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Cover Page Footnote

J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2009, St. Mary's College of Maryland. The author would like to thank Professor Benjamin Mintz for his invaluable insight and guidance throughout this process and the editors and staff of the *Catholic University Law Review* for their tireless efforts in contributing to this Comment. She would also like to thank her family and Matt for their everlasting support and encouragement.

ENHANCING ACCOUNTABILITY AT THE DEPARTMENT OF VETERANS AFFAIRS: THE LEGALITY OF THE VETERANS ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014 UNDER THE DUE PROCESS CLAUSE

Ashton Habighurst⁺

In April 2014, investigators uncovered untold instances of long delays at the Phoenix Veterans Affairs Medical Center (Phoenix VAMC) for those attempting to schedule health care appointments and the resulting deaths of forty veterans waiting for care, which shocked the nation.¹ This revelation sparked calls for reform and prompted investigations from the Office of Inspector General (OIG) and congressional oversight committees.²

⁺ J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.A., 2009, St. Mary's College of Maryland. The author would like to thank Professor Benjamin Mintz for his invaluable insight and guidance throughout this process and the editors and staff of the *Catholic University Law Review* for their tireless efforts in contributing to this Comment. She would also like to thank her family and Matt for their everlasting support and encouragement.

1. Scott Bronstein & Drew Griffin, *A Fatal Wait: Veterans Languish and Die on a VA Hospital's Secret List*, CNN.COM (Apr. 23, 2014, 9:19 PM), <http://www.cnn.com/2014/04/23/health/veterans-dying-health-care-delays/> (reporting the deaths of at least forty veterans who died waiting for appointment at the Phoenix VAMC after being placed on a "secret waiting list" that was purportedly "part of an elaborate scheme designed by Veterans Affairs managers in Phoenix who were trying to hide that 1,400 to 1,600 sick veterans were forced to wait months to see a doctor").

2. See generally SEN. TOM COBURN, FRIENDLY FIRE: DEATH, DELAY & DISMAY AT THE VA, U.S. DEP'T OF VETERAN AFFAIRS (2014), http://stripes.com/polopoly_fs/1.290429.1403627335!/menu/standard/file/Friendly%20Fire%20VA%20report.pdf [hereinafter FRIENDLY FIRE] (compiling information from recent VA OIG reports addressing the long wait times at VA medical facilities and backlogged disability cases). Following the scandal at the Phoenix VAMC, the OIG found that "veterans waited an average of 115 days for primary care appointments," a finding inconsistent with reports by Phoenix VAMC that represented that their patients "waited an average of only [twenty-four] days." *Id.* at 13. In March 2014, it was found that "more than 638,000 veterans were awaiting decisions on disability claims filed with the VA." *Id.* at 16; see also Richard A. Oppel, Jr., *Audit Shows Extensive Medical Delays for Tens of Thousands of Veterans*, N.Y. TIMES, June 10, 2014, at A12 [hereinafter *Audit Shows Extensive Medical Delays*] (reporting on the recent VA audit of over 700 VA medical facilities, which found that "[thirteen] percent of patient schedulers said that they had been instructed by 'supervisors or others' to enter false information"). Compare Richard A. Oppel, Jr., *No Link Found for Deaths and Veterans' Care Delays*, N.Y. TIMES, Aug. 26, 2014, at A14 [hereinafter *No Link Found*] (reporting that following an investigation of several VA medical facilities, an OIG report determines that there is no conclusive link between the long wait times at the VA and the forty deaths at the Phoenix VAMC), with Richard A. Oppel, Jr., *VA Official Acknowledges Link Between Delays and Patient Deaths*, N.Y. TIMES, Sept. 17, 2014, at A17 [hereinafter *Link Between Delays and Patient Deaths*].

As noted by Senator Tom Coburn (R-OK): “The problem is not money at the VA. The problem is management, accountability, and culture.”³ In response, Congress, in the spring of 2014, worked quickly to reform the Department of Veterans Affairs (VA).⁴ Following a series of expedited hearings,⁵ Congress passed legislation overhauling the Veterans Health Administration (VHA) and establishing new termination procedures for the VA’s senior management.⁶ In August 2014, President Obama signed the Veterans Access, Choice, and Accountability Act of 2014 (Act) into law.⁷

Addressing the perceived lack of accountability among VA senior executives, Section 707(a)(1) of the Act reforms the process by which the Secretary of the Department of Veterans Affairs may terminate employees positioned within the Senior Executive Service (“SES” or “senior executives”) classification.⁸ The new termination procedures, principally, eliminate the notice requirement for terminated SES employees, they significantly reduce the amount of time a terminated SES employee has to appeal an adverse employment decision to the Merit Systems Protection Board (MSPB), and they nearly eliminate the role of the MSPB’s three-member Board in reviewing a final administrative law judge (ALJ) determination.⁹

In practice, once a senior executive is terminated, the Act provides for an expedited review by the MSPB, whereby a terminated employee is given seven

(reporting that a senior official at the VA actually acknowledged a link between delays in care and patient deaths at the Phoenix VAMC).

3. *Veterans Access, Choice, and Accountability Act of 2014*, 160 CONG. REC. S5207 (July 31, 2014) (statement of Sen. Tom Coburn), <http://www.gpo.gov/fdsys/pkg/CREC-2014-07-31/html/CREC-2014-07-31-pt1-PgS5206.htm>; *see also* David A. Fahrenthold, *How the VA Developed Its Culture of Coverups*, WASH. POST (May 30, 2014), <http://www.washingtonpost.com/sf/national/2014/05/30/how-the-va-developed-its-culture-of-coverups/> (exposing the manner in which VA employees “fool[ed] the VA’s own accountability system” by “zero[ing] out the date” for patient appointments).

4. *See, e.g.*, Department of Veterans Affairs Management Accountability Act, H.R. 4031, 113th Cong. (as passed by the House, May 21, 2014) (making it easier for the Secretary of the Department of Veterans Affairs to remove underperforming VA executives).

5. *See, e.g.*, *All Actions: H.R. 4031 – 113th Congress (2013–2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4031/all-actions> (last visited July 21, 2015) (tracking the bill’s progress from its introduction in the House to its movement to the Senate over a few months).

6. *See generally*, H.R. 4031 113th Cong. (2014) (changing the procedures by which senior executives can appeal an adverse personnel action).

7. *See* Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, 128 Stat. 1754, 1754 (2014).

8. *See id.* § 707(d)(1), 128 Stat. at 1799 (stating that “the procedures under section 7543(b) of title 5 shall *not* apply to a removal or transfer under this section”) (emphasis added). The U.S. Office of Personnel Management (OPM) requires certain pre-termination procedures to include “at least 30 days’ advance written notice,” “a reasonable time . . . to answer orally and in writing,” representation by an attorney, and a written decision with “specific reasons.” 5 U.S.C. § 7543(b)(1)–(4) (2012).

9. *See* Veterans Access, Choice, and Accountability Act, § 707(d)(1), 128 Stat. at 1799.

days from the date of removal to petition the MSPB for review.¹⁰ In turn, an ALJ from the MSPB has only twenty-one days to review and rule on the terminated employee's case.¹¹ If the ALJ does not make a decision within twenty-one days, the agency termination becomes final.¹² The Act, as a result, greatly restricts the ability of a VA senior executive to appeal a termination to the MSPB's three-member Board,¹³ while terminated employees positioned at other federal agencies have no such constraint on their civil service appellate rights.¹⁴ These changes to the civil service appellate rights of VA senior executives, thereby, implicate procedural due process concerns.¹⁵

This Comment analyzes Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 and addresses whether the new provisions that truncate terminated VA senior executives' appellate rights implicate due process concerns. Part I introduces the Civil Service Reform Act of 1978 (CSRA) and includes a discussion of the legislative history and purpose of creating the SES, as well as the corresponding rights provided to this class of federal employees. Part II examines the text and legislative history of Section 707, investigates the purpose behind the new statutory changes, and compares the appellate rights provided to all SES employees with those allocated specifically to VA senior executives. To determine whether the Act provides terminated SES employees with adequate process, this Comment analyzes case law addressing the procedural due process framework and the manner in which courts balance public and private interests. In light of this discussion—scrutinizing the text of Section 707 and balancing the respective interests involved—Part III concludes that the Act violates VA SES employees' procedural due process rights and advocates for a more internal reform approach, focusing on revising agency performance appraisal procedures and communicating clear expectations for employees.

10. *Id.* § 707(a)(1), 128 Stat. at 46.

11. *Id.*

12. *Id.*

13. *Id.* § 707(a)(1), 128 Stat. at 1799.

14. *See* 5 U.S.C. § 7701(a) (2012).

15. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”). This Comment focuses solely on the procedural due process implications imposed by the expedited appellate procedures. Although the new provisions only affect a specific class of federal employees—those in the SES at one federal agency, the VA—for this very reason the Act also potentially violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, which states, “[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. The concept of equal protection is implicit in the Fifth Amendment, which applies to the federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

I. HISTORICAL REFORM: THE CHANGING RIGHTS OF THE FEDERAL SENIOR EXECUTIVE SERVICE AGAINST THE BACKDROP OF THE DUE PROCESS CLAUSE

The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁶ As noted by the U.S. Supreme Court, due process may be procedural or substantive.¹⁷ “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property.’”¹⁸ Courts utilize a three-prong inquiry to determine whether the Due Process Clause applies to a question of law: 1) whether the interest at stake is implicated under the Due Process Clause; 2) whether a government action deprived an individual of said interest; and 3) whether the process was adequate in light of the attendant facts and circumstances of the case.¹⁹ For purposes of this three-pronged analysis, property interests constitute a broad construct, encompassing interests ranging from employment²⁰ to government benefits²¹ to driver’s licenses.²² Constitutionally protected employment termination procedures generally recognized under the Due Process Clause include the right to notice, the right to a pre-deprivation hearing, and the right to an appeal.²³

A. *The Civil Service Reform Act (CSRA) of 1978*

1. *The Need for Reform: Legislative History of the CSRA*

In response to criticism of the federal Civil Service Commission, established by the Pendleton Act (1883),²⁴ and the general public’s distrust of the federal

16. U.S. CONST. amend. V.

17. See *Washington v. Glucksberg*, 521 U.S. 702, 762–64 (1997) (Souter, J., concurring) (discussing the Court’s adoption of procedural and substantive due process).

18. See U.S. CONST. amend. V; *Mathews*, 424 U.S. at 332.

19. See *Mathews*, 424 U.S. at 334–35. The Court found that the issue of whether administrative procedures are “constitutionally sufficient” is properly resolved by balancing “the governmental and private interests that are affected.” *Id.* at 334.

20. See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985) (analyzing an employment claim as a potential deprivation of property under the Due Process Clause); *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 576–77 (1972) (describing cases in which termination of public employment was reviewed under the procedural due process analysis).

21. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261–62 (1970) (stating that welfare benefits are a valid property interest under the Due Process Clause because they are “a matter of statutory entitlement” where “termination involves state action that adjudicates important rights”).

22. See, e.g., *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that the continued possession of a driver’s license is a valid property interest for procedural due process purposes).

23. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1280–81, 1294–95 (1975).

24. See PATRICIA WALLACE INGRAHAM, *THE FOUNDATION OF MERIT: PUBLIC SERVICE IN AMERICAN DEMOCRACY 74–75* (1995) (stating that by the 1970s, many felt that the civil service was “rigid and rooted in the past,” “large and unwieldy,” and “arcane”). The Pendleton Act was Congress’s response to the “Spoils Era,” whereby “patronage became central to public employment.” *Id.* at 20. It was the first major attempt at reforming the civil service system by

government following the Watergate scandal,²⁵ President Jimmy Carter prioritized the reform of the Civil Service Commission, “seiz[ing] on the issue . . . in the earliest stages of his campaign for president.”²⁶ To alleviate the growing bureaucratic “red tape,” President Carter charged nine separate task forces with studying the civil service and proposed guidelines to reorganize it.²⁷ Based on the task forces’ findings, the Carter administration abolished the Civil Service Commission and created what was known as Reorganization Plan Number 2.²⁸ This plan called for the creation of three new federal entities: the Office of Personnel Management (OPM), the MSPB, and the Federal Labor Relations Authority (FLRA).²⁹

introducing merit principles to the federal government, where admission was gained only “through fair, open, and competitive examinations.” *Id.* at 26. The Pendleton Act created the Civil Service Commission to monitor federal civil service and insulate federal employees from politics. *Id.* at 27–28.

25. *See id.* at 74–75. A 1978 Roper Organization poll found that “only [ten] percent of the citizens responding believed that government was free of corruption,” “[l]ess than a fourth believed that government was an exciting place to work,” and “only [eighteen] percent believed that government attracted the best people.” *Id.* at 74.

26. *See id.* at 75 (stating that Carter “seized on the issue of civil service reform in the earliest stages of his campaign for president” based on “lessons he had learned [as governor of] Georgia,” and that Carter campaigned “in large part of the premise of ‘fixing what’s wrong with government’”).

27. *See* Dwight Ink, *What Was Behind the 1978 Civil Service Reform?* in *THE FUTURE OF MERIT: TWENTY YEARS AFTER THE CIVIL SERVICE REFORM ACT* 39, 41–42 (James P. Pfiffner & Douglas A. Brook eds., 2000).

28. INGRAHAM, *supra* note 24, at 77; *see also* S. REP. NO. 95-969, at 3 (1978) (noting the overwhelming need for reform as the civil service evolved into a complex system involving numerous procedures and an immense amount of bureaucratic paperwork). The primary objective of the reform was to streamline the civil service system and reestablish an efficient system of merit. *Id.* (addressing task force findings, including the effect of the existing civil service system on the public, and noting that “valuable resources [were] lost to the public service by a system” that was “increasingly too cumbersome to compete for talent”).

29. INGRAHAM, *supra* note 24, at 77; *see generally* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Title II of the CSRA created the structure and functions of the OPM, which would be led by the Director of OPM. *Id.* § 201(a), 92 Stat. at 1119 (codified as amended at 5 U.S.C. §§ 1101–05 (2012)). The Director of OPM would be responsible for “executing, administering, and enforcing the civil service rules and regulations of the President and the Office and the laws governing the civil service.” *Id.* Additionally, Title II created the structure and functions of the MSPB as a quasi-judicial agency that adjudicates matters within its jurisdiction, including adverse personnel actions against federal employees. *Id.* § 202, 92 Stat. at 1122 (codified at 5 U.S.C. § 1205 (2012)). Finally, Title VII created the structure and functions of the FLRA, which vested the agency with the responsibility of “establishing policies and guidance” for labor-management relations in the federal service. *Id.* § 701, 92 Stat. at 1192, 1196–97 (codified at 5 U.S.C. §§ 7104–05 (2012)).

2. *Creating the Senior Executive Service and a System of Merit Principles*

The creation of the SES, intended by Congress to be the hallmark of a merit-based civil service,³⁰ was perhaps one of the most influential aspects of the CSRA.³¹ The CSRA originally defines an SES member as an employee in “any position in an agency which is classified above GS-16, 17, or 18 of the General Schedule.”³² Because SES members are “rank in person” employees with skill sets that are transferable to other agencies,³³ Congress contemplated that their achievements would create a cascade effect that would trickle down merit-based principles to all other members of the civil service.³⁴

3. *Removal Under the CSRA: Statutory Protections Afforded to SES Employees*

Due to the magnitude of SES employees’ authority, the CSRA also affords proportionate protections for adverse personnel action taken against them.³⁵ The cornerstone of these protections is the “for cause” constraint on removal, whereby an SES employee can only be removed for “less than fully successful executive performance.”³⁶ What precisely constitutes such a “fully successful”

30. INGRAHAM, *supra* note 24, at 77–79 (noting its compensation statement “had a significant performance-based component”). Under the system, derived from the British civil service model, “the personal qualifications and experience of a member, rather than the job description” determine the employee’s compensation level. *Id.* at 79.

31. *See* Civil Service Reform Act of 1978 § 402(a), 92 Stat. at 1154–55 (codified at 5 U.S.C. § 3131 (2012)). The SES was created “to ‘ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation.’” *Id.*

32. *Id.* § 402(a), 92 Stat. at 1156 (codified as amended at 5 U.S.C. § 3132(a)(2) (2012)). Currently, the definition of “Senior Executive Service position” is “any position in an agency which is classified above GS-15 pursuant to section 5108 or in level IV or V of the Executive Schedule.” 5 U.S.C. § 3132(a)(2) (2012).

33. *Id.* at 78–79.

34. *See* Patricia W. Ingraham & Donald P. Moynihan, *Evolving Dimensions of Performance from the CSRA Onward*, in *THE FUTURE OF MERIT*, 103, 107 (James P. Pfiffner & Douglas A. Brook, eds. 2000) (“[T]he [CSRA] was intended to ensure that individual performance was being monitored at the negative and positive ends of the performance spectrum . . .”); *see also* U.S. OFFICE OF PERS. MGMT., *GUIDE TO THE SENIOR EXECUTIVE SERVICE 2* (2014) [hereinafter *GUIDE TO THE SENIOR EXECUTIVE SERVICE*], <https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf>. Congress created the SES in hopes of providing “greater authority to agencies to manage their executive resources.” *Id.* SES employees’ statutory duties include “direct[ing] the work of an organization unit,” “monitor[ing] progress toward organizational goals,” “supervis[ing] the work of employees,” and “exercise[ing] important policy-making, policy-determining, or other executive functions.” 5 U.S.C. § 3132(a)(2)(A)–(E) (2012).

35. *See* 5 U.S.C. § 3592 (b)(1) (2012) (restricting the involuntary removal of SES employees).

36. *See id.* § 3592(a)(2) (providing removal procedures for SES employees). An SES member may be either reassigned or removed for adequate cause. *See* *GUIDE TO THE SENIOR EXECUTIVE SERVICE*, *supra* note 34, at 19 (“Agency managers can take a performance-based action after the career appointee has: received a performance plan; been given a progress review; served the minimum appraisal period; and been rated on his/her performance. If the rating is unsatisfactory,

performance is determined agency-by-agency via a statutorily-mandated “performance appraisal system[.]”³⁷ To remove a senior executive for poor performance, the CSRA requires that a senior executive “receive [two] unsatisfactory ratings in any period of [five] consecutive years” or collect a “less than fully successful” performance rating “twice in any period of [three] consecutive years.”³⁸

The CSRA further mandates that OPM establish procedural regulations outlining the pre-termination process.³⁹ These basic pre-termination procedural guarantees include that “[thirty] days’ advance written notice” must be provided in the absence of “reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed,” to allow the affected employee the opportunity to seek representation, and to respond to the removal notice—a window of review of “not less than [seven] days.”⁴⁰

In the event an agency can justify the for cause removal constraint and then appropriately follow the pre-termination procedural guidelines mandated by law, the now terminated senior executive is further entitled to additional appellate privileges, including the right to a post-termination hearing before a MSPB ALJ,⁴¹ afforded by the MSPB.⁴² Following a hearing, the ALJ—generally within 120 days⁴³—provides a written decision.⁴⁴ In the event the agency’s decision is affirmed, the terminated employee may then appeal to the

the agency [may] . . . remove . . . or reassign [the employee] . . .”). When an SES employee is removed, the agency gives him or her written notice of the removal at least thirty days prior to its effectiveness. *Id.* at 19–20. If removal is based on unsatisfactory performance, then the SES member cannot appeal the removal directly to the agency head, but may request an informal MSPB hearing. *Id.*

37. 5 U.S.C. § 4312(a) (providing that agencies must create systems for evaluating SES employee performance). Performance appraisal systems may consider factors such as “improvements in efficiency, productivity, and quality of work,” “cost efficiency,” and “timeliness of performance” in evaluating SES employees. 5 U.S.C. § 4313(1)–(3).

38. 5 U.S.C. § 4314(b)(3)–(4).

39. 5 U.S.C. §§ 7513(c), 7514. OPM regulations provide further details concerning the process outlined in 5 U.S.C. § 7513(b), but note the basic requirements of “[thirty] days’ advance written notice” of an adverse employment action, the employee’s opportunity to respond during a “reasonable amount of official time . . . but not less than [seven] days,” and the right to representation by an attorney must remain intact. 5 C.F.R. § 752.404(b), (c), (e). However, OPM notes that a senior executive’s right to orally respond “does not include the right to a formal hearing . . . unless the agency provides for such hearing in its regulations.” *Id.* § 752.404(c)(2).

40. 5 C.F.R. § 7513(b)(1)–(3); *see also* 5 C.F.R. § 4303(b)(1)(A)–(C) (outlining the same process for removal based on unacceptable performance).

41. 5 C.F.R. § 7701(a), (b)(1).

42. *Id.* § 7513(d).

43. U.S. MERIT SYS. PROT. BD., JUDGES’ HANDBOOK 1, 52 (2007), www.mspb.gov/netsearch/viewdocs.aspx?docnumber=241913&version=242182. The MSPB Judge’s Handbook states that ALJs should reach decisions within 120 days “except for good cause shown.” *Id.* The Handbook states that “due process and fairness,” as well as “caseloads” can be relevant factors for extending the amount of time it takes an ALJ to issue a decision. *Id.* at 1.

44. 5 U.S.C. § 7701(b)(1).

MSPB's three-member Board.⁴⁵ As the investigation continues through the appellate process, the terminated employee is entitled to continued compensation from the agency.⁴⁶

B. The Veterans Access, Choice, and Accountability Act of 2014

1. A Sense of Urgency: The Legislative History of the Act

Representative Jeff Miller (R-FL), spearheading the campaign for reform in the wake of the reported abuse and misconduct at the Phoenix VAMC, introduced the Department of Veterans Affairs Management Accountability Act of 2014, which became House Bill 4031.⁴⁷ This bill primarily amended the protectionist removal process previously afforded to VA senior executives.⁴⁸ In June 2014, Senator Bernard Sanders (I-VT)—hoping to expedite the MSPB appellate process for adverse employment decisions taken against VA senior executives—introduced the Veterans' Access to Care through Choice, Accountability, and Transparency Act of 2014,⁴⁹ which later became Senate Bill 2450.⁵⁰ Although the Senate did not pass Senate Bill 2450, a companion measure, House Bill 3230, passed and evolved into the Veterans Access, Choice, and Accountability Act of 2014.⁵¹

45. *Id.* § 7701(e)(1)(A). If the MSPB affirms the agency's decision and upholds the termination, then the affected employee may "petition[] the Board for review within [thirty] days after the receipt of the decision." *Id.*

46. *Id.* § 7701(b)(2)(B) (providing that the affected party "shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review").

47. *H.R. 4031 (113th): Department of Veterans Affairs Management Accountability Act of 2014*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr4031#> (last visited Aug. 25, 2015); see *supra* notes 1–6 and accompanying text.

48. Department of Veterans Affairs Management Accountability Act of 2014, H.R. 4031, 113th Cong. § 2(a) (as passed by the House, May 21, 2014). This bill enhances the Secretary of the VA's ability to terminate SES employees by adding substandard performance as a new "for cause" factor. *Id.*

49. See, e.g., Veteran's Access to Care Through Choice, Accountability, and Transparency Act of 2014, S. 2450, 113th Cong. § 713(d)(1). This section outlines the MSPB's expedited review process for an appeal by a terminated SES employee. *Id.* The MSPB "shall issue a decision not later than [twenty-one] days after the date of the appeal." *Id.* If the MSPB cannot make a decision within the twenty-one day timeframe, "the [MSPB] shall submit to Congress a report that explains the reason why [it] is unable to issue a decision in accordance with such requirement in such case." *Id.* § 713(d)(2). The appellant "may not receive any pay, awards, bonuses, incentives, allowances[,], . . . or benefits from the Secretary until the [MSPB] has made a final decision." *Id.* § 713(d)(5). Finally, the MSPB's decision "shall not be subject to any further appeal." *Id.* § 713(d)(6).

50. See Veterans' Access to Care Through Choice, Accountability, and Transparency Act of 2014, S. 2450, 113th Cong. This bill never passed the Senate, but it was later incorporated into the Veterans Access, Choice, and Accountability Act of 2014. See *infra* note 52 and accompanying text.

51. See H.R. 3230, 113th Cong. (2014) (enacted). Introduced by Congressman Harold Rogers (R-KY) on October 2, 2013, this bill passed the House the day after it was introduced, but stalled in the Senate for several months. See *H.R. 3230 – Veterans Access, Choice, and Accountability Act*

The discussion and debates concerning the accountability provisions under Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 were very limited. In fact, the bill proceeded through the legislative process in just four months and most of the accountability provisions were simply lifted from House Bill 4031.⁵² Still, some had their doubts. Expressing dissatisfaction with these provisions, Representative Mike Michaud (D-ME), the ranking Democratic Member on the House Committee on Veterans Affairs, exclaimed that “the [Committee] was not given the opportunity to consider th[e] bill.”⁵³

of 2014, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/3230> (last visited Aug. 5, 2015). The Senate eventually acted after the Phoenix VAMC scandal, and passed House Bill 3230 in lieu of Senate Bill 2450. See Bronstein & Griffin, *supra* note 1 (indicating that news of the Phoenix VAMC scandal broke during the spring of 2014); *H.R. 3230 – Veterans Access, Choice, and Accountability Act of 2014*, *supra* (stating that House Bill 3230 passed the Senate on June 11, 2014); see also Daniel Wilson, *Senate Overwhelmingly Passes VA Healthcare Reform Bill*, LAW360 (June, 2014, 6:11 PM), <http://www.law360.com/articles/547170/senate-overwhelmingly-passes-va-health-care-reform-bill> (stating that Senate Bill 2450, which would have allowed veterans to seek care outside the VA system under certain conditions and funded the construction of new hospitals, was attached to House Bill 3230 to allow for faster consideration). The enacted bill retained many of the same expedited MSPB review provisions suggested in the stalled House bill, including one stating that an MSPB ALJ “shall issue a decision not later than [twenty-one] days after the date of the appeal,” and once a decision is issued, it “shall be final and shall not be subject to any further appeal.” H.R. 3230, § 707(a)(1).

52. Compare H.R. 4031, § 2(a) (unenacted bill), with H.R. 3230, § 707(a)(1) (enacted bill) (indicating that House Bill 3230 adopted many of the same accountability provisions House Bill 4031); see also 160 CONG. REC. H4694 (daily ed. May 21, 2014) (statement of Rep. Miller) (acknowledging that the Secretary of the VA “want[ed] to hold others accountable, but he [was] being held back by a failed civil service that [made] it nearly impossible to remove SES employees” because the system was “so calcified in bureaucratic red tape that it [was] easier for someone to get a bonus than it [was] to be given some type of discipline”); but see Letter from Carol A. Bonosaro, President, Senior Execs. Ass’n, to House of Representatives (May 20, 2014), https://seniorexecs.org/images/documents/policy_letters/SEA_Letter_to_House_Opposing_HR_4031_00021170-2x87C30.pdf (highlighting, in opposition to House Bill 4031, the SEA’s contention that SES members are already subject to removal for poor performance and that “3,000 employees at the VA had been removed, including fourteen Senior Executives over the past two years”). The letter goes on to state that the proposed legislation would do nothing to change the culture at the VA and would likely only cause more harm, as it could “create a culture where quality managers and executives choose to work elsewhere.” *Id.*; see also Press Release, Senior Execs. Ass’n, *SEA Opposes Senate Action, Urges Conference Committee to Address Problems at VA instead of Scapegoating Career Senior Executives* (June 11, 2014), <https://seniorexecs.org/newsroom/press-releases/416-sea-opposes-senate-action-urges-conference-committee-to-address-problems-at-va-instead-of-scapegoating-career-senior-executives-2> (recounting the quick legislative process for House Bill 3230 and remarking that there was “no debate, amendments or committee hearings”).

53. 160 CONG. REC. H4695 (daily ed. May 21, 2014) (statement of Rep. Michaud). Representative Michaud further explained the importance of the markup process:

I believe this bill would be stronger and more reflective of the substantive reforms necessary in the Department if it had been allowed to go through the committee markup process. . . . This bill will simply turn approximately 400 senior executive civil service positions across the VA into essentially at-will positions, of which 165 are in the Veterans Health Administration. More importantly, [House Bill] 4031 does not adequately

Representative Steny Hoyer (D-MD) noted the lack of “markup in committee,” the fact that the bill “was brought to the floor with little notice,” and the potential due process concerns arising from what the Congressman perceived as a “knee-jerk reaction to a bad situation, painted with a very broad brush.”⁵⁴ By the time House Bill 3230 reached the Senate, the political pressure to pass some sort of reform as soon as possible inundated Congress.⁵⁵ Remarks from Senator John McCain (R-AZ) reflect this political vice-grip, acknowledging that the bill was “not perfect legislation,” but nevertheless urged that “for [Congress] not to pass it at this time would send a message to the men and women who have served this country that we have abandoned them.”⁵⁶

This sense of urgency stymied debate, evidenced by the lack of additional consideration and the addition of a new finality clause—an amendment not introduced until after Congress issued the Joint House and Senate Conference Committee Report.⁵⁷ The new finality clause, which removes the ability of a

address the performance metrics of VA executives. It doesn’t provide any framework for ensuring problems and failures don’t occur in the first place.

Id.

54. *Id.* at H4697 (statement of Rep. Hoyer). Representative Hoyer further objected: I cannot support this bill as written. I believe it opens the door to a slippery slope of undoing the careful civil service protections that have been in place for decades. This is about due process. Now due process is put under stress at critical times. Pursuing due process at times when there is no stress is not difficult. The test of a society is whether, at times of stress, it can follow due process and the law. This bill does not provide for that.

Id. Representative Chris Van Hollen (D-MD) similarly noted his reservations about the new accountability provisions, stating that they “give[] the VA Secretary broad authority to fire [SES] employees even though the VA already has the tools to remove SES employees who are rated unsatisfactory.” *Id.* at E1316 (daily ed. Aug. 1, 2014) (statement of Rep. Van Hollen). These same concerns are echoed in recent debates surrounding H.R. 1994, a recent bill introduced by Congressman Jeff Miller (R-FL). *See* H.R. 1994, 114th Cong. (2015) (unenacted). This bill, if enacted, provides non-executive employees terminated for poor performance a similar truncated appellate process and revises the termination procedures under 5 U.S.C. § 7513(b) by requiring an appeal made to the MSPB be filed within seven days of termination, while only allowing an ALJ forty-five days to make a decision. *See* H.R. 1994 § 715(d)(1), § 715(e)(1)–(2) (2015). H.R. 1994 passed the House on July 29, 2015, despite dissenting views of a similar nature, charging that “Section 2 would provide only an abbreviated level of post-determination due process,” and that this lack of due process “may provide the grounds by which courts overturn disciplinary actions taken by the VA under color of this authority.” *See H.R. 1994 – Veterans Accountability Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/1994> (last visited Aug. 12, 2015).

55. *See, e.g., id.* at S5206 (daily ed. July 31, 2014) (statement of Sen. McCain) (“If there was ever a definition of an emergency, that emergency faces us today . . .”).

56. *Id.* at S5207 (statement of Sen. McCain).

57. House Report 564 was ordered to be printed on July 28, 2014 and stated that the “Senate recede[s] from its disagreement to the amendment of the House and agree to the same with an amendment” as provided in House Report 564. *Id.* at 1. House Bill 3230 was subsequently enacted as the Veterans Access, Choice, and Accountability Act of 2014 on August 7, 2014. Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, 128 Stat. 1754.

terminated VA senior executive to appeal to the MSPB's three-member Board, places even more pressure on the twenty-one day window provided to the ALJ to reconsider an agency's decision. In effect, this last minute amendment removed an otherwise guaranteed procedural right enjoyed by other senior executive employees.⁵⁸ President Obama, nevertheless, signed the bill into law within eleven days of the Joint Conference Committee Report.⁵⁹

2. *Revising the CSRA: Section 707 of the Act*

In compliance with the CSRA, members of the SES were typically provided with thirty days advance written notice of termination, the opportunity to respond to the advanced notice, and could appeal their termination to the MSPB.⁶⁰ Section 707 of the Act revises these pre- and post-termination procedures of VA SES employees.⁶¹ For example, under Section 707 a VA senior executive is neither afforded the pre-termination procedure of notice, nor is given the same opportunity to respond.⁶² Additionally, while a terminated VA senior executive may still appeal an agency decision to the MSPB, this appellate review process is hastened as the ALJ only has twenty-one days to issue a decision.⁶³ If an ALJ is unable to meet this hurried deadline, "the removal or transfer is final" and the decision "shall not be subject to any further appeal."⁶⁴

58. See H.R. REP. NO. 113-564, at 47 (2014) (Conf. Rep.). Neither the initial House bill nor the Senate bill contained the finality provision for the new 5 U.S.C. § 713(e)(3), which states that "[i]n any case in which the administrative judge cannot issue a decision in accordance with the [twenty-one] day requirement under paragraph (1) *the removal or transfer is final.*" *Id.* (emphasis added); see also S. 2450, 113th Cong., § 409 (2014); H.R. 4031, 113th Cong., § 2(a) (as passed by H.R., May 21, 2014) (not indicating that the removal or transfer would be final).

59. See Pub. L. No. 113-146, 128 Stat. 1754 (noting that the bill was signed into law on August 7, 2014); see also H.R. REP. NO. 113-564, at 1 (2014) (Conf. Rep.) (stating that the Conference Report was issued on July 28, 2014).

60. See *Senior Executive Service Performance Suspension and Removal*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/policy-data-oversight/senior-executive-service/performance/#url=Suspension-and-Removal> (last visited Aug. 5, 2015).

61. See generally Pub. L. No. 113-146, § 707(a)(1), 128 Stat. 1754, 1799 (2014) (altering removal procedures for Senior Executive Service members).

62. See *id.* § 707(d)(1), 128 Stat. at 1799 (stating that "the procedures under section 7543(b) of title 5 shall *not* apply to a removal or transfer under this section") (emphasis added). Despite this new provision, VA officials have, based on advice from VA attorneys, instituted a policy providing candidates for removal with a five-day notice period. Jacqueline Klimas, *VA's 5-day Firing Notice Too Long for Congress, Too Short for Lawyers*, WASH. TIMES (Nov. 30, 2014), <http://www.washingtontimes.com/news/2014/nov/30/va-5-day-firing-notice-too-long-for-congress-too-s/?page=all>.

63. § 707(a)(1), 128 Stat. at 1799.

64. Pub. L. No. 113-146, 128 Stat. 1754 at § 713(e)(1). During the limited debates concerning these provisions, the House proposed an amendment providing the Secretary with the authority to remove a VA SES employee based on poor performance. H.R. REP. NO. 113-564, at 80 (2014) (Conf. Rep.). The Senate submitted Amendment 3237 to House Bill 3230, which initially proposed the provisions regarding expedited review by the MSPB and included the twenty-one day adjudication period by an ALJ. 160 CONG. REC. S3610 (daily ed. June 11, 2014) (amendment

Moreover, unlike non-VA SES employees, the terminated VA senior executive is not entitled to receive “any pay, awards, bonuses, incentives, allowances[,] . . . or benefits” during the appeals process.⁶⁵

To comply with the expedited review outlined in Section 707, the MSPB issued an “interim final rule” concerning the process, effective October 22, 2014.⁶⁶ Despite comments questioning the validity of the expedited review and its effect on the actual hearing provided,⁶⁷ this new rule imposed new discovery restrictions on the termination process⁶⁸ and created a rebuttable presumption that the agency’s determination was justified.⁶⁹ This presumption contradicts the MSPB’s practices regarding other federal agencies, which must prove by a preponderance of the evidence that “the penalty promotes the efficiency of the service and is reasonable.”⁷⁰

proposed by Sen. Tester). Senator Jon Tester (D-MT) addressed the reasoning behind the expedited review, stating that “[b]y getting rid of incentives to falsify wait times and make it easier to remove bad managers, we will hold more folks accountable.” *Id.* at S3594 (statement of Sen. Tester). It was not until the conference between the Senate and the House that the provisions concerning the finality of an ALJ’s determination were added, as the Conference Agreement “generally adopts the Senate provision with an amendment to change the level of review at the MSPB.” H.R. REP. NO. 113-564, at 80. This change provides no further appeal beyond the ALJ, such as a second level review by the MSPB’s three-member Board. *Id.*

65. *See supra* text accompanying note 46; § 707(a)(1), 128 Stat. at 1799.

66. *See* Merit Systems Protection Board, 79 Fed. Reg. 63,031 (Oct. 22, 2014) (to be codified at 5 C.F.R. pts. 1201, 1210) (stating that the Board is “adopting as final an interim rule that adapted the Board’s regulations to . . . new laws applicable to the removal or transfer of [SES] employees of the [VA]”).

67. *See id.* at 63,031–32 (listing the various concerns with the interim rule raised by a number of commenters). For instance, one commenter expressed that terminated employees might not have “sufficient and equal time to present their cases.” *Id.* at 63,032.

68. *See id.* at 63,031. The new discovery rules “limit the parties to [ten] interrogatories, no depositions, and no second round of discovery” to enable the feasibility of the shortened review process. *Id.*

69. *See id.* at 63,031–32 (disagreeing with the objection that giving the Secretary of the VA a rebuttable presumption for the appropriateness of a penalty determination is inconsistent with statutory and case law). The MSPB explains that it interpreted the language of 38 U.S.C. § 713(a)(1), which provides the Secretary with the authority to remove a senior executive “if the Secretary determines the performance or misconduct of the individual warrants such removal,” as granting the Secretary “broad discretion” to determine the appropriate penalty to impose upon an SES employee. *Id.* at 63,031.

70. *Id.* (recognizing the difference in “the penalty analysis the Board employs in other appeals [for other agencies]”); *see also* 5 C.F.R. § 1201.56(a)(1)(ii)(2014) (stating that the agency action will be sustained if “[i]t is brought under any other provision of law or regulation and is supported by a preponderance of the evidence”). The appellant must prove by a preponderance of the evidence arguments regarding “[i]ssues of jurisdiction,” “[t]imeline of the appeal,” and “[a]ffirmative defenses.” *Id.* § 1201.56(a)(2)(i)–(iii).

C. Procedural Due Process: An Analytical Framework

1. Property Interests Subject to Protection

It is an established principal that “[p]roperty interests . . . are not created by the Constitution,” but are instead “created and their dimensions are defined by existing rules or understandings that stem from an independent source.”⁷¹ Consequently, an individual asserting deprivation of procedural due process must assert a “legitimate claim of entitlement” and not a mere “abstract need or desire for it.”⁷²

Based on this framework, the Supreme Court held in *Board of Regents v. Roth*⁷³ that a professor did not have a valid property interest in tenured reemployment where he had only contracted for a fixed one-year term of employment.⁷⁴ The Supreme Court expounded, stating that the nature of the valid property interest—for procedural due process—is more akin to the facts in *Cleveland Board of Education v. Loudermill*,⁷⁵ where an employee was the subject of a “for cause” termination after his employer discovered that he had been dishonest on his job application.⁷⁶ The *Loudermill* Court held that because “[d]ismissals for cause will often involve factual disputes,” the employee had a constitutionally protected property interest in continued employment, and that the employee’s interest in “reaching an accurate decision” in his case is “of obvious value.”⁷⁷

2. Determining What Process is Due: The Mathews v. Eldridge Balancing Test

After discovering the encroachment of a valid property interest, courts must then determine how much process an individual is afforded.⁷⁸ While courts

71. See *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); see also *Covell v. Menkis*, 595 F.3d 673, 675–76 (7th Cir. 2010) (clarifying that a valid property interest for purposes of the Due Process Clause “can arise from a statute, regulation, municipal ordinance, or an express or implied contract”).

72. *Bd. of Regents*, 408 U.S. at 577.

73. 408 U.S. 564 (1972).

74. *Id.* at 578; but see *Perry v. Sindermann*, 408 U.S. 593, 602–03 (1972) (holding that a professor of ten years provided enough evidence to put at issue whether he had a legitimate property interest in his claim of tenure created through the university’s implied tenure policy).

75. 470 U.S. 532 (1985).

76. *Id.* at 535, 438–40.

77. *Id.* at 543; see also *Arnett v. Kennedy*, 416 U.S. 134, 152 (1974) (finding a valid property interest in employment subject to “for cause” termination where “Congress was obviously intent on accord[ing] a measure of statutory job security to governmental employees”).

78. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (stating that the Supreme Court has “consistently . . . held that some form of hearing is required before an individual is finally deprived of a property interest” and that “[the] Court has increasingly . . . had . . . to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter”).

generally recognize that legislation affords adequate due process,⁷⁹ courts must still make this determination on the basis of the attendant facts and circumstances of each particular case.⁸⁰ The hallmark case for determining what process is due is *Mathews v. Eldridge*,⁸¹ where the Supreme Court explained, “due process is flexible and calls for such procedural protections as the particular situation demands.”⁸²

In *Mathews*, the Court sought to determine whether a recipient of Social Security Administration (SSA) disability benefits received adequate process prior to the termination of his benefits.⁸³ In evaluating the adequacy of the procedures provided, the Court fashioned a three-part balancing framework, analyzing the various interests involved: 1) the private interest affected;⁸⁴ 2) the fairness and reliability of the current process, including whether or not additional procedural safeguards are warranted;⁸⁵ and 3) the government’s interest in being free of any potential administrative burden.⁸⁶

79. See, e.g., *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986) (holding that an action of the Arkansas legislature removing certain personnel in the sheriff’s department from civil service status is constitutional because “the legislature which creates a property interest may rescind it, whether the legislative body is federal or state”). The Eighth Circuit held in *Gattis* that where the Arkansas legislature had removed the appellants’ civil service employment protections before terminating their employment, the employees’ property interest had already been eliminated. *Id.*; see also *Gallo v. U.S. Dist. Court for the Dist. of Ariz.*, 349 F.3d 1169, 1181 (9th Cir. 2003) (stating that “[w]hen the [governmental] action is purely legislative, the statute satisfies due process if the enacting body provides public notice and open hearings”).

80. See *infra* note 82 and accompanying text.

81. 424 U.S. 319 (1976).

82. *Id.* at 334 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

83. *Id.* at 323–25, 349. Petitioner Eldridge, after the SSA determined that he was no longer totally disabled and therefore no longer unemployable, alleged that he should have been afforded a pre-termination hearing prior to the SSA’s termination of his disability benefits. *Id.* at 324–25.

84. *Mathews*, 424 U.S. at 335, 340. The Court determined that the private interest implicated was the “uninterrupted receipt of [a] source of income” but found that while this “may be significant,” it was not necessarily vital to Eldridge’s basic needs for survival because “[e]ligibility for disability benefits . . . is not based upon financial need.” *Id.* at 340–42; but see *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (finding that the termination of welfare benefits—without a pre-termination hearing—during the pendency of the determination of continuing eligibility is too detrimental because the “crucial factor” is that termination of these benefits “may deprive an eligible recipient of the very means by which to live while he waits”).

85. *Mathews*, 424 U.S. at 343. The Court found that the potential value for a pre-termination hearing is minimal because SSA’s adjudication rests on medical documentation, which is a “more sharply focused and easily documented decision than the typical determination of welfare entitlement.” *Id.* The Court proceeded to state that information in a welfare proceeding turns on witness statements, and thus the final determination depends upon “witness credibility and veracity,” which would prompt the need for a hearing. *Id.* at 343–44; see also *Goldberg*, 397 U.S. at 270 (holding that welfare recipients must be “given an opportunity to confront and cross-examine the witnesses relied on by the [government]” due to the nature of information involved in a welfare termination proceeding).

86. *Mathews*, 424 U.S. at 347. The Court recognized “the administrative burden and other societal costs” imposed with the requirement of a pre-termination hearing, and finds that the costs are not as insubstantial as the cost associated with the additional protection to those “whom the

a. Factor One: Assessing the Private Interest

When evaluating the private interest affected, courts generally recognize that the termination of employment is rather significant because it “depriv[es] a person of the means of livelihood.”⁸⁷ The *Loudermill* Court belabored this interest, explaining, “[w]hile a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.”⁸⁸

b. Factor Two: Balancing the Risk of Error Associated with the Procedures Employed and the Interplay between Pre- and Post-Termination Hearings

Procedures typically recognized as satisfying due process requirements include notice and an opportunity for a hearing, “which must be granted at a meaningful time and in a meaningful manner.”⁸⁹ However, the extent and nature of the hearing afforded is neither a settled concept nor an actual requirement in every case.⁹⁰

For example, the terminated employee in *Loudermill* argued that he was entitled to a pre-termination opportunity to respond to the allegations that ultimately resulted in his dismissal.⁹¹ The Supreme Court ultimately agreed with Mr. Loudermill, emphasizing that “the root requirement” of procedural due process is “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.”⁹² Importantly, however, the Court noted carefully that the degree of pre-termination procedures “need not be elaborate,” as such requirements depend in large part on “the nature of the

preliminary administrative process has identified as likely to be found undeserving” could redirect resources provided for other social programs. *Id.* at 348.

87. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985).

88. *Id.*

89. *Armstrong v. Manzo*, 380 U.S. 545, 550, 552 (1965); *see also* *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (stating that a fundamental requirement of due process is “the opportunity to be heard”).

90. *See Mathews*, 424 U.S. at 348 (stating that “[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking [sic] in all circumstances”). Rather, at a minimum, the affected party must be afforded an opportunity to present evidence to an impartial judge. *Goldberg*, 397 U.S. at 271; *see also* *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987) (stating that “[d]ue process of law . . . [is not satisfied] where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard”).

91. *Loudermill*, 470 U.S. at 535–36. Loudermill argued that the procedures under which he was terminated were facially unconstitutional because he was neither able to respond to charges prior to his removal nor was he able to receive a “sufficiently prompt postremoval hearing[.]” *Id.* at 536.

92. *Loudermill*, 470 U.S. at 542 (emphasis in original) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

subsequent proceedings.”⁹³ Since Mr. Loudermill was afforded a full post-termination hearing before the Civil Service Commission,⁹⁴ the Court determined that the pre-termination procedures of notice, coupled with an opportunity to respond, were sufficient.⁹⁵

Courts have also recognized that the absence of a pre-termination hearing does not necessarily render process inadequate.⁹⁶ These cases typically involve an employer suspending or terminating an employee on account of criminal misconduct and usually involve significant post-termination processes.⁹⁷

For example, in *Gilbert v. Homar*,⁹⁸ a police officer was suspended without any form of notice or hearing after he was arrested and charged with a drug-related felony.⁹⁹ The Supreme Court held that the process afforded to the officer was adequate because the public interest in immediately suspending an employee who is in a position of “public trust” is significant.¹⁰⁰

The Supreme Court similarly determined in *Federal Deposit Insurance Corporation v. Mallen*¹⁰¹ that adequate process was afforded to a suspended banking employee, absent notice or hearing, after the employee was indicted for

93. *Id.* at 545 (citation omitted) (internal quotation marks omitted); see *West v. Grand Cnty.*, 967 F.2d 362, 367 (10th Cir. 1992) (finding that “[t]he standards for a pretermination hearing are not stringent because of the expectation that a more formal post-termination hearing will remedy any resulting deficiencies”); see also *Arnett v. Kennedy*, 416 U.S. 134, 168–69 (1974) (Powell, J., concurring) (rejecting a non-probationary federal employee’s claim that failure to provide a pre-emptive hearing increased the possibility of wrongful termination because the statute provides for recuperation of retroactive pay if termination is later determined to be wrongful on appeal). Justice Powell balanced the interests established in *Mathews* and determined that the government’s interest of maintaining “employee efficiency and discipline,” noting that retention of an unsatisfactory employee “can adversely affect discipline and morale in the workplace,” outweighed the private interest of a “temporary interruption of income.” *Id.* at 168–69; but see *id.* at 185 (White, J., dissenting) (finding that the employee’s ability to appeal a removal action affords rights not previously available because “a hearing must be held at some time before a competitive civil service employee may be finally terminated for misconduct” in order to satisfy the general principle of due process). *Id.* at 185. Justice White further addressed the specific facts of the agency’s decision to terminate the employee, questioning the impartiality of the agency officer adjudicating the employee’s removal because the “hearing examiner’s own reputation, as well as the efficiency of the service, was at stake.” *Id.* at 199.

94. See *Loudermill*, 470 U.S. at 535–36. While the Commission-appointed hearing referee urged that Loudermill be reinstated, the Commission ultimately upheld his dismissal. *Id.*

95. See *id.* at 546–48. The Court stated that while “[t]he opportunity to present reasons . . . why [a] proposed action should not be taken is a fundamental due process requirement,” ordering an additional pre-termination process “would intrude to an unwarranted extent on the government’s interest in quickly removing an unsatisfactory employee.” *Id.* at 546.

96. See *infra* notes 98–105 and accompanying text.

97. See *infra* notes 98–105 and accompanying text.

98. 520 U.S. 924 (1997).

99. *Id.* at 926–28.

100. *Id.* at 932.

101. 486 U.S. 230 (1988).

making false statements to the Federal Deposit Insurance Corporation (FDIC).¹⁰² The Court explained that the statute authorizing the FDIC to suspend the employee was enacted for the purpose of providing federal banking agencies more “effective regulatory powers” when responding to felonious acts committed by federal employees, especially when that act is of a dishonest nature or one that constitutes a breach of the public trust.¹⁰³ The Court reasoned that the risk of error was minimal because the statute still required a formal post-suspension hearing¹⁰⁴ and the governmental interest in preserving the “integrity of the banking industry” is strong.¹⁰⁵

Because pre-termination and post-termination procedures are “inextricably intertwined,” the degree of post-termination process deemed constitutionally sufficient is wholly dependent upon the nature of the pre-termination process afforded an employee.¹⁰⁶ In *Carter v. Western Reserve Psychiatric Habilitation Center*,¹⁰⁷ the Sixth Circuit noted that a terminated employee was still entitled to a more thorough post-termination hearing based on the extent of pre-termination procedures.¹⁰⁸ Although the court remanded the case to determine the degree of post-termination process, it stated that “at a minimum,” a post-termination hearing requires the “assistance of counsel,” the ability to “call witnesses and produce evidence,” and the “opportunity to challenge the evidence.”¹⁰⁹

c. Factor Three: Assessing the Governmental Interest

The final factor of the *Mathews*' balancing test considers the governmental interest and the associated administrative or financial burdens imposed by providing a particular degree of process.¹¹⁰ One of the more common

102. *Id.* at 236–38, 248.

103. *Id.* at 232–33.

104. *Id.* at 234–35, 245.

105. *Id.* at 244.

106. *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985). The Sixth Circuit remarked that “[w]here . . . a court has approved an abbreviated pre-termination hearing, due process requires that a discharged employee’s post-termination hearing be substantially more ‘meaningful.’” *Id.*

107. 767 F.2d 270 (6th Cir. 1985).

108. *Id.* at 273–74 (noting that plaintiff, pre-termination, was provided “notice of the charge [underlying the termination]” and “opportunity to rebut [the] charge”); *see also* Powell v. Mikulecky, 891 F.2d 1454, 1458 (10th Cir. 1989) (emphasizing that “[b]ecause the post-termination hearing is where the definitive fact-finding occurs, there is an obvious need for more formal due process”); *Duchesne v. Williams*, 849 F.2d 1004, 1008 (6th Cir. 1988) (describing the dual roles of the pre-termination hearing, which is “designed to invoke the employer’s discretion . . . [and] his willingness to reconsider [the termination],” and the post-termination hearing, which “serve[s] to ferret out bias, pretext, deception, and corruption by the employer in discharging the employee”) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) (internal quotation marks omitted)).

109. *Carter*, 767 F.2d at 273–74.

110. *See supra* note 86 and accompanying text.

governmental interests advanced is the government's desire to expeditiously remove unsatisfactory employees.¹¹¹ For instance, in *Biliski v. Red Clay Consolidated School District Board of Education*,¹¹² the Third Circuit held that the governmental interest in terminating an employee who received five consecutive unsatisfactory performance evaluations was stronger than the employee's interest in continued employment.¹¹³ Because the employee was unable to identify any additional procedures that would have reduced the risk of error, the court held that the employer provided adequate notice by way of five memoranda outlining the employee's poor performance and warnings of potential termination.¹¹⁴

In contrast to *Biliski*, the District Court for the Western District of Pennsylvania held in *Mosley v. City of Pittsburgh Public School District*¹¹⁵ that the terminated Director of Staffing and Recruitment for Pittsburgh's Public School District received inadequate process¹¹⁶ when he was removed for poor performance without an opportunity to refute his supervisor's performance-related claims.¹¹⁷ The court disregarded the government's asserted interest of "efficiently removing unsatisfactory employees" in light of the employee's greater interest in employment, coupled with the significant risk of error when the employer fails to provide either a pre-termination or a post-termination hearing.¹¹⁸

II. A BREAKDOWN IN PROCEDURAL DUE PROCESS: VA SENIOR EXECUTIVE'S LIMITED RIGHTS UNDER THE VETERANS ACCESS, CHOICE, AND ACCOUNTABILITY ACT OF 2014

A. *An Analysis of Section 707 Under the Procedural Due Process Framework: Is a Property Interest Implicated?*

Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 includes worrisome provisions regarding the appellate rights of VA senior executives. Specifically, Section 707 of the Act eliminates the usual pre-termination notice and opportunity to respond and expedites the MSPB appellate process by limiting the time—just twenty-one days—in which an ALJ must

111. See *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 574 F.3d 214, 221 (3rd Cir. 2009) (evaluating the private interest of a terminated employee's continued employment, against the school district's interest in removing underperforming employees).

112. 574 F.3d 214 (3rd Cir. 2009).

113. *Id.*

114. *Id.* at 222–23. The court also held that the employee's letter to the Board of Education constituted a fair opportunity to present his case. *Id.*

115. 702 F. Supp. 2d 561 (W.D. Pa. 2010).

116. *Id.* at 563, 576.

117. *Id.* at 568–69.

118. *Id.* at 576–77.

make a determination.¹¹⁹ Moreover, if an ALJ does not render a decision within the twenty-one day deadline, the termination is final and the terminated senior executive is denied the opportunity to appeal to the MSPB's three-member Board.¹²⁰ These provisions, directed particularly at VA senior executives, effectively eradicate constitutionally understood procedural safeguards afforded to other senior executives under the CSRA.

As established in *Loudermill*, an individual's interest in continued employment is a valid property interest subject to procedural protections per the Due Process Clause when that employment is subject to "for cause" termination.¹²¹ Because SES employees are *only* subject to "for cause" termination, a VA senior executive, by default, has a constitutionally protected property interest in his or her employment.¹²² Therefore, serious questions exist as to whether the Section 707 provisions afford adequate process.

B. How Much Process is Due? Balancing the Interests Under the Mathews Test

Courts generally believe that legislation affords adequate process.¹²³ The *interests* involved in the new termination procedures, however, must still be balanced under the *Mathews* test to ensure that such procedures actually afford a terminated VA senior executive adequate process.¹²⁴

The private interest at stake is unambiguous: senior executives have a recognized right to continued employment and to a fair hearing by an impartial judge.¹²⁵ VA senior executives are high-level employees who are entrusted with substantial authority,¹²⁶ an authority arguably stronger than the authority

119. See Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 707(a)(1), 128 Stat. 1754, 1754–1801 (2014).

120. *Id.* § 707(a)(1), 128 Stat. at 1799.

121. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985) (stating that the employees in the case had a valid property interest in their employment where they could be dismissed only for "misfeasance, malfeasance, or nonfeasance in office").

122. Civil Service Reform Act of 1978, 5 U.S.C. § 3592(a)(2) (2012) (stating that an SES member may be removed "for less than fully successful executive performance").

123. See *United States v. Locke*, 471 U.S. 84, 108 (1984) ("[A] legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements.").

124. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (setting forth the three-part balancing test involving the private interest, the risk of erroneous deprivation, and the governmental interest).

125. See, e.g., *Loudermill*, 470 U.S. at 538–39; *Arnett v. Kennedy*, 416 U.S. 134, 169–70 (1974) (Howell, J., concurring) (finding that a terminated civil service employee's interest only resulted in a "temporary injury" because the employee has the right to appeal an adverse decision and potentially recuperate full retroactive pay if the removal was wrongful).

126. See Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-446, § 707(a)(1), 128 Stat. 1754, 1800 (2014) (defining "senior executives" as "career appointees" as well as "administrative" or "executive" employees); see also 5 U.S.C. § 3132(a)(2)–(4) (noting that

provided to the security guard in *Loudermill* where the private interest was considered “significant.”¹²⁷ Given the permanent nature of termination, the interest of continued public employment by VA senior executives is significant.

The next factor in determining whether VA SES employees receive adequate process under the Act is whether Section 707’s elimination of pre-termination notice and its post-termination expedited review increases the risk of erroneous employment decisions.¹²⁸ Courts have generally recognized a right to some type of a pre- and post-deprivation hearing before an impartial decision-maker,¹²⁹ as avoiding an erroneous termination decision is particularly important because of the permanence of termination.¹³⁰ Although the expedited review does not eliminate a senior executive’s right to appeal a termination decision to the MSPB,¹³¹ the truncated appellate process has the effect of eliminating, by removing several of the typical pre-termination procedures,¹³² the senior executive’s right to a meaningful post-termination hearing by an impartial judge.¹³³

The provisions imposing a twenty-one day decision deadline on an ALJ, while making a termination final if the ALJ does not meet that deadline, effectively remove the opportunity for a post-termination hearing.¹³⁴ Unlike SES employees in other federal agencies, VA senior executives have no additional recourse because Section 707 also removes the right to appeal—in these circumstances—to the MSPB’s three-member Board.¹³⁵

Unlike the employee in *Loudermill*, who received a full post-termination procedure and, per the Court’s holding, should have also received pre-termination notice and the opportunity to respond,¹³⁶ terminated VA senior executives will be denied any meaningful opportunity to be heard pre- and post-termination.¹³⁷ VA senior executives will, in effect, experience the same

senior executives may wield great responsibility within the agencies they work for, including directing work, managing projects, and supervising other employees).

127. *Loudermill*, 470 U.S. at 549 (Marshall, J., concurring).

128. *See Mathews*, 424 U.S. at 335.

129. *See, e.g., Loudermill*, 470 U.S. at 547–48; *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

130. *See supra* notes 87–88 and accompanying text.

131. *See Veterans Access, Choice, and Accountability Act of 2014*, § 707(a)(1), 128 Stat. at 1799 (stating that terminated employees may appeal to the MSPB, but that the MSPB must refer the appeal to an ALJ).

132. *See id.* (stating that the MSPB or ALJ “may not stay any removal or transfer” and that “[d]uring the period beginning on the date on which an individual appeals a removal . . . and ending on the date that the [ALJ] issues a final decision . . . [the terminated employee] may not receive any pay, awards, . . . or benefits”).

133. *See id.*

134. *See id.*

135. *See id.*

136. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 535–36, 542–44 (1985).

137. *See* § 707(a)(1). SES employees’ opportunity for an adequate hearing will be severely curtailed because their pre-termination and post-termination process will be truncated and they may

procedural defects as the employee in *Carter*, a case that explained that an “abbreviated pre-termination hearing” of notice and response still triggered a “substantially more meaningful” post-termination hearing.¹³⁸

The practical implications of Section 707 are already apparent. The MSPB promulgated a final rule implementing the new appellate process,¹³⁹ affording the VA a rebuttable presumption¹⁴⁰ unavailable to any other federal agency.¹⁴¹ Accordingly, even if an ALJ is able to meet the twenty one-day deadline and the terminated employee navigates the reduced time frame for discovery,¹⁴² the heightened standard necessary to overcome this presumption¹⁴³ effectively makes it incredibly difficult for a terminated VA senior executive to present his or her case and prevail.¹⁴⁴ Therefore, the opportunity to appeal to the MSPB’s three-member Board—a right conferred to every other SES employee in every other agency—is even more necessary to “remedy any resulting deficiencies.”¹⁴⁵ Further, as terminations based on performance and misconduct often involve disputes of material fact,¹⁴⁶ the need for appropriate appellate hearing

not even be able to have their cases heard by ALJs depending upon whether the ALJ assigned to the case makes a decision within the statutorily-imposed deadline. *Id.*

138. *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985).

139. *See* Merit Systems Protection Board, 79 Fed. Reg. 63,031, 63,031–32 (Oct. 22, 2014) (to be codified at 5 C.F.R. pts. 1201, 1210).

140. *Id.* (“An appellant may rebut [the presumption in favor of the Secretary’s determination] by establishing that the selected penalty was unreasonable under the circumstances of the case.”).

141. Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 707(a)(1), 128 Stat. 1754, at 1798 (2014) (“The procedures under section 7543(b) of title 5 shall not apply to a removal or transfer under this section.”). The MSPB noted that this presumption “differs from the penalty analysis . . . employ[ed] in other appeals.” *Id.*

142. Merit Systems Protection Board, 79 Fed. Reg. at 63,031 (noting that implementing regulations for the Act retain the previous discovery rules, limiting discovery “to [ten] interrogatories, no depositions, and no second round of discovery” absent an exception made on the part of the ALJ). The MSPB, in assessing comments on the Act’s implementing regulations, asserted that it was “convinced that broader discovery rules [would be] incompatible with the requirement to adjudicate [SES employee termination cases] within [twenty-one] days.” *Id.*; *see also* 5 C.F.R. § 1210.12 (2015) (outlining discovery rules for VA SES employee termination cases before an ALJ).

143. Merit Systems Protection Board, 79 Fed. Reg. at 63031. The Board noted that it generally “requires that an agency prove by preponderant evidence that the penalty promotes the efficiency of the service and is reasonable.” *Id.* However, the new rules provide that the VA Secretary may “remove an individual from a [SES] position . . . if the Secretary determines the performance or misconduct of the individual warrants such removal.” *Id.*

144. *See id.* (discussing how commenters on the new SES employee removal rules have opined that the new rules will result in deficient process).

145. *West v. Grand Cnty.*, 967 F.2d 362, 367 (10th Cir. 1992). The Tenth Circuit reasoned that pre-termination processes do not need to be significant where there is substantial and formal post-termination process. *Id.*

146. *See, e.g., Mosely v. City of Pittsburgh Sch. Dist.*, 702 F. Supp. 2d 561, 577 (W.D. Pa. 2010) (“Thus, contrary to the School District’s assertion, issues of material fact, as well as credibility issues, exist as to whether Plaintiff’s performance was, indeed, unsatisfactory.”).

procedures would help root out any disagreement concerning the merits of the termination.¹⁴⁷

Indeed, eliminating a VA senior executive's right to appeal to the MSPB's three-member Board severely limits any attempt at judicial review.¹⁴⁸ Although it remains unclear whether the VA senior executive may still seek relief in the Court of Appeals for the Federal Circuit,¹⁴⁹ as provided in the CSRA,¹⁵⁰ the reviewing panel will not have the benefit of a prior appeals record for review.¹⁵¹ This superficial due process is fundamentally unfair to VA senior executives and does not comport with the protections afforded under the Due Process Clause.¹⁵²

The third and final factor to consider under the *Mathews* test balances the strength of the governmental interest, "and hence that of the public," with any

147. See *id.* at 576–77 (noting that the "risk of erroneous termination" was one of the most critical factors because of the absolute lack of pre-termination process that the employee received and because of certain issues of material fact underlying the employee's termination had yet to be fully investigated).

148. Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 707(a)(1), 128 Stat. 1754, 1799; see also Jessica L. Parks, *The Merit Systems Protection Board as a Model Forum*, 4 FED. CIR. B.J. 15, 15–16 (1994) (describing the ways in which the MSPB provides due process for federal employees); Cameron P. Quinn & Katharine A. Klos, *Contingency Enhancements in Attorney Fee Cases*, 20 PEPP. L. REV. 1, 10 (1992) (describing the MSPB as "strengthen[ing] employee due process protections").

149. See § 707(a)(1). There is no affirmative statement denying a terminated VA senior executive the right to appeal to the Court of Appeals for the Federal Circuit; however, an appeal to the Federal Circuit has, arguably, also been eliminated because Congress eliminated a VA senior executive's right to appeal to the MSPB's three-member Board; see also Joe Davidson, *Court Action Challenges VA Firing Law*, WASH. POST, May 13, 2015, <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/05/13/court-action-challenges-va-firing-law/> (highlighting a terminated VA SES employee challenge of the Act in court, where the Department of Justice, representing the VA, argued that the ALJ's decision to terminate the employee was "final and [should] not be subject to any further appeal") (internal quotation marks omitted).

150. See 5 U.S.C. § 7703 (2012) (providing for judicial review of MSPB decisions); see also § 707(a)(1) ("Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge . . . shall be final and shall not be subject to any further appeal."); but see § 702 (providing for judicial review of an agency action where "[a] person suffer[s] [a] legal wrong" or is "adversely affected or aggrieved" by such action "within the meaning of a relevant statute").

151. See *Friendly*, *supra* note 23, at 1291–92 (noting that "a written statement of reasons[] [is] almost essential if there is to be judicial review," and that in administrative appeals a record would be necessary).

152. See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."); see also Richard C. McCrea, Jr., *Loudermill—What Pretermination Process is "Due" Public Employees*, 60 FLA. B.J. 37, 38–39 (1986) ("In the first place, public employers cannot simply rely . . . upon blind adherence to their statutory or administrative termination procedure. While such . . . provisions may create property interests for public employees, they cannot define what process is due once such a property interest exists."); *supra* text accompanying notes 139–41 and 145 (discussing the fact that termination procedures for VA senior executives differ from the procedures for other agencies' senior executives).

associated administrative or financial burdens imposed upon the government in affording individuals additional process.¹⁵³ Congress asserts that the revised procedures are necessary to provide the Secretary of the VA with the proper tools to enhance management quality and accountability among the VA's SES.¹⁵⁴ On the surface, this appears to be a valid governmental interest recognized by the courts as significant.¹⁵⁵ This interest, however, fails to advance Congress's stated goal in legislating the Act when balanced against private interests.¹⁵⁶

Significantly, the CSRA already provides "for cause" removal through which an agency can terminate a member of the SES.¹⁵⁷ In fact, the new Secretary of the VA, Robert McDonald, conceded that the new termination provisions did not alter some of the most important aspects of the current agency termination process, particularly the actual process of *terminating* an employee in the first place.¹⁵⁸ Moreover, there is no indication that the new termination provisions will enhance VA senior executive accountability, as it does not address the performance metrics that indicate whether a senior executive should be terminated for poor performance.¹⁵⁹ Although the government's interest in

153. *Mathews*, 424 U.S. at 348.

154. *See, e.g.*, 160 CONG. REC. H4694 (daily ed. May 21, 2014) (statement of Rep. Jeff Miller) (discussing the objectives of the Act and the depth of the problems it is designed to address).

155. *See, e.g.*, *Biliski v. Red Clay Consol. Sch. Dist. Bd. of Ed.*, 574 F.3d 214, 221 (3rd Cir. 2009) (determining that a board of education had a "significant . . . interest in removing employees who fail to perform satisfactorily" as well as an "interest in removing such employees by means that do not cause disproportionate fiscal or administrative burdens").

156. *See infra* notes 158–67 and accompanying text.

157. *See* 5 U.S.C. § 7543 (2012) (providing that an agency may take action against an SES employee only for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function").

158. Josh Hicks, *VA Chief Considering Disciplinary Action for up to 1,000 Employees*, WASH. POST, Nov. 7, 2014, <http://www.washingtonpost.com/blogs/federal-eye/wp/2014/11/07/va-chief-considering-disciplinary-action-for-up-to-1000-employees/> (addressing the Secretary's new proposal to terminate thirty-five employees, including four senior executives, and noting that McDonald stated that "the new statute shortened the appeal process but didn't give him authority to terminate employees without delay"). McDonald further noted that "[t]he law didn't grant any kind of new power that would suddenly give me the ability to walk into a room and simply fire people." *Id.*; *see also* Jeremy Diamond, *VA Chief Announces Restructuring, Firings*, CNN.COM (Nov. 10, 2014, 1:48 PM), <http://www.cnn.com/2014/11/10/politics/va-reforms-and-restructuring/> (noting that "McDonald first needs to build up a case against each person listed on the pink slip list, since a judge needs to approve each firing").

159. *See* 160 CONG. REC. 4695 (daily ed. May 21, 2014) (statement of Rep. Mike Michaud) ("The Secretary of the [VA] already has the authority to fire any employee, including executives who are not doing their job. . . . More importantly, [the bill] does not adequately address the performance metrics of VA executives. It doesn't provide any framework for ensuring problems and failures don't occur in the first place.").

promoting efficiency is significant,¹⁶⁰ the manner in which it proposes to do so is not clearly related to the execution of this goal.

Similar to the facts in *Mosley*, where the asserted governmental interest in eliminating an employee's right to either a pre- or a post-termination hearing was to "efficiently remov[e] unsatisfactory employees without incurring additional fiscal or administrative burdens,"¹⁶¹ the reduction of VA's senior executives' appellate rights does not forward Congress's goal of promoting efficiency and quality management at the VA.¹⁶² Rather, once the VA terminates a senior executive, the employee is no longer associated with the agency.¹⁶³ The terminated VA senior executive no longer receives a salary or benefits, even during the pendency of the outcome of an appeal to the MSPB.¹⁶⁴ Instead, the VA's role in the termination, at this point, has ended; the revised appellate procedures only affect the terminated senior executive.¹⁶⁵ If the government was truly motivated by a desire to remove unsatisfactory employees, the changes to the removal process should have been made at the *initial agency level*.¹⁶⁶

Moreover, there are significant new administrative burdens that inevitably result from this expedited process.¹⁶⁷ As MSPB Chairwoman Susan Tsui Grundmann noted, the MSPB is still dealing with the influx of appeals following

160. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (finding that the government, as an employer, retains a strong interest in maintaining efficiency and should therefore "have wide discretion and control over the management of its personnel and internal affairs").

161. *Mosley v. City of Pittsburgh Pub. Sch. Dist.*, 702 F. Supp. 2d 561, 576 (W.D. Pa. 2010).

162. See, e.g., Hicks, *supra* note 158 (reporting that even the Secretary of the VA felt that firing employees would be a significant challenge under the revised appellate procedures); see also Eric Katz, *VA Officials Say They're Trying to Fire People, But It's Still Really Hard*, GOV'T EXECUTIVE (May 13, 2015), <http://www.govexec.com/management/2015/05/va-officials-say-theyre-trying-fire-people-its-still-really-hard/112717/> (last visited Aug. 5, 2015) (stating that lawmakers have been "unimpressed" with reform at the VA in the wake of the new termination procedures); Heath Druzin, *One Year After Phoenix, the VA is Under More Scrutiny Than Ever*, STARS AND STRIPES (Apr. 8, 2015), <http://www.stripes.com/news/veterans/one-year-after-phoenix-the-va-is-under-more-scrutiny-than-ever-1.339036> (last visited Aug. 5, 2015) (stating that reports of malfeasance and retaliation against whistleblowers continue to filter out of the VA and that "[m]uch of the leadership implicated in wrongdoing throughout the VA system is still in place or on paid leave").

163. Veterans Access, Choice, and Accountability Act of 2014, Pub. L. No. 113-146, § 707(a)(1), 128 Stat. 1798, 1798.

164. *Id.* § 707(a)(1), 128 Stat. at 1799.

165. See Merit Systems Protection Board, 79 Fed. Reg. 63,031, 63,031-32 (Oct. 22, 2014).

166. See, e.g., Joe Davidson, *House Panel Takes on VA Employee Ratings and Performance Awards*, WASH. POST (June 22, 2014), http://www.washingtonpost.com/politics/federal-government-house-panel-takes-on-va-employee-ratings-and-performance-awards/2014/06/22/796c54f6-f8aa-11e3-a606-946fd632f9f1_story.html (noting that despite the facts unearthed in the scandal, the VA, under its performance appraisal system, "rated all of its senior executives as 'fully successful' or better").

167. See *id.* (noting Chairwoman Grundmann's observation that the new termination procedures only add to ALJs' workload).

furloughs by many agencies during the summer of 2013.¹⁶⁸ Tacking on the requirement of an expedited review process where the MSPB “will have to issue VA rulings [eighty-three] percent faster than it currently does” to meet the new deadlines will only add to the current backlog.¹⁶⁹

These additional delays could result in a higher probability of error when it comes to reviewing agency personnel decisions, if review of these decisions is even possible.¹⁷⁰ To better curtail administrative burdens and cut costs, the VA should change its performance appraisal procedures to detect poorly performing VA senior executives earlier.¹⁷¹ The agency must still provide a record to the MSPB for review; however, the agency is doing so under the new truncated process outlined in section 707.¹⁷² If the VA were to keep the original for cause termination appellate procedures and rights in place, while only adjusting performance appraisal procedures, the VA would merely experience minimal *additional* administrative burdens.¹⁷³

Based on the current language of section 707 of the Act, a challenge to the constitutionality of the afforded process is likely.¹⁷⁴ Terminated VA senior executives could argue that the legislative process was defective, claiming that

168. *Id.* (noting that the MSPB has only adjudicated 6,000 of the 33,000 appeals resulting from the furloughs, and that the 200-employee MSPB will now have to process potential additional appeals from the VA).

169. *Id.*

170. *See supra* notes 129–33 and accompanying text.

171. *See supra* notes 159–66 and accompanying text; *see also* Tom Cohen & Curt Devine, *Performance Reviews at Troubled VA Showed No Bad Senior Managers*, CNN.COM (June 20, 2014, 10:08 PM), <http://www.cnn.com/2014/06/20/politics/va-scandal-bonuses/> (noting that senior VA managers around the country—despite the horrific incidents occurring in their medical centers and offices ranging from exposure to hepatitis B and C, “inexcusable” wait times, and a bacterial outbreak that killed six patients—received bonuses in the thousands of dollars in 2014). To address this issue, Rep. Jeff Miller (R-FL) introduced “Increasing VA Accountability to Veterans Act of 2015” on January 22, 2015. *H.R. 473-Increasing the Department of Veterans Affairs Accountability to Veterans Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/473> (last visited Aug. 5, 2015). Among other reforms, the bill seeks to reform the performance appraisal system for senior executives by limiting the number of senior executives who can receive certain rating levels. *See* *Increasing the Department of Veterans Affairs Accountability to Veterans Act of 2015*, H.R. 473, 114th Cong. § 3(a)(1).

172. § 707(a)(1), 128 Stat. at 1799.

173. *See Hicks, supra* note 158 (suggesting that the work required to terminate a poorly performing VA senior executive did not necessarily decrease with the advent of the new termination procedures).

174. *See, e.g.,* Eric Katz, *Federal Appeals Board Has Major Concerns with Firing Provisions in New VA Law*, GOV'T EXEC. (Aug. 7, 2014), <http://www.govexec.com/management/2014/08/federal-appeals-board-has-major-concerns-firing-provisions-new-va-law/90887/?oref=related-stories> (according to MSPB Chairwoman Susan Tsui Grundmann, “[r]emoving the [MSPB] from the [firing process] raises a ‘larger question of constitutionality’”); *see also* Davidson, *supra* note 149 (highlighting a terminated VA employee’s challenge to her termination in federal court, which cites due process violations as well as violations of the “[A]ppointments [C]lause” of the Constitution, by taking away authority from officials who are appointed by the [P]resident and confirmed by the Senate”).

it failed to include review by the Committee on Veterans' Affairs and ignored admonitions by Congressional members concerning the revised process.¹⁷⁵ Additionally, one could argue that it is unclear how the expedited termination and review process actually furthers the VA's stated goal of enhancing accountability. For instance, MSPB Chairwoman Susan Tsui Grundmann stated that the expedited firings "could challenge the meritocratic system at the core of the civil service" because these new tools give the VA the potential to "clean house."¹⁷⁶

III. A PROPOSAL TO ENHANCE ACCOUNTABILITY AT THE VA: A CALL FOR REVISION OF SECTION 707 AND A REDUCTION OF PRE-TERMINATION PROCEDURES

A. *Revise Section 707 to Comply with Due Process by Providing Terminated VA Senior Executives with a Meaningful Post-Termination Hearing*

In light of the significant private interest at stake, the fact that the revised termination procedures do not advance the governmental interest, in addition to the heightened risk of error based on the expedited review of an agency decision, it is unlikely that a court will conclude that Section 707's expedited review procedures comport with Due Process.¹⁷⁷

Still, based on case law and the statutory exception that notice does not have to be provided if the agency has "reasonable cause" to believe that the employee has "committed a crime for which a sentence of imprisonment may be imposed," the Act's removal of any pre-termination notice and hearing arguably complies with the Due Process Clause.¹⁷⁸ The misconduct uncovered at the VA alone may constitute criminal conduct¹⁷⁹ and could trigger the statutory exception, implicating the type of situations noted in both *Gilbert* and *Mallen*.¹⁸⁰

In both of these cases, the terminated individuals were public employees situated in positions of substantial trust¹⁸¹ and both individuals involved breached their duty of trust and loyalty to the public by engaging in criminal

175. See *supra* notes 52–54 and accompanying text.

176. Katz, *supra* note 174.

177. See Eric Katz, *Burden of Proof: The New Reality for Senior Execs at VA*, GOV'T EXEC. (Oct. 23, 2014), <http://www.govexec.com/management/2014/10/burden-proof-new-reality-senior-execs-va/97286/> (noting that various parties have objected to the constitutionality of the new termination procedures, in part because they create a presumption of a terminated employee's "guilt").

178. See *supra* notes 40, 96–105 and accompanying text.

179. Evan Perez, *FBI Launches Criminal Probe of VA*, CNN.COM (June 11, 2014, 11:20 PM), <http://www.cnn.com/2014/06/11/politics/va-fbi-probe/> (indicating that the FBI opened a criminal investigation into the Phoenix VAMC scandal during the spring of 2014).

180. See *supra* notes 98–105 and accompanying text.

181. *Gilbert v. Homar*, 520 U.S. 924, 925 (1997); *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 232–33 (1988).

conduct.¹⁸² The Court determined that the interest in upholding the integrity of the public purpose was strong enough to eliminate the pre-termination hearing entirely.¹⁸³ Of course, full post-termination hearings would be necessary for sufficient Due Process.¹⁸⁴

Similar to the employees in *Gilbert* and *Mallen*, a VA senior executive is involved in the public sphere as a high-level civil servant, incurring substantial trust.¹⁸⁵ If the alleged misconduct involves the type of conduct that occurred at the Phoenix VAMC,¹⁸⁶ then the public interest in removing an employee without a pre-termination hearing would be substantial.¹⁸⁷ To retain this ability, however, Congress should repeal the provisions mandating expedited review by the MSPB and rendering the agency decision final if an ALJ is unable to make a determination in order to ensure that the terminated VA senior executive is afforded the requisite meaningful post-termination hearing to properly investigate an agency decision. As established in *Loudermill*, all that is needed is the opportunity for a “meaningful” hearing.¹⁸⁸ This meaningful hearing can either come before or after a termination, as in the cases of *Mallen*¹⁸⁹ and *Carter*,¹⁹⁰ as long as one is provided at some point during the process.

B. Reduce the Degree of Pre-Termination Process Provided to SES Employees

The public’s response to the various reports of misconduct and abuse of authority at the VA shows that there is a general desire for reform.¹⁹¹ Even if

182. *Gilbert*, 520 U.S. at 926–27; *Mallen*, 486 U.S. at 231–32.

183. *Gilbert*, 520 U.S. at 932–33; *Mallen*, 486 U.S. at 245.

184. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546–48 (1985).

185. GUIDE TO THE SENIOR EXECUTIVE SERVICE, *supra* note 34, at 2 (stating that SES employees are “charged with leading the Federal Government and producing results for the American people”).

186. See Bronstein & Griffin, *supra* note 1 (describing the misconduct that occurred at the Phoenix VAMC in connection with the wait-time scandal).

187. See *supra* text accompanying notes 181–84.

188. See *Loudermill*, 470 U.S. at 547; *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (finding that the due process rights of a biological father were violated when the mother proceeded with an adoption proceeding without fair notice and an opportunity for the father to present his evidence, resulting in an opportunity that was not “at a meaningful time and in a meaningful manner”).

189. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 244 (1988).

190. *Carter v. W. Reserve Psychiatric Habilitation Ctr.*, 767 F.2d 270, 273 (6th Cir. 1985).

191. Emily Swanson, *Veterans Administration Faces Public Opinion Crisis, Too*, HUFFINGTON POST (May 21, 2014, 3:59 PM), http://www.huffingtonpost.com/2014/05/21/veterans-administration-poll_n_5366900.html (noting that in the wake of the Phoenix VAMC scandal, one recent poll found that “[n]early half of Americans think that returning veterans receive worse care from Veterans Affairs hospitals than they would from civilian hospitals”); Travis J. Tritten, *VA Reform Bill Preserves Employee Bonuses*, STARS & STRIPES (Aug. 5, 2014), <http://www.stripes.com/news/veterans/va-reform-bill-preserves-employee-bonuses-1.296911> (reporting that “[d]espite public outrage over dysfunctional and dangerously run hospitals,” the Veterans Access, Choice, and Accountability Act was signed into law while still preserving hefty bonuses for VA executives).

Congress repeals section 707's provisions concerning the expedited timeline by the MSPB, the initial motivation and goal behind section 707 is not entirely lost.¹⁹² Given the gravity of the accusations against senior executives at the Phoenix VAMC and various other VA facilities,¹⁹³ disciplinary measures are warranted.

Although the elimination of pre-termination notice arguably complies with adequate Due Process as long as terminated senior executives are provided with a meaningful post-termination hearing, the timeliness of removing an underperforming employee is still a problem.¹⁹⁴ The VA's performance appraisal system already provides the means to efficiently remove employees based on performance.¹⁹⁵ What appears to be lacking, however, is sufficient use of this system.

The creation of an independent oversight committee to ensure that the VA is effectively enforcing these measures is one mechanism by which Congress could monitor the VA's progress.¹⁹⁶ Additionally, the VA should increase its efforts internally by enhancing communication with its employees through interoffice memoranda outlining specific criteria for satisfactory and unsatisfactory performance, such as its recent issuance of an office-wide update to its handbook detailing the type of conduct associated with each performance rating.¹⁹⁷ By transforming the evaluation of personnel performance from an insular to a more public medium, individuals will be made more aware of the agency's expectations.¹⁹⁸

192. See *supra* text accompanying notes 156, 159–60, 162.

193. Perez, *supra* note 179; see also Christina Marcos, *House Passes Third '15 Appropriations Bill*, THE HILL (May 30, 2014, 1:16 AM), <http://thehill.com/blogs/floor-action/house/207689-house-passes-third-2015-appropriations-bill> (last visited Aug. 5, 2015) (noting that the House passed a funding measure authorizing \$1 million designated for a Department of Justice investigation into criminal activity at the VA).

194. See, e.g., *Armstrong v. Manzo*, 280 U.S. 545, 552 (1965) (stipulating that a terminated employee receive a hearing at a "reasonable time").

195. 5 U.S.C. § 4312(a) (2012); 5 U.S.C. § 3592(a) (2012) (providing for review and removal of senior executives).

196. See Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL'Y REV. 79, 137–38 (2012). Shkabatur addresses accountability measures and attempts at reform throughout federal agencies, with a special focus on President Obama's platform for enhancing transparency in the federal government. *Id.* at 113. In addition to implementing measures within the agencies, the author proposes creating a congressional independent oversight board, which would have the authority to discipline agencies that disregard transparency measures through sanctions. *Id.* at 137–38.

197. See VA Directive 5027; Handbook 5027/2, Part V, at 8–9 (Nov. 6, 2014), http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=773&FType=2.

198. Ingraham & Moynihan, *supra* note 34, at 121–22 (discussing the need for performance expectations to be communicated to all levels of an agency).

IV. CONCLUSION

Section 707 of the Veterans Access, Choice, and Accountability Act of 2014 raises several due process concerns. The legitimate property interest of continued employment in a “for cause” removal setting—a generally accepted property interest recognized by the Supreme Court—triggers the *Mathews* analysis.¹⁹⁹ Despite the general principle that legislation incorporates adequate due process,²⁰⁰ the conclusions of the *Mathews* balancing test show that both the private interest of continued employment and the heightened risk of error resulting from an expedited appellate process outweigh the government’s efficiency interest.²⁰¹

The expedited termination proceedings, in addition to suspect legal justifications, are also unlikely to provide the reform that is needed at the VA.²⁰² Instead, legislation should focus reform on internal adjustments aimed at promoting accountability.²⁰³ Rather than looking for a blunt mechanism to terminate seemingly underperforming employees, the VA would be better served to evaluate these individuals against clear agency-wide expectations, and enforce these expectations accordingly.²⁰⁴ Further, the ability to fire employees is not the main obstacle in enhancing accountability, as the Secretary of the VA has always retained this power.²⁰⁵ Rather, internal measures of the VA effectively using its performance appraisal system and working to reintegrate a service-oriented culture among all levels would provide the VA with the accountability necessary for success.²⁰⁶

199. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1965) (recognizing a property interest in continued public employment).

200. *See supra* text accompanying note 123.

201. *Mathews v. Eldridge*, 424 U.S. 319, 340, 343, 347 (1976); *see also supra* Part II.B.

202. *See supra* notes 162–73 and accompanying text.

203. *See supra* Part III.

204. *See supra* notes 196–98 and accompanying text.

205. *See supra* notes 157–59 and accompanying text.

206. *See supra* Part III.

