Court recently held that fair representation claims cannot be the basis for a private cause of action in the federal courts but must be pursued through FLRA unfair labor practice proceedings. See Karahalios v. Nat'l Fed'n of Fed. Employees, U.S. , 109 S. Ct. 1282 (1989).

503 See supra text accompanying notes 202, 208, 210.

504 Source: Administrative Office of U.S. Courts.
realistic route for many employees suggests caution in limiting unit employees to arbitration, albeit with a right to later resort to the courts.

In addition to reasons that are perhaps distinctive in the discrimination cases, factors similar to those that push ordinary Chapters 43 and 75 actions into the administrative routes may operate with regard to EEO matters. The same constitutional and other difficulties that would attend vesting exclusive jurisdiction in the NGP, though, might either not be present or be present but not to the same extent. In fact, the more the EEO process is improved, the more resistance to eliminating options is likely to arise.

It should be noted that at least one agency, the Department of Health and Human Services, has analyzed the costs of EEO processing from its own point of view and has concluded that it would be less costly to process these matters through the grievance machinery. Accordingly, one of its collective bargaining agreements with the National Treasury Employees Union creates incentives for the union to take these matters to arbitration. The agency has agreed to pay seventy percent of the costs of arbitration, and the procedures for fact discovery and record production have been enhanced. However, while these arrangements are worthy of study by other agencies and unions, it is questionable whether individual employee options should be limited without some assurance that the same types of protections will be negotiated in other cases. Yet, requiring that such modifications be made in the arbitral process as it applies to ordinary EEO matters raises some of the political and other difficulties that may confound similar tinkering with the process as it applies in ordinary Chapters 43 and 75 actions.

In addition, with regard to mixed cases that involve Chapters 43 and 75 actions, it would be difficult to defend a proposal consigning those actions exclusively to the NGP process with a right to trial de novo in the district courts while employees involved in Chapters 43 and 75 actions that do not contain allegations of discrimination could choose the NGP or the MSPB process. This proposal might be seen as a disguised attempt to discourage

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505 See supra text accompanying notes 436-39.
506 See supra text accompanying notes 431-35.
507 See supra text accompanying notes 500-01.
508 Id.
raising discrimination claims, and it might in fact operate in that fashion. Furthermore, any proposal, such as eliminating resort to the statutory processes, presenting the possibility of increasing docket congestion in the federal courts must be scrutinized closely, given the existing workload of federal judges.

Finally, the fact that the administrative processes for EEO matters appear to be the overwhelming choice today bodes ill for any proposal that seeks to modify the current statutory structure by eliminating the option to choose the statutory over the NGP route for unit members. In short, the existing right of a unit employee to choose the statutory over the NGP route in discrimination cases (both mixed cases and others) should be preserved. Future improvements of the EEO process in terms of quality and expedition of decision-making will likely further solidly support in favor of retaining this option.

3. *Appeal to the MSPB and EEOC from the NGP in Discrimination Cases*

Where discrimination is alleged and an NGP covers discrimination claims, unit employees may obtain MSPB "review" of arbitral awards and FLRA decisions in mixed cases and EEOC "review" of agency, arbitrator, and FLRA decisions in other instances. While conceivably both the MSPB and EEOC might have taken the position that they could conduct a searching review for factual and legal error and also order record supplementation in appropriate cases, neither has done so. Rather, by adopting to a great extent the traditional deference exercised by reviewing bodies with respect to arbitral awards, both the MSPB and EEOC accept the record created below and examine largely for errors of legal interpretation. Unless the federal sector arbitration process

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509 The MSPB will not review an agency decision on a grievance filed in the NGP. See, e.g., Parks v. Smithsonian Inst., 39 M.S.P.R. 346 (1988); Gillman v. Dept. of the Air Force, 7 M.S.P.B. 192 (1981). This approach might be criticized because of the inability of the employee on his or her own to invoke arbitration. It might be argued, however, that one of the risks of taking the grievance route is the refusal of the union to go to arbitration. As long as the employee is thus advised so that he or she can opt initially for the MSPB/EEOC process, this approach may make sense because the record for review where there is only an agency decision on a grievance is likely to be almost nonexistent.

510 See *supra* notes 181-210.

is to be transformed into a system bearing little resemblance to that found in the private sector, that result was a foregone conclusion.

To date, relatively few requests for review have been received by either agency. To some extent this may be attributable to lack of notice to the employee in the arbitrator's decision or otherwise regarding the right to further proceedings. (Where an EEO complaint is processed through the employing agency and outside the NGP, a formal notice of the right to take the matter to the EEOC is expressly afforded.) At the same time, most EEO matters appear to be processed currently outside the negotiated grievance process and this situation is unlikely to change to any significant extent, at least in the short term. Given the variety of considerations impacting the choice of the statutory processes over the NGP in the discrimination context, the absence of the opportunity for a limited appeal from the NGP to the MSPB or EEOC probably will not contribute significantly to the forum choice. Moreover, the employee who chooses to prosecute a discrimination case through the NGP will retain any rights that currently exist under the CSRA to sue de novo in district court.

If parity of treatment with non-federal employees protected by the anti-discrimination statutes is desired, the proposal to eliminate the right to obtain MSPB and EEOC review can still be justified with relatively minor additional statutory changes. Currently, non-federal employees, both in the public and private sectors, can prior to suit in the federal courts, invoke the efforts of the EEOC to investigate charges of discrimination and, if there is reasonable cause to believe that the charges are well-founded, engage in informal "conference, conciliation, and persuasion." Rather than affording federal employees a limited opportunity for third-party involvement at the end of the arbitration process, where it may have little practical value, Congress could mandate that collective bargaining agreements, whose negotiated grievance processes encompass claims of discrimination, must provide for investigation and mediation by third-party neutrals at the request of the employee at the pre-arbitration stage. Currently, unless a collective

512 See supra text accompanying notes 340, 375-77.
513 See infra note 600.
514 See, e.g., 29 C.F.R. § 1613.221(e) (1988).
515 See supra note 273 and infra text accompanying note 519.
bargaining agreement provides otherwise, employees opting for the NGP in a discrimination matter lose all of the benefits of the EEO agency process other than counselling.\footnote{See 29 C.F.R. § 1613.219(b) (1988).} The statutory modifications suggested would reduce this discrepancy between the two appellate routes and, as a side benefit, eliminate one of the incentives to avoid the NGP, which may be more expeditious and cheaper for all parties as a way to deal with discrimination cases.\footnote{See supra text accompanying notes 507-08.}

Whether or not this change is adopted, Congress should specify that any required exhaustion of non-judicial remedies occur at the time the agency issues its decision on an employee grievance or, if the union invokes arbitration, at the time the arbitral decision is issued. Along the way it should also eliminate existing uncertainty in some quarters and provide expressly that opting for the NGP does not constitute a waiver of the right to trial\textit{ de novo} in the district court.\footnote{See supra note 273.}

There may be some concern that the proposal to limit the opportunity for EEOC review will result in splitting claims. In defense of a personnel action, an employee may raise both discrimination and other issues, such as violation of civil service rules. Generally speaking, the latter issues will not be resolved in the EEO process. For bargaining unit employees, the NGP may be the only process with jurisdiction to examine all related matters. Addressing this problem in part, EEOC regulations currently specify that once the grievance process has been invoked, even if no claim of discrimination has been raised, later filing of an EEO complaint regarding the same "matter" must be rejected and the employee informed that he or she should pursue the discrimination claim in the NGP.\footnote{See 29 C.F.R. § 1613.219(b) (1988).} This provision, however, does not deal with the situation where the EEO complaint is filed first and later the non-discrimination aspect of the case is presented in the context of the grievance process.

If the option to appeal to the EEOC in discrimination cases is eliminated, would this result in more spitting of claims and the inefficiencies and confusion that may ensue, on the argument that employees will have a greater incentive to file first in the EEO process rather than take the whole case to the NGP? As noted earlier, most discrimination claims appear now to proceed through
the statutory process anyway and it is unlikely that elimination of the appeal option will by itself change this situation. Improvement of the NGP in terms of its capacity to assist the employee in investigating the merits of an EEO matter prior to arbitration can only encourage consolidation of all issues in the NGP. It should also be noted in this connection that currently with regard to non-bargaining unit employees and those bargaining unit employees whose NGP does not encompass discrimination claims, splitting of discrimination and non-discrimination aspects of a personnel action between, for example, the agency administrative grievance system and the EEO process may be required. The bottom line appears to be that the proposed elimination of review by the EEOC and the MSPB of the results of the NGP is unlikely to create problems or aggravate existing ones.

4. The Right to Trial De Novo in Discrimination Cases

Under present law, federal employees may obtain a trial de novo in United States District Court on allegations of employment discrimination where the administrative and arbitral processes have not provided requested relief. In one respect, this option raises significant issues. 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) and, if unsuccessful, obtain a second de novo adjudicatory hearing in the district court on the discrimination claim. While the same substantive anti-discrimination protections apply to employees in the public and private sectors, it is only federal employees that have the right to two full hearings on the same claim.

Relieving parties of the cost and vexation of multiple lawsuits, conservation of judicial and other resources, and permitting reliance on adjudication as a final resolution of controversies underlie the common law doctrines of preclusion that generally bar suing two or more times on the same claim. Moreover, current budgetary constraints and docket congestion in both administrative and judicial fora provide additional support in favor of the application of the principles of claim preclusion absent extremely compelling circumstances.

These general policies and concerns that appear equally applicable in the discrimination context, as indicated by recent Supreme

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521 See generally Restatement (Second) of Judgments § 24 (1982).
Court precedent, suggest that where an employee has been afforded a full trial-type hearing before the MSPB in a mixed case, he or she should be entitled only to the limited judicial review generally applicable to administrative determinations and not the full trial de novo currently permitted. This assumes that the administrative procedures would afford a fully adequate opportunity to litigate all relevant matters that are to be precluded.

In order to implement this proposal, Congress must revise the relevant statutes. Operation of the common law of preclusion is now foreclosed in part by various provisions of the CSRA and the anti-discrimination statutes as construed by the courts. For clarity's sake, the statutory amendment should indicate expressly that an employee in a mixed case has the right to an MSPB hearing or a judicial trial de novo but not both. The scope of preclusion should extend in this context, as it does normally, to matters that could have been but were not raised before the MSPB to avoid splitting a claim with the personnel side adjudicated by the MSPB and the discrimination issues by the district court where much the same evidence may be relevant to both.

For many matters of extreme importance to individuals—other than discrimination—Congress has deemed an administrative adjudication followed by limited judicial oversight to be sufficient protection for the interests at stake. If few people currently resort to court after an unsuccessful administrative trial, elimination of a trial de novo may adversely effect few employees. If, on the other hand, dual proceedings are more common, substantial savings may result from elimination of this option.

The opportunity for some administrative investigation and consideration of the merits of a mixed case prior to filing suit in the federal courts has much to recommend it and this is generally mandated in the case of both public and private sector employees. Requiring initial resort to a process that provides for the investigation of a claim and an attempt at its informal resolution permits the agency whose action is questioned to remedy the claim on its

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own without the intervention of outside authorities and, to the extent a settlement of the dispute is arrived at, to conserve party and judicial resources. The effectiveness of the process may turn on the involvement of a neutral third party to assess the merits, make recommendations, and facilitate settlement discussions. The EEOC now has the authority to adopt procedural regulations to require this type of informal dispute resolution and in fact its existing regulations establish at least the foundation for this type of process. Some modifications, such as requiring involvement of a neutral third party, would be appropriate for those mixed cases where employees intend to avail themselves of the option of suing de novo in district court. Where an employee does not choose the MSPB or NGP processes for adjudication of a mixed case, he or she should have to exhaust the method provided by the EEOC's regulations applicable to informal dispute resolution of mixed cases prior to resort to federal district court for a trial de novo except in the case of an age discrimination complaint (where the relevant statute does not require exhaustion).

Under current EEO regulations, an employee complaining of discrimination with regard to an action that is not appealable to the MSPB cannot invoke a quasi-judicial proceeding equivalent to that of the MSPB. For example, in the current EEO process, a hearing may be held by an EEOC administrative judge but the administrative judge's findings can be rejected by the agency. Also, under the negotiated grievance process, absent union request, an arbitral hearing is not at all available and, even if requested, is relatively informal. Accordingly, the right to ask for a de novo judicial proceeding following exhaustion of the EEOC or NGP route should be retained, even if it is only of theoretical value for many employees. For similar reasons, an employee pursuing a mixed case through an NGP should not forfeit the right to a later trial de novo in district court.

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527 This appears to be required by existing law. See 5 U.S.C. §§ 7702(a)(2), (e)(1)(A) (1988).
528 On October 31, 1989, the EEOC proposed revised federal sector regulations which attempt both to expedite final dispositions of EEO matters and eliminate the conflict of interest presented by agency power to reject recommended decisions. For example, the hearing of right before an EEOC administrative judge will come after, rather than before, the agency decision on an EEO complaint. See 54 Fed. Reg. 45,747, 45,748 (Oct. 31, 1989).
529 This is the case outside the federal sector and, in part, for the same reasons mentioned in the text. See Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
5. Judicial Review in Mixed Cases

It bears reiteration here that mixed cases are those involving personnel actions of the type that generally fall within MSPB jurisdiction and involve claims of prohibited discrimination of certain kinds. They may be Chapter 43 or Chapter 75 actions or others, such as within-grade pay denials or reductions-in-force. The retention of the statutory option for discrimination matters allows, for example, that all mixed cases—even those that are, absent discrimination, within the exclusive scope of a NGP and FLRA jurisdiction—may be brought before the MSPB as an initial matter. In addition, the statutory right to trial de novo in district court at the insistence of an employee applies today regardless of the appeal route chosen, though some agencies take the position that selection of the NGP constitutes a waiver of this right. Accordingly, following MSPB adjudication or arbitration of a mixed Chapter 43 or Chapter 75 case, an employee suit can now be brought in federal district court, though not the Federal Circuit that has jurisdiction only in non-mixed Chapters 43 and 75 actions.

Under the "one shot" approach suggested above, where a personnel action allegedly infected with prohibited discrimination is adjudicated by the MSPB, the employee should forfeit the right to a de novo proceeding in the district court. Instead, the employee should be afforded the type of limited-scope judicial review of findings of fact and law afforded by the Administrative Procedure Act, or perhaps somewhat more searching judicial scrutiny on the fact findings relevant to the discrimination issue. This proposal dictates that non-bargaining-unit members should have the choice of going directly to the district courts for a de novo trial in mixed cases following exhaustion of special administrative remedies or litigating through the MSPB administrative process, but not both. For those bargaining unit employees whose negotiated grievance process encompasses discrimination claims, they should be able to choose between a trial de novo in district court (following ex-

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530 See supra text accompanying notes 218-20.
531 See supra text accompanying notes 503-08.
532 But see infra notes 576-78.
533 See supra text accompanying notes 521-25.
535 See supra text accompanying notes 526-27.
haustion of special administrative remedies or the NGP process and an MSPB hearing, but not both.

Currently, judicial review in mixed cases takes place in the district courts in oddly structured proceedings where the court conducts a fully *de novo* proceeding (both as to record and scope of review) on the discrimination issue and a limited record and restricted scope of review on the personnel issues (where there has been prior MSPB adjudication). The decision of the federal district court is then appealable only to the United States Court of Appeals whose circuit embraces that district.

Under the proposals made here, 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 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. In these ways, forum shopping may be discouraged and some degree of uniformity between MSPB, arbitral, and district court processes achieved, as was intended by Congress in 1978.

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536 See supra text accompanying notes 525-27.
537 See supra text following note 518. As noted previously, an employee has no right to arbitration and any arbitral proceeding is usually informal. Accordingly, preclusive effect is not appropriate.

Under current law, a collective bargaining employee can opt out of the NGP in a mixed case and, like non-unit members, file either an appeal directly with the MSPB or a mixed complaint with his or her agency and, following the agency decision on the mixed complaint, see supra text accompanying notes 198-99, file directly in district court. See 5 U.S.C. § 7702(a)(2) (1988).

538 See Williams v. Dep't of the Army, 715 F.2d 1485 (Fed. Cir. 1983).
539 See supra text accompanying notes 396-98.
540 See supra text accompanying notes 489-93. This approach is consistent with Gardner-Denver, 415 U.S. 36.
The legislative history of both the 1978 CSRA and the 1982 Federal Courts Improvement Act, the latter of which created the federal circuit, clearly indicates a concern for the unity of federal personnel law. Moreover, the CSRA incorporates various special mechanisms to ensure that at least those Chapters 43 and 75 actions that do not involve allegations of discrimination are treated uniformly.

One mechanism is the provision for judicial review of both MSPB and arbitral decisions (outside the mixed case context) in the federal circuit. Regional circuit review in mixed cases may substantially undercut the ability to achieve these goals.

The complexity of the statutory scheme established in 1978 and the fact that the 1982 legislation had a broad focus not confined to the civil service area suggest that Congress may not have directly confronted the question of whether the goals of uniformity in personnel law and in treatment of employees involved in Chapters 43 and 75 actions are less deserving of protection in mixed than in MSPB appealable non-mixed cases. If those goals are of preeminent importance, the CSRA should be amended to provide for judicial review at employee request of MSPB and district court decisions in mixed cases in the federal circuit. A concern for uniformity in at least the basic elements of personnel law can be defended on various grounds, including, mitigation of managers' uncertainty regarding the limits on their discretion in dealing with employee problems, reduction in confusion suffered by employees in deciding which appellate route to take, and avoidance of discrimination in legal treatment between similar cases where there is a lack of adequate justification.

To the extent that under the recommendations made here an employee must choose between a full trial-type hearing at the MSPB and one in the district court, there must be some concern

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543 See, e.g., 1978 S. Report, supra note 70, at 111.
544 In 1978, judicial review of the MSPB in non-mixed cases was placed within the jurisdiction of the regional circuits, allegedly for uniformity purposes, id. at 63, though the district courts were to retain jurisdiction in discrimination cases. Id. However, in 1978, the choice of the Federal Circuit was not available and the Senate did not address directly the question of which circuit should hear appeals from the district courts in EEO matters.
545 But cf. Williams, 715 F.2d at 1496-97 (Bennett, J., dissenting) (suggesting that the 1982 Federal Courts Improvement Act's concern for unity of personnel law pointed to Federal Circuit review in mixed cases). See also Dep't of Treasury v. FLRA, 58 U.S.L.W. 2170, No. 88-1159 (D.C. Cir. 1989) (emphasizing MSPB "primacy" in personnel law and the Federal Circuit as the device to ensure uniformity).
for eliminating inappropriate incentives to forum shop. This was another concern that underlay the design of the 1978 CSRA which permits bargaining unit employees to choose between the MSPB and NGP processes in Chapters 43 and 75 actions. Accordingly, the scope of judicial review of MSPB and district court decisions in mixed cases should be the same or as nearly identical as feasible. In addition, as will be discussed below, where the government loses at the MSPB level, the opportunity for it to obtain direct judicial review should be limited to instances where the Board erred in interpreting civil service law and the decision will have a substantial impact. This limited right of review helps to expedite final disposition of cases. These same limits should be applied to the government’s right to seek appellate review in the instance of district court disposition of mixed cases.

6. Administrative Jurisdiction in Mixed Cases

This brings us to one of the most difficult issues: should the responsibility for administrative adjudication of mixed cases be vested in the MSPB or the EEOC or both to some degree? Currently, mixed cases are funnelled through the MSPB, involving the EEOC only when the employee petitions for EEOC consideration of an MSPB final decision. The available statistics do not establish that the MSPB process is substantially less likely to result in a finding for an employee in a discrimination case than the EEOC process as currently structured. Moreover, over the years, it has been comparatively rare for the EEOC to differ with the Board regarding the latter’s conclusions on discrimination issues presented in mixed cases. The interpretation of the statistics here may be disputed for a variety of reasons, though at a minimum they should cause hesitation in concluding that continued EEOC involvement in mixed cases is necessary in order to give adequate protection to equal employment opportunity goals. The delays and confusion plaguing the mixed-case process over the years suggest caution in concluding that the existing statutory scheme for shared

546 See infra text following note 579.
547 See supra text accompanying notes 224-27.
548 See supra text accompanying notes 362-72.
549 See, e.g., supra text accompanying notes 341-46. It might also be argued that the possibility of EEOC review has kept the MSPB on the “straight and narrow.”
550 See supra text accompanying notes 347-49, 374.
551 See supra text accompanying notes 236-70.
MSPB/EEOC involvement should be retained. This is true even if the right to proceed *de novo* in district court is eliminated for those employees who proceed through the administrative process.

**a. Option 1: Exclusive MSPB Jurisdiction**

If the design of an appellate system to handle mixed cases could be arrived at without regard to the baggage of history and the political crosscurrents that have or may control, vesting administrative jurisdiction solely in the MSPB would seem eminently sensible. After all, the Board’s expertise lies in the personnel area. Mixed cases call for a fine appreciation for not just EEO law but also the complicated web of personnel law. In fact, the crux of mixed cases is often the personnel side as the agency asserts and the complainant tries to question the official reasons for the action. Moreover, unless the EEO process is substantially revamped, the MSPB process today offers many advantages over the EEO framework: it is faster, independent of the employing agency, and the judicialized procedures protect the employee.\(^5\)\(^2\) And even if the EEO process is ultimately changed to mitigate its current perceived weaknesses, it is far from clear that the new framework would necessarily be superior to the MSPB from the employee’s point of view.

Certainly, the EEOC has over the years accumulated significant experience in the application of federal personnel law. If mixed cases remain outside its jurisdiction, the EEOC will continue to be confronted by personnel law issues in the context of the ordinary EEO process. However, it would be hard to maintain that it is better equipped than the MSPB with regard to its knowledge of existing and developing personnel principles. While the dispersal of the major performance and disciplinary actions between the MSPB and NGP may create some risk of less than fully informed decisions in the area of personnel law by arbitrators and there is no support for the proposition that the EEOC (including its hearing officers) is less expert in this regard than arbitrators, fragmentation of responsibility for the major performance and disciplinary actions (along with other personnel matters such as

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\(^5\)\(^2\) EEOC is currently proposing significant revisions to its federal sector regulations. See supra note 528.
reductions-in-force) can only be justified if substantial benefits are likely to be obtained.  

b. **Option 2: Concurrent MSPB/EEOC Jurisdiction**

One alternative to exclusive Board jurisdiction is to vest concurrent jurisdiction in the MSPB and EEOC in mixed cases. This would ensure parity between the two agencies and allow the employee to choose whichever forum he or she believes more favorable. The option obviously expands EEOC authority beyond that contemplated by Congress in 1978 but, by itself, that certainly is not objectionable. There are, however, various administrative problems posed by this approach, many of which are directly traceable to the difficulties of identifying a case as mixed at the time of filing, particularly for *pro se* claimants who today constitute a large portion of the MSPB's appellants and probably the majority of those using the EEO process.

At the outset, the nature of the "mixed case" must be noted. A mixed case may involve a controversy wherein the employer purports to justify its action by reference to performance inadequacies or allegedly service-connected conduct, e.g., the commission of a crime. The employee's defense may be premised solely on the argument that the agency's explanation masks a discriminatory motive. In other cases, the employee may not only raise the discrimination argument but may also contend that, even if discrimination was not present, the agency's action is not supported by documented performance inadequacies or other conduct. As is clearly evident and as recognized by Congress in 1978, the mixed case presents two sides of the same coin, thereby creating substantial difficulties and diseconomies in trying to resolve it in two separate proceedings.

Under the concurrent jurisdiction scenario, if an employee files first in the MSPB process without initially presenting a claim of discrimination but later raises such issues, should the opportunity to choose between the MSPB and EEO routes be reactivated so as to allow a mid-course change of forum? It is not uncommon today for discrimination charges to be added late at the MSPB

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53 That jurisdictional choice turns in part on the MSPB "appealability" of the personnel action at issue raises the possibility of "ping-pong" matches between the MSPB and EEOC, see *supra* note 188, though this problem seems to be a relatively minor one today. One solution might be to require a case filed in the ordinary EEO process to be stayed on agency request for MSPB determination of its jurisdiction.
and currently provision is made in appropriate cases for their consideration. The fact that many employees are not represented by attorneys magnifies the likelihood of failures to present claims of discrimination at the outset. However, allowance of mid-course changes to accommodate the disadvantages suffered by appellants (whether or not represented by counsel) may substantially increase the costs of adjudication for all parties since the effort and expenses already invested may have to be duplicated on the change of forum.

If the employee files first in the EEO process under a mistaken notion that unlawful discrimination is implicated and the complaint is dismissed early on (as in the manner of Rule 12(b)(6) dismissal under the Federal Rules of Civil Procedure), after a hearing, or somewhere in between, should the employee be able to take any purely personnel law objection to the agency action (e.g., in a Chapter 43 removal, that his or her performance was fully adequate) to the MSPB? If so, the interrelationship of the personnel and discrimination claims that is typical of mixed cases will often mean that much the same evidence will be presented both in the EEO process and at the Board. Based on available statistics indicating the relative infrequency of findings of discrimination in the EEO process, this duplication is likely to be a very common occurrence—unless employees are exhausted by the time the EEO process reaches its terminal point and choose not to proceed further.

This second problem could be eliminated by a provision to the effect that once the EEO route is selected, the employee can prevail only on the discrimination claim and will be deemed to waive any purely personnel law matters. Currently, EEOC does not have the authority to deal with the purely personnel aspects of a case but the MSPB, like the NGP, can deal with all issues raised. The employee in these circumstances has a choice, but it will have to be made with great circumspection and with potentially disastrous results. The potential unfairness of this scheme to the employee will be explored further below.

Turning to other types of difficulties posed, it is very possible that joint jurisdiction in mixed cases will result in the application of different rules of personnel and discrimination law, depending on the forum chosen for the action. Since today there is no opportunity for direct judicial review of EEOC decisions by the government and government relitigation of both the factual and legal aspects of an EEOC finding in favor of a complainant may
be foreclosed in the district court, the potential for forum shopping and discrimination in terms of different rules applied is substantially increased.

From an employee's point of view, the multiplication of appeal routes may appear to be an improvement of sorts. In order to make an intelligent choice, however, employees must be clearly informed at some point regarding the procedural (if not the substantive) differences between the MSPB and EEO processes. The available statistics relating to the MSPB in mixed cases and the EEO process in non-mixed cases suggest that in relatively few cases does an employee succeed in proving discrimination. Both those statistics and the impressions gathered during the interviewing process leading to this article suggest that many employees fervently believe that there has been discrimination where it either does not exist or may be difficult to prove. Add to all this the fact that many employees in both the MSPB and EEO processes proceed pro se, and there is some question whether it is reasonable to expect that employees can make adequately informed decisions regarding the best forum for their cases. Their dilemma would be considerably heightened to the extent that choice of the EEO process constitutes a waiver of the purely personnel law matters they could raise in the MSPB process.

In short, joint MSPB/EEOC jurisdiction may present deceptively simple choices for a large class of employees. However, ultimately, they may forfeit the opportunity to a full, timely, and consolidated trial of all of their contentions.

c. Option 3: Exclusive EEOC Jurisdiction

A final option is to vest exclusive jurisdiction over mixed cases in the EEOC. This would simplify matters considerably. However, the current EEO process is afflicted with a variety of problems, including lack of resources and delays, some of which may not be remedied at least in the short term. To force employees into this route is not likely to be perceived as fair. Moreover, many of the same or analogous problems that accompany vesting mixed case jurisdiction in both the MSPB and the EEOC are presented by this option, e.g., the employee will have to consider whether or not to raise any discrimination claim based on perhaps incomplete understanding of the procedural and other consequences.

554 See Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986).
555 But see supra note 552.
There are in fact ways to improve the attractiveness of a proposal to vest exclusive adjudicatory jurisdiction in mixed cases in the MSPB. Perhaps with congressional ratification, MSPB could relax its focus on the 120 day deadline that may interfere with the ability of the employee to develop his or her case on the discrimination issues. Presiding officials should make particular efforts to assist pro se appellants, particularly in the area of factual discovery. Such efforts may not be entirely lacking today on the part of at least some administrative judges. The burdens of proof in Board proceedings in mixed cases must be modified to accord more closely with those applicable in the district courts in discrimination cases (something that may require some legislative tinkering). More emphasis might also be placed on educating Board presiding officials on various aspects of discrimination law, including its nuances and the factual patterns suggesting the existence of discriminatory motive. Pronouncements and decisions by the Board could trumpet the fact that principles of discrimination law are not a "hostile" outsider but are part and parcel of personnel law and must be implemented accordingly throughout the Board's various decision-making processes.\(^5\)

Finally, a way to institutionalize some formal involvement by the EEOC in the mixed case process should be explored. The EEOC might be authorized to intervene in MSPB proceedings presenting issues of discrimination law and petition for judicial review of such cases. EEOC rights in these regards could be limited in the same manner as the OPM's current opportunity for involvement with Board cases.\(^5\) Alternatively, they might be more broadly defined to include, for instance, the right to judicial review.

To the extent that the Board is granted exclusive administrative jurisdiction in mixed cases (outside those processed through the NGP), bargaining unit members and non-members alike should retain the choice to file an appeal directly with the Board or with the agency in accordance with EEO's mixed complaint regulations (with a hearing at the MSPB level).

The mixed complaint process has a variety of advantages. It serves to filter out complaints that might otherwise clog the Board's

\(^{556}\) Cf. 5 C.F.R. § 1201.155(b) (1988).

\(^{557}\) The Board's administrative judges are currently excepted service attorneys serving at the will of the Board. Affording these officials the protections in terms of salary and tenure of administrative law judges is an additional possible change that might alter perceptions of the Board and ease the way for exclusive MSPB jurisdiction.

\(^{558}\) See 5 U.S.C. §§ 7701(d), (e); 7703(d) (1988).
processes. For the unrepresented, the investigation stage may discover material unavailable to them in the Board's processes because of time constraints or the inability to master discovery techniques. Settlement possibilities can be explored in an atmosphere where perhaps the employee is less intimidated and where the invocation of formal processes does not solidify the positions of the main actors. Finally, the agency is given the opportunity to resolve matters that affect its own employees.559 Efforts to improve the EEO process at the agency level may make the mixed complaint process even more valuable in these respects.

The existing mixed appeal/mixed complaint regulations are not, however, the easiest to understand.560 Despite the inherent complications of the process, more could probably be done to clarify and simplify the procedures.561 In addition, while perhaps not a frequent occurrence, in some instances there are parallel EEO and MSPB filings that, under the regulations, should not both be allowed to proceed. There may also be duplicative filings involving the NGP, which also is not permitted by the CSRA. Better communication among personnel, EEO, and labor relations offices would reduce these multiple proceedings and the wasted time, energy, and other resources.

7. The Fate of the Special Panel

Since 1978, there have been three Special Panel proceedings.562 Congress did not anticipate that the Panel would often be called upon to resolve disputes between the Board and the EEOC.563 Since the Special Panel apparatus was originally put in place to insure some adjudicatory role for the EEOC in mixed cases,564 by definition, a conclusion that continued EEOC involvement is

559 These procedures may have to be differentiated from those applicable to mixed cases where there will be a trial de novo in district court, see supra text accompanying notes 526-27, though the option to choose the MSPB over the district court should remain open as long as it is feasible.
560 Neither are other parts of existing EEOC regulations. For example, a less than experienced practitioner or employee might take the regulations defining the relationship between the NGP and the EEOC as applicable to mixed cases, which apparently they are not. See 29 C.F.R. §§ 1613.219, .231, .401-.421 (1988).
561 The newly proposed EEOC regulations are, in part, an attempt to more clearly define the federal sector process. See 54 Fed. Reg. 45,747 (Oct. 31, 1989).
562 See supra text accompanying notes 236-57.
563 See 1978 CONFERENCE REPORT, supra note 219, at 142.
564 See supra text accompanying notes 218-24.
unnecessary would consign it to a place in the history books alone. The problems and disputes that have arisen during its brief tenure seem not to recommend its continuation in any form.

The prevailing approach to the authority of the Special Panel (laid down in Ignacio v. United States Postal Service) is complex and suggests that the convoluted arrangement creates incentives for the ultimate decision-maker (the Panel) to avoid rather than make its own decision on the merits. Moreover, the structure is so self-evidently contrived as a political compromise rather than a rational approach to design of a structure for the fair and expeditious resolution of personnel disputes that it evokes cynicism rather than confidence on the part of the clients of the system.

If, however, it is thought desirable to retain some form of EEOC review of Board decisions in cases that are significant beyond the individual facts presented, a revision of the Special Panel machinery might be devised to accord with what the Senate proposed in 1978. The Senate bill envisioned the MSPB/EEOC dialogue as focusing on cases where the MSPB order would have "a substantial impact on the general responsibilities of the Commission for implementing the anti-discrimination laws." Accordingly, "decisions and orders which propel case law in a new direction, or which raise significant conflicts with the policies or interpretations of the Commission may be considered."

Section 7702 of Title 5 could, therefore, be amended 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. The current composition of the Panel would remain unchanged under this approach, thus assuring an EEOC voice on the Panel. However, requiring MSPB concurrence regarding the

[564] See supra text accompanying notes 236-70.
[566] See supra text accompanying note 240.
[568] Id. at 58. The existing statutory language permits the EEOC to exercise its discretion in this sparing fashion—but the EEOC has chosen to accept most petitions filed for merits review. Congress should, therefore, make its intent clear—if the Special Panel is retained—if for no other reason than cutting down the potential for delay in the system.
EEOC's assessment of the nature of the issue presented and its importance raises the possibility of stalemate. Despite the possibility that the EEOC could make its findings merely to prevent the MSPB from having the last word, it should be assumed that that Commission will not engage in such overreaching.

In addition, the rules of *Ignacio* that prevent a decision on the merits should be abolished by Congress. Rather, once certification occurs, the Panel should be directed to resolve the substantive issues presented with an appropriate deference to the respective expertises of the Board and the EEOC.

Moreover, in order to elevate the importance of the Special Panel proceeding and to deter improvident references, its resolution of the legal issues should be made 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" weight of circuit court precedent. As in the case of MSPB orders, judicial review of the Special Panel decision (or the EEOC decision where the MSPB does not make the specified finding) should be placed within the jurisdiction of the Federal Circuit though under a very limited scope of review.

8. **Government Access to Judicial Review in Discrimination Cases**

At the present time, 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. When approaching this situation two scenarios should be distinguished: where the underlying personnel action at issue is of the type that could be appealed by the employee to the MSPB, and where this is not the case.

With regard to the latter situation, a discrimination complaint now—and under the proposals contained earlier in this article—may be adjudicated by the EEOC if the employee chooses to opt

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569 See supra text accompanying note 240.

570 The Board has made it clear that it will follow Special Panel decisions deferring to the EEOC on matters of discrimination law even where the Panel decision is inconsistent with lower court precedent (which *Ignacio* was at the time of its issuance and continues to be). See Ellis v. U.S. Postal Service, 37 M.S.P.R. 503 (1988).

571 See supra notes 503-08.
for the statutory appeal route, or by an arbitrator if the NGP is used. There are no statutory provisions that expressly allow an agency to appeal directly to the courts from an adverse EEOC or arbitrator decision. Rather, the agency may refuse to comply with an EEOC decision, in which case any judicial review would occur in the course of the employee’s de novo suit in federal court, though preclusion prevents government relitigation of at least some issues.572

In the case of an arbitral award, while an agency may appeal to the FLRA, there is no direct judicial review of the FLRA’s decision on the award.573 Refusal to comply with the award may result in an unfair labor practice proceeding before the FLRA, whose disposition of the case is judicially reviewable, though judicial scrutiny of the underlying arbitral decision may be very narrow indeed—if it exists at all.574

With regard to MSPB appealable actions, the situation may be somewhat different. The statute provides that “any final order or decision” of the Board is appealable to the federal circuit by OPM if the “substantial impact on civil service law” test is met.575 This authority is not limited by express statutory provision to non-mixed cases. While the federal circuit has held that it lacks jurisdiction in mixed cases,576 the jurisdictional issue should arguably be treated differently where it is the government, and not the employee, that is dissatisfied with the result of the administrative (or arbitral process).577 In that context there will need be no impingement on the employee’s right to obtain a de novo hearing on the facts in district court.578

Politically, it likely would be difficult, if not impossible, to make a case that the OPM should be able to appeal MSPB, EEOC, arbitral, or FLRA decisions where it is seeking to contest a factual

572 See Moore, 780 F.2d 1559.
573 See supra note 123 and accompanying text.
574 American Federation of Government Employees v. FLRA, 850 F.2d 782 (D.C. Cir. 1988).
576 See supra text accompanying note 277.
577 The Federal Circuit reviews arbitral awards in Chapter 43 and 75 actions outside the mixed case context and the CSRA provides for such review on the same terms as apply to review of MSPB decisions. Other MSPB appealable actions within the NGP that are arbitrated go to the FLRA. Accordingly, in mixed non-Chapter 43 and 75 actions that are arbitrated, the government’s opportunity to review, if any, is largely identical to that which exists in discrimination cases that are not MSPB appealable.
finding of discrimination. Allowing the OPM to contest a legal interpretation in the area of pure discrimination law may encounter less resistance but still is difficult to justify to the extent that the OPM's area of interest and expertise is seen to rest in the arena of pure personnel law. 579

The fact that a refusal to comply with administrative or arbitral determinations is necessary before review can be requested (assuming it is then available) is not only inefficient but, by raising the spectre of agency defiance of authority, it casts a pale of illegitimacy over what may be an entirely justifiable claim of legal error. The happenstance that issues of personnel law arise in the context of discrimination cases does not suggest that there is less need for direct judicial review than is available outside the discrimination context. Many of the most important issues of personnel law today are those that require inquiry into the relationship of civil service rules and the anti-discrimination statutes.

In fact, the combination of limitations on the government's right to appeal and employees' rights to choose among several appeal routes means that different legal rules may be applied in the administrative, arbitral, and judicial fora in discrimination cases. For example, the interpretation of the Rehabilitation Act adopted by the first Special Panel proceeding580 is currently applied by both the EEOC and the MSPB but it has been rejected by the courts. The confusion thereby engendered and the discrimination in terms of applicable legal doctrine are hard to justify.

Accordingly, Congress should clearly provide that the OPM, the agency responsible for the overall administration of the civil service rules and the one agency with a government-wide perspective, should have the same right to directly request judicial review in discrimination cases that it has in other contexts. Specifically, where the Director of the Office believes that a decision of the MSPB, EEOC, FLRA (assuming its arbitral review jurisdiction is

579 In the latest episode of the Lynch saga, see supra text accompanying notes 250-56, the Board held that the discrimination laws administered by the EEOC are not "civil service" laws for the purpose of OPM's statutory right to ask for Board reconsideration and do not come within the purview of 5 U.S.C. § 7703(d) (OPM's right to petition Federal Circuit for review). Lynch v. Dep't of Education, 39 M.S.P.R. 319 (1988). The Federal Circuit has granted OPM's petition to explore at least this jurisdictional issue. Where a matter raised involves the interrelationship of pure personnel and discrimination law (generally the grist for the Special Panel mill), a reading of Section 7703(d) to permit Federal Circuit review is clearly reasonable. However, in Lynch, the merits issue presented appears to be one of pure discrimination law.

retained), or an arbitrator constitutes an incorrect interpretation of civil service law that may have a substantial impact, the Director should be expressly authorized to petition for judicial review. The grant of that petition should remain within the discretion of the reviewing court. Moreover, consistent with the goal of ensuring the uniformity of federal personnel law and uniformity in treatment of the major personnel actions and with current provisions vesting review jurisdiction in the Federal Circuit in non-mixed Chapters 43 and 75 actions, Congress should consider vesting exclusive jurisdiction in the Federal Circuit to hear appeals by OPM. To the extent that the Federal Circuit has exclusive jurisdiction in at least mixed cases, the forum for judicial review will not vary depending on whether the government or the employee seeks judicial review.

9. Agency Administrative Grievance Systems

Given the trend of recent judicial opinions in the area of implied statutory rights of action under the Civil Service Reform Act, agency administrative grievance systems take on increased importance as perhaps, in some cases, the only avenue of redress that can be invoked by the individual employee (other than the potential assistance of the Office of Special Counsel). Interviews disclosed mixed perceptions regarding whether employees and their representatives do or should trust the ability of these processes to fairly dispose of cases, given the fact that the agency is ultimately the judge in its own case. Clearly, agencies vary in the elaborateness of the procedural protections afforded. But details regarding the nature of the variation government-wide are not currently available. Statistics regarding the usage and effectiveness of these systems, among other things, are lacking. Efforts should be undertaken in order to ensure that these systems in fact provide a fair and efficient method of resolving workplace disputes.

To the extent that non-unit employees now resort to the EEOC process for workplace disputes lacking substance as discrimination matters in order to obtain the intervention of third party neutrals, improvement of the agency administrative grievance systems (by, for example, providing for investigation and recommended decision by a third party) may relieve some of the

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581 See supra text accompanying notes 301-07.
582 See supra text accompanying note 352.
pressure on the EEO framework and, along the way, expedite resolution of disputes in both arenas.

10. The Office of Special Counsel

One of the most problematic areas for potential reform relates to the role of the Office of Special Counsel. Criticism of its effectiveness was not mooted even by a 1985 General Accounting Office study that failed to find substantial flaws in the OSC's treatment of whistleblower reprisal cases. Whether the OSC has in fact failed its assigned task and, if it has, why this has occurred apparently are not questions that are answered easily in a dispassionate fashion. At a minimum it would seem fair to say that, in view of the breadth of its jurisdiction to investigate and seek corrective and disciplinary action from the MSPB, the financial resources currently available to the Office (and perhaps likely to be available in the foreseeable future) may very well be inadequate to allow the Office to serve effectively as an avenue of resort for federal employees allegedly injured by prohibited personnel practices or other violations of civil service law in the manner desired by the Office's critics.

It may seem alluring to give the Office additional powers and duties. It would be ideal if the Office were staffed (as it may now be) with aggressive individuals endowed with a sense of mission to ferret out and correct abuses of the merit system. Without a larger budget, however, heightened expectations for the operation of the Office are likely to be dashed.

This brings us to the Whistleblower Protection Act of 1989. The House and Senate voted overwhelmingly in favor of the Act against a background of years of criticism of the operation of the OSC in terms of its ability or willingness to protect the interests of federal employees. As late as 1985, the Office took the position that its statutory mandate was to protect the integrity of the merit system through prosecution of those who violated the law and that it was not empowered to "represent individual employees."

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585 OFFICE OF THE SPECIAL COUNSEL, A REPORT TO CONGRESS FROM THE OFFICE OF SPECIAL COUNSEL/FISCAL YEAR 1985 at 2, 3 and 8. Such a view received some support in judicial opinions. See, e.g., Frazier v. MSPB, 672 F.2d 150, 162-63 (D.C. Cir. 1982).
The next year, however, it announced that "[t]he focus of all OSC operations is protection of the rights of employees under the merit system through corrective actions and when warranted, the discipline of those who violate the law." That emphasis continued in 1987 as its annual Report to Congress noted that "OSC's most significant achievement during this reporting period was its pursuit and accomplishment of more corrective actions on behalf of more federal employees than in any one year since 1981, as a result of the Office's emphasis on corrective actions, particularly in aid of employees victimized by reprisal for whistleblowing."

Such reassurances apparently fell on deaf ears in Congress. The 1989 legislation establishes that "the primary role of the Office . . . is to protect employees, especially whistleblowers, from prohibited personnel practices" and "that the Office . . . shall act in the interests of employees who seek assistance" from it. While this statutory "clarification" of the OSC's role is beneficial in some respects, it should be noted that the existence of such a declaration may very well be used by dissatisfied federal employees suing in federal court as support for the proposition that the court should order the Office to prosecute corrective actions before the MSPB where there are indications that a prohibited personnel practice has occurred. Federal judges might in some cases accept such arguments despite the presence of what appears to be discretionary language contained in the 1978 statute and retained by the 1989 legislation.

The 1989 legislation does not address the current policy of the Office not to routinely investigate allegations of prohibited discrimination falling within EEOC jurisdiction. At the same time, it deletes the existing authority to defer investigations of "activities [other than prohibited personnel practices] prohibited by any

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586 Office of the Special Counsel, A Report to Congress From the Office of Special Counsel/Fiscal Year 1986 at 5.
587 Office of the Special Counsel, A Report to Congress From the Office of Special Counsel/Fiscal Year 1987 (draft) at 1.
589 Compare Dunlop v. Bachowski, 421 U.S. 560 (1975) (where, unlike the CSRA however, the statute used "shall" not "may" with respect to both investigatory and prosecutorial authority).
590 See 5 U.S.C. § 1206(c)(1)(B) (1988) and § 3(a)(11) of Whistleblower Act (adding § 1214(b)(2)).
591 See supra text accompanying notes 287-89.
civil service law, rule, or regulation\textsuperscript{593} and grants authority to the OSC to seek corrective and disciplinary action in these cases.\textsuperscript{594} The legislative history of the 1989 Act suggests that such authority is meant to cover only "major abuses of the civil service processes."\textsuperscript{595}

In view of the focus of this study, perhaps the most striking aspect of the 1989 legislation is its creation of the right of individual employees to seek corrective action from the Board with respect to any "personnel action" allegedly taken as a reprisal for whistleblowing—after having requested (but not received) OSC action where the personnel action is not otherwise appealable to the Board.\textsuperscript{596} Given the apparently applicable statutory definitions of "employee" and "personnel action,"\textsuperscript{597} these provisions give to many more federal employees with respect to many more types of personnel actions than is currently the case the individual right to seek redress from the MSPB—though only in cases where reprisal for whistleblowing is alleged. The impact on the Board's docket is unclear but may be very substantial indeed, particularly if allegations of reprisal for whistleblowing are made routinely in personnel disputes largely to obtain access to the Board's processes. It would be very difficult to come up with a method to cull out meritless claims of reprisal early in the process without raising charges that the Board is insensitive to the protection of whistleblowers.

The 1989 legislation fails to address the interaction between the new right to invoke the Board's processes and section 7121 of Title 5,\textsuperscript{598} which makes the negotiated grievance process the exclusive means for resolving many matters within its scope (which could include allegations of reprisal for whistleblowing). The legislation does not expressly prevent an employee from proceeding simultaneously or sequentially through an NGP with a whistleblower matter and to the MSPB under the new right of action. (New Section 1222 of Title 5 expressly preserves existing statutory rights and remedies outside of Chapters 12 and 23 of Title 5). These are perhaps only a few of the unresolved issues that the new legislation raises in this area.

\textsuperscript{593} See supra note 590, § 3(a)(11) (adding § 1216(b)).
\textsuperscript{594} Id. (adding § 1216(c)(2)).
\textsuperscript{596} See § 3(a)(11) (adding § 1221).
The silence of Congress regarding Section 7121 perhaps augurs a tendency toward less than comprehensive consideration of the entire statutory framework established in 1978 in dealing with particular issues that arise. A persistent pattern of focusing on discrete issues without a substantial effort to ascertain the wider ramifications throughout the system of any proposed change will lead to one or more baneful results. Agencies, private attorneys, and the courts will be left with the task of trying to invent a way to put all the pieces together, which is a task that properly lies in the hands of Congress. In addition, the system may evolve into an even more complicated morass that will make its current level of intricacy seem quaintly straightforward even to those who have been able to wade this far into this article. The inefficiency and confusion that would thereby be created and redound to the detriment of everyone—but particularly the hapless federal employee and manager—must be avoided.

11. Better Communication Within Agencies and to Employees

Even if all of the changes urged above are instituted by legislation or otherwise, the system for federal employee complaints, grievances, and appeals will remain fragmented and complicated, though choices may have been narrowed and simplified somewhat. To the extent federal managers see "too many reviews/appeals" as an obstacle to taking formal action against employees, the situation may be improved somewhat from a manager's point of view.

A premium must, however, be placed on clarity and simplicity in drafting implementing regulations. Personnel, labor relations, and EEO administrative staff must be well-educated in the system and continually brought up-to-date on the latest changes in the law that impact on the various processes. More consistent patterns of communication among these groups, something that now appears to occur fitfully at best in many agencies, must be established, if only to avoid the costs of parallel, duplicative proceedings in the MSPB, the EEO framework, and/or the NGP. In some

599 See U.S. Merit Systems Protection Board, Federal Personnel Policies and Practices—Perspectives From the Workplace at 11-12 (1987) (41% of supervisors questioned viewed "too many reviews/appeals" as an obstacle of some significance in taking formal action in performance cases; 32% viewed it as an obstacle in taking formal action in misconduct cases; but 88% indicated they would take formal action when informal measures fail).
instances, internal organizational restructuring might assist here—or systems of computer case tracking.

Finally, the intended beneficiaries of the system—federal employees—must have easy access to materials that, in as straightforward and as clear a fashion as possible, provide necessary information regarding their rights without swamping them with unnecessary detail.600

600 The Guide to Rights and Responsibilities in Resolving Disputes in the Federal Government (Nov. 1987) is a good start, though even it may be too detailed and intimidating for most employees.

It might be questioned, for example, whether the dearth of MSPB appeals from the grievance process in mixed cases is due to the lack of express notice in the arbitral award regarding the existence of further appeal rights. Compare, e.g., Smith v. Dep't of the Navy, 37 M.S.P.R. 560 (1988) (an opinion that seems to confuse agency notice of the right to initially appeal to the Board or file a grievance in the NGP with notice of the right to appeal from the NGP to the MSPB) with Marenus v. Dep't Health and Human Serv., 39 M.S.P.R. 498 (1989) (Board waives time period for filing given "mistaken" first filing with EEOC).