COMMENT

RE-BALANCING THE PENDULUM: A RECOMMENDATION FOR CIVIL SERVICE REFORM

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TABLE OF CONTENTS

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INTRODUCTION

The civil service system and its inability to efficiently address poor performing federal employees is increasingly at the forefront of political conversations, frustrations, and debate; however, this is not a new development.[1] Historically, under the spoils system, whether employees were hired or fired coincided with their political affiliation and support of the party in power, not merit.[2] This arbitrary hiring and firing practice created substantial turnover, chronic lack of institutional knowledge, and widespread incompetency within civil service.[3] To correct the problem, Congress instituted civil service reforms that required merit-based employment actions.[4] These protections, however, created a tenure-like system where federal employees are rarely terminated for poor

1. Andrew Baran, *Federal Employment—The Civil Service Reform Act of 1978—Removing Incompetents and Protecting "Whistle Blowers,"* 26 WAYNE L. REV. 97, 97 (1979); *see also* 5 U.S.C. § 4301(3) (2012) ("'Unacceptable performance' means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.").

2. *See* U.S. MERIT SYS. PROT. BD. (MSPB), WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? 4 (2015), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber= 1166935&version= 1171499&application=ACROBAT [hereinafter MSPB, WHAT IS DUE PROCESS] (internal quotation marks omitted) (stating that it was called the "spoils system" because federal positions were provided as payment to political supporters as "spoils of war"); *see also* Robert G. Vaughn, Symposium, *Ethics in Government and the Vision of Public Service*, 58 GEO. WASH. L. REV. 417, 420–21 (1990) (explaining that because employees were hired based on political contributions, employees felt an obligation to the person or party that hired them rather than an obligation to the public).

3. MSPB, ADDRESSING POOR PERFORMERS AND THE LAW 3 (2009), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=445841&version=446988&application=ACROBAT [hereinafter MSPB, ADDRESSING POOR PERFORMERS]; *see also Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1625 n.39 (1984) (finding that the spoils system caused federal employees to frequently change jobs, resulting in the loss of all the skills, knowledge, and expertise that is gained from experience).

4. MSPB, WHAT IS DUE PROCESS, *supra* note 2, at 5–10 (discussing the effects of the Pendleton Act, Lloyd-La Follette Act of 1912, Veterans' Preference Act of 1944 (VPA), and the Civil Service Reform Act of 1978 (CSRA) on civil service reform).

performance.[5]

For example, in 2014, employees at over 100 U.S. Department of Veterans Affairs (VA) medical facilities used fraudulent wait time records and secret wait lists to misrepresent how long veterans waited for an appointment to receive medical treatment.[6] At the VA, employees' performance goals are tied to whether veterans receive timely medical care.[7] Veterans are supposed to receive medical treatment within fourteen to thirty days of requesting an appointment.[8] However, this did not occur in reality. As a result of VA employees manipulating wait time data and maintaining secret records, 177,000 U.S. veterans were forced to wait months to receive medical attention and over forty of them died waiting for their appointments.[9]

Of the 280,000 VA employees involved in the scandal, only eight were punished.[10] The director of the Phoenix VA's Health Care System is currently the only person who was fired; however, she was fired for receiving "inappropriate gifts," not for her role in the wait time

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5. Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 945 (1976).

6. *See Veterans Affairs Employees Falsified Data to Hide Delays, USA Today Reports*, HUFFINGTON POST (Sept. 30, 2014, 5:59 AM), http://www.huffingtonpost.com/2014/07/31/veterans-affairs-false-data_n_5639491.html (stating that 109 U.S. Department of Veterans Affairs (VA) medical centers manipulated wait time data and 110 VA medical centers kept secret records that documented the actual wait times between requesting and receiving medical care).

7. *See* David Lawder, *Obama's Veterans Agency Nominee Vows Corporate-Style Discipline*, REUTERS (July 22, 2014, 7:12 PM), http://www.reuters.com/article/2014/07/22/us-usa-veteransaffairs-nominee-idUSKBN0FR2KT20140722 (finding that VA employees manipulated waitlist times to create the appearance that veterans' medical appointments were scheduled in a timely fashion, allowing employees to meet performance goals and receive bonuses); *see also* Tom Cohen & Curt Devine, *Performance Reviews at Troubled VA Showed No Bad Senior Managers*, CNN (June 20, 2014, 10:08 PM), http://www.cnn.com/2014/06/20/politics/va-scandal-bonuses/ (illustrating that the performance goals of VA employees who schedule veterans' medical appointments are tied to whether the VA waiting list system shows that veterans received their requested appointments within 14 days).

8. *See* Cohen & Devine, *supra* note 7; *see also* Scott Bronstein & Drew Griffin, *A Fatal Wait: Veterans Languish and Die on a VA Hospital's Secret List*, CNN (Apr. 23, 2014, 9:19 PM), http://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/ (noting that VA patients ought to receive care within 14 to 30 days).

9. *See, e.g.*, Cohen & Devine, *supra* note 7 (finding that 177,000 veterans waited more than 60 days for an appointment and over 43,000 veterans waited more than 120 days); *see also* Lawder, *supra* note 7.

10. *See* Dave Philipps, *Few People Lost Jobs with V.A. in Scandal*, N.Y. TIMES (Apr. 22, 2015), http://www.nytimes.com/2015/04/23/us/few-people-lost-jobs-with-va-in-scandal.html?_r=0 (noting the VA fired one employee, allowed one employee to retire in lieu of termination, initiated termination proceedings for one employee, and suspended five employees for up to two months).

manipulation scandal.[11] Moreover, in the fiscal year immediately preceding the scandal, all 470 VA senior managers received performance appraisal ratings of "fully successful" or better.[12] Additionally, 78% of the VA senior managers received performance appraisal ratings of "outstanding" or "exceeds fully successful," which qualified them for extra pay or additional compensation.[13] In other words, 366 of the 470 VA senior managers qualified for additional compensation even though more than forty U.S. veterans died waiting for appointments.[14] The VA scandal illustrates that the pendulum of civil service protection has swung too far and has made it too difficult for managers to remove poor performing employees; therefore, it is time to consider additional civil service reforms.[15]

Part I of this Comment provides a background of the civil service system by discussing the history and evolution of civil service laws, rules, and regulations. Additionally, Part I explains why a federal employee's job is protected by constitutionally granted due process rights and answers the question "what process is due"?[16] Part II provides a background of the current process for addressing poor performing federal employees, explains the issues associated with initiating an adverse employment action under Chapter 75, offers an overview of why Congress enacted Chapter 43, and offers reasons for Chapter 43's failure.[17] Part III highlights the current need for civil service reform and offers three primary explanations for why managers are reluctant to address poor performing employees: the

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11. *See* Emily Wax-Thibodeaux, *After a Year of Frustration, New Bill Would Make it Easier to Fire VA Employees*, WASH. POST (Apr. 23, 2015), http://www.washingtonpost.com/news/federal-eye/wp/2015/04/23/after-a-year-of-frustration-new-bill-would-make-it-easier-to-fire-va-employees/ (indicating that the director's inappropriate gifts included $729.50 for five Beyoncé concert tickets and a $11,000 trip to Disneyland that included an eight-night stay for six of her family members).

12. *See* Cohen & Devine, *supra* note 7.

13. *Id.* The VA Pittsburgh Health Care System regional director received $63,000 in bonuses even though his center was responsible for a legionella outbreak that resulted in six patient deaths. *Id.* Furthermore, a VA regional director received $53,000 in bonuses even though his average disability claim processing time increased to "inexcusable levels." *Id.* Even though his center exposed veterans to hepatitis B and C, a VA Ohio medical center director received over $10,000 in bonuses. *Id.*

14. *See id.*; *see also supra* note 9 and accompanying text.

15. *See* Eric Katz, *Firing Line*, GOV'T EXEC. http://www.govexec.com/feature/firing-line/ (last visited May 17, 2016) (stating that Capitol Hill is currently trying to loosen the protections afforded to federal employees).

16. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

17. *Compare* 5 U.S.C. §§ 4303(b)(1)(A)–(D) (2012) (delineating the procedure for initiating an adverse employment action based on an employee's "unacceptable performance"), *with id.* § 7513 (delineating the procedure for initiating an adverse employment action based on an employee's "efficiency of service").

burdensome removal process; the current performance appraisal systems' limitations and inaccuracies; and the fear that upper-management will not support the managers' removal action. Finally, Part IV provides three recommendations for civil service reform and a corresponding plan to implement each recommendation: (1) managers' performance ratings should be based on managerial proficiencies rather than technical competencies; (2) agencies should implement a quarterly performance appraisal system, instead of annual or semi-annual, to increase the utility of the evaluation to both the employee and manager; and (3) agencies should incorporate a performance improvement plan (PIP) into an employee's quarterly performance appraisal, if he demonstrates poor performance, to reduce the amount of time it takes a manager to remove a poor performer.

I. BACKGROUND

A. History

Prior to 1883, federal employees were hired, retained, and fired based on their political affiliations and corresponding support for the political party in power rather than capabilities or competence.[18] Then, Congress passed the Pendleton Act of 1883 (the Act)[19] to reform the spoils system by focusing on civil service hiring practices.[20] Specifically, the Act required agencies to hire federal employees based on competency and merit instead of political affiliations and contributions.[21] Additionally, the Act established the Civil Service Commission (CSC) and assigned CSC the responsibility of ensuring that the government adheres to merit-based principles established by the Act.[22] The Act, however, failed to establish a mechanism prohibiting arbitrary firing of federal employees.[23] Therefore, although agencies were required to hire employees based on merit, agencies could

18. Jonathan Fineman, *Cronyism, Corruption, and Political Intrigue: A New Approach for Old Problems in Public Sector Employment Law*, 8 CHARLESTON L. REV. 51, 59 (2013).

19. The Civil Service Act of 1883, 22 Stat. 403 (1883).

20. *See id.* § 2(2), 22 Stat. at 403–04 (mandating that civil service hiring practices must be based on merit).

21. *See id.* (stating that prospective employees should be hired based on an "open, competitive examination" of the employee's "relative capacity and fitness" to perform the job).

22. *Id.* § 1, 22 Stat. at 403.

23. *See* William V. Luneburg, *The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*, 78 KY. L.J. 1, 6–7 (1990) (explaining that civil service reformers believed firing restrictions were unnecessary because the merit-based hiring requirement removed the manager's incentive to fire a competent employee since the manager could not replace the terminated employee with a political cohort in return for his loyalty).

still arbitrarily fire employees, which created a gap in the law.[24]

In 1897, President McKinley issued Executive Order 101 to close the gap between hiring and firing practices by mandating that a federal employee could only be removed from civil service for cause.[25] In other words, an employee could only be removed from his civil service position for legitimate, non-political reasons.[26] Congress subsequently codified this requirement in the Lloyd-La Follette Act of 1912[27] to ensure that federal employees are both hired and fired based on merit.[28] Specifically, the Lloyd-La Follette Act mandated that federal employees could only be removed for causes that will promote efficiency of civil service.[29] By stipulating that federal employees could only be removed for cause, the Lloyd-La Follette Act provided federal employees with what was later recognized as a property interest in continued employment, which triggers constitutional due process protection.[30]

In 1944, Congress passed the Veterans' Preference Act (VPA),[31] which granted federally employed veterans extensive rights to challenge adverse employment actions, including the right to file an appeal with CSC and provide CSC with documentation to support the appeal.[32] Based on the

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24. *See id.* (stating that the Pendleton Act created a merit-based hiring system, but left a "back door" open for managers to fire employees arbitrarily).

25. U.S. CIVIL SERVICE COMM'N (CSC) ANN. REP. XVIII 282 (1901) (directing that civil service firing practices must be based on just cause). *See* Frug, *supra* note 5, at 956, 956 n.17; *see also* The Civil Service Act of 1883, § 2, 22 Stat. at 403–04 (1883) (mandating that civil service hiring practices must be based on the prospective employee's merit).

26. *See* Frug, *supra* note 5, at 956 (reiterating that President McKinley's executive order prohibited the firing of federal employees for any reason other than just cause).

27. The Lloyd-La Follette Act, § 6, 37 Stat. 555 (1912).

28. *Id.*

29. *Id.*; *see also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538–39 (1985) (limiting for-cause removal to inefficient service or malfeasance).

30. Federal employees who possess a legitimate claim of entitlement to continued employment have a property interest in their employment. *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 576–77 (1972). Furthermore, because Congress deemed a federal position a property interest of the employee holding that job, the government must follow due process requirements in order to deprive that employee of his job. *See Loudermill*, 470 U.S. at 538–39; *see also* U.S. CONST. amend. V (providing that the government may not deprive a person of a property right without due process). Should the government seek to remove the employee, the government must provide the employee with written notice and the opportunity to respond to the proposed removal. *See Loudermill*, 470 U.S. at 546 ("The essential requirements of due process . . . are notice and an opportunity to respond.").

31. VPA, 58 Stat. 387 (1944).

32. Initially, under the Lloyd-La Follette Act, CSC could investigate suspected abuses of civil service laws by requesting and reviewing the employee's removal file. *See* The Lloyd-La Follette Act, § 6, 37 Stat. 555 (1912). The CSC's authority, however, was limited to ascertaining whether the removal was procedurally compliant with civil service laws, not

evidence presented, CSC would issue findings and recommendations regarding the adverse employment action.[33] The VPA provided eligible veterans with adverse action protection and access to an appeal process; however, it did not provide similar protections to civil service employees without preferential status.[34] In an effort to close this gap, President Kennedy issued Executive Order 10,988 in 1962 to provide similar adverse action rights to all civil service employees.[35]

Prior to 1978, Congress enacted civil service legislation in a "patchwork" fashion to address specific issues as they arose.[36] In 1978, Congress passed the Civil Service Reform Act (CSRA)—the most comprehensive civil service reform since the Pendleton Act.[37] The CSRA embodied and codified the merit-based principles delineated in prior civil service laws, prohibited personnel practices, and, in response to Watergate, delineated procedures to protect federal employees from whistleblower retaliation.[38] Additionally, the CSRA abolished CSC and divided its duties between two entities: the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB).[39] OPM, which inherited the CSC's

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whether the agency had sufficient cause for the employee's removal. *See Developments in the Law*, *supra* note 3, at 1630–31; *see also* MSPB, WHAT IS DUE PROCESS, *supra* note 2, at 7 (defining adverse actions as "discharges, suspensions of more than 30 days, furloughs without pay, reductions in rank or compensation, or debarment"). This changed when Congress passed the VPA. *See* 58 Stat. at 391 (stating that the VPA provided CSC with authority to ascertain whether a veteran is eligible for reappointment).

33. Although agencies initially were not required to comply with the CSC's recommendations in adverse action appeals, Congress amended the VPA in 1948 to require agencies to comply with the CSC's provided recommendations in adverse action appeals. MSPB, WHAT IS DUE PROCESS, *supra* note 2, at 7–8.

34. *Id.* at 7–9.

35. Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 19, 1962).

36. *See* MSPB, WHAT IS DUE PROCESS, *supra* note 2, at 8 (emphasizing that Congress created a state of confusion regarding civil service laws because it retroactively enacted civil service legislation to address different civil service issues at different times).

37. CSRA, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.); *see Developments in the Law*, *supra* note 3, at 1632 (articulating that the CSRA was a comprehensive reform designed to restructure the federal workforce).

38. Mark D. Laponsky, *Use and Abuse of Performance Appraisals Under the Civil Service Reform Act*, 3 LAB. LAW. 287, 288 (1987); *see* 5 U.S.C. §§ 2302(b)(1)–(13) (2012) (stating that prohibited personnel practices include discrimination and retaliation against whistleblowers); *see also* Julie Jones, Comment, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1141 (2003) (explaining that Congress passed the CSRA in response to Watergate to prevent agencies from misusing their power to retaliate against whistleblowers).

39. *See* Laponsky, *supra* note 38, at 287–89; Melissa R. O'Rourke, Comment, *Challenges to Performance Appraisals of Federal Employees Under the Civil Service Reform Act of 1978*, 38 S.D. L. REV. 341, 346 (1993) (indicating that CSC was abolished because it had "conflicting

managerial and administrative duties, is responsible for coordinating government-wide personnel management policies.[40] Currently, although OPM seemingly leaves the length of the appraisal period to the discretion of the agency, OPM's performance appraisal regulations provide that the appraisal period generally shall be twelve months, so employees are rated annually.[41] MSPB, on the other hand, is an independent adjudicative agency that is responsible for ensuring that agencies adhere to merit systems principles and adjudicating challenges to civil service laws as challenges arise.[42]

Moreover, the CSRA distinguished between the requirements for initiating adverse actions against poor performing employees under Chapter 43 versus Chapter 75.[43] If an agency wants to take an adverse action against an employee for poor performance, deciding which Chapter to use will affect the type of performance deficiency the agency must prove, the required level of pre-termination and post-termination procedure, and the burden of proof the agency must meet to justify its decision to take an adverse action.[44]

A. Constitutional Due Process Rights

One of the significant ramifications of the Lloyd-La Follette Act of 1912 was that it created a property interest in a federal employee's continued employment by requiring for-cause removal, as opposed to a private sector

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functions," diminishing the CSC's ability to uphold merit system principles effectively); *see also* Luneburg, *supra* note 23, at 22 (indicating that the CSRA created the Federal Labor Relations Authority "to oversee federal labor-management relations"); Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 615, 647–50 (1982) (explaining that the CSRA created the Office of Special Counsel to protect federal whistleblowers).

40. *See Developments in the Law*, *supra* note 3, at 1635; *see also* Laponsky, *supra* note 38, at 288 (citing 5 U.S.C. §§ 1101–05).

41. *See* 5 C.F.R. §§ 430.206(a)(1)–(2) (2012) (indicating that the Office of Personnel Management (OPM) regulations allow a performance evaluation period that is longer than twelve months, but are silent regarding a shorter performance evaluation period); *see also id.* § 430.207(b) (articulating that agencies should conduct "one or more progress reviews during each appraisal period").

42. *See Developments in the Law*, *supra* note 3, at 1635 (explaining that MSPB is a quasi-judicial entity responsible for protecting the civil service system from abuse); *see also* Laponsky, *supra* note 38, at 288 (citing 5 U.S.C. §§ 1201–09).

43. *Compare* 5 U.S.C. §§ 4301–03 (delineating the procedure for taking an adverse action against an employee based on unacceptable performance), *with id.* §§ 7511–13 (delineating the procedure for taking an adverse action against an employee based on misconduct or to promote efficiency of service).

44. *See generally* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 6–7 (describing the differences between Chapter 43 and Chapter 75 performance-based actions).

employee who can be removed at will.[45] The Supreme Court, however, did not recognize this right until its 1972 decision in *Board of Regents v. Roth.*[46] Since the Act bestowed federal employees with a property interest in continued employment, an employee cannot be deprived of that property interest without due process.[47] Therefore, the question becomes, "what process is due"?[48]

The Supreme Court determined that the essential requirements of due process are notice and the opportunity to respond;[49] however, the circumstances of the situation also affect the sufficiency of the process.[50] Courts have consistently held that due process must be flexible because not every situation calling for procedural protections calls for the same level of procedure; therefore, protections should correspond to the particular situation.[51] To provide a flexible structure for determining the sufficiency of due process in a given situation, the Supreme Court in *Mathews v. Eldridge*[52] identified three relevant factors to consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[53]

Applying the *Mathews* factors to civil service employment requires balancing two competing interests: the federal employee's interest in retaining employment; and the government's interest in efficiently and

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45. *See supra* notes 28–30 and accompanying text.

46. *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 566–67 (1972) (recognizing that a tenured teacher has a legitimate claim of entitlement to continued employment, and therefore cannot be terminated unless his removal is for cause).

47. *Id.*

48. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

49. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (finding that a tenured employee "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity" to explain why the proposed action should not be taken).

50. *See* Cafeteria & Rest. Workers Union Local 473 v. McElroy (*Cafeteria Workers*), 367 U.S. 886, 895 (1961) (articulating that "time, place, and circumstances" are relevant factors to determine sufficiency of due process); *see also* Goss v. Lopez, 419 U.S. 565, 582–83 (1975) (holding that a student, prior to a 10-day school suspension, must be provided notice, a basis for the accusation, and an opportunity to explain his side of the story; there is no reason to delay the time between notice and the informal hearing, given the short suspension).

51. *Morrissey*, 408 U.S. at 481; *Cafeteria Workers*, 367 U.S. at 895.

52. Mathews v. Eldridge, 424 U.S. 319 (1976).

53. *Id.* at 335.

fairly removing poor performing employees.[54] An employee's interest in retaining employment is undoubtedly significant, not only because it is the source of his livelihood, but also because it will likely be difficult for an employee to obtain employment elsewhere once he is terminated.[55] Furthermore, although employees are entitled to post-termination process, they could be "left in limbo" for a considerable period of time between termination and a decision at the post-termination hearing.[56] During this time, the employee is vulnerable to personal and economic strife due to lost wages and the potential inability to secure another job or access unemployment benefits (if terminated for cause).[57]

Likewise, the government's interests in expeditiously removing a poor performing employee and minimizing the administrative burdens associated with the removal process are also high.[58] Because the government's ability to enforce effectively performance standards "is central to its ability to manage its operations" and effectively serve the public, it cannot afford to retain poor performing employees.[59] Retaining a poor performing employee will adversely affect the government by reducing workplace morale, cultivating conflict, and impairing agency efficiency.[60] Furthermore, an administratively burdensome removal process will deter managers from disciplining incompetent employees, strain high performing employees, and consume scarce fiscal and administrative resources.[61]

While federal employees and the government both have significant interests, the *Mathews* due process analysis attempts to balance the substantial and competing interests of the employee and the government.[62] *Mathews* examines the fairness and reliability of an agency's pre-termination procedures, as well as "the probably value, if any, of additional procedural

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54. *See Loudermill*, 470 U.S. at 542–43.

55. *Id.*

56. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 549 (1985) (Marshall, J., concurring) (indicating that nine months passed between when Loudermill was terminated and when Loudermill received a decision at his post-termination hearing).

57. Employees terminated for cause may experience various forms of personal hardship, including the loss of income and the inability to fulfill basic needs and obtain alternative employment. *Id.* at 549 (Marshall, J., concurring) (noting that many states compound the problem by "deny[ing] unemployment compensation to workers discharged for cause").

58. *Id.* at 542–43.

59. *See* Frug, *supra* note 5, at 994 (emphasis omitted).

60. *See* Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (explaining that the government's interest is great in expeditiously removing poor performing employees because retaining inefficient employees imposes delays and administrative costs, as well as adversely affects workplace discipline, morale, and efficiency).

61. *Id.* at 168.

62. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

safeguards."[63] It examines these factors in order to minimize the error of erroneously terminating a federal employee.[64]

Whether due process is sufficient is also based on the totality of procedural safeguards, including the employee's pre- and post-termination opportunities and procedures to respond to the charges.[65] Providing both a pre-termination opportunity to respond and a post-termination review of agency decisions allows the government to protect a merit-based civil service system without infringing on an employee's constitutionally granted due process rights.[66] Because the pre-termination and post-termination procedures are "coupled," the nature and quality of each of the procedures will affect the sufficiency of the other.[67] The pre-termination procedure should be expeditiously offered and only needs to include oral or written notice of the proposed action, the employer's explanation of its evidence, and an opportunity for the employee to respond to the proposed action.[68] The opportunity to respond is intended to allow the employee "to present his side of the story" and preliminarily determine whether the adverse action is inappropriate or malicious; it does not need to be elaborate because it is not intended to conclusively determine whether the adverse action was fitting.[69] Conversely, the post-termination procedure requires a more comprehensive hearing; however, courts have not defined what a more comprehensive hearing entails.[70]

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63. *Id.* at 335, 343.

64. *Id.* at 341–43; Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–43 (1985).

65. *Loudermill*, 470 U.S. at 547–48; *see Arnett*, 416 U.S. at 171 (finding that no due process rights require a pre-termination hearing).

66. *See* MSPB, WHAT IS DUE PROCESS, *supra* note 2, at 17 (explaining that whether a termination procedure is constitutional turns on both the pre- and post-termination process, as part of the "'totality' of the procedures" provided; therefore, if the government terminates a poor performing employee, but provides the employee with both pre- and post-termination procedures, the government can advance a merit-based civil service system without violating an employee's due process rights).

67. *See, e.g.*, *Loudermill*, 470 U.S. at 545–48 (concluding that a state government employee removed for cause is entitled to a limited pre-termination hearing and a more comprehensive post-termination hearing).

68. *Id.* at 546.

69. *See id.* at 545–46 (stressing that a pre-termination hearing serves as "an initial check against mistaken decisions"; it is used to determine whether it is reasonable "to believe that the charges against the employee are true"); *see also* Gilbert v. Homar, 520 U.S. 924, 929 (1997) (stating that state government employees are only "entitled to a very limited hearing prior to . . . termination").

70. *See Homar*, 520 U.S. at 929, 936 (remanding the issue of sufficient post-suspension hearing to the lower court); *see also Cafeteria Workers*, 367 U.S. 886, 895 (1961) (indicating that due process requirements are not inflexible; rather, what process is due depends on the circumstances of a given situation).

II. ADDRESSING UNACCEPTABLE PERFORMANCE

A. Chapter 75

Currently, Title 5 of the United States Code provides managers with two mechanisms for taking adverse actions against an employee whose performance is unacceptable—Chapter 43 and Chapter 75.[71] Prior to the CSRA, Chapter 75 was the only statutory mechanism available to remove poor performing employees, but that was not its specific design—rather, it was designed to govern broadly agency actions against employees for misconduct and performance issues.[72]

Chapter 75 requires agencies to prove, by a preponderance of the evidence, that removing the employee will increase "efficiency of service."[73] In 1976, Congress discovered that only 226 out of 2,833,000 federal employees (0.0079%) were fired for unacceptable performance under Chapter 75.[74] Congress believed that Chapter 75's high burden of proof and stringent removal standard made it "virtually impossible" to fire poor performing employees, and specifically attributed Chapter 75's ineffectiveness of its removal procedures being too complex, rigid, burdensome, and antiquated to effectively address poor performing employees.[75] To rectify this, Congress investigated possible civil service reforms to make it easier for agencies to address poor performing employees, and in 1978, Congress enacted Chapter 43 as part of the CSRA to remedy the defects of Chapter 75.[76]

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71. Although there are procedural differences between the two chapters based on their respective focuses, there are also procedural commonalities—both chapters mandate that a federal employee be entitled to "30 days' advance written notice of the proposed action," a reasonable opportunity to respond to the proposed action orally and in writing, representation by an attorney, a written decision, and the ability to file an appeal with MSPB to attempt to overturn an agency's written decision. *See* 5 U.S.C. §§ 4303(b)(1)–(2) (2012*)*; *id.* §§ 7513(b)(1)–(4).

72. *See id.* §§ 7511–13; *see also* Patricia A. Price, *Dismissals of Civil Service Employees for Unacceptable Performance*, 29 HOW. L.J. 387, 389 (1986); MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 4, 6.

73. *See* Price, *supra* note 72, at 389–91.

74. *See* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 4; OPM, HISTORICAL FEDERAL WORKFORCE TABLES, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/total-government-employment-since-1962/ (last updated Mar. 27, 2015) (finding that two years before Congress enacted the CSRA there were 2,833,000 executive branch federal employees and 5,002,000 total federal employees); *see also* Price, *supra* note 72, at 389 (suggesting that Chapter 75 made it difficult—even "virtually impossible"—to fire poor performing employees).

75. S. REP. NO. 95-969, at 3 (1978); *see* Price, *supra* note 72, at 389–91.

76. S. REP. NO. 95-969, at 2 (1978); *see also* Robert G. Vaughn, *Federal Employment*

B. Chapter 43

Congress created Chapter 43 to provide agencies with a streamlined, merit-based removal process that was designed to exclusively address poor performance.[77] First, Chapter 43 imposed a new removal standard that allows agencies to terminate an employee if the employee fails to meet his established performance requirements; this new standard attempted to create a more concrete relationship between poor performance and the employee's corresponding termination.[78] Establishing this direct relationship would make it easier for agencies to remove poor performing employees because if an employee fails to meet the established performance requirements, then by definition, his performance is unacceptable and removal is justified.

Second, Chapter 43 sought to make it easier to remove poor performing employees by reducing the agency's burden of proof from preponderance of the evidence to a substantial evidence test.[79] Congress lowered Chapter 43's burden of persuasion because it recognized that under Chapter 75 it is significantly harder for an agency to prove effectively unacceptable performance than to prove employee misconduct, which simply requires a specific example of malfeasant conduct.[80] Arguably, the lessened burden of proof is the most significant difference between Chapter 75 and Chapter 43.

Additionally, under Chapter 43, the MSPB cannot mitigate the agency's decision to remove a poor performing employee if the agency satisfies all the procedural and substantive requirements to remove the poor performer.[81] Conversely, under Chapter 75, the MSPB can mitigate the

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Decisions of the Federal Circuit, 35 AM. U. L. REV. 1037, 1044 (1986) [hereinafter Vaughn, *Federal Employment Decisions*]; Price, *supra* note 72, at 389.

77. *See* Price, *supra* note 72, at 390.

78. *See id.* at 390–91 (internal quotation marks omitted) (indicating that agencies find it difficult to meet Chapter 75's removal standard because it requires agencies to show that removing a poor performing employee would "promote the efficiency of the service"). *Compare* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 6 (same), *with* Price, *supra* note 72, at 391 (explaining that Chapter 43's removal standard requires an agency to prove that an employee failed to meet the established performance requirements).

79. *Compare* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 6 (explaining that preponderance of the evidence requires an agency to prove that a reasonable person would find that the agency's removal action was more likely than not correct), *with Developments in the Law*, *supra* note 3, at 1639 (internal quotation marks omitted) (explaining substantial evidence only requires an agency to prove that a reasonable person "*could*" find that the agency's removal action was correct).

80. *See* Price, *supra* note 72, at 391 (stating Congress placed a lower standard of proof for performance-based actions than misconduct based actions).

81. Lisiecki v. MSPB, 769 F.2d 1558, 1568 (Fed. Cir. 1985).

agency's decision to remove a poor performing employee if the MSPB determines that the employee's removal is not appropriate.[82] The MSPB is not permitted to mitigate the agency-imposed penalties under Chapter 43 because it would frustrate Congress's intent to make it easier to remove poor performing employees, as well as increase the administrative and judicial review of removal actions.[83]

Finally, Chapter 43 created a performance appraisal system that provides a basis for agencies to evaluate a federal employee's job performance against defined performance objectives.[84] By creating a performance appraisal system that exclusively applies to performance-based actions, agencies can effectively identify and address poor performing employees.[85] Chapter 43 requires an agency's performance appraisal system to, at a minimum, establish an employee performance plan that contains critical elements and employment standards, communicate the performance plan to the employee, and evaluate the employee based on the defined performance elements and standards.[86] Currently, OPM's performance appraisal regulations require agencies to designate the appraisal period length.[87] Although OPM seemingly provides agencies with discretion regarding the appraisal period length, the regulations state, "The appraisal period generally *shall* be 12 months so that employees are [rated annually]."[88] The regulations also indicate that agencies must

82. Vaughn, *Federal Employment Decisions*, *supra* note 76, at 1044; *see also* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 9 (explaining that the MSPB will evaluate the relevant *Douglas* factors to determine whether the agency applied an appropriate penalty).

83. Vaughn, *Federal Employment Decisions*, *supra* note 76, at 1044; *see also Lisiecki*, 769 F.2d at 1561, 1566 (explaining that allowing the MSPB to mitigate an agency's removal decision would vest it with unintended management power over the agency and require the agency to retain a poor performing employee).

84. 5 U.S.C. §§ 4303(b)(1)–(2) (2012); *id.* § 4301(3) (defining "unacceptable performance"); *see also* Price, *supra* note 72, at 392. *But see* §§ 7511–13 (showing Chapter 75 does not require agencies to demonstrate unacceptable performance through a performance appraisal system).

85. *See* Price, *supra* note 72, at 392. *But see* S. REP. NO. 95-969, at 9 (1978) (indicating that Chapter 75 performance evaluation procedures were ineffective because they could not identify poor performing employees in a manner that would withstand scrutiny).

86. 5 U.S.C. §§ 4303(b)(1)–(2); *see* 5 C.F.R. §§ 430.206(a)(1)–(2) (2012) (requiring agencies to designate an appraisal period, which" generally shall be twelve months," in which agencies monitor an employee's performance and rate the employee in accordance with his performance); § 430.208 (requiring agencies to create written performance evaluations that rate how well an employee performed his job during the appraisal period based on the previously established performance criteria); *see also id.* §§ 430.205(a), 430.207(b) (indicating agencies shall conduct one or more performance appraisals during each appraisal period).

87. *See* 5 C.F.R. § 430.205(a); § 430.206(a)(1).

88. *See* §§ 430.206(a)(1)–(2) (emphasis added).

conduct at least one progress review during the appraisal period.[89]

The results of an employee's performance appraisal should be used in accordance with merit-based principles to recognize and reward an employee for good performance, assist an employee in improving unacceptable performance, or discipline an employee who continues to demonstrate unacceptable performance *only after the employee is provided a "reasonable opportunity" to improve* through a PIP.[90] If the agency initiates a PIP, the agency must first notify the employee of his performance deficiency and tell the employee what standards he must meet "in order to demonstrate acceptable performance."[91] Then, the agency must warn the employee that continued unacceptable performance could lead to an adverse action.[92] Finally, the agency must offer the employee agency assistance to help improve his performance and "the agency shall afford the employee a reasonable opportunity to demonstrate acceptable performance."[93] If the agency provides the employee a reasonable opportunity to improve and the employee continues to demonstrate unacceptable performance during or following the PIP, the agency must follow Chapter 43's procedures to initiate an adverse performance-based action.[94]

Prior to removal, the employee is entitled to "30 days' advanced written notice of the proposed action," the right to be represented by an attorney, "a reasonable time to answer orally and in writing," and a written decision—with supervisory concurrence—that provides specific instances of

89. *See id.* § 430.207(b). *Compare* § 430.203 (defining "progress review" as a review to tell the employee how his performance compares with the established performance standards), *with* § 430.203 (defining "performance rating" as the written appraisal of an employee's performance compared with his established performance standards), *and* § 430.203 (defining "appraisal" as the process to review and evaluate performance).

90. 5 C.F.R. § 432.104 (emphasis added). *But see* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 6 (showing Chapter 75 does not require agencies to provide employees with the opportunity to improve their performance once it is deemed unacceptable).

91. *See* 5 C.F.R. § 432.104 (explaining that the agency must identify the "critical [performance] elements" for which the employee's performance was unacceptable). *Accord* § 430.203 ("Critical [performance] element means a work assignment or responsibility of such importance that unacceptable performance on the element would result in a determination that an employee's overall performance is unacceptable.").

92. *See* 5 C.F.R § 432.104 (2012).

93. *Id.*

94. *Id.*; 5 U.S.C. §§ 4302–03 (2012); *accord* 5 C.F.R. §§ 432.105(a)(1)–(2) (explaining that if the employee's performance improves and is acceptable for one year immediately following the "opportunity to demonstrate acceptable performance," then the agency must provide the employee with another PIP process prior to removal, if the employee's performance is again considered unacceptable).

an employee's unacceptable performance.[95] Additionally, an employee is entitled to a series of appeals to attempt to reverse the manager's removal action.[96] The manager's decision, however, is rarely reversed.[97]

C. The Surprising Result: The Failure of Chapter 43

Although Congress enacted Chapter 43 to create a mechanism to help agencies effectively and efficiently remove poor performing employees, Chapter 43 has not worked as Congress initially intended.[98] Surprisingly, the majority of performance-based removals still occur under Chapter 75.[99] The question then becomes why would an agency initiate a performance-based removal action under Chapter 75 when the removal standard is more difficult, the burden of persuasion is harder to meet, and the agency's imposed penalty can be mitigated? The likely answer is that Chapter 43 failed for the same reasons that Chapter 75 failed—its removal procedures are too complex, rigid, burdensome, and antiquated to address effectively poor performing employees.[100]

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95. 5 U.S.C. §§ 4303(b)(1)(A)–(D).

96. U.S. GOV'T ACCOUNTABILITY OFF. (GAO), GAO-15-191, FEDERAL WORKFORCE 18 (2015) [hereinafter GAO-15-191]. First, the employee may file an appeal with MSPB to request a hearing before a MSPB administrative judge (AJ). *Id.* The initial MSPB hearing is not before an administrative law judge because the Administrative Procedure Act (APA) § 554(a)(2) exempts hearings involving federal tenured employees from the formal adjudication procedures in the APA §§ 554, 556, and 557. *See* 5 U.S.C. § 554(a)(2). Next, if the employee is dissatisfied with the initial hearing decision, the employee may file a petition for review with the MSPB to request that the full three-member MSPB review the AJ's decision. GAO-15-191, *supra* note 96, at 18. Finally, if the employee is still dissatisfied, the employee has the final recourse of seeking judicial review of the MSPB's final decision with the United States Court of Appeals for the Federal Circuit (Federal Circuit). *Id. Accord* John P. Stimson, *Unscrambling Federal Merit Protection*, 150 MIL. L. REV. 165, 173 (1995) (indicating employees are entitled to back pay if the MSPB AJ renders an initial decision in the employee's favor).

97. *See* MSPB, ANNUAL REPORT FOR FY 2014 27 (2015), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1179694&version=1184281&application=ACROBAT (finding the MSPB affirmed agency's decisions in nearly 98% of adjudicated cases); *see also* MSPB, ANNUAL PERFORMANCE REPORT (FY 2012) AND PLAN (FY 2013 (FINAL) – FY 2014 (PROPOSED)) 16 (2013), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=812087&version=815229&application=ACROBAT (highlighting the Federal Circuit affirmed over 92% of MSPB's decisions).

98. *See* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 21 (explaining the Department of Defense and Department of Homeland Security found Chapter 43 to be "more trouble than it was worth and sought to create department-wide policies to use only Chapter 75 to take performance-based actions").

99. *See id.* at 5 (finding from 1998–2007, agencies removed 62% of poor performing employees using Chapter 75 and 38% of poor performing employees using Chapter 43).

100. *See* S. REP. NO. 95-969, at 3 (1978) (explaining the inherent problems of Chapter 75

Many managers complain that the existing civil service rules and procedures are complex, and although they were designed to shield employees from arbitrary employment actions and guarantee a merit-based civil service system, the procedures have "too often become the refuge of the incompetent employee" by creating undue delays and burdensome paperwork.[101] When incompetent and inefficient employees remain employed, it undermines confidence in the merit-based system and forces "the dedicated and competent employee [to] increase his workload so that the public may benefitted. . . ."[102] Additionally, if performance objectives are too easily met or managers do not appropriately rate poor performance as unacceptable, it is "as difficult to reward the outstanding public servant as it is to remove an incompetent employee."[103]

Managers who are willing to address poor performers are therefore "the single greatest key" to increasing employee performance and government efficiency.[104] However, the Government Accountability Office (GAO) recently reported that many managers are reluctant to address poor performing employees for three primary reasons.[105] First, managers view the civil service landscape as entrenched in "red tape"; therefore, managers find it easier to work around an incompetent employee instead of directly addressing performance issues.[106] For example, in the wake of the VA scandal, Congress identified the burdensome employee removal process as a key factor causing the lack of employee accountability.[107]

Second, managers are reluctant to initiate a removal action if they believe that upper-management will not support their decision.[108]

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removal procedures and discussing the need for reform); *see also* Price, *supra* note 72, at 389–91 (explaining that Congress made Chapter 43 to be more effective than Chapter 75).

101. O'Rourke, *supra* note 39, at 343 (citing S. REP. NO. 95-969, at 2–3.

102. *Id.*

103. *Id.*

104. *See* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 27; *see also* GAO-15-191, *supra* note 96, at 29 (concluding that "supervisors who take performance management seriously" can avoid or mitigate the burdensome removal process).

105. *See* GAO-15-191, *supra* note 96, at 19–20 (stating that the burdensome resource commitment, lack of internal support, and potential legal ramifications deter managers from addressing poor performing employees).

106. *See* Fineman, *supra* note 18, at 89 (describing civil service laws as "cumbersome," onerous, and surrounded with "red tape"); *see also* Felicia Dye, *Problems with Firing Government Employees*, GLOBAL POST, http://everydaylife.globalpost.com/problems-firing-government-employees-18606.html (last visited May 18, 2016) (articulating that most managers find it easier to ignore performance issues than address them because the removal process is very difficult and intense).

107. *See* Philipps, *supra* note 10.

108. *See* 5 U.S.C. § 4303(b)(1)(D)(ii) (2012) (requiring upper-management concurrence for a manager to initiate an adverse employment action); *see also* MSPB, REMOVING POOR

Managers may be concerned that if they attempt to address a poor performing employee, upper-management will view the manager as the one who is incompetent and determine that the manager is unable to manage effectively his employees.[109] Additionally, upper-management may prefer to discretely handle the performance issue instead of confronting the poor performing employee, which undermines the manager's authority and makes it more difficult for the manager to address incompetent employees.[110]

Third, managers are concerned that if they initiate a removal action, the poor performing employee will appeal the removal decision, file a retaliatory grievance, or lodge a frivolous discrimination complaint.[111] In essence, the employee could "turn the tables" on the manager by claiming that the manager did not properly document performance issues or alleging that the manager engaged in a prohibited personnel practice.[112] While it is important that employees have the ability to challenge unfair personnel actions, it is also important that employees do not abuse the process. Furthermore, if the employee successfully appeals the removal action, he will likely return to work in the same office, which could create an uncomfortable environment for the employee, manager, and other colleagues working in the office.[113]

To address these issues, Congress enacted Chapter 43 as part of a comprehensive reform intended to make it easier for agencies to remove poor performing employees.[114] In effect, however, Chapter 43 failed to achieve its goal because the removal process remains too complex and burdensome, managers are unwilling to address poor performing employees, and performance appraisals do not effectively correlate

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PERFORMERS IN THE FEDERAL SERVICE 7 (1995), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253662&version=253949&application=ACROBAT (finding that more than one-quarter of federal managers do not address poor performance because of "insufficient support" from upper-management).

109. *See* GAO-15-191, *supra* note 96, at 19.

110. *See, e.g.*, Dye, *supra* note 106 (discovering that upper-management sometimes "cleans up an employee's personnel file" by downgrading a manager's written warning to an oral warning—eliminating any documentation of an employee's performance issues).

111. *See* GAO-15-191, *supra* note 96, at 20.

112. *See id*. (indicating that if an employee appeals the agency's removal decision or files a grievance against the manager, the manager may need to provide depositions and witness statements, as well as attend meetings for an extended period of time to resolve the dispute); *see also* Frug, *supra* note 5, at 946 (explaining that a manager fears that "he, not the employee will be put on trial" if he addresses a poor performing employee).

113. *See* 5 U.S.C. §§ 7701(2)(A)(ii)(I)–(II) (stating that the employee shall return to the place of employment, if he successfully appeals the removal action, unless the employing agency determines that the employee's return is "unduly disruptive" to the office).

114. *See* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 21.

employee performance with their removal.[115]

III. THE NEED FOR REFORM

A. The Overly Burdensome Removal Process and its Effect on Employee Accountability

The current removal process takes approximately 170 to 370 days—approximately 80 to 200 days to observe performance issues, conduct counseling sessions, and monitor and provide regular performance feedback; 50 to 110 days to create and implement a PIP; and 40 to 60 days to prepare a proposed notice of removal, notify the employee, review the employee's response to the proposed removal, provide the deciding official's decision to the employee, and inform the employee of their right to appeal.[116] If the employee appeals the agency's decision, the initial appeal will add another 240 days to the process.[117] Consequently, the entire removal process including an initial appeal, can take 410 to 610 days.[118] This tedious and time-consuming process dissuades managers from addressing poor performing employees, and therefore allows incompetent employees to seek refuge within the cumbersome procedure.[119]

The public, as well as federal employees, expect government managers "to hold *every* employee accountable" to an agency's designated performance standards.[120] Managers who fail to hold every employee accountable pose a significant threat to the overall quality and integrity of civil service.[121] Over time, management's tolerance for poor performance will disenfranchise good employees and drive them to either stop

115. *See supra* notes 106–12 and accompanying text.

116. GAO-15-191, *supra* note 96, at 15; *see also* O'Rourke, *supra* note 39, at 343 (citing S. REP. NO. 95-969, at 2–3 (1978) (indicating that the civil service rules and procedures were intended to protect employees from arbitrary employment actions; however, the rules and procedures are so complex that they undermine merit system principles by allowing incompetent employees to seek "refuge" within the paperwork and delays associated with removal); *see also* GAO-15-191, *supra* note 96, at 26 (stressing that removing a federal employee is challenging because it is time consuming and resource intensive).

117. *See* GAO-15-191, *supra* note 96, at 14–15.

118. *Id.*

119. *See* S. REP. NO. 95-969, at 2–3; Baran, *supra* note 1, at 97 (stating the burdensome removal process is rarely used, "and even then is rarely successful"); *see also* Fineman, *supra* note 18, at 68, 89 (stating that the existing civil service procedures are so onerous that they frequently shelter poor performing employees).

120. *See* MSPB, MANAGING PUBLIC EMPLOYEES IN THE PUBLIC INTEREST 42 (2013), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=790793&version=793798&application=ACROBAT [hereinafter MSPB, THE PUBLIC INTEREST].

121. *See* Katz, *supra* note 15 (cautioning when a poor performer is not held accountable, satisfactory performing employees have to work harder to compensate for the poor-performing employee, decreasing agency efficiency, productivity, and employee morale).

performing at a satisfactory level or leave civil service all together.[122] This will force managers to divert limited resources away from other priorities in order to compensate for the loss in productivity.[123]

Ultimately, when managers do not hold employees accountable to the established performance standards, almost everyone is dissatisfied.[124] First, managers are dissatisfied because they are unable to address effectively performance issues.[125] Next, satisfactorily performing employees are dissatisfied because they must compensate for poor performing employees.[126] Moreover, Congress is dissatisfied because of the agency's lack of accountability.[127] Finally, the public is dissatisfied because federal employees "have jobs seemingly for life—no matter what they do or don't do."[128]

B. Performance Appraisals: Do They Appraise Performance?

Performance appraisals are designed to allow managers to compare and rate an employee's performance against the corresponding performance standards established for the appraisal period.[129] However, due to the perceived difficulty in addressing poor performers, managers do not necessarily rate an employee's performance accurately.[130] For example, in

122. *See* MSPB, THE PUBLIC INTEREST, *supra* note 120, at 42 (finding that managers indirectly punish high performing employees if managers expressly or impliedly ask high performing employees to complete the work of poor performing employees); *see also* GAO-15-191, *supra* note 96, at 1 (stating that managers risk losing their high performing employees if they do not address poor performing employees); *see also* Katz, *supra* note 15 (explaining that it is "human nature" to feel disenfranchised if a colleague is doing half the work, but receiving the same pay); *see also* Stewart Liff, *Part 1: How to Manage Difficult Government Employees*, THE PERFORMANCE INST. (Feb. 25, 2015), http://www.performanceinstitute.org/2015/02/25/part-1-of-3-how-to-manage-difficult-government-employees/ (indicating that satisfactory performing employees are unhappy, as they do not enjoy working more while their poor performing counterparts receive the same performance ratings, salary, within-grade increases, bonuses, and possibly promotions).

123. *See* MSPB, THE PUBLIC INTEREST, *supra* note 120, at 33 (stressing that if an organization loses too many employees, it will devote a disproportionate amount of energy adapting to the loss in personnel, "leaving it with too little energy to focus on the work that needs to be done").

124. *See* Liff, *supra* note 122.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *But see* O'Rourke, *supra* note 39, at 341–42 (indicating that performance appraisals are not always administered in accordance with merit-based principles).

130. *See id.* at 342 (cautioning that sometimes performance appraisals do not align with the CSRA's purpose).

2013, managers rated 1,992,000 out of 2,000,000 federal employees as satisfactory performers—99.6% of the federal workforce.[131] While it is possible that all 1,992,000 federal employees did perform satisfactorily, the more likely explanation for the disproportionate performance figures is that managers would rather give an employee a satisfactory rating and ignore the performance issue than give an employee an unsatisfactory rating and address the performance issue.[132] In fact, all 470 VA senior managers received performance appraisal ratings of "fully successful" or better just months before the VA waitlist manipulation scandal was exposed.[133]

The performance appraisal system loses its merit if managers assign a significantly disproportionate number of federal employees the highest ratings, a negligible number of federal employees less-than-satisfactory ratings, and only a "miniscule" number of federal employees unsatisfactory ratings.[134] For example, if a manager pursued a justified adverse action against a poor performing employee, but his justification was procedurally flawed in the performance evaluation system, the poor performing employee could challenge the adverse action and the action would likely be overturned.[135] Therefore, although performance appraisals are supposed to capture how well an employee met their defined performance objectives for the appraisal period, evidence suggests that this does not occur in

131. *See* GAO-15-191, *supra* note 96, at 19 ("In 2013 about 8,000 of the nearly 2 million federal employees received 'unacceptable' or 'less than fully successful' performance ratings").

132. *See, e.g.*, Katz, *supra* note 15 (finding that eight out of ten federal employees and managers agree that federal termination procedures "discourage the firing of poor performers"); *see* GAO-15-191, *supra* note 96, at 1–2, 19 (articulating that federal employees and agency leaders believe that the current performance evaluation systems are not built to address poor performance and that supervisors do not effectively address poor performing employees); *see also* Dye, *supra* note 106 (determining that many managers believe it is easier to tolerate or ignore performance issues than address them).

133. *See supra* notes 12–14 and accompanying text.

134. *See Testimony Before the Subcomm. on Regulatory Affairs & Fed. Mgmt., S. Comm. on Homeland Sec. & Gov't Affairs*, 114th Cong. 8 (2015) (statement of Dan G. Blair, President & Chief Exec. Officer, Nat'l Acad. of Pub. Admin.) (stating that few managers, employees, or anyone else believe that the current rating process serves a useful purpose; in fact, many believe it is harmful); *see also* Sebastian Bailey, *5 Reasons Why Performance Management Fails*, FORBES (Dec. 20, 2012, 12:06 PM), http://www.forbes.com/sites/sebastianbailey/2012/12/20/5-reasons-why-performance-management-fails/ (explaining that if every employee scores the same, there are no incentives for outstanding performance and no consequences for poor performance).

135. *See* O'Rourke, *supra* note 39, at 342, 351 (internal quotation marks omitted) (cautioning that performance appraisals are often challenged and overturned due to the appraisals' subpar implementation, including performance standards that are "absolute," "vague and subjective," or written in a "backwards fashion").

practice.[136]

Managers who fail to accurately evaluate employees during the employee's performance appraisal are only part of the problem; the other part of the problem is the performance appraisal system itself.[137] Today's environment is increasingly complex.[138] Managers need a performance appraisal system that provides managers with the flexibility to adapt their employees' performance objectives to correspond with the agency's continually evolving objectives, roles, and responsibilities.[139] Currently, however, the performance appraisal system is stagnant and generally only requires managers to set performance objectives once or twice a year.[140]

C. Upper-Management's Support: A Key Factor

Upper-management plays a key role in the removal process by providing important oversight over the manager's removal decision and ensures that there is adequate justification to remove the poor performing employee.[141] By nature, this can create an adversarial relationship between the manager and upper-management, but it is necessary to ensure that the employee's

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136. *See* Stephen Barr, *Is the Annual Performance Review the Goof-Off's Best Friend?*, WASH. POST (Jan. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/09/AR2006010901824.html (suggesting that annual performance appraisals inhibit the agency's ability to remove poor performing employees); *see also supra* notes 132–34 and accompanying text.

137. *See* O'Rourke, *supra* note 39, at 342, 351 (detailing that an improperly implemented performance appraisal system is problematic for managers because employees can use the performance appraisal system to undermine the manager's removal justification, and potentially reverse the manager's proposed removal action).

138. *See generally* Marcus Buckingham & Ashley Goodall, *Assessing Performance: Reinventing Performance Management*, HARV. BUS. REV. (Apr. 2015), https://hbr.org/2015/04/reinventing-performance-management (describing Deloitte's unique redesigned performance management system that was developed to respond to the industry's evolving nature, and which focuses on using time and resources more effectively and the ability to adapt to new situations).

139. *See Human Capital Update on Strategic Mgmt. Challenges for the 21st Century: Testimony Before the Subcomm. on Regulatory Affairs & Fed. Mgmt., S. Comm. on Homeland Sec. & Gov't Affairs*, 114th Cong. 8 (2015) (statement of Yvonne D. Jones, Director of Strategic Issues, GAO) [hereinafter *Testimony*] (acknowledging that agencies are taking on additional roles and responsibilities, which increase the agency's need for federal employees to possess a wide variety of expertise and skills); *see also* S. REP. NO. 95-969, at 3 (1978) (observing that federal managerial practices are "antiquated" when compared to current managerial best practices).

140. *See* Buckingham & Goodall, *supra* note 138 (indicating Deloitte redesigned its performance appraisal system because it recognized, as did several other companies, annual performance appraisals were too stationary to keep up with today's work environment).

141. *See* 5 U.S.C. §§ 4303(b)(1)(D)(i)–(ii) (2012) (requiring upper-management to concur with the manager's proposed removal action based on the manager's provided justification).

removal is justified and is not pursuant to prohibited personnel practices.[142] As a result, a manager's willingness to address a poor performing employee is influenced by whether upper-management supports the adverse action.[143] Moreover, managers do not want upper-management to perceive them as incapable of managing their employees effectively.[144] Managers can only initiate a removal action after they identify an employee as a poor performer and provide the employee an opportunity to improve.[145] By initiating a removal action, managers fear that their own supervisors will see the employee's poor performance as the manager's failure, not the failure of the employee.[146] This fear is particularly valid if the employee has a history of satisfactory performance appraisals.[147] A 2014 survey illustrated this mentality by discovering that only 28% of federal employees felt managers took steps to address poor performing employees who cannot or will not improve their unsatisfactory performance; meaning 72% of the federal managers chose to ignore performance issues.[148]

IV. RECOMMENDATIONS

This Comment recommends three adjustments to the existing civil service system and provides a corresponding plan to implement each recommendation. First, a manager's performance appraisal should be primarily based on managerial proficiencies rather than technical competencies. Second, under OPM regulatory authorization, agencies

142. *See id.*

143. *See* GAO-15-191, *supra* note 96, at 19.

144. *See id.* (finding that managers are concerned that if they address a poor performing employee, upper-management will scrutinize the manager, instead of the employee, and view the manager as unable to effectively manage his employees).

145. *See* 5 U.S.C. § 4302(b)(6) (stating that a manager can only remove a poor performing employee if the manager provides the employee with an opportunity to exhibit "acceptable performance," but the employee fails to do so and continues to perform poorly).

146. *See, e.g.*, GAO-15-191, *supra* note 96, at 19 ("None of the previous supervisors had problems with him. Why do you?").

147. *Id.* Upper-management generally has limited first-hand knowledge of an employee's actual performance history. *Id.* If the employee's documented performance history shows satisfactory performance, upper-management will begin to question the manager's ability to manage his employees. *Id.*; *see also* Barr, *supra* note 136 (cautioning it will be "impossible" for a manager to remove a poor performing employee if the employee's personnel file contains satisfactory performance reviews from the previous manager).

148. OPM, FEDERAL EMPLOYEE VIEWPOINT SURVEY RESULTS 40 (2014); *see also* Andy Medici, *Federal Employee Firings Hit Record Low in 2014*, FED. TIMES (Feb. 24, 2015, 4:52 PM), http://www.federaltimes.com/story/government/management/agency/2015/02/24/federal-firing-2014/23880329/ (discovering that managers sometimes find it "easier to ignore the bad employee" and hope performance issues correct themselves); *see also supra* notes 130–33 and accompanying text.

should implement a quarterly, as opposed to the current annual or semi-annual, performance appraisal system that will make it easier for managers to efficiently and effectively serve the public by: (1) communicating specific, quantifiable, and objective performance expectations and standards to employees at the beginning of each quarterly evaluation period; (2) providing specific, meaningful, and timely feedback to an employee during his performance appraisal; (3) identifying and addressing performance issues before they result in an unacceptable performance rating; and (4) rewarding or reprimanding employees based on merit.[149] Implementing a quarterly performance appraisal will significantly increase the usefulness of the evaluation to the employee and manager because the level of employee engagement and the quality of the appraisal's substantive feedback directly correlates to the frequency of the appraisal.[150] Finally, if a manager determines that an employee's performance is unacceptable, the quarterly performance appraisal should incorporate a PIP to reduce the amount of time it takes a manager to remove a poor performing employee.[151]

To implement these three recommendations, this Comment suggests that OPM should issue guidance for two of the recommendations and a regulation for one of the recommendations. OPM should issue guidance for the recommendation that the PIP should be incorporated into the quarterly performance appraisal system and the recommendation that the managers' performance appraisals should rate managers based on their managerial proficiencies rather than their technical competencies.[152] Conversely, OPM should issue a regulation to adjust the performance appraisal system from annual (or semi-annual) to quarterly.[153] OPM, the government's personnel manager, is the best agency to implement these recommendations because it is responsible for the quality and management of federal employees.[154]

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149. *See* Luneburg, *supra* note 23, at 16–17 (stating that OPM is responsible "for executing, administering, and enforcing civil service laws, rules, and regulations"); *see also* Josh Bersin, *Time to Scrap Performance Appraisals?*, FORBES (May 6, 2013, 7:24 AM), http://www.forbes.com/sites/joshbersin/2013/05/06/time-to-scrap-performance-appraisals/#3cb3f778121d (finding that quarterly performance appraisals receive "31% greater returns from their performance process" than annual performance appraisals).

150. *See* Buckingham & Goodall, *supra* note 138 (determining that the usefulness of a performance evaluation's content is directly related to its frequency—the more frequent the evaluation, the more employees understand how to do their best work in the future).

151. *See infra* Part IV.C.

152. *See infra* Part IV.

153. *Id.*

154. *See* Luneburg, *supra* note 23, at 16–17.

A. Manager and Employee Accountability

Increasing accountability in the government begins with holding managers accountable for their managerial responsibilities, including addressing poor performing employees.[155] Currently, however, managers' performance ratings focus predominantly on their technical work, not supervisory skills; thus, managers could still theoretically receive satisfactory performance appraisals even if they do not perform their managerial functions.[156] Managers, under this paradigm, are more incentivized to demonstrate short-term technical success on a project rather than build a sustainable culture of high performance.[157] However, if managers' performance ratings instead emphasize supervisory skills over technical competencies, they will be held accountable for communicating clear performance standards and expectations, providing timely and constructive feedback, and documenting specific instances of poor performance.[158] Accountability starts at the top and trickles downward—if managers are held accountable, then they may more consistently hold employees accountable; this will ultimately boost employee morale, increase employee accountability, and bolster agency effectiveness.[159]

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155. *See* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 27*; see also* Katz, *supra* note 15 (quoting Rep. Jeff Miller, who asserts that an agency can "change [its] culture through holding people accountable"); *see also* REVIEWSNAP, THE TRUTH ABOUT PERFORMANCE APPRAISALS 7 (2015), http://www.reviewsnap.com/documents/white_papers/Reviewsnap_-_The_Truth_About_Performance_Appraisals.pdf [hereinafter REVIEWSNAP] (indicating effective performance review should help reinforce manager and employee accountability).

156. *See* OPM, *Supervisors in the Federal Government: A Wake-Up Call* (July 6, 2015, 11:54 PM), https://www.opm.gov/policy-data-oversight/performance-management/performance-management-cycle/monitoring/supervisors-in-the-federal-government/ [hereinafter OPM, *A Wake-Up Call*] (noting instead of creating a separate performance appraisal to evaluate supervisory responsibilities, "most agencies simply add a generic element covering supervisory responsibilities to the technical work elements").

157. *See id.*

158. *Compare* GAO-15-191, *supra* note 96, at 5 (stating that managers who engage in managerial activities—setting performance goals, monitoring employee performance, and providing feedback—can help encourage high-performing employees to continue to improve their performance, as well as help marginal performing employees become better performers), *with* RETHINKING THE PERFORMANCE REVIEW, MODERN SURVEY 2 (2013), http://www.modernsurvey.com/wp-content/uploads/2013/09/Rethinking-the-Performance-Review.pdf [hereinafter MODERN SURVEY] (cautioning that a performance appraisal system that lacks consistent performance management will likely be a "meaningless activity that managers dread and employees disregard or disrespect").

159. *See* MSPB, THE PUBLIC INTEREST, *supra* note 120, at 42 (stating that "*every*" employee must be held accountable for meeting performance standards); *see also* Frug, *supra* note 5, at 946 (suggesting that increasing the managers' ability to uphold a high standard of employee performance is essential to civil service reform).

A manager's ability to communicate clearly and effectively performance standards and expectations to an employee is critical for accountability.[160] Clearly defined performance standards make it easier for the employee to understand what the manager expects from him and what is required for him to perform satisfactorily.[161] Additionally, clearly defined performance standards make it easier for the manager to accurately compare the established performance standards with the employee's performance, determine whether the employee successfully met or failed to meet the performance standards, provide substantive feedback to the employee, and take any necessary action.[162]

Because there is an inverse relationship between the quality of the performance appraisal and the length of the appraisal period, decreasing the appraisal period from annual to quarterly will help managers hold employees accountable.[163] The shorter the appraisal period, the easier it is for managers to establish clearly defined performance standards and expectations, provide meaningful feedback to the employee, and document specific instances of the employee's performance to justify a satisfactory or unsatisfactory rating.[164] Conversely, the longer the performance appraisal period, the more difficult it is to effectively keep track of specific examples to justify an employee's rating at the end of the appraisal period.[165] If a manager does not document specific examples of the employee's performance, the manager will have to rely on memory, the limited instances he did document, or the employee's self-evaluation to create a

160. *See* MSPB, THE PUBLIC INTEREST, *supra* note 120, at 39 (finding that the merit-based civil service system is based on the capacity to establish employee standards, measure employee performance against those standards, and hold employees accountable to those standards).

161. *See* Katz, *supra* note 15 (emphasizing that managers must clearly communicate performance expectations to employees to successfully "nip problems in the bud").

162. *See* Buckingham & Goodall, *supra* note 138 (finding that if a manager conducts more frequent performance appraisals, it is easier for the manager to directly correlate the employee's performance to the performance appraisal).

163. *See id.*

164. *See id.* (illustrating that frequent performance feedback provides employees with clarity regarding what a manager expects of the employee and why, what satisfactory performance looks like, and how each employee can do his best work).

165. *See id.* (indicating that annual performance evaluations are not as valuable as more frequent performance evaluations that incorporate specific examples highlighting why the employee deserved the performance rating he received); *see also* Stephanie Taylor Christensen, *3 Ways Companies Are Changing the Dreaded Performance Review*, FAST CO. (OCT. 2, 2015, 5:00 AM), http://www.fastcompany.com/3051779/lessons-learned/3-ways-companies-are-changing-the-dreaded-performance-review (stating that the lapse in time between the employee's performance and the performance appraisal decreases the quality of the manager's feedback because "the feedback becomes broader and less detailed").

performance appraisal.[166] This type of appraisal is not helpful to the employee or the manager.[167] On the other hand, a manager who regularly evaluates an employee's performance is better able to recall specifically how the employee performed during the appraisal period and incorporate specific examples into the employee's appraisal to demonstrate why the employee's performance is satisfactory or unsatisfactory.[168]

Quarterly performance appraisals not only hold managers accountable for performing their managerial duties, but they can also help managers gain upper-management's support for pursuing an adverse employment action against a poor performing employee.[169] Quarterly appraisals provide managers with three formal opportunities to discuss and address potential poor performing employees with upper-management before a performance issue rises to a level necessitating a formal action against the employee.[170] The increased interaction and engagement between managers and upper-management can alleviate the manager's concern that upper-management would not support a removal action against the poor performing employee in the future, as well as mitigate the risk that the manager is unfairly or erroneously removing the employee.[171] Likewise, more frequent appraisals will provide regular opportunities for managers to recognize top performing employees.[172] Increasing the sample size of an employee's performance appraisals will provide managers with a more comprehensive picture of an employee's strengths, weaknesses, and areas for improvement.[173] Additionally, if upper-management scrutinizes the manager's removal decision, managers will be able to provide better justification, qualitatively and quantitatively, to support the removal action against a poor performing employee.[174]

While it is possible that managers will continue to evaluate erroneously an employee's performance, a quarterly performance appraisal system is better equipped than an annual performance appraisal system to prevent

166. MODERN SURVEY, *supra* note 158, at 2.

167. *Id.*

168. *Id.* at 2–3; *see also* Christensen, *supra* note 165 (indicating annual performance reviews do not allow managers to properly evaluate the employee's performance).

169. *See* GAO-15-191, *supra* note 96, at 5 (stating that managerial responsibilities include "expectation-setting, coaching, and feedback").

170. *See id.* at 1 (stressing that managers should address and improve performance deficiencies sooner rather than later).

171. *See supra* notes 142, 146–47 accompanying text.

172. *See* Christensen, *supra* note 165.

173. *See* Buckingham & Goodall, *supra* note 138 (arguing that the problem with annual performance evaluations is that they are not comprehensive—employees are only evaluated one time during a twelve month period).

174. *See supra* notes 168–73 and accompanying text.

an erroneous evaluation.[175] First, quarterly performance appraisals also apply to managers, which means upper-management will be more engaged with the manager and the manager's ability to effectively perform his managerial duties—including accurate performance evaluations.[176] Second, a quarterly performance appraisal system increases the number and frequency of performance appraisals, which not only allows managers to evaluate employees more frequently, but also allows employees to receive more relevant and substantive feedback from their manager to understand how the manager justified the employees' ratings.[177] Additionally, if an employee disagrees with the manager's evaluation, it is easier for the employee to recall and provide the manager with specific examples of why he believes the rating is erroneous because it is temporally closer to the performance at issue. Finally, quarterly performance appraisals provide managers with the ability to capture both upward and downward trends in an employee's performance, which provides a more robust evaluation of the employee and eliminates drastic deviations in performance ratings between appraisal periods.[178]

B. Timely Feedback Improves the Workforce

In today's complex environment, the government is consistently expected to do more with less, agencies are assuming additional roles and responsibilities, and managers are expected to adapt their employees' roles and responsibilities to correspond with the agency's evolving role.[179]

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175. *See* Buckingham & Goodall, *supra* note 138 (describing how Deloitte successfully reinvented its performance appraisal system by moving away from annual performance evaluation to more frequent evaluations, which could work for the federal government).

176. *See supra* notes 155, 158–59 and accompanying text.

177. *See* Buckingham & Goodall, *supra* note 138; *see also* MODERN SURVEY, *supra* note 158, at 2–3 (explaining that more frequent performance reviews provide employees with feedback "more regularly and constructively" than the once-a-year review system).

178. For example, if an employee is rated one time every twelve months, his performance appraisal could be drastically different from one appraisal to the next. *See* Bersin, *supra* note 149 (indicating that managers cannot effectively evaluate an employee's performance on an annual basis). The deviation could subsequently prompt upper-management to question the manager's ability to manage and fairly rate the employee. GAO-15-191, *supra* note 96, at 19. Conversely, if the employee is rated four times every twelve months, his performance appraisal will likely provide a more robust picture of an employee's performance over the same time period. *See* Buckingham & Goodall, *supra* note 138 (emphasizing that effective performance evaluations are not supposed to provide the "*simplest view*" of the employee, but the "*richest*" view). Additionally, the regular evaluations will allow the manager to capture a steady decline in employee performance. *Id.*

179. *See Testimony*, *supra* note 139, at 8 (recognizing that agencies' roles and responsibilities are increasingly expanding); *see also* REVIEWSNAP, *supra* note 155, at 3 (indicating that the need to improve the performance appraisal systems is increasing as

Managers need a performance appraisal system that will allow them to operate effectively in today's environment.[180] Currently, under the annual (or semi-annual) performance appraisal system, managers only set performance objectives once or twice per year, which severely limits their ability to maintain relevant performance objectives for an employee.[181] This inflexibility can cause long delays in reestablishing performance objectives and possibly even result in rating an employee against outdated objectives that only apply to a small portion of the employee's work throughout the year.[182] Quarterly performance appraisals, on the other hand, provide managers with the necessary flexibility to capture more easily and accurately changing mission requirements.[183] Annual performance appraisals, therefore, are no longer an effective or realistic way to evaluate an employee's performance because they do not provide managers with the necessary flexibility to redefine employee performance expectations and standards to align with the agency's evolving priorities, objectives, and responsibilities.[184] In fact, fifty-two large companies abandoned annual performance appraisals this past year because they are no longer effective in the current environment.[185] Moreover, 68% of the large companies surveyed recommended at least quarterly evaluations.[186]

Generally, feedback is less valuable if employees only receive it once or twice a year, as opposed to feedback given closer to the employee's actual

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today's workplace environment becomes more complex and challenging).

180. *See* REVIEWSNAP, *supra* note 155, at 5–6.

181. *See id.* (cautioning that "the biggest problem with annual performance appraisals today is that they happen too infrequently" to capture evolving business objectives).

182. *See* MODERN SURVEY, *supra* note 158, at 3 (emphasizing that managers operating in today's environment "can't wait for midyear reviews or annual reviews in order to make adjustments and ensure their employees are hitting their performance goals"); *see also* REVIEWSNAP, *supra* note 155, at 6 (indicating performance appraisals should occur more frequently because employee performance objectives no longer correspond with the end of the fiscal year, but with "shorter-term projects and other strategic deadlines").

183. *See* MODERN SURVEY, *supra* note 158, at 3 (explaining that mid-year and annual performance reviews are insufficient).

184. *See id.*; *see also* REVIEWSNAP, *supra* note 155, at 5–6.

185. *See* David Rock & Beth Jones, *What Really Happens When Companies Nix Performance Ratings*, HARV. BUS. REV. (Nov. 6, 2015), https://hbr.org/2015/11/what-really-happens-when-companies-nix-performance-ratings (finding that more than fifty-two large companies, representing a wide spectrum of industries, abandoned annual performance appraisals as of November 2015; hundreds of other companies are estimated to follow this trend).

186. *Id.* (stating that of the thirty-three companies studied, 68% recommended, "at minimum, quarterly conversations"). *Accord* Susan M. Heathfield, *3 Main Reasons Why Performance Reviews are Not Successful Tools* (Sept. 27, 2015), http://humanresources.about.com/od/performancemanagement/f/performance-reviews.htm (cautioning that managers must conduct performance appraisals quarterly, at a minimum, in order "to have any shot at all" at a successful performance appraisal system).

performance.[187] If an employee needs to improve his performance, the sooner the manager can notify the employee about the performance issue, "the sooner [the employee] can correct the problem."[188] Similarly, if an employee reaches or exceeds his goal, the sooner a manager can provide the employee with positive feedback, the more rewarding the feedback is to the employee.[189] Although managers can provide feedback to an employee outside of an employee's annual or semi-annual performance evaluation(s), most managers indicate that it is "rare" to provide any feedback to employees outside of the formal feedback cycle.[190] Quarterly performance appraisals, therefore, would likely quadruple the amount of feedback an employee receives compared to annual appraisals, and double the amount of feedback an employee receives compared to semi-annual appraisals.[191]

In addition to increasing the quantity of feedback, the quality of feedback would also increase because the manager can provide specific, meaningful, and timely commentary that directly correlates with the employee's performance.[192] If the manager does not provide meaningful and timely feedback to the employee, the manager will likely receive a poor performance rating from upper-management because the manager's performance appraisal is based on his managerial proficiencies, including properly appraising his employees.[193]

Some may argue that quarterly performance appraisals would be too time-consuming for managers and would detract managers from other aspects of their work; however, the law requires managers to evaluate, document, and rate an employee's performance over the appraisal period, regardless of whether the rating period is annual or quarterly.[194]

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187. *See, e.g.*, MODERN SURVEY, *supra* note 158, at 3 (analogizing managers to coaches—coaches do not provide feedback to their athletes at the end of a game; rather, coaches provide feedback to their athletes at halftime or during time-outs because regular feedback is more effective than infrequent feedback).

188. *See Feedback is Critical to Improving Performance*, OPM, https://www.opm.gov/policy-data-oversight/performance-management/performance-management-cycle/monitoring/feedback-is-critical-to-improving-performance/ (last visited Mar. 27, 2015) [hereinafter OPM, *Feedback is Critical*].

189. *See id.*

190. *See* OPM, *A Wake-Up Call*, *supra* note 156.

191. *See* 5 C.F.R. § 430.206(a)(1)–(2) (2014) ("The appraisal period generally shall be 12 months.").

192. *See* MODERN SURVEY, *supra* note 158, at 1–3.

193. *See* GAO-15-191, *supra* note 96, at 5.

194. *See* 5 C.F.R. § 430.206(a)(1)–(2) (requiring agencies to "designate an appraisal period," which "generally must be twelve months," in which agencies monitor an employee's performance and rate the employee in accordance with his performance); *see also* § 430.208(a)(1)–(2) (2014) (requiring agencies to create written performance evaluations that rate how well an employee performed his job, based on the previously established

Implementing quarterly performance appraisals would reduce the manager's burden by breaking up one large twelve-month appraisal into four smaller, more manageable three-month appraisals. While it may, at first glance, appear that quarterly appraisals would add more work for managers, it may actually reduce the managers' burden at each of the critical steps in the performance appraisal process.

Shorter and more frequent appraisal periods make it easier for managers to define clearly performance expectations because managers only need to define objectives for a three-month period instead of a twelve-month period.[195] Similarly, more frequent appraisals would also reduce the manager's overall burden throughout the performance appraisal process. First, more frequent appraisals will potentially decrease the number of employee performance objectives that the manager establishes at the beginning of each performance period.[196] This, in turn, will decrease the number of objectives that the manager defines for the employee and correspondingly decrease the number of objectives that the manager rates the employee against at the end of the appraisal period.[197] Second, a shorter appraisal period makes it easier for managers to recall, document, and provide more effectively specific examples of how the employee's performance either met or did not meet those expectations.[198]

Third, by requiring more frequent feedback and overall engagement, quarterly performance appraisals put managers in a better position to identify and correct performance issues before they initiate a formal adverse employment action.[199] This provides two benefits. First, if a manager can successfully address the performance issue, he can avoid the procedural burden of initiating a removal action and can retain a good employee.[200]

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performance criteria, during the appraisal period); *see also* § 430.207(b) (indicating that agencies shall conduct "one or more" performance appraisals "during each appraisal period"); Buckingham & Goodall, *supra* note 138 (stating frequent evaluations are not "*in addition*" to the manager's responsibility, they "*are*" the manager's responsibility).

195. *See* 5 U.S.C. § 4302(b)(1)–(6) (2012) (delineating the requirements for establishing performance objectives, communicating the objectives to the employee, and evaluating the employee against those objectives); *see also* 5 C.F.R. § 430.206(a)(2) (2012) (requiring managers currently to appraise employees annually).

196. 5 C.F.R. § 430.204(b)(1)(i) (2014)

197. §§ 430.204(b)(1)(i)–(iv).

198. *See* Buckingham & Goodall, *supra* note 138 (indicating that shorter appraisal periods are generally more valuable to employees because managers can provide feedback containing more useful content, such as clearly defined performance expectations and examples to justify the employee's rating); *see also* MODERN SURVEY, *supra* note 158, at 2.

199. *See* OPM, *Feedback is Critical*, *supra* note 188.

200. *See* GAO-15-191, *supra* note 96, at 6 (stating that improving an employee's performance provides a benefit to both the agency and the employee because it builds upon the agency's investment in the employee and the employee's investment in the agency).

Second, the manager will improve office morale and productivity by demonstrating poor performance will not be tolerated.[201] Finally, if the manager is unable to improve the employee's unsatisfactory performance, the quarterly performance appraisal still provides a benefit. Quarterly appraisals increase the interaction, documentation, and engagement between the employee, manager, and upper-management.[202] This holistic engagement strengthens the manager's justification for removing a poor performing employee, reduces the likelihood that the adverse action is unjustified, and increases the likelihood that upper-management will support the manager's removal action.[203]

Therefore, quarterly performance appraisals offer the following benefits: (1) provide managers with the necessary flexibility to establish employee performance expectations that correspond with an agency's changing priorities and requirements; (2) allow managers to provide more meaningful, timely, and substantive feedback to the employee in a less burdensome manner; (3) identify and correct employee performance issues before they initiate a formal adverse employment action; and (4) offer specific evidence to justify removing a poor performing employee.[204]

C. Incorporating a PIP into the Quarterly Performance Appraisal

Currently, a PIP[205] requires the agency to notify the poor performing employee of the performance deficiency, warn the employee that continued unacceptable performance could lead to an adverse action, and offer the employee assistance and a reasonable opportunity to improve.[206] The proposed quarterly performance appraisal system would incorporate the PIP process into the evaluation cycle so managers can reduce the amount of time it takes to remove a poor performing employee without infringing on the employee's due process rights or statutory guarantees.[207] For example, if a manager rates an employee's performance as unacceptable during the first quarter's performance appraisal, the manager will notify the employee of the performance deficiency during the performance review, offer the employee agency assistance to improve his performance during

201. *See* Katz, *supra* note 15 (nothing that managers decrease employee morale when they do not hold a poor performing employee accountable).

202. *See* MODERN SURVEY, *supra* note 158, at 3–5.

203. *Id.*

204. *See* REVIEWSNAP, *supra* note 155, at 5–6; *see also* MODERN SURVEY, *supra* note 158, at 2–4.

205. The PIP is applicable to Chapter 43 adverse actions, not Chapter 75 adverse actions. *See* 5 U.S.C. § 4303(d) (2012).

206. 5 C.F.R. § 432.104 (2014).

207. *See supra* notes 50–53, 87–96 and accompanying text.

the second quarter, and warn the employee that if his performance does not improve during the second quarter's appraisal period, the employee will be subject to an adverse employment action.[208]

First, due process requires balancing the federal employee's interest in retaining employment, the government's interest in efficiently removing poor performing employees, and the risk of erroneously terminating a federal employee.[209] A quarterly performance appraisal that incorporates a PIP considers the employee's interest in retaining employment by providing the employee notice of the performance deficiency, warning the employee of the potential for an adverse action if his unacceptable performance continues, and providing the employee a reasonable opportunity to improve and access to agency resources.[210] Additionally, the quarterly performance appraisal and incorporated PIP considers the government's interest in efficiently removing poor performing employees by reducing the overall amount of time it takes for managers to complete the removal process once an employee's performance is deemed unacceptable.[211] Finally, the quarterly performance appraisal and PIP system minimizes the risk of erroneous deprivation by ensuring that managers abide by merit-based principles and are held accountable for communicating clear performance standards, providing timely feedback, and documenting specific instances of poor performance.[212] Therefore, incorporating the PIP into the quarterly performance appraisal would not infringe on poor performing employees' due process rights.

Second, civil service laws mandate that a federal employee be entitled to "30 days' advance written notice of the proposed action," a reasonable opportunity to respond to the proposed action orally and in writing, representation by an attorney, a written decision, and the ability to file an appeal with the MSPB to attempt to reverse an agency's written decision.[213] The quarterly performance appraisal system preserves these statutory due process rights while simultaneously reducing the overall amount of time

208. *See* 5 C.F.R. §§ 430.204(b)(1)(i)–(vi).

209. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–43 (1985); Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

210. Regulations require agencies to provide poor performing employees with a reasonable opportunity to improve; the regulations do not designate what amount of time is reasonable. § 432.105; *see* MSPB, ADDRESSING POOR PERFORMERS, *supra* note 3, at 6.

211. *See* GAO-15-191, *supra* note 96, at 13–15 (demonstrating the current burdensome removal process).

212. *See* GAO-15-191, *supra* note 96, at 6 (indicating that a performance appraisal system requires managers to communicate performance standards clearly, provide consistent feedback, transparently document examples of poor performance, and contain the necessary safeguards for merit-based performance actions).

213. 5 U.S.C. §§ 4303(b)(1)(A)–(D) (2012).

and burden associated with removing a poor performing employee. Currently, it takes managers 80 to 200 days to observe performance issues, conduct counseling sessions, and monitor and provide employees with regular performance feedback.[214] The proposed quarterly performance appraisal would reduce the amount of time to 90 days, eliminating 110 days. Additionally, it currently takes managers 50 to 110 days to create and implement PIP.[215] The proposed quarterly performance appraisal creates and implements the PIP as part of an unsatisfactory evaluation; therefore, absent the time it takes to complete the subsequent quarter to determine whether the employee's performance improved, there is no additional time added, eliminating 50 to 110 days from the removal process.[216] Moreover, it currently takes managers 40 to 60 days to prepare a proposed notice of removal, notify the employee, review the employee's response to the proposed removal, provide the deciding official's decision to the employee, and inform the employee of their right to appeal.[217] The proposed quarterly performance appraisal would notify an unsatisfactorily performing employee at the beginning of the quarter that if the employee continues to perform poorly at the end of his PIP period, the manager would take an adverse action. If the employee's performance is deficient at the end of the PIP period, the employee will be granted 30 days to respond and will be notified of his right to appeal, eliminating 10 to 30 days.[218]

Therefore, incorporating the PIP into the quarterly performance appraisal system helps Congress achieve its central goal for enacting Chapter 43—it makes it easier for managers to fire employees "for the right reasons"—without infringing on an employee's statutory or due process rights.[219]

D. Implementing the Proposed Recommendations

OPM is the executive agency that serves as the government's personnel manager.[220] OPM is responsible for the quality and management of federal employees, prescribing performance appraisal system parameters, and administering and executing "civil service laws, rules, and regulations."[221] Therefore, OPM is the best agency to implement the proposed changes.

214. *See* GAO-15-191, *supra* note 96, at 15.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *See* S. REP. NO. 95-969, at 4 (1978).
220. *See* 5 U.S.C. § 1104 (2012).
221. *See* Luneburg, *supra* note 23, at 16–17.

MSPB, on the other hand, is an adjudicatory entity responsible for protecting federal employees against arbitrary employment actions.[222] Therefore, MSPB is the best agency to ensure that the recommendations "adher[e] to merit system principles," laws, and regulations.[223] The two agencies would provide checks-and-balances to the performance appraisal system—OPM would implement the proposed changes and MSPB would ensure that the changes complied with merit-based principles.

To implement the three proposed adjustments, OPM should issue guidance for two of the recommendations and a regulation for one of the recommendations. OPM should issue guidance for the recommendation that the performance appraisal system incorporate a PIP, if an employee's performance is unsatisfactory, to reduce the amount of time it takes a manager to remove a poor performing employee. Likewise, OPM should issue guidance for the recommendation that a managerial performance appraisal should rate managers based on their managerial proficiencies rather than their technical competencies. However, OPM should issue a regulation to implement a quarterly performance appraisal system that will replace the annual (or semi-annual) performance appraisal system.

When an agency issues guidance, it is either interpreting existing laws or explaining how it will exercise its discretion, not establishing new binding requirements.[224] OPM-issued guidance is appropriate for the recommendation that federal managers' performance appraisals should evaluate their supervisory skills instead of their technical skills and the recommendation that a PIP should be incorporated into the performance appraisal cycle because both recommendations interpret existing performance appraisal laws, not establish new laws.[225]

However, OPM should issue a regulation to implement and require agencies to use the quarterly performance appraisal system because it is a substantive change to, rather than an interpretation of, the existing performance appraisal regulation and corresponding annual appraisals.[226] Although OPM seemingly leaves the length of the appraisal period to the

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222. *See Developments in the Law*, *supra* note 3, at 1635; Laponsky, *supra* note 38, at 288.

223. *See* Laponsky, *supra* note 38, at 288 (citing 5 U.S.C. §§ 1201–09 (2012)).

224. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) [hereinafter Final Bulletin].

225. *See id.* (indicating agencies can issue guidance to help interpret and clarify existing laws, as well as inform the public).

226. OPM would not be able to invoke the agency management or personnel rulemaking exemption under APA § 553 because the CSRA requires the OPM Director to publish general notice of all proposed rules in the Federal Register. APA, 5 U.S.C. § 553(a)–(b); CSRA, Pub. L. No. 95-454, 92 Stat. 1111, 1119 (1978) (codified as amended in 5 U.S.C. § 1103(b)(1)); *see* Final Bulletin, 72 Fed. Reg. at 3433 (stating guidance is not appropriate if the proposed change "establish[es] new policy positions that the agency treats as binding").

discretion of the agency, OPM's existing performance appraisal regulations indicate that the appraisal period generally *shall* be twelve months, so employees are rated annually.[227] Therefore, OPM must comply with the Administrative Procedure Act's notice-and-comment requirement prior to issuing a new regulation.[228]

CONCLUSION

Civil service reforms have not solved the problems they were intended to solve. The problems that plague the civil service system could be helped if (1) the managers' performance ratings were based on managerial proficiencies rather than technical competencies; (2) agencies implemented a quarterly performance appraisal system, instead of an annual or semi-annual system, to increase the utility of the evaluation to both the employee and manager; and (3) a PIP were incorporated into the quarterly performance evaluation system to reduce the amount of time it takes a manager to remove a poor performer.

227. 5 C.F.R. § 430.206(a)(2) (1996) (emphasis added); *id.* § 430.207(b).

228. First, the agency issues an Advanced Notice of the Proposed Rulemaking to announce and explain the agency's proposed rule to the public. *See* OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS, http://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Mar. 25, 2016). Next, the agency opens a notice-and-comment period to invite the public to submit comments on any part of the proposed rule to help develop and improve the proposed regulation. *Id.* Then, the agency must review the public's comments and create the final version of the rule based on all of the "facts accumulated" during the rulemaking process. *Id.* Finally, if the President and the Office of Information and Regulatory Affairs approve the proposed rule, it is published in the *Federal Register*. *Id.*

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