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Defending Liberty
Pursuing Justice

In the Name of Security, Insecurity: The Trend to Diminish Federal Employees' Rights

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I. Introduction

On March 3, 2005, the Department of Homeland Security (DHS) announced its new personnel regulations, to take effect no later than August 1, 2005.[1] These regulations drastically reduce approximately 110,000 employees' rights to appeal adverse conduct- or performance-based actions, to engage in labor-management collective bargaining, and to be assured of consistent pay increases. It is Capitol Hill's worst-kept secret that the new DHS regulations have the potential to reach far beyond DHS. The Bush administration has intimated that it hopes to expand personnel reforms like those at DHS to many, if not all, other federal agencies.[2] Most immediately, the Department of Defense's (DoD's) approximately 750,000 civilian employees are likely to see similar changes within a year.[3] The federal government's approximately 2.5 million civilian workers nationwide might all soon be impacted.

The new regulations stemmed from the Homeland Security Act of

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1. 70 Fed. Reg. 5,272 (Feb. 1, 2005) (to be codified at 5 C.F.R. pt. 9701). DHS forestalled implementation of the regulations until after August 15, 2005, in light of a motion by the federal employees' unions to enjoin the implementation of the regulations. The motion was heard by the U.S. District Court for the District of Columbia, Judge Rosemary Collyer, and decided August 12, 2005. NTEU v. Chertoff, No. CIV.A. 05-201, 2005 WL 1941398, at *1, 177 L.R.R.M. (BNA) 3089 (D.D.C. Aug. 12, 2005). Following this decision, several sections of the regulations are being implemented as planned by DHS. *Id.* at *1. However, significantly, Judge Collyer enjoined implementation of several sections of the regulations, as discussed below. *Id.*

2. *See, e.g.*, Tim Kauffman and Eileen Sullivan, *Future of Civil Service: Reforms Empower Managers, Set Course for Government* FED. TIMES (Jan.31, 2005) (quoting Clay Johnson, Office of Management and Budget (OMB), Deputy Director for Management). Mr. Johnson commented on the DHS reforms, saying, "We think that the same opportunity to better other agencies exists in the rest of the federal departments." *Id.*

3. Legislation has mandated a new human resources system, the National Security Personnel System (NSPS), for the Department of Defense, as authorized by the National Defense Authorization Act, Pub. L. No. 108–136, § 1101, 117 Stat. 1392 (2003). The proposed NSPS regulations were issued but are not yet final as of the date of this article. *See* 70 Fed. Reg. 7,552 (Feb. 14, 2005) (to be codified at 5 C.F.R. pt. 9901).

2002 (November 25, 2002) (the Act),[4] which created DHS effective March 1, 2003, combining 20 existing federal agencies and functions. Some say the creation of DHS to streamline the fight against terrorism represented the most significant reorganization of federal agencies in the executive branch in more than 50 years. The Act gave the DHS secretary and the director of the Office of Personnel Management (OPM) the authority to establish a "contemporary" and "flexible" new human resources management system for DHS,[5] abandoning many of the existing requirements of Title 5 of the U.S. Code.

Between November 2002 and February 2004, debate raged regarding the new personnel policies, leaving DHS employees with a sense of foreboding as to the policies that would govern their employment at the new agency. Finally, on February 20, 2004, DHS and OPM issued the proposed personnel policies for DHS[6]—which many employees felt confirmed their worst fears, by endeavoring to strip away many of their most basic employment rights. The DHS secretary and OPM director were required to accept comments from the public. On March 22, 2004, the major federal employees' unions (including the American Federation of Government Employees (AFGE), AFL-CIO, and the National Treasury Employees Union (NTEU)), directly representing more than one-quarter of DHS employees, submitted a ninety-one-page joint commentary.[7] The unions objected to the DHS system "in its entirety and strongly recommend[ed] that it not be implemented until the many serious defects . . . have been corrected."[8]

On May 19, 2004, Senator Joseph I. Lieberman, D-Conn., the former chairman of the Senate Governmental Affairs Committee and, as of the date of this writing, its ranking member, sent a letter to then-DHS Secretary Thomas Ridge and OPM Director Kay Coles James, responding to the proposed DHS personnel regulations.[9] The senator explained: "DHS and OPM assert that the purpose of the regulations is to enable the Department to carry out its mission, but I fear the actual effect of these sweeping changes would be the opposite: to undermine the employee safeguards that prevent arbitrary and abusive workplace practices and that sustain the employee morale and performance on which the Department's mission depends."[10] Senator Lieber-

4. Pub. L. No. 107–296, 116 Stat. 2135 (2002).

5. *See* 5 U.S.C. § 9701(b)(1) and (2).

6. 69 Fed. Reg. 8,030 (Feb. 20, 2004) (to be codified at 5 C.F.R. pt. 9701).

7. Joint Comments and Recommendations Submitted by the National Presidents of the NTEU and AFGE *inter alia*, Re: DHS Human Resources Management System (Mar. 22, 2004), pp. 1–2. The AFGE and NTEU are the largest of the unions dedicated to representing federal civilian employees—of whom as many as 60 percent are covered by collective bargaining units. *Id.*

8. *Id.*

9. Press Release, Senate Committee on Homeland Security and Governmental Affairs (May 19, 2004), *available at* http://hsgac.senate.gov (last visited Dec. 6, 2004).

10. *Id.*

man carried special credibility on homeland security issues because it was he who originally conceived and promoted legislation to create the new DHS. His vociferous opposition to the proposed personnel regulations—and that of such a large, organized contingent of the DHS workforce—could not be taken lightly.

The regulations finally enacted on March 3, 2005, did contain variations from the original proposed regulations—for example, providing greater detail on the new mandatory removal offenses (MROs), giving some arbitration opportunities to employees with non-MROs, eliminating the notion of "Performance Review Boards," and maintaining the status quo burden of proof for an agency in a non-MRO misconduct action, i.e., that to sustain an action against a nonprobationary employee, an agency must prove by a preponderance of the evidence that an employee engaged in misconduct.[11] However, most of the originally proposed DHS changes were adopted in the final regulations, including, for example: (1) eliminating the General Schedule, and substituting a new "pay-banding" system that gives management more discretion to grant or prevent pay increases; (2) curtailing union rights across the board and establishing a Homeland Security Labor Relations Board (HSLRB); and (3) drastically reducing the scope and changing the nature of possible employee appeals of performance- and conduct-based adverse actions.[12]

This article will focus on one of the three major areas of change—the impact on federal civilian employee appeals. This article begins by profiling over a century of growth in federal employees' rights under both Democratic and Republican presidents, and then explores how the new DHS regulations dramatically reverse this pattern.

II. History of Federal Employees' Rights

In 1881, after an applicant for federal employment was rejected for political reasons, he assassinated President James A. Garfield. Congress responded by passing the Pendleton Act, which brought about the creation of a classified Civil Service in 1883.[13] The Pendleton Act only prohibited "removal for the failure of an employee in the classified service to contribute to a political fund or to render any political service."[14] In 1897, Republican President William McKinley expanded federal employees' protections, promulgating Civil Service Rule II, which provided that "removal from the competitive classified service should not be

11. *See* 70 Fed. Reg. 5,272.

12. *Id.* Again, it is worth noting that the implementation of the final regulations, and, in particular, one portion of the regulations that is the focus of this essay, regarding employee appeals invoking mitigation of penalties, is currently enjoined by the U.S. District Court, per the terms of Judge Collyer's decision. *See* NTEU v. Chertoff, 2005 WL 1941398, at *30.

13. Civil Service Act (Pendleton Act), ch. 27, 22 Stat. 403 (1883).

14. *Id.*

made except for just cause and for reasons given in writing."[15] While job tenure was protected, there were no administrative appeal rights, and the courts refused to enforce the rule judicially. In 1912, Republican President William Howard Taft signed into law the Lloyd-LaFollette Act, as one section of the Post Office Department appropriations bill.[16] It substantially enlarged upon Civil Service Rule II, stating:

> No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses not (sic) any trial or hearing shall be required except in the discretion of the official making the removal.[17]

The Lloyd-LaFollette Act provided limited statutory protections for federal employees for over 30 years.

There was no requirement for an administrative hearing until the Veterans Preference Act of 1944 gave certain veterans procedural and appeal protections for adverse personnel actions, which included removal, suspension of more than fourteen days, reduction in grade or pay, and furlough of thirty days or less.[18] Under the Veterans Preference Act, veterans could appeal their cases to the Civil Service Commission (CSC), which was the predecessor of today's OPM.[19]

On January 17, 1962, Democratic President John F. Kennedy signed Executive Order (EO) 10,987,[20] which extended adverse action appeal rights to nonveterans.[21] President Kennedy followed the guidance of the Report of the President's Task Force on Employee-Management Relations in the Federal Service, which recommended that "[a] more uniform system of appeals of adverse actions should be established by Government agencies. Veterans and non-veterans should have identical rights to appeal adverse actions to the Civil Service Commission [CSC]."[22] EO 10,987 left it up to the CSC and the departments and agencies to issue regulations and develop an appeals system with a hearing in most cases, "except when the holding of a hearing is im-

15. Fifteenth Report of the Civil Service Commission 70 (1897–1898). *See also* Arnett v. Kennedy, 416 U.S. 134, 149 n.19 (1974) (citing Civil Service Rule II).

16. *Id.* at 150.

17. *Id.* at 150 n.20 (quoting Act of Aug. 24, 1912, c. 389, § 6, 37 Stat. 555).

18. Veterans Preference Act of 1944, Pub. L. No. 78–359, §§ 12 and 14 (codified as 5 U.S.C. § 2108).

19. *Id.*

20. Exec. Order No. 10,987, 27 Fed. Reg. 550. Exec. Order No. 10,987 *revoked by* Exec. Order No. 11,787, 39 Fed. Reg. 20,675 (June 11, 1974).

21. Exec. Order No. 10,987, 27 Fed. Reg. 550.

22. Report of the President's Task Force on Employee-Management Relations in the Federal Service, ¶ J, "Appeals" (Nov. 30, 1961).

practicable by reason of unusual local or other extraordinary circumstance."[23] Employees had only a single level of appeal.[24] EO 10,987, section 4 also provided for advisory arbitration in the agency appeals system, as recommended by the President's Task Force.[25] This provision allowed unions to negotiate with agencies to allow for advisory decisions by neutral arbitrators, instead of CSC hearing examiners.[26] Under EO 10,987, a number of agencies retained employees in a duty status until receipt of the decision in the agency hearing.[27] The latter was a substantial benefit to federal employees who received removal actions, inasmuch as dismissed employees are usually under severe financial pressure, making it difficult for them to retain counsel.[28] The CSC also had the significant authority to mitigate agencies' unreasonable penalties in misconduct actions.[29]

On October 29, 1969, Republican President Richard M. Nixon issued EO 11,491, extending appeal rights identical to veterans' rights to the vast majority of federal employees.[30] The CSC continued to provide hearing examiners and an appeals process, and its final decisions were binding upon agencies. In 1974, in EO 11,787, President Nixon eliminated agency predecision hearings and provided for hearings by the Federal Employee Appeals Authority (FEAA) and appellate review by the Appeals Review Board (ARB).[31] These new bodies were theoretically separate from other CSC functions and reported directly to the CSC members (the Commissioners). EO 11,787 also eliminated the op-

23. Exec. Order No. 10,987, 27 Fed. Reg. 550.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See* Edward H. Passman, *Federal Employees' Statutory Appeals Procedure—Status Quo or Change*, J. COLLECTIVE NEGOTIATIONS (1976), at 299. The Supreme Court held in *Arnett* that there was no Constitutional requirement to retain employees in a duty status pending the hearing outcome. *Arnett*, 416 U.S. at 151.

28. While this provision was not carried over into the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7701 *et seq.* (CSRA), it was included in some of the stronger collective bargaining agreements. However, recently, the Federal Service Impasses Panel ordered a long-standing stay provision deleted from the collective bargaining agreement between Local 12, American Federation of Government Employees, AFL-CIO and the Department of Labor, Washington, DC. *See* In the Matter of Local 12, American Federation of Government Employees, 4 Fed. Serv. Imp. Pan. Rels. 111 at § 8 (Dep't. of Labor 2005).

29. LaChance v. Devall, 178 F.3d 1246, 1256 (Fed. Cir. 1999). *See also* Douglas v. Veterans Administration, 5 M.S.P.R. 280, 290 (1981) ("It cannot be doubted, and no one disputes, that the Civil Service Commission was vested with and exercised authority to mitigate penalties imposed by employing agencies.").

30. Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969). Appeals rights were extended to the "competitive civil service," which includes most federal employees other than certain certified professionals, such as lawyers and doctors. *Id.* In 1990, the Civil Service Due Process Amendments, 5 U.S.C. §7611(a)(1), extended adverse action appeal rights to nonveterans in the "excepted service." *Id.* Unlike their counterparts in the competitive service who have a one-year probationary period, excepted service attorneys, physicians, and others have to serve two years in a federal position before they are entitled to adverse action appeal rights. *Id.*

31. Exec. Order No. 11,787, 39 Fed. Reg. 20,675 (June 11, 1974).

tion of advisory arbitration, although appellants had enjoyed greater success with this procedure.

There were a number of problematic areas in EO 11,787's revised appellate system. For example, the system did not give the FEAA or the ARB authority to substitute a less severe penalty in adverse action cases, except where an agency violated its own table of penalties.[32] Even where the FEAA or the ARB canceled an adverse action for being unduly harsh and severe, the agency was allowed to employ a form of "double jeopardy"[33]—to re-charge the offense with a less severe penalty in a new personnel action. The CSC regulations failed to specify that the agency had the burden of proof in adverse action cases. Agencies were not required to produce witnesses in their employ or documentary evidence in their control, though such were relevant to the case.[34] The revised appellate system also lacked published concurring or dissenting opinions by the ARB panel members.

Democratic President James E. Carter's Civil Service Reform Act of 1978 (CSRA)[35] streamlined appellate procedures and added greater procedural fairness. For example, the CSRA eliminated agency hearings and appeals for reduction in rank and created the independent Merit Systems Protection Board (MSPB or Board) to replace the FEAA and the ARB.[36] The three members of the independent MSPB, including one member from the minority party, are appointed by the president and confirmed by the Senate.[37] The MSPB regulations expedite the hearing process for adverse actions and other statutory appeals, strongly encouraging MSPB administrative judges (AJs) to issue initial decisions within 120 days—though, in practice, second-level appeals to the Board often progress slowly.[38] The CSRA gives employees the oppor-

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32. *Id.*

33. This term is not intended in the literal sense, which applies only to criminal proceedings, but to invoke an argument for fairness embodied in the principle barring double jeopardy.

34. *See* Passman, *supra* note 27, at 298.

35. Pub.L. No. 95–454, codified in 5 U.S.C. § 7101, *et seq.*

36. The CSRA incorporated many changes first executed by Reorganization Plans 1 and 2 of 1978, even as the CSRA superseded these Plans. *See* Pub. L. No. 95–454, § 905. The MSPB swallowed the former functions of the FEAA and ARB as part of these incorporated changes. *See* Reorg. Plan No. 2 of 1978, pt. II, § 203.

37. 5 U.S.C. §1201.

38. The MSPB clarified the 120-day standard, and its underpinnings, in Milner v. Dep't of Justice, stating, "The 120-day deadline for adjudicating cases is a yardstick that the Board relies upon to evaluate its AJs and its success rate in expeditiously processing appeals." Milner v. Dep't of Justice, 87 MSPR 660, 665 (2001).

The Board continued:

> The Board's policy of deciding appeals within 120 days is based on the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (CSRA), which reflects Congressional intent that appeals be decided expeditiously. For example, 5 U.S.C. § 7701(i)(4) provides that it "shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that pro-

tunity to pursue appeals of actions they allege are based upon whistleblower retaliation and/or discrimination[39] and requires agencies to prove misconduct charges against employees by a preponderance of the evidence[40]–or see such charges permanently dismissed.[41] In addition, there are ample opportunities for the parties to conduct discovery,[42] and AJs have authority to issue subpoenas that are enforceable in U.S. district courts.[43]

Under the CSRA, as amended, as previously under the CSC, MSPB AJs can mitigate unreasonable penalties that agencies have proposed against employees.[44] The Board applies a twelve-factor test for mitigation first outlined in *Douglas v. Veterans Administration.*[45] Also, under the CSRA, unions may negotiate coverage of statutory appeals under the

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ceeding." *See also* 5 U.S.C. § 7702(a)(1) (requiring the Board to decide within 120 days appeals in which discrimination prohibited by section 2302(b)(1) is alleged). Section 7701(i)(1) provides, however, that when the Board announces dates by which it expects to complete action on appeals, these dates are to be "consistent with the interests of fairness and other priorities of the Board." In *Thomas v. Department of Veterans Affairs*, 51 M.S.P.R. 218, 220 (1991), the Board explained that the policy underlying this CSRA statutory requirement that the Board expeditiously process appeals was to benefit appellants by preventing delays that adversely affected appellants who might be unemployed while their appeals were pending. A similar expeditious processing policy applies to individual right of action appeals. *See* 5 U.S.C. § 1221(f) (the Board must issue a final order or decision "as soon as practicable" after the proceeding is initiated).

Average case processing times for Petitions for Review have hovered around 150 days. *See* MSPB PERFORMANCE PLAN FOR FY2005 (REVISED FINAL), Feb. 7, 2005, at 2 *available at* http://www.mspb.gov/foia/forms-pubs/03annrpt/FY2003AnnualReport.html. However, the average processing time for cases where the MSPB issues a substantive, written decision is much longer, since this 150-day figure includes many rapidly processed cases in which the Petition for Review is summarily rejected. *See also infra* notes 60 and 61.

39. 5 U.S.C. § 2302.

40. 5 U.S.C. at § 7701(e)(1).

41. 5 U.S.C. § 7701(c)(1)(B); *see generally* Byers v. Dep't of Veterans Affairs, 89 MSPR 655 (2001).

42. 5 C.F.R. § 1201.72; *see also, e.g.*, Delalat v. Dep't of Navy, 86 M.S.P.R. 455, 460–61 (2000) (requiring discovery opportunities).

43. 5 U.S.C. §§ 1204(b)(2)(A), 1204(c).

44. *See* 5 U.S.C. § 7701(b)(3) (1994). Congress amended the CSRA to incorporate Board case law (especially Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981), and its progeny), allowing for the mitigation of unreasonable agency-imposed penalties, and to extend this right of mitigation to senior Executive Service employees. *Devall*, 178 F.3d at 1256 (citing 137 CONG. REC. H9630-02 (daily ed. Nov. 12, 1991). The Board noted in *Douglas*, 5 M.S.P.R. at 292, and argued to the Federal Circuit in *Devall*, 178 F.3d at 1252, that its mitigation authority remained after the CSRA as it was under the CSC, based upon section 202 of Reorganization Plan 2 of 1978. *See also* Lisiecki v. Merit Systems Protection Board, 769 F.2d 1558, 1566 (Fed. Cir. 1985). In *Devall*, the Federal Circuit explained that mitigation authority arose from the original CSRA, 5 U.S.C. § 7513, as interpreted by the Board and courts, because the standard requiring that adverse actions promote the "efficiency of the service" requires recognition of the need for mitigation of unreasonable penalties. *Devall*, 178 F.3d at 1256.

45. 5 M.S.P.R. 280 (1981). *See infra* for additional discussion regarding mitigation.

negotiated grievance and arbitration procedures of their contracts.[46] The Supreme Court has held that arbitrators are required to follow the same substantive provisions of law as determined by the MSPB.[47] With the passage of the Federal Courts Improvement Act of 1982,[48] all judicial appeals of final MSPB decisions have been consolidated in the U.S. Court of Appeals for the Federal Circuit.[49] This has led to a more uniform body of law for all federal employees, although agencies have been successful in the overwhelming majority of cases decided by the Federal Circuit.[50]

III. Unchanged or Expanded Rights: Few and Far Between[51]

While much has changed about the personnel regulations that will govern the daily work-lives of DHS employees—as we discuss below—a few basic constructs related to employee appeals will remain intact. Apart from the MROs, discussed *infra*, there is no change regarding the actions that are considered "adverse actions" appealable to the MSPB—i.e., a furlough for thirty days or less, a suspension of fifteen days or more, a demotion, a reduction in pay, or a removal.[52] As under the personnel regulations affecting other agencies, the DHS regula-

46. 5 U.S.C. § 7111.

47. Cornelius v. Nutt, 472 U.S. 648, 119 L.R.R.M. (BNA) 2905 (1985).

48. Pub. L. No. 97–164, 96 Stat. 25 (1982).

49. *Id.*

50. The Federal Circuit affirmed the Board over 90% of the time (ranging from 93–96%) during Fiscal Years 2001–2004. *See* MSPB PERFORMANCE PLAN FOR FY2005, *supra* note 38, at 3. The Board, in turn, has affirmed agencies in 70–80% of appeals adjudicated on the merits—to say nothing of the 50%+ of appeals that are dismissed prior to adjudication. *See, e.g.*, MSPB ANNUAL REPORT: FY 2002, at 22–23, *available at* http://www.mspb.gov/foia/forms-pubs/02annrpt/FY2002AnnualReport.html; MSPB ANNUAL REPORT: FY 2003, at 18–20, *available at* http://www.mspb.gov/foia/forms-pubs/03annrpt/FY2003AnnualReport.html. For example, of 6,601 appeals decided in FY 2003, the Board only mitigated, modified, or reversed agencies' decisions in 260 cases (less than 4% of appeals decided). *Id.* at 22–23. The Board only granted Petitions for Review (PFRs) or reopened cases 13–15% of the time on receiving PFRs of Intial Decisions regarding appeals. *Id.* at 24; MSPB ANNUAL REPORT: FY 2002 at 28. To its credit, the Board reversed, mitigated, or remanded 69–74% of those cases where PFRs were granted or cases were reopened. *Id.* at 29; MSPB ANNUAL REPORT: FY 2003 at 25.

51. Of the 180,000 DHS employees, approximately 110,000 will be covered by the new regulations. Fact Sheet: DHS and OPM Final Human Resource Regulations (Jan. 26, 2005) *available at* http://www.dhs.gov/dhspublic/display?content=4313. The DHS website's "Fact Sheet: DHS and OPM Final Human Resource Regulations" explains that the employees of the Inspector General, Transportation Security Administration, and Emergency Preparedness & Response Stafford Act are not included in any elements of the new system. *Id.* The website explains, "Secret Service is excluded from labor relations, and the Uniformed Division is not included in pay and classification elements of the System. Wage Grade employees are not included in pay and classification in initial implementation. In addition, the Senior Executives (SES) will be covered by a government-wide pay-for-performance system." *Id.* The website goes on to state, ominously, "It is important to note that employees not included in the Human Resource Management System right now may be included at a future date." *Id.*

52. 5 C.F.R. § 9701.706(a).

tions allow employees to petition for review by the full MSPB within thirty days of a decision by an MSPB AJ, and allow the director of OPM to appeal to the Board only if the "decision is erroneous and will have a substantial impact on a civil service law, rule, regulation, or policy directive."[53] The DHS personnel regulations will not affect the appeals rights of federal employees who are whistleblowers and/or victims of discrimination (e.g., mixed-case complaints under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, and complaints under the Uniformed Services Employment and Reemployment Rights Act and the Veterans Employment Opportunities Act).[54]

The agency must still prove the charge that is the basis of its adverse action decision by a preponderance of the evidence—a significant change to the regulations from those originally proposed by DHS and OPM.[55] Interestingly, one development in the DHS personnel regulations seems to liberalize the prior state of the law to favor employees. Under the regulations currently governing agencies other than DHS, management can remove, demote, or reassign an employee for poor performance under 5 U.S.C. § 4303 based upon a showing of substantial evidence—a considerably easier standard to meet than the preponderance of the evidence standard applicable to conduct-based actions.[56] However, under the new DHS regulations, no distinction is made between performance- and conduct-based actions.[57]

IV. Diminished Rights

The chief spokesman for the new DHS personnel regulations, Dr. Ronald P. Sanders, testified before the U.S. Senate about the new adverse action appeals system shortly before the regulations went into effect.[58] Dr. Sanders said that because the DHS mission requires a "high level of workplace accountability," Congress authorized DHS and OPM to waive the provisions of Title 5 of the U.S. Code dealing with

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53. 5 C.F.R. § 9701.706(f).

54. 5 U.S.C. § 9701(b)(3).

55. 5 C.F.R. § 9701.706(d). DHS and OPM initially proposed a reduced appellate burden of proof for the agency, but they were overcome in the "meet-and-confer process" by a united coalition of employees' groups and legislators. Dr. Ronald P. Sanders discussed this change in his Statement to the U.S. Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia Committee on Homeland Security and Government Affairs on February 10, 2005. *Unlocking the Potential within Homeland Security: The New Human Resources System Hearing befor Sen. Subcomm. on Oversight of Government Management, the Federal Workforce, and the District of Columbia*, 112th Cong. 6 (2005) [hereinafter Sanders Statement] (Statement of Dr. Ronald P. Sanders, Associate Director for Strategic Human Resources Policy, Office of Personnel Management). Sanders is one of the architects of the new DHS personnel regulations. *Id.* at 9.

56. 5 U.S.C. § 7701(c)(1)(A).

57. 5 C.F.R. § 7701(c)(1)(A). *See also* Sanders Statement, *supra* note 55, at 9.

58. Sanders Statement, *supra* note 55, at 9.

adverse actions and appeals, while assuring DHS employees "that they would continue to be afforded the protections of due process."[59] While the new DHS personnel regulations will certainly accomplish the former, by holding employees accountable for offenses they did or did not commit, employees' Due Process rights in many instances will be more rhetorical than real. We discuss below several of the key restrictions on employees' rights featured in the new DHS system, including a curtailed MSPB adjudication process; restricted vehicles for settlement; the creation of new mandatory removal offenses and a new mandatory removal bureaucracy; and the end of *Douglas* and its opportunity for penalty mitigation—though the latter provision is currently enjoined by the U.S. district court.[60]

A. *Curtailed MSPB Adjudication Process*

The new adjudication process that will govern DHS employees' appeals drastically curtails discovery possibilities. DHS will rush the appeals process so much that no real opportunity to develop a factual record is guaranteed. The new DHS regulations allow summary judgment to eliminate employees' long-held appeal rights.

1. Rocket Docket

The MSPB process (prior to any appeal to the full Board) is already vastly accelerated, in comparison with other federal administrative and judicial processes. Currently, AJs are pushed to complete case processing within 120 days, with one 30-day suspension of proceedings possible.[61] As a matter of course, in some cases, AJs grant brief additional stays of proceedings to allow for settlement negotiations, resolution of basic jurisdiction/timeliness questions, or extraordinary extenuating circumstances affecting one or both of the parties. Nonetheless, MSPB cases frequently take less than 180 days from the date of the appeal to the date of an initial decision by an AJ, even after a suspension and extensions.[62] Compare this to the EEOC, where it is not uncommon

59. *Id.* at 6.

60. Judge Collyer's decision in *Chertoff* emphasizes 5 U.S.C. § 9701(f)(2)(C), which provides that the new regulations must modify the personnel procedures only insofar as such modifications are designed to "further the fair, efficient, and expeditious resolution of matters involving employees of the DHS." 2005 WL 1941398, at *26. Judge Collyer explained, "The Chapter to which Congress was speaking when it addressed appeals of adverse actions and authorized changes that meet certain requirements was Chapter 77. The 'sense of Congress' was that DHS employees 'are entitled to fair treatment in any appeals that they bring in decisions relating to their employment.' 5 U.S.C. § 9701(f)(1)(A) . . . Clearly, Congress anticipated that any changes affecting employee appeals of adverse actions would occur within the context of Chapter 77—and that the statutory requirements of fairness, expedition, and efficiency would apply to such changes." *Id.*

61. 5 C.F.R. §§ 1201.22(b), 1201.28(b).

62. MSPB PERFORMANCE PLAN FOR FY 2005, *supra* note 38, at 4. The average case processing time, from appeal filing to an AJ's Initial Decision, hovers around 90 days currently—but this includes many cases that are dismissed without complete adjudication. *Id.* at 4.

that a federal employee and agency will lack even an assigned AJ (by an Acknowledgment and Order) for 180 days from the date of a hearing request—and the hearing process and time to receive a decision can easily stretch for years. Even cases before Department of Labor administrative law judges (ALJs), while accelerated like MSPB cases, might still take eight months from a hearing request to the conclusion of hearing—not counting the time it takes to receive an ALJ's decision, which can easily take years longer. Federal district court cases not on the "rocket docket" can take a year or more just to begin discovery after the suit has been filed, by the time the parties have finished litigating and obtaining rulings on all of their preliminary motions.

Under the new DHS standards, employees' time to vindicate their rights is drastically constrained compared to even the MSPB's currently expedited processing time. Now, before an employee realizes what is happening to him or her and has a chance to hire a representative and respond, he or she will be unemployed—despite possibly decades of dedication to the civil service and regardless of the merits or lack of merits of the agency's charges.

Employees are deeply disadvantaged at the outset by the shortened timeframes under the new DHS personnel regulations. Whereas the agency already has seasoned attorneys and personnel accustomed to and prepared for prosecuting adverse actions, the employee will likely be experiencing the process for the first time. Employees will not be likely to engage experienced representation quickly unless the employees have a premonition of their impending doom and schedule appointments before any actions are proposed.

Even if an employee does manage to meet timely with a prospective representative, the chosen attorney or union representative will not be able to study the case history and develop a sound legal strategy before he/she faces major deadlines. Given representatives' inevitable scheduling conflicts, the net result will be that attorneys or unions will be willing to undertake representation in fewer cases—further stacking the proverbial deck against employees' rights. Moreover, current MSPB Chairman Neil A. G. McPhie, a George W. Bush appointee, not known for being anti-agency, implied in his testimony before Congress that the Board currently does not have the resources to arrive at carefully reasoned decisions within the new regulations' timeframes.[63] In sum, Due Process suffers greatly under the new deadlines.The hurried processing under the new DHS personnel regulations begins with the pre-appeal process, in which employees will only be given fifteen days' notice before an adverse action can be taken, with a ten-day window (included in the

63. *The Countdown to Completion: Implementing the New Homeland Security Personnel System Hearing before the House Subcomm. on the Federal Workforce and Agency Organization*, 112th Cong. 6–7 (2005) (statement of Neil A.G. McPhie, MSPB Chairman) [hereinafter McPhie Statement].

total of fifteen days) to respond to a proposed adverse action.[64] Currently, agencies must give thirty days' notice before an adverse action, with a seven-day window to respond.[65] In practice, both the notice and response timeframes are routinely extended under the present regime, whenever an employee or employee's representative requests an extension of time to reply and requests documentation and information to include in the reply.

Employees' time for filing an MSPB appeal is shortened from thirty to twenty days.[66] Filing such an appeal is often difficult for an unrepresented party who is not accustomed to completing legal forms. Moreover, unrepresented employees may omit crucial bases of appeal and affirmative defenses because of the pressured filing time. Employees' representatives, even if they are hired timely, will scarcely have a chance to review a case before the statutory filing deadline has passed. Employees alleging constructive removals—for example, in instances of involuntary retirement due to an adverse reassignment, or forced resignation after unbearable harassment following whistleblower disclosures—will be more prone to filing late appeals, with the shorter deadlines. This will only foster more resource-consuming litigation before the Board as to whether employees are entitled to a waiver for filing untimely appeals due to mitigating circumstances.

Moreover, the new twenty-day deadline counts from the effective date of service,[67] unlike the present thirty-day clock, which starts ticking when the employee actually receives notice of the effective date of the adverse action.[68] Certified mail often takes five or more days to arrive, thereby effectively shortening an employee's filing deadline under the new DHS personnel regulations to approximately two weeks or less. In a procedure designed to guarantee an employee's right to Due Process, there can be no justification for beginning to count against an employee's filing deadline before he/she even knows of an adverse action decision—unless the process is really only designed to create the illusion of Due Process.

Additionally, the new DHS personnel regulations require that the entire MSPB process—from the appeal through the issuance of an initial decision by an MSPB AJ—be crammed into ninety days from date of filing,[69] cutting at least 25 percent from the present, already-

64. 5 C.F.R. §§ 9701.609(a), 9701.610(a).
65. 5 U.S.C. §§ 3502(e)(3), 4303(b)(1)(A), 4303(b)(2).
66. 5 C.F.R. §§ 9701.706(k)(1), 1201.22(b).
67. 5 C.F.R. § 9701.706(k)(1)).
68. 5 C.F.R. § 1201.22(b).
69. 5 C.F.R. § 9701.706(k)(7) (1995). Again, counting from the filing date, as opposed to the date of receipt of an appeal (as under the prior standards), this deadline represents another means of shortening the real time for the employees to obtain Due Process through the MSPB. *Id.*

abbreviated processing time.[70] The new DHS personnel regulations effectuate the goal of reduced processing time in part by making it more difficult for any party in contentious litigation to suspend case proceedings—where, currently, one thirty-day suspension is allowed at the AJ's discretion.[71] With the new regulations, all requests for suspension in DHS cases must be joint requests—the AJ is robbed of any discretion.[72] MSPB Chairman McPhie explained the unfairness of this change, noting, "[r]equiring that [case suspension] requests be jointly submitted effectively gives the non-moving party the authority to block a request that is based on a legitimate reason, such as illness of a party or representative."[73]

2. Hamstrung Discovery[74]

The biggest change effectuated to ensure rapid case processing is a set of drastic limitations on the MSPB discovery process. Apparently, the MSPB will be rushed to judgment—and with only partial information—under the new DHS personnel regulations. The current MSPB discovery

70. 5 C.F.R. §§ 9701.706(k)(7), 1201.22(b). In cases involving MROs, the case processing time is narrowed to 30 or 45 days. 5 C.F.R. § 9701.707(c)(2). Chairman McPhie noted—in the most understated possible manner—"It is not clear that this revision provides adequate time to conduct a thorough review." McPhie Statement, *supra* note 63, at 3. Likewise, the MSPB will be required to decide upon Petitions for Review (PFR) within 90 days of the close of the record. 5 C.F.R. § 9701.706(k)(7). As Chairman McPhie noted in his statement to Congress, currently there is no specific limit to the MSPB's time to consider PFRs, and the average time is 141 days. McPhie Statement, *supra* note 63, at 3. This rushed processing simply means that the Board will have to docket PFRs regarding DHS cases above other agencies' cases, regardless of the urgency of any particular matter. *Id.*

71. 5 C.F.R. §§ 9701.706(k)(4), 1201.28(b).

72. 5 C.F.R. § 9701.706(k)(4).

73. McPhie Statement, *supra* note 63, at 5.

74. The employees' unions challenged the reduced discovery opportunities, along with the new summary judgment provision, but Judge Collyer did not enjoin them. Judge Collyer's decision asked the question, "[D]id Congress authorize the Agencies to modify the internal regulations of MSPB, an independent agency?" She answered the question, holding: "Strange as it may sound, the Court concludes that the Agencies' interpreation of the [Act] to that effect is entitled to *Chevron* deference." *Chertoff*, 2005 WL 1941398, at *28. "Chevron deference" is explained elsewhere in Judge Collyer's opinion, as follows:

> The Court reviews the Agencies' interpretation of the [Act] under the now-familiar *Chevron* framework. Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. But, if the statute is silent or ambiguous with respect to the issue at hand, then the Court must defer to the Agencies so long as their "answer is based on a permissible construction of the statute." *Id.* at 843. At *Chevron* step two, "a 'reasonable' explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a 'permissible' construction is made; an explanation that is 'arbitrary, capricious, or manifestly contrary to the statute,' however, is not."

Id. at *10. (Citations omitted)

process, while quicker than in other forums, is notable for its openness. Parties conduct discovery largely without AJ intervention, making as many follow-up requests for documents as necessary within the strict timeframes allotted. The new DHS policies will limit parties to one set of discovery requests and, most egregiously, to two depositions.[75]

Though DHS can (and agencies usually do) adequately conduct discovery in this manner—deposing the employee and maybe one favorable witness, and setting forth a broad cross-section of blanket interrogatories and document requests—there are few cases that an employee can adequately develop with two depositions and one set of discovery requests. After deposing the proposing and deciding officials, an employee will have no depositions left to question any agency managers, human resources personnel, or other employees. The latter witnesses might not speak to the employee's attorney voluntarily, but might provide favorable testimony contradicting that of the instigators of the adverse action. The employee will not be able to conduct any follow-up written discovery after learning in an agency official's deposition about types of exculpatory documents of which the employee had no notice at the time of the initial discovery request.

Although an employee will be allowed to file a motion requesting additional discovery, such discovery may be granted only upon a heightened showing of "necessity and good cause."[76] AJs will no longer have discretion to consider the circumstances of each individual case in making discovery rulings. It will instead be based upon this objective requirement.[77]

To assess how the "necessity and good cause" standard will be applied, we look to similar standards in other contexts. For example, a similar standard is employed when judging whether a party should be able to depose opposing counsel during discovery or call him/her as a witness during trial. In this instance, the burden is on the party seeking testimony from opposing counsel to demonstrate propriety and need.[78] The Eighth Circuit Court of Appeals set forth the often-cited standard that discovery of opposing trial counsel is appropriate only when "(1) [n]o other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case."[79] The *Shelton* court noted that courts have long discouraged "the practice of forcing trial counsel to testify as a witness."[80] Several policy reasons for imposing this necessity and good cause inquiry include the "potential

75. 5 C.F.R. § 9701.706(k)(3)(iii).
76. 5 C.F.R. § 9701.706(k)(3)(iii).
77. *Id.*
78. Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).
79. *Id.*
80. *Id.* (citing Hickman v. Taylor, 329 U.S. 495, 513, 67 S. Ct. 385, 394 (1947)).

for disruption to the adversarial system, an increase in the time and costs of litigation, lowered standards of the legal profession, detraction from the quality of legal representation, and a chilling effect on attorney-client communications."[81] "Additional reasons to limit discovery of opposing counsel include its potential for harassment and disqualification of counsel."[82]

While there are apparently ample reasons for limiting deposition of or calling as a witness opposing counsel, such that the practice should be limited by "necessity and good cause," there are no similar reasons for limiting discovery in an MSPB adverse action appeal. While there is a long history of restricting the right to question opposing counsel, thorough discovery is generally encouraged in the federal courts and administrative legal system. Ample discovery often promotes a better understanding of the merits of a case before hearing and helps parties define disputed issues clearly, without burdening the judiciary or, in this case, the MSPB. Undoubtedly, the high rate of settlements at the MSPB[83] has been attributable, in large part, to the flexible discovery procedures that preexisted the new DHS system. The constriction of discovery under the new DHS personnel regulations is unwarranted and ill-advised.

3. Compromised Due Process

After narrowing the employee's opportunity for discovery and rushing the employee through the adverse action appeals process—which has always existed for his or her protection—the new DHS personnel regulations impose a major new limitation upon Due Process rights: employees' appeals will be subject to summary judgment.[84] After decades of civil servants having a right to a hearing in their adverse action appeals, the new DHS regulations eliminate this right. Indeed, as Chairman McPhie pointed out in his statement to Congress, AJs will be required—not merely allowed—to grant summary judgment where there are no material facts in dispute.[85] Because there has never been a case decided on summary judgment in an employee adverse action appeal, we can only imagine the facts that employees must allege to create a dispute, in order to reach hearing. It is likely, however, that without adequate discovery opportunities, many employees will have difficulty surviving summary judgment. The parties will reach fewer

81. Doubleday v. Ruh, 149 F.R.D. 601, 614 (E.D. Cal. 1993) (citing *Shelton*, 805 F.2d at 1327).

82. *Id.*

83. Every year from FY2001–2004, more than half of the cases settled, of the cases that were slated for adjudication (i.e., the cases that were not dismissed). MSPB PERFORMANCE PLAN FOR FY2005, *supra* note 38, at 6. *See infra* for additional discussion regarding the impact of the new DHS personnel regulations upon the settlement process.

84. 5 C.F.R. § 9701.706(k)(5). *See supra* note 74 and accompanying text.

85. McPhie Statement, *supra* note 63, at 4.

mutually agreeable settlements because more employees' appeals will be dismissed prematurely, resulting in more petitions for review and appeals to the Federal Circuit. The net result will likely be to clog the MSPB's and Federal Circuit's dockets even further, rather than to expedite processing.

B. The End of Douglas

One of the most striking differences between the regime before the enactment of the new DHS personnel system and the regime after this event would have been the virtual elimination of federal employees' ability to mitigate an unreasonable proposed penalty—a right that has existed since the 1960s.[86] Currently, the enforcement of the portion of the new regulations eliminating mitigation has been enjoined by U.S. District Court Judge Rosemary Collyer.[87] Nonetheless, the proposed and nearly executed scheme merits some discussion because DHS may seek to overturn Judge Collyer's decision.

Since 1981, literally thousands of decisions, from the U.S. Supreme Court to the MSPB and arbitrators (and in virtually every court in between), have invoked the *Douglas* factors, analyzing to what degree, if any, an employee's penalty for misconduct should be reduced by the twelve-factor test. For decades, federal employees from every agency have invoked *Douglas* in their oral and written replies to proposed disciplinary or removal actions, compelling management to give real weight to the seriousness of given offenses, whether penalties are being applied consistently, an employee's personal circumstances, and other considerations. Under *Douglas*, management is forced to consider a diversity of individualized, factual scenarios: the fact that twelve others who committed the same offense received a one-day suspension while removal is now being proposed; the fact that the employee's spouse died the day before the incident; or the fact that the incident was a one-time lapse in an unblemished thirty-five-year career.[88] Considering all of these factors, agencies have only been entitled to impose penalties within the "range of reasonableness," up to the maximum reasonable penalty.[89]

For DHS employees, the *Douglas* analysis would have been turned on its head. Under the DHS's regulations, "an arbitrator, adjudicating official or MSPB may not modify the penalty imposed by [DHS] unless such penalty is so disproportionate to the basis for the action as to be wholly without justification . . . When a penalty is mitigated, the max-

86. *See supra* part IV.

87. *Chertoff*, 2005 WL 1941398, at *25–27, 30.

88. These illustrate hypothetical, stark examples of common mitigating factors under *Douglas*.

89. *See Devall*, 178 F.3d at 1260 (explaining the "maximum reasonable penalty" standard).

imum justifiable penalty must be applied."[90] DHS might as well have sought to eliminate mitigation altogether.[91] Indeed, employees might be better off if mitigation were outright eliminated, rather than DHS's proposed scheme, because at least employees would not waste their limited resources trying to reach the impossible new standard of proof, in which even the agency's unreasonable penalty will be sustained if the agency states any rationale for it.

The "wholly without justification" standard is wholly without precedent in the labor and employment context. The standard recalls that applied under Rule 38 of the Federal Rules of Appellate Procedure, which allows a court of appeals to sanction an appellant if the court determines that the appeal is frivolous or wholly without merit.[92] Thus, it seems that employees must show that management's proposal is so obviously wrong as to be sanctionable—essentially a showing of bad faith—to have any mitigation considered in their cases. Yet, there is no precedent by which employees will be able to prove that the agency's decision is obviously wrong, because AJs, the Board, and arbitrators

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90. 5 C.F.R. § 9701.706(k)(6).

91. Dr. Sanders, the chief exponent of the new DHS personnel regulations, argues that this possibility for mitigation actually greatly expands employees' rights in performance cases, where they currently have no possibility of mitigation under *Lisiecki*. *See* Sanders Statement, *supra* note 55, at 9. However, the "wholly without justification" standard leaves so slim a chance of mitigation for employees that, we predict, this small concession to employees is nothing more than illusory. *Id.*

92. FED. R. APP. P. 38. For cases applying this standard, *see, e.g.*, Newhouse v. McCormick & Co., Inc., 130 F.3d 302, 305 (8th Cir. 1997) (appellant sanctioned where his persistence in continuing to litigate the question of whether or not he was entitled to an enhanced contingency fee, in the face of controlling precedents that removed every colorable basis in law for his position, made appeal both frivolous and "wholly without merit"); Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656–657 (9th Cir. 1984) (insurance claim based upon false statements, with negative statutory language and case law directly on point, is "wholly without merit," such that appeal of denied claim is "frivolous" and the "result is obvious"); Williams v. U.S. Postal Serv., 873 F.2d 1069, 1075 (7th Cir. 1989) (appeal was wholly without merit where it was frivolous and "unwarranted" and result was obvious in light of unequivocal district court order—a "forgone conclusion"; "wholly without merit" standard met where appellate counsel failed to cite any relevant cases, or make any arguments addressing district court's accurate exposition of the law, demonstrating "insistence on litigating a question in the face of controlling precedents which removed every colorable basis in law for the litigant's position."); In re Prop. Movers, L.L.C., 31 Fed. Appx. 81, slip op., 2002 WL 225836, *2 (4th Cir. 2002) (unpublished opinion) (finding appeal wholly without merit or frivolous where an appellant cites no relevant cases in response to a lower court's accurate exposition of the law, and where an appellant's arguments are irrelevant to the issues in dispute); Communications Workers of Am. v. Forward Telecasting, 1983 WL 2038, *5 (W.D. Wis.) (citing Amoco Oil Co. v. Oil, Chem. and Atomic Workers Int'l Union, 548 F.2d 1288, 1296 (7th Cir. 1977), *cert. denied*, 431 U.S. 905, 97 S. Ct. 1697, 52 L. Ed. 2d 389 (1977)). *See also, e.g.*, Dixon v. Coburg Dairy, Inc., 369 F.3d 811 (4th Cir. 2004) (First Amendment claim against private employer was so attenuated and insubstantial as to be "wholly devoid of merit"); Tolbert v. Branche, 1986 WL 1844, *3 (N.D. Ill.) (punishment "wholly without justification" may be cruel and unusual punishment under the Eighth Amendment); Erie R.R. Co. v. Solomon, 237 U.S. 427, 431, 35 S. Ct. 648, 59 L. Ed. 1033 (1915) (case "wanting in substance," "unsubstantial and frivolous" is "wholly devoid of merit").

have been applying reasonableness-based mitigation standards for more than twenty-five years.[93]

There is no guarantee under the new standards that the Board would allow mitigation in any circumstance, even for an employee (hypothetically) with decades of service, without disciplinary incident, who was fired for his first instance of being five minutes tardy. Short of this extreme example, the "wholly without justification" standard provides virtually no hope of achieving any penalty mitigation.

Judge Collyer's decision enjoining the regulations' provision all but foreclosing mitigation eloquently explains the court's rationale:

> The Court finds that the desire of the Agencies to restrict MSPB review results in a system that is not fair. First, the Court seriously doubts that by insisting on fairness, the Congress meant that DHS could discipline or discharge employees without effective recourse. Second, rather than afford a right of appeal that is impartial or disinterested, the Regulations put the thumbs of the Agencies down hard on the scales of justice in their favor. Under current law, MSPB reviews the reasonableness of agency adverse actions and will mitigate a penalty only when it is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable. This is, in fact, a generous standard in an agency's favor. Under the Regulations at DHS, however, MSPB would have to find that the penalty was "so disproportionate" as to be "wholly without justification." 70 Fed.Reg. at 5281. This would render an MSPB review almost a nullity and, since it is the MSPB decision that goes to the Federal Circuit and not the employing agency decision, see 5 U.S.C. § 1204(a), *Douglas, supra at* 284, it could effectively insulate DHS adverse actions from review. Such a procedure fails to measure up to the sense of Congress that "employees of the Department are entitled to fair treatment in any appeals," 5 U.S.C. § 9701(f)(1)(A), or Congress's express requirement that any modified procedures "further the fair . . . resolution of matters involving the employees of the Department." 5 U.S.C. § 9701(f)(2)(C). The Court concludes that the Agencies failed to apply the plain meaning of the statute in this regard and so are not entitled to *Chevron* deference.[94]

C. *Constricted Settlement Opportunities*

While alternative dispute resolution (ADR) is rising throughout the American legal system and judges at all levels are increasingly required to encourage parties to settle,[95] the new DHS regulations take

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93. Chairman McPhie acknowledged as much to Congress, arguing that the new regulations misapprise the current state of the law. McPhie Statement, *supra* note 63, at 3–4. Chairman McPhie observed that the Board does not routinely or willy-nilly second-guess managers' chosen penalties, contrary to the statements of those advocating the new regulations—but only mitigates penalties that clearly exceed the maximum reasonable penalty. *Id.*

94. *Chertoff*, 2005 WL 194138, at *27.

95. For example, the Dispute Resolution Act of 1998 § 4, 28 U.S.C. § 652, requires all federal district courts to adopt an ADR program for civil actions. *Id.* President William J. Clinton's May 1, 1998, Memorandum for Heads of Executive Departments and Agen-

the unjustified and bizarre step of closing off avenues of settlement between the agency and appealing employees. The regulations provide, "MSPB or an adjudicating official may not require settlement discussions in connection with any appealed action under this section."[96]

Until now, and still in non-DHS cases, MSPB AJs have typically issued Acknowledgment Orders to the parties when the AJs are first assigned to cases, which frequently include language such as the following:

> I DIRECT the agency to contact the appellant within 35 calendar days of the date of this Order to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. The agency must discuss concrete, specific settlement proposals with the appellant unless either party concludes in good faith that no compromise of any kind is possible. The agency must also be prepared to discuss with me the status of its settlement discussions.[97]

Thus, as a practical matter, agencies are never forced to settle, as long as they decline resolution in good faith. Yet, settlement provisions in Acknowledgment Orders do have the effect of preventing wasteful litigation, by requiring the parties at least to discuss the possibility of finding a middle ground—which parties accomplish more than 50 percent of the time.[98] The current system promoting settlement sometimes overcomes an agency's instincts toward obstreperousness, which will be rewarded under the new DHS policies.

In its explanation for limiting the MSPB's authority over settlement negotiations, DHS asserts that "we believe strongly that settlement should be a completely voluntary decision made by the parties on their own, based on their individual interests."[99] This rationale is disingenuous because agencies are never required presently to settle cases

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cies strongly encouraged the use of ADR by federal agencies and set up the Alternative Dispute Resolution Working Group to be convened by the attorney general. Memorandum from President William J. Clinton to the Heads of Executive Departments and Agencies (May 1, 1998). Likewise, nearly every state court, from Alabama to Wyoming, has adopted ADR requirements at both the trial and appellate levels. *See* Cornell University Law School, Legal Information Institute, *State Statutes Dealing with Alternative Dispute Resolution*, at www.law.cornell.edu/topics/state_statutes.html#alternative_dispute_resolution. *See also* Lawrence D. Connor, *The Proposed New Court Rules—Modern Dispute Resolution for Michigan*, MICH. B. J., (May 2000) (citing Vol. 79, FLA. R. CIV. P. 1.700 (1997); IND. R. P., Burns Ind. ADR 2.1 (1997); MASS. SUP. CT. R. 1:18 (1998); TENN. SUP. CT. R. 31).

96. 5 C.F.R. § 9701.706(i)(1). This is despite 5 C.F.R. § 9701.705 of the new regulations, giving lip service to the development of ADR methods to address employee-employer disputes arising in the workplace, including those that may involve disciplinary actions, and providing that ADR will be subject to collective bargaining.

97. Such orders are issued under the authority of 5 C.F.R. §1201.41(c), which allows an AJ to "initiate" settlement discussions "at any time." *Id.*

98. *See* MSPB PERFORMANCE PLAN FOR FY2005, *supra* note 38, at 6.

99. 70 Fed. Reg. 5,271, at 93.

involuntarily, and since the curtailed MSPB adjudication process already tilts the playing field more in favor of the agency.

The DHS regulations take the additional step of precluding the most likely official to encourage settlement—the MSPB AJ charged with the case—from engaging in any settlement discussions with the parties, requiring that all settlement talks be with "an official specifically designated by MSPB for that sole purpose."[100] There is nothing *per se* unreasonable about providing designated settlement judges to assist parties in negotiating cases, without prejudicing the judge assigned to a given case. Yet, foreclosing the involvement of the AJ assigned to the case is exceedingly rigid, inasmuch as how frequently the parties agree that an AJ's involvement in encouraging settlement is constructive. As a practical matter, the MSPB is not currently staffed to allow for a separate settlement judge in every case—or even nearly so.[101]

Preventing the AJ assigned to a case from encouraging resolution has a disproportionate impact upon the employee, who is often unrepresented and disempowered in MSPB proceedings. Many employees are prevented by escalating costs from pursuing an appeal through hearing with representation. The reduced likelihood of a successful outcome (because of the crippled discovery process, *inter alia*) will also mean a smaller chance of recovering attorney fees, only further diminishing the opportunity for employees to obtain legal representation. For such employees, early resolution is often their only opportunity to resolve satisfactorily an adverse action.

D. Mandatory Removal Offenses (MROs) and the New Mandatory Removal Bureaucracy[102]

The new DHS personnel regulations regarding MROs provide that the Secretary in his/her sole, exclusive, and unreviewable discretion will identify offenses that have an alleged direct and substantial impact on DHS's ability to protect homeland security.[103] The secretary has not completely identified the MROs to date but claims he "intends to consult with the Department of Justice in preparing the list of offenses."[104]

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100. 5 C.F.R. § 9701.706(i)(2).

101. *See* McPhie Statement, *supra* note 63, at 4.

102. Judge Collyer did not alter the MRO process embodied in the new DHS personnel regulations, holding that the agencies' interpretation of the legislative intent, while "extraordinary," was entitled to *Chevron* deference. *Chertoff*, 2005 WL 1941398, at *29.

103. 5 C.F.R. § 9701.606.

104. 70 Fed. Reg. 5,272 at 88 (DHS commentary on new personnel regulations) (citing Department of Homeland Security Human Resources Management System—Adverse Actions, 5 C.F.R. § 9701.607).

A preliminary list of potential MROs includes:

- Intentionally or willfully aiding or abetting an act, or potential act, of terrorism.
- Intentionally or willfully allowing the improper transportation or importation of illegal weapons (including, but not limited to, weapons of mass destruction) or materials to be used for the purpose of committing or contributing to a terrorist act.
- Intentionally or willfully allowing the improper entry of an individual into the United States who could compromise, or potentially compromise, homeland security.
- Soliciting or intentionally accepting a bribe or other personal benefit that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise.
- Intentionally or willfully misusing and/or divulging law enforcement sensitive or confidential information (including, but not limited to, classified material) to unauthorized recipients that compromises, or could compromise, homeland security, when the employee knew or reasonably should have known of the compromise or potential compromise, subject to applicable whistleblower and free speech protections.
- Intentionally or willfully engaging in activities that compromise, or could compromise, the information, economic, or financial infrastructure of the Federal Government, when the employee knew or reasonably should have known of the compromise or potential compromise.[105]

While no one doubts the gravity of such offenses, DHS employees and their advocates have taken issue with the process for enforcing the MRO policy. While in the criminal law context, the most serious crimes, the death penalty offenses, have more—not fewer—Due Process rights associated with them, DHS reverses this notion in the employment context. The economic "death penalty"—an MRO finding, which will not only end an employee's federal career, but likely his entire career—will be meted out more hastily and with fewer guarantees of fairness.

The MRO procedure is as follows: employees will have a brief fifteen-day period of advance written notice of a proposed adverse action, with a concurrent ten-day reply period.[106] An employee found to have committed an MRO will be removed following an expedited ap-

105. Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5,272, at 26–27 (Feb. 1, 2005) (to be codified as C.F.R. pt. 9701).

106. 5 C.F.R. §§ 9701.609(a), 9701.610(a). Under 5 C.F.R. §9701.609(a), a shorter five-day notice and reply period is provided, patterned after 5 U.S.C. § 7513, when there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed.

peals process.[107] This process culminates in an appeal before an "independent" DHS panel, the Mandatory Removal Panel (MRP), consisting of three members appointed by the secretary.[108]

One of DHS's few concessions to labor organizations participating in the meet-and-confer process is a requirement that "every proposed notice of mandatory removal be approved by a Departmental official before being issued to the employee."[109] According to DHS, "[t]his requirement, combined with the secretary's authority to mitigate the removal penalty" is sufficient to guard against "the potential for such abuse and assures consistency of application."[110]

Meanwhile, the secretary's appointed MRP is charged with holding a hearing after establishing "procedures for the fair, impartial, and expeditious assignment and disposition of cases . . ."[111] The MRP can only sustain or overturn a mandatory removal and does not have authority to mitigate the penalty, a right reserved to the secretary (like a governor issuing a pardon)—whose designee authorized the MRO charge in the first place.[112] The DHS decision can only be overturned if the employee proves harmful procedural error, a prohibited personnel practice, or a decision not in accordance with law.[113]

Thereafter, an employee has only a fifteen-day window of time to appeal the MRP's decision to the MSPB—and must show that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"; caused by procedural error; or "[u]nsupported by substantial evidence."[114] These standards of review are significantly higher than the Board's normal "preponderance of the evidence" review in other DHS cases. In other words, appealing the economic "death penalty" is much more difficult, and must be done more quickly, than appealing any other adverse action. Finally, the Board must decide the appeal within a mere thirty to forty-five days of receiving the parties' submissions—or the MRP's decision is considered affirmed, and an employee's only recourse is a Federal Circuit appeal.[115]

MSPB Chairman McPhie highlighted faults of the MRO appeals system in his testimony before Congress:

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107. 70 Fed. Reg. 5,272 at 88 (Feb. 1, 2005).

108. 5 C.F.R. §§ 9701.707(a), 9701.708(a).

109. 70 Fed. Reg. 5,272, at 27. *See Id.* at 88–89.

110. *Id.*

111. 5 C.F.R. §9701.707(b)(1). At the MRP hearing, the vote of the chair will be dispositive of any split between the other members. 5 C.F.R. §9701.707(b)(2).

112. 5 C.F.R. § 9701.707(b)(4).

113. 5 C.F.R. § 9701.707(b)(5).

114. 5 C.F.R. § 9701.707(c)(1). In addition, a member of the DHS secretary's MRP will substitute for a member of the MSPB if there is a "mixed case," involving an MRO adverse action and an affirmative defense of discrimination. 70 Fed. Reg. 5,272, at 95 (Feb. 1, 2005) (to be codified as 5 C.F.R. pt. 9701).

115. 5 C.F.R. § 9701.707(c)(2)–(4).

> [Subsection] 9701.707(c)(4) . . . provides that "If MSPB does not issue a final decision within the mandatory time limit [30 to 45 days], MSPB will be considered to have denied the request for review of the Mandatory Review Panel's (MRP) decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. § 7703." This provision is not consistent with the law. The Homeland Security Act of 2002 does not authorize DHS to confer jurisdiction on the U.S. Court of Appeals for the Federal Circuit over appeals from DHS decisions. When the MSPB fails to act on a petition for review of an MRP decision within a stated time, that MRP decision does not constitute the decision of the MSPB. It is unlikely that the Federal Circuit would take jurisdiction over an appeal when there has not been a final MSPB decision, although that determination is for the court to make. *See* 5 U.S.C. § 7703(a) ("[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision") (emphasis supplied).[116]

MSPB Chairman McPhie also noted that the MRO procedures reinstate an almost draconian, "double jeopardy" adverse action prosecution, which was replaced decades ago with the CSRA and fundamental fairness. Chairman McPhie testified:

> [S]ubsection 9701.707(d) provides that if a mandatory removal offense is not sustained, DHS may bring a second, non-MRO action against the employee based on the same conduct and on evidence that was not a part of the initial record. The possibility that an employee would be subject to multiple actions based on the same underlying conduct raises a substantial question of fundamental fairness. *Cf.* Byers v. Dep't of Veterans Affairs, 89 M.S.P.R. 655, ¶ 19 (2001) (an employee may not be disciplined more than once for the same conduct).[117]

Clearly, the MRO appeals system is designed to ensure close control—and unfettered ability to act—by the DHS secretary throughout, to the point that the Secretary oversteps his or her authority. Chairman McPhie commented that the MRP and the agency are so closely tied that the Board, exercising fundamental fairness, might not be able to give binding, precedential effect to the MRP's decisions.[118] Chairman McPhie's deep lack of faith in the objectivity of the new MRP is illustrative. He testified, "If the MRP is not deemed to be sufficiently independent of DHS for collateral estoppel purposes,[119] neither party would be precluded from relitigating (in a second action) all of the issues that were decided by the MRP."[120] Such repetitive litigation would lead to a profound waste of resources and inefficiency.

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116. McPhie Statement, *supra* note 63, at 6.
117. *Id.*
118. *Id.*
119. *See* Wright v. Dep't of Transp., 89 M.S.P.R. 571 (2001).
120. McPhie Statement, *supra* note 63, at 6.

In sum, apart from political considerations, there appears to be no demonstrated need for MROs or the new MRP bureaucracy. Most, if not all, of the potential MROs would probably constitute criminal offenses for which the employee could be indefinitely suspended while being prosecuted. It is hard to believe that such offenses, if proven, would not result in the sustaining of a penalty of removal by the MSPB or an arbitrator under a collective bargaining agreement. It is also hard to discern how this paternalistic MRO appeals system protects employees' Due Process rights, especially in comparison to the present, independent adjudicatory system. The MRP will be beholden to the same secretary whose office brought the MRO, economic "death penalty" charges, and has a reduced burden of proof on appeal to the Board and Federal Circuit.

V. Conclusion

Across the generations, many talented Americans have joined the civil service with a desire to help build their country, although their compensation has never competed with that available in the private sector. These civil servants have labored for decades, in many cases, because they have known that they could count on stability in their jobs, unaffected by the whims of politicians or the latest trends. Now, the new DHS personnel system threatens to undermine federal employees' appeals rights that have developed over more than a century—thus inspiring insecurity in the same employees whom we count on now more than ever to protect our security. If the DHS personnel system becomes the norm across the government, many of America's best and brightest will look for employment elsewhere.[121] Without a real chance for merit-driven appeals, the appellate process will lose credibility, employees will lose hope, and all Americans will lose the protection of an impartial government, run by employees for the public benefit, not to please politicians or to protect their paychecks.

121. A major study by the Partnership for Public Service and the Institute for the Study of Public Policy Implementation, which was conducted in December 2004, after the new DHS personnel regulations were proposed, found that DHS employees gave their employer among the lowest ratings given by any group of federal agency employees—29th out 30 federal agencies surveyed. *See Best Places to Work in the Federal Government, available at* www.bestplacestowork.org/.