5-1982

A Civil Service Reform Act of 1978: Its Causes and Consequences

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THE CIVIL SERVICE REFORM ACT OF 1978:

ITS CAUSES AND CONSEQUENCES

by

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An Independent Study

Submitted to the Graduate Faculty

of the

University of North Dakota

in partial fulfillment of the requirements

for the degree of

Master of Public Administration

Grand Forks, North Dakota

May
1982

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PREFACE

The Civil Service Reform Act of 1978 was the culmination of a debate over the federal bureaucracy and its alleged effectiveness or ineffectiveness. It has long been a favorite issue in Presidential elections. Candidates usually charge that federal bureaucrats are underworked and overpaid. It appears that in recent years there has been some substance to those charges, and that is why Congress finally enacted the legislation.

The purpose of this paper will be to examine reasons for the legislation, to examine the provisions of the legislation and to evaluate its impact. This will be done by primarily reviewing the conditions prior to 1978 under the regime of the now defunct Civil Service Commission.

President Carter, who was committed to the principles of modern management, argued that governmental workers must perform efficiently and competently and with public confidence. It is a difficult thesis to argue with assuming that one can be satisfied with the criteria used in making evaluations. Measuring efficiency and productivity of public employees has been difficult because there are oftentimes no measurable standards.

A major overhaul of the Civil Service was long overdue, and the 1978 legislation proved to be the most comprehensive since the establishment of the Civil Service System with the Pendleton Act in 1883. It was necessitated because the Civil Service Commission had developed contradictory roles of being administrator, appeals board and adjudicator as a result of a combination of legislation, executive orders and regulations.

The main result of this development was to establish security and stability for the employees.

It was an important milestone when the Civil Service Reform Act became law in 1978, and that date may rank as a landmark along side 1829 with the introduction of the spoils system under Andrew Jackson and 1883 with the introduction of the Civil Service system. It has been the latest development in one of the enduring issues of American history. All three of these events resulted from a concern on the part of the public that the people's business be conducted in a proper manner.

The legislation enacted in 1978 was designed to strike a proper balance between managerial effectiveness and adequate employee protection. The provisions of the new law will be examined in order to make a determination about those features and the likelihood of achieving those objectives. There will be close examination of the provisions which provide due process for the employees in regard to such matters as reduction in grade and removal from the service.

Before the Pendleton Act, the legislation which inaugarated the Civil Service system in the United States, the system was highly politicized with virtually no protection for the employees. After the passage of that Act, politics ceased to be a major problem, but new problems developed which affected the Civil Service. These problems were studied by a panel of experts, and a proposal was placed before the Congress which struck a proper balance between managerial effectiveness and adequate employee protection.

There will be four phases examined in this paper: the pre-Jacksonian period of an aristocratic federal service, the spoils system introduced

by Andrew Jackson, the first Civil Service period introduced by the Pendleton Act in 1883 and the second Civil Service period introduced by the Civil Service Reform Act of 1978.

CHAPTER 1

THE PRE-CIVIL SERVICE PERIOD

Bureaucracy has never been popular since the term was first coined by the French in the eighteenth century. The traditional terms for describing politics-monarchy, aristocracy and democracy-were not adequate descriptions, for bureaucrats did not fit into those traditional forms. From the very beginning there was criticism that bureaucratic positions were not created in the public interest, but only to create positions for bureaucrats. The emergence of bureaucracy was caused by the rise of the nation-state in the sixteenth century when a unified state required that many functions heretofore conducted at the local level be directed from the capital. Thus the citizens had to accustom themselves to dealing with distant bureaucrats who were not popular from the outset.

Bureaucracies have been unpopular because of the role they place in peoples' lives. Resources are limited and bureaucracies are involved in the allocation of these resources, and such decisions displease more than they please. The American and French Revolutions were to a large degree the results of dissatisfactions with the bureaucracies. Bureaucrats collected the hated taxes that triggered widespread discontent that led to revolution.

The origins of bureaucracy in the United States may have contributed to a lasting poor image. In his denunciation of King George III, Thomas Jefferson attacked the royal bureaucracy with a ringing indictment. In the Declaration of Independence he charged, "He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance."[1]

After the American Revolution, the United States opted for the Articles of Confederation, a type of government which was decentralized and lacking in any central bureaucracy. That experiment seemed to demonstrate that a nation could not exist without a bureaucracy. Lack of central control produced disorder and the clamor for a new system. After the brief experiment with the Articles of Confederation, the Constitution, with a pre-eminent central government, went into effect.

According to the Constitution, the appointment power is shared by the President with the Senate which must advise and consent on appointments to the most important offices. There was a real fear about providing too much power to the President in the appointment process because of the memories of the British colonial abuse of power was still fresh in their minds. The advice and consent of the Senate was seen as a method of limiting the President's appointive power.

No reference was made in the Constitution about the removal power in the executive branch except for those references to impeachment of the President and other high officials. The question of removal was left to the First Congress in 1789.

When the Congress established the first department of the new government, Department of Foreign Affairs, a serious debate followed about the President's power to remove the head of that Department. James Madison introduced a proposal that the President alone should remove a department head. The Congress was evenly divided on this issue, but Madison's proposal was finally adopted. It was no doubt helped by the fact that Washington was the President at that time, and the Congress had confidence in him. Nonetheless, this legislation set the pattern for development of the federal bureaucracy.

Under the Constitution, there have been four distinct historical periods in American history. The first one was from the time of George Washington to Andrew Jackson when those born to and trained for public service held the public positions in the United States government. The second period was characterized by the introduction of the "spoils system" during the administration of Andrew Jackson. It led to large turnovers after each election, and the instability of this system led to the creation of the Civil Service system under the Pendleton Act in 1883 which was the beginning of the third period, a period when government employees were protected from political interference and could achieve permanent status. The Civil Service Act of 1978 inaugarated the latest period.

During the first period from the administration of Washington through that of John Quincy Adams, competence was linked with merit, but merit was associated with one's family background, social status, education and political loyalty.[2] It was a period when one's personal philosophy and political connections were most important, and it resembled the spoils system in that it resulted in a change in the top policy-making positions with the change of administrations while those in the lower echelons were likely to have longer periods of service.[3]

The essential characteristics of the spoils system were features of the American system of government before Jackson. Washington did not remove employees for partisan reasons, but he appointed persons in a partisan spirit.[4] He said he would not "bring men into any office of consequence knowingly whose political tenets are adverse to the measures the general government is pursuing; for this in my opinion, would be a sort of political suicide."[5]

In fact, the spoils system antedated Washington and was traceable to the British civil service as practiced in the colonies and in England. Historian Edward Channing made the observation: "The 'spoils system' indeed, instead of being an invention of Jacksonian Democrats or Jeffersonian Republicans, was inheritance from the Federalist Presidents and by them had been built up on colonial and English precedents."[6]

Andrew Jackson's election was one of the most important in American history and represented a shift of political power from upper to lower classes and from the East to the West and South. By the end of Jackson's term the right to vote had been extended to practically all white males, and there was an insistence that there be greater rotation in office. With the cry of "to the victors belong the spoils," Andrew Jackson adopted the practice of rewarding political supporters with government jobs.[7] Jackson elevated the system to a principle of democracy by rewarding loyal party workers with government jobs. In doing so he rejected those with greater competence and more experience. In selecting department heads, Jackson recognized different regions and factions as do all political leaders. With a few exceptions, however, the appointees of Jackson were quite undistinguished.[8]

The political upheaval which led to the election of Andrew Jackson was largely a rebellion against one of the largest bureaucratic institutions of the nation, the Second Bank of the United States. It will be used as an example of how popular support can be mobilized against a bureaucratic institution. The First Bank of the United States had originally been chartered in 1791 by Alexander Hamilton for 20 years. It was bitterly opposed by Thomas Jefferson and his followers at that time, and after they attained power they were determined to get rid of

it as soon as possible. It was not rechartered in 1811 because James Madison was President, and he shared Jefferson's aversion to it. Five years later in 1816, it was chartered for another 20 years. It was found by the Jeffersonians to be a necessary part of the American economy which it regulated. It marketed and was depository for government bonds, and it was an important source of credit. Its power derived from the fact that it controlled one-fifth of the bank notes and one-third of the bank deposits and specie in the nation.[9]

Even though the Bank was quite possibly a necessary and useful institution to regulate the economy, it did make enemies becuase of its policies and practices. During the prosperity after the War of 1812, the Bank loaned money quite freely to state banks who in turn loaned to farmers and others who bought land. In 1819 when economic decline occurred, and the Bank began to call in its notes forcing the closing of state banks and the loss of many farms. As a result, there were many embittered, particularly in the West.

Opposition to the Bank was one of the main ingredients of the Jacksonian movement. It would have to apply for a new charter in 1836, the date of its expiration. Opponents of Jackson were determined to force the issue sooner. Nicholas Biddle, the Director of the Second Bank of the United States, applied for a new charter in 1832, enmeshing the question in the Presidential Election of 1832 when Jackson was opposed by Henry Clay, his arch rival and a strong supporter of the Bank. The bill to recharter easily passed both houses of the Congress, but Jackson, as he promised, vetoed it with a strong message:

> The Bank of the United States...enjoys...a monopoly of... favor and support, and, as a necessary consequence, almost a monopoly of foreign and domestic exchange. The powers, privileges, and favors bestowed upon it in the original charter, by increasing the value of stock far above its par value, operated as a gratuity of many millions of stockholders...

> The modifications of the existing charter proposed by this act are not such, in my view, as make it consistent with the rights of the States or the liberties of the people...All the objectionable principles of the existing corporation, and most of its odious features, retained without alleviation...Already is almost a third of the stock in foreign hands and not represented in elections. It is constantly passing out of the country, and this act will accelerate its departure. The entire control of the institution would necessarily fall into the hands of a few citizen stockholders...
>
> If we cannot at once...make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code of laws and system of political economy.[10]

Jackson attacked the monopoly position of the Bank, and he alluded to the privileged character of it. The theme had similar basis in appeal as did his promotion of the spoils system. That appeal was to take government away from the rich and the privileged and make it amenable to all. The functions of government should no longer be the preserve of the well endowed.

In spite of his association with the spoils system and the charges of his political opponents, Jackson left 80 percent of the officeholders retain their positions during his eight years of office.[11] In introducing the system he opened a pandora's box, for his successors were far more enthusiastic in their practice of the system than he had been.

In spite of the Whig attacks on the system, William Henry Harrison, who was the first Whig President, removed Democrats from office en masse in 1841. Four years later the Democrats returned to power under James Polk, and he replaced 13,500 of the nation's 16,000 postmasters.[12] The Whigs returned under Zachary Taylor in 1849 and he in turn was replaced by Franklin Pierce four years later with massive turnovers of personnel. Even when Democrat James Buchanan replaced fellow Democrat Pierce, there was substantial turnover.[13] The election of Lincoln

witnessed the complete triumph of the spoils system when he removed 1,457 incumbents of the 1,639 Presidential appointees.[14] Since Lincoln was the first President elected by the newly formed Republican party, it was quite logical that there would be hunger for the rewards of victory.

One of the more undesirable features of the spoils system was introduced by the Whigs. That was political assessments which meant that not only did employees have to show political orthodoxy, but they had to provide time and money in the political campaigns.[15] This type of an obligation superseded their public obligation to the detriment of the service.

With this philosophy appointments were made for political reasons and government employees formed a personnel and financial base for political machines.[16] Politicians could appoint and remove employees at will so the workers played the game of survival and contributed time and money to the support of the party in power. In most agencies a cadre of permanent employees was retained regardless of which party won in order to keep the agency functioning and to train new employees.[17]

The problem of Civil Service was compounded by the fact that the period from the end of Jackson's term of office through the end of the Civil War was one of the most unstable in American history. The degree of political instability was demonstrated by the fact that one political party (Whigs) disappeared from history; another (Republican) was created and eventually became a major party; and the majority Democratic Party was consigned to a minority status for 75 years.

The volatile political situation became stabilized after the Civil War, but there did arise a Civil Service reform movement. President

Ulysses Grant and the Congress took some actions to reform the system, but it was not until President James A. Garfield was assassinated by a disappointed office seeker that Congress moved to seriously reform the federal employment system with the Pendleton Act which established a merit system based upon the British model. It called for the merit standard which would lead to the professionalization of the service and institute protections from political removals over at least a portion of the service.

At first only 10.5 percent of the employees were covered, but the law granted the President the authority to extend protection to other areas of the service.[18] For the most part it dealt with the entry into the federal service and such matters as tenure, promotion, removal, while veterans' perference, pensions and other subjects were hardly dealt with at all. It provided for competitive exams for entry into the classified Civil Service, and it specifically prohibited soliciting employees to contribute to a political fund, and punishing them for failure to do so.[19]

By 1932 almost 80 percent of government offices were covered by the Civil Service and by the end of World War II the system was complete.[20] In extending Civil Service protections, there have been some abuses. Toward the end of a presidential term there was a tendency to extend Civil Service security to incumbents of an outgoing administration.

Shortly after the enactment of the Pendleton Act, it was argued that the service should strive for efficiency. Woodrow Wilson argued this point in his work, Study of Administration in 1887. A certain degree of efficiency would result from the fact that the spoils system was at an end, for that practice by its very nature had to lead to enormous inefficiencies because of the massive turnover which resulted after each change of administration.

While the Pendleton Act seemed to end the abuses of the spoils system, it has ultimately led to others. The aim of the legislation was to protect employees from having to contribute to any political fund or join any political party as a condition of holding public employment. Additional protections have been added since the original legislation, and such protections have adversely affected efficiency of the service.

Footnotes

[1] U.S. Declaration of Independence, paragraph 12.

[2] Carl E. Lutrin and Allen K. Settle, American Public Administration (Palo Alto, California: Mayfield Publishing Company, 1976), p. 186.

[3] Ibid.

[4] Ari Hoogenboom, Outlawing the Spoils (Urbana, Illinois: University of Illinois Press, 1961), p.4.

[5] Ibid. p. citing Catherine Drinker Bowen, The Lion and the Throne (Boston, 1967) Passim.

[6] Ibid. citing Edward Channing, A History of the United States (New York,1905-1925), IV, p. 56.

[7] Lutrin and Settle, p. 182.

[8] John Blum et. al. The National Experience (New York: Harcourt Brace Jovanich, Inc., 1977), p. 212.

[9] Ibid., p. 220.

[10] Ibid., p. 221.

[11] Blum, p. 212.

[12] Hoogenboom, p. 6.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid., p. 210.

[18] Arnett v. Kennedy 416 U.S. 149.

[19] Ibid.

[20] Paul P. Van Riper, History of the United States Civil Service (Evanston, Illinois: Row, Peterson and Company, 1958), p. 312.

CHAPTER 2

THE CIVIL SERVICE SYSTEM

The Pendleton Act of 1883 which inaugarated the Civil Service system reform was one of the most important issues of its day. It had widespread support as it passed the Senate by a vote of 38 to 5 and the House of Representatives by a vote of 155 to 47.[1]

It was a Republican President and Congress which enacted this legislation. A possible motive could have been the fact that the GOP had lost ground in the congressional elections of 1882. This new law would freeze a number of Republicans in office, for their party had controlled the Presidency since 1860, one of the longest reigns in history. Regardless of motive, there was obviously strong public support for the reform.

Only ten percent of the service was covered initially, and this was undoubtedly the optimum step because of the sheer inability of the government to absorb a comprehensive system all at once. Additionally, the politicians did not desire the complete abandonment of the spoils system. The spoils of office were still important and there was a strong desire to retain some degree of patronage.

Finally, the Democrats were the winners of the Presidential Elections in 1884, ending their 24 years of opposition. Grover Cleveland became President and the Civil Service System survived this change of political parties. Sometime later, William Jennings Bryan, a latter day Jacksonian, urged a return to the spoils system, but he lost out in his bids to become President. His defeat symbolized the ultimate triumph of the Civil Service System by the end of the McKinley Administration in 1901.

The history of the federal Civil Service has been primarily one of increasing protections of career members, resulting from subsequent legislation, rules and regulations.[2] The first significant protection after the Pendleton Act was Civil Service Rule II promulgated by President McKinley in 1897:

> No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and opportunity to make defense.[3]

The main problem with the presidential rule was that there were no administrative appeal rights should any actions be taken in violation of it. It remained this way until the enactment of the Lloyd-LaFollette Act which became law in 1912 as a part of the Post Office Department appropriation bill for the fiscal year 1913. It expanded upon Civil Service Rule II as follows:

> No person in the classified Civil Service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order or removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall be furnished copies of the same....[4]

Prior to the enactment of this legislation there was no protection for employees unless the First Amendment guarantees could be cited. This legislation was the beginning of the great array of protections which have grown since that time. One of the reasons has been that

the standard for dismissal has been both broad and vague. For the Lloyd-LaFollette Act stated that a person may be removed only for "such cause as will promote the efficiency of said service." Because of a lack of precision, it afforded the employees greater protection than otherwise was intended. The reason for such language was to cover a diversity of situations which existed in the federal Civil Service.

Subsequent legislation has extended the coverage provided by the Lloyd-LaFollette Act. The Veterans' Preference Act of 1944 added procedural requirements for processing adverse actions, most importantly an opportunity to respond orally or in writing to the charges on which a dismissal was based.[5] Such protection involved only veterans (preference eligible), but subsequently an executive order in 1962 extended similar protection to all others in the classified Civil Service.[6] Based upon the executive orders of recent years, the Civil Service Commission expanded regulations granting protections to civil servants.[7]

In addition to the statutes and executive orders, the Civil Service Commission pursuant to executive orders established additional protections. Among these were a written notice of at least 30 full days stating any and all reasons specifically and in detail for the adverse action;[8] materials which substantiate the reasons including statements of witnesses, documents and investigative reports shall be made available to the employee for his review.[9] Any material which cannot be disclosed to the employee was not to be used to substantiate the decision. An employee was entitled to a reasonable time to respond to a notice and supporting data. It shall be reasonable in terms of allowing an adequate review as well as enough time to prepare an answer with supporting documentation. Official time was to be made available

in this process. After he made his response, the employee was entitled to notice of the agency's decision at the earliest practicable date which should be made at or before the time the action would be effective.

The written notice stated which of the reasons were sustained, informed the employee of his right of appeal and to whom such an appeal should be directed, informed him of the time limits for appeal and where he might obtain information to facilitate such an appeal.[10] The appeal was to be heard before an examiner either prior to the agency decision or the appellate decision at the agency's option.[11] There was no requirement for pre-termination hearing according the Lloyd-LaFollette Act or Civil Service Commission regulations, but such a requirement was made available to eight agencies through internal regulations: the Federal Communications Commission, National Labor Relations Board, Civil Aeronautics Board, Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of Justice, Civil Service Commission and Panama Canal Company.[12]

The foregoing regulations applied to the internal appeal within the agency which was not the only appeal available to an aggrieved employee of the Federal Government. It was also his right to appeal to the Civil Service Commission after the agency appeal ran its course. It was not possible, however, to file the two appeals concurrently to the agency and the Civil Service Commission, and if an employee initiated an appeal to the Civil Service Commission, he forfeited his right to the agency appeal.

Hearings within the agency were not open to the public or press and limited only to those persons the examiner determined had a direct connection to the appeal.[13] The conduct of the hearing was designed to

bring out pertinent facts avoiding irrelevant or repetitious testimony without strict application of the rules of evidence.[14] Decisions on the admissibility of evidence or testimony were made by the examiner. Witnesses, who appeared and testified, were under oath and subject to cross examination.[15]

Both parties were entitled to call witnesses, and the agency was to produce witnesses when requested by the employee or the agency through examiner. If the agency determined that it was not administratively practicable to make such witnesses available, it could notify the examiner of the reasons in writing and if the examiner determined that it was essential for such witnesses he could postpone the hearing until the agency complied with the request.[16] The hearing was recorded and transcribed verbatim with all documents submitted to and accepted by the examiner at the hearing and made part of the record.[17] Either side submitting documents had to make them available to the other party, and the employee was entitled to a complete record of the hearing.[18]

If the appeal was to be brought before the Civil Service Commission, there were different regulations which governed those proceedings.[19] In such an appeal both the employee and the agency appeared personally or through a representative. An agency was required to make any of its personnel available upon request of the employee or the agency unless it was administratively impracticable to do so, and such a decline had to be in writing. Any employee who testified in such a hearing was to be free from restraint, interference, coercion, discrimination or reprisal in presenting their testimony, and they would be in duty status.

The hearing was conducted by a representative of the Commission who would afford the parties the full opportunity to introduce evidence and

cross examine witnesses under oath. The rules of evidence were not strictly applied but irrelevant or unduly repetitious testimony was excluded by the representative of the Commission. The hearing was reported in either verbatim form or summary. When it was reported verbatim, the transcript was made available to both of the parties and became a part of the record of the proceedings. Whenever a summary was used, the parties could if they disagreed submit written exceptions and that became part of the record too.

After the initial appeal to the Civil Service Commission, either party could request further consideration before an Appeals Review Board which consisted of seven members assisted by appeals examiners. At this level all appeals had to be in writing, for there was no right to present oral arguments before the Board although oral arguments could be presented to the Board as its own discretion.[20] After the arguments were presented, they were studied by the examiner who wrote a proposed decision. It was then submitted to two Board members who, if they agreed, could issue a decision, if not a third member was brought in to cast the deciding vote.[21]

Beyond this there was the discretionary review, but this was seldom granted. At this point the next appeal process was to exercise judicial review at the district court level. In recent years, these courts had been more assertive, and thus this could prove attractive to any employee in the appellate process.

Unquestionably this very complex procedure under the system in effect prior to the Reform Act of 1978 permitted almost endless litigation without any effective time limits. It undermined confidence in the system, and it caused frustration on the part of the managers who believed

that too often it became a refuge for incompetents. Once a manager embarked on a decision to remove an employee, he would never know how much time he might be forced to spend on the case.

In addition to all of the above-mentioned due process protections, the Civil Service Commission had assumed certain additional enforcement responsibilities as a result of legislation which had prohibited discrimination under four different statutes: the Civil Rights Act of 1964 prohibiting discrimination based upon race, sex, and national origin; the Fair Labor Standards Act (Equal Pay Act) prohibiting discrimination in pay matters; the Rehabilitation Act of 1973 prohibiting discrimination based upon a handicapping condition; and the Age Discrimination Act of 1967 prohibiting discrimination based upon age. With these enforcement responsibilities, the Civil Service Commission was further enmeshed in employment grievance cases.

The organizational nature of the Civil Service Commission tended to place it in a position where security and stability were the supreme goals. Although the Civil Service Commission was an independent agency headed by three presidentially appointed commissioners, it was the head of the personnel complex in the Federal Government.[22] Organizationally it interacted with the House and Senate Committees on Post Office and Civil Service, and all three have interacted with such interest groups as the National Civil Service League, the National Federation of Federal Employees and the American Federation of Government Employees and the Postal Unions. This entire complex has worked together to create a personnel system which has a heavy stress on security and stability.[23]

Louis C. Gawthrop stated that the participants in the personnel complex:

> seek to maximize individual security and protection against arbitrary personnel decisions. They agree that effective and efficient administrative actions can only be realized within a relatively stable organizational environment in which individual anxieties and tensions generated by feelings of occupational insecurity have been significantly eliminated. If one can remove the causes of such anxiety-threatened dismissals, reductions in rank, arbitrary reward allocations-then personnel security can be realized, administrative continuity develops, and operating efficiency increases.[24]

The Civil Service Commission was supposed to be the agent of the President, but it was difficult to tell where the loyalty of the Civil Service Commission lies. One critic believed that the President was well down the list in regard to the institutions the Civil Service Commission actually worked for: "Well first we think it works for its congressional committee, second for the status of the employees, third for the American Legion in support of veterans' preference laws, fourth for the Civil Service employees unions, and possibly fifth for the President."[25]

There have been historical reasons for the development of the strong due process protections which existed in 1978. These date back to World War II when the government became concerned about the loyalty of government employees in a war-time situation. The Civil Service Commission issued a circular in June, 1940, advising department heads to remove members of Nazi, Fascist or Communist organizations, and in 1942 a Commission order provided for investigation of persons charged with disloyalty and dismissal when there was a reasonable doubt as to the employee's loyalty to the United States.[26]

Congress appropriated money for loyalty checks and loyalty boards were established especially after World War II when Communism in government became the major issue of the time. The Amerasia scandal and

and revelations by Whittaker Chambers and Elizabeth Bantley cast doubt on the loyalty of government employees. Soon congressional investigations were under way.

As a result, pressure for more drastic action existed and on March 21, 1947, President Truman issued an executive order establishing a new federal loyalty program.[27] Under this program the loyalty of 4,750,000 employees were examined with 26,000 cases developed and 16,000 eventually receiving clearances while the remainder were removed or withdrew from application for employment. It has to be remembered that membership in any organization designated by the Attorney General as "totalitarian, Fascist, Communist or subversive was the principal ground for establishing disloyalty.[28]

Communism in government had been a major issue in the presidential campaign of 1952 and with the election of President Eisenhower a far more stringent loyalty review program was established. After that the fundamental criterion for discharge became a finding that employment "may not be clearly consistent with the interests of national security."[29]

In 1954, the administration began releasing figures about the thousands of employees dismissed under the loyalty review program. In October of 1954, the Civil Service Commission stated that there had been 8,008 security program releases.[30] Democrats challenged the figures, and the Chairman of the Civil Service Commission was forced to admit that most of the 8,008 releases involved other than security considerations and about forty percent were Eisenhower probationary employees.[31]

The Truman and Eisenhower loyalty programs demonstrated that although federal employees had long been guaranteed Civil Service protection, they

were still vulnerable to a sharp political turn of events. The loyalty review program involved rather substantial violations of due process as the politicians of both political parties attempted to outbid one another in removing employees from the government on the grounds of disloyalty. In the process disloyalty was not defined, and there was no right to face one's accuser in many instances. Guilt by association became the standard as one was judged by their organizational memberships.

There were serious constitutional questions raised by the Truman and Eisenhower loyalty programs. It was charged by the critics that people were being discharged not for overt acts, but for state of mind and guilt by association in violation of the First Amendment to the United States Constitution. The inability to cross examine accusers was seen as a serious violation of due process and a violation of the Sixth Amendment to the Constitution.

The defenders of the program argued that the government had a right to insist upon a loyal service and they further held that these were not criminal proceedings where guilt was found and punishment inflicted. At this time the Supreme Court had held that there was no right to government employment. In Bailey v. Richardson in 1951, the Supreme Court upheld a Court of Appeals in the District of Columbia which ruled that since there was no constitutional right to federal employment and that due process in removal cases was not necessary.[32] During the 1960's and 1970's, the Supreme Court dealt with the question of employees's rights to their jobs, and since that time the Supreme Court has changed its position concerning government employment and today it views it as a property interest for employees who are in a permanent status. This idea was

originally promoted in an article by Professor Charles Reich who argued that various types of benefits provided by the government, including public employment, should be viewed as a right and be protected.[33]

Under this concept, a worker who was on a permanent status had a property interest in his position.[34] He could then only be deprived of it for certain reasons and only according to the due process clause of the Fifth Amendment to the United States Constitution.[35] In arriving at this position, the Court had moved a considerable distance from the earlier decision in Bailey v. Richardson.

In Arnett v. Kennedy which was the most definitive position concerning due process rights of government employees, all nine justices, who divided sharply on other due process issues, found that a property interest did exist. This decision in 1974 represented a change from the earlier decisions.

In many respects the Arnett v. Kennedy case epitomized the confusion which existed prior to the Civil Service Reform Act of 1978 because there was little agreement on just what were the due process rights of federal employees. In that decision, a majority of the Court held that the Lloyd-LaFollette Act guaranteed sufficient protection to the employees of the Federal Government. The central issue was whether or not the employee should have a pre-termination hearing. Justice Thurgood Marshall, joined by three other colleagues, argued procedural due process required a pre-termination evidentiary hearing except in emergency circumstances.[36] A majority held that a pre-termination hearing was not necessary in order to conform to the due process requirements. It met due process standards as long as a hearing was held sometime before the action became final, and the Civil Service regulations in 1978 conformed to the reasoning in Arnett v. Kennedy.

The Civil Service system in 1978 prior to the Reform Act was in need of reform because of the unmanageability of the system. Reform would have to be accomplished in a manner which allowed greater management flexibility and still provide substantial protections, for the employee was always subject to arbitary personnel actions and threats from political events such as the loyalty reviews of the forties and fifties.

Footnotes

[1] Paul P. Van Riper, History of the United States Civil Service (Evanston, Illinois: Row, Peterson and Company, 1958), p. 312.

[2] Carol H. Weiss and Allen H. Barton, Making Bureaucracies Work (Beverly Hills, California: Sage Publications, 1980), p. 58.

[3] Arnett v. Kennedy 416 U.S. quoting Rule II, Sec. 8 in the Fifteenth Report of the Civil Service Commission 70 (1897-1898)

[4] Ibid. p. 150 quoting the Act of Congress August 12, 1912 C389 6 37 Stat 555.

[5] Ibid. 5 USC, Sec. 770.

[6] Andrew Baran, "Federal Employment-The Civil Service Reform Act of 1978-Removing Incompetents and Protecting 'Whistleblowers,' Wayne Law Review (November, 1979) p. 98.

[7] Kennedy v. Arnett 416 U.S. 142

[8] 5 Code of Federal Regulations Sec. 752.202.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] "Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees," Harvard Civil Rights-Civil Liberties Law Review, 1975, p. 491.

[13] Code of Federal Regulations Sec. 752.210.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] David H. Rosenbloom, Federal Equal Employment Opportunity (New York: Praeger Publishers, 1977), p. 81.

[23] Ibid.

[24] Ibid. citing Louis Gawthrop, Bureaucratic Behavior in the Executive Branch (New York: Free Press, 1969), p. 147

[25] Ibid. p. 83

[26] 5 Code of Federal Regulations, 771.212

[27] Ibid.

[28] Ibid.

[29] 5 Code of Federal Regulations, 772.310a

[30] Ibid.

[31] Alfred H. Kelley and Winfred Harbison, The American Constitution (New York: W.W. Norton & Company, 1963), p. 897.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

CHAPTER 3

PUBLIC OPINION AND THE CIVIL SERVICE

One of the promises Jimmy Carter made in the Presidential Election Campaign of 1976 was to reform the Civil Service System of the Federal Government. It was an easy campaign promise for a non-incumbent to make, but the remarkable fact was that he was able to deliver on his promise. He stated that "Civil Service reform will be the centerpiece of governmental reorganization during my term of office.[1] He was responding to various problems which developed in the Civil Service and to the popular perception of that service: As the President stated in his message:

> But the system has serious defects. It has become a bureaucratic maze which neglects merit, tolerates poor performance, permits abuse of legitimate employee rights, and mires every personnel action in red tape. Most Civil Service employees perform with spirit and integrity. Nevertheless, there is still widespread criticism of the Federal Government's performance. The public suspects that there are too many government workers, that they are underworked, overpaid, and insulated from the consequences of incompetence.[2]

As far as his references to the public perception of the Civil Service, the President does seem to have had an accurate reading. Public opinion sampling by the Gallup Poll Organization which was conducted in 1977 demonstrated the negative feelings of the public, and these negative feelings were held by a broad cross section of the nation. In fact on all questions regarding Federal Government workers, there was a remarkable consistency.

Between May 20 and 23, 1977, the Gallup pollsters asked the question: Just your opinion, do you believe that the Federal Government employees are paid more or paid less than persons would earn in non-governmental jobs? Approximately two-thirds (64 percent) of those questioned agreed that this was true. The same proportion held up in

different education, political and occupational groupings.[3] Those working in clerical and sales along with the Republicans believed that this was the case most firmly, but even among Democrats, who generally are not as adverse to the bureaucracy, this was the case by almost a two-thirds majority. Figure 1 illustrates the public's opinion on this particular question.

Figure 1

Just your opinion, do you believe that Federal Government employees are paid more or paid less than persons would earn in non-government jobs?

	Paid More	Paid Less	Paid Same	Don't Know
Total	64%	12%	13%	11%
By Education				
College	62	14	17	7
High School	64	13	11	12
Grade School	69	7	9	15
By Politics				
Republicans	67	12	11	10
Democrats	62	13	13	12
Independents	65	11	15	9
By Occupation				
Professional and Business	60	16	18	6
Clerical and Sales	70	9	10	11
Manual Workers	65	11	12	12
Labor Union & Non-Labor Union Families				
Labor Union Families	62	13	15	10
Non-Labor Union Families	65	12	12	11

Source: George H. Gallup, The Gallup Poll: Public Opinion 1972-1977, Vol. 1 (Wilmington, Delaware: Scholarly Resources Inc., 1978), p. 1111-1112.

By even larger majorities the public believes that fringe benefits are more generous in federal employment than in non-governmental employment. This is illustrated in Figure 2 where the following question was posed: Just your impression, do they (government workers) have more fringe benefits-time off, holidays, pensions, and the like-than they would in non-government jobs, or do you think they have fewer fringe benefits?

Figure 2

Just your impression, do they (government workers) have more fringe benefits-time off, holidays, pensions, and the like-than they would in non-government jobs, or do you think they have fewer fringe benefits?

	More	Fewer	The Same	Don't Know
Total	77%	6%	9%	8%
By Education				
College	81	6	8	5
High School	78	6	9	7
Grade School	65	7	11	17
By Politics				
Republicans	77	7	7	9
Democrats	74	8	10	8
Independents	81	3	8	8
By Occupation				
Professional and Business	80	6	9	5
Clerical and Sales	86	3	7	4
Manual Workers	76	7	8	9
Labor Union and Non-Labor Union Families				
Labor Union Families	76	8	9	7
Non-Labor Union Families	76	6	9	9

Source: Gallup, op. cit. p. 1113-1114.

The public believes that federal employees get paid more and they have more fringe benefits than do others and they believe that they do less work. This is borne out in Figure 3 which is a sampling raising the question: Just your impression, do you think they (government employees) work harder or not so hard as they would in non-governmental jobs?

Figure 3

Just your impressions, do you think they (government employees) work harder or not so hard as they would in non-governmental jobs?

	Harder	Not So Hard	Same	Don't Know
Total	9%	67%	15%	9%
By Education				
College	7	67	19	7
High School	10	68	13	9
Grade School	11	65	12	12
By Politics				
Republicans	8	74	10	8
Democrats	11	64	16	9
Independents	5	69	16	10
By Occupation				
Professional and Business	8	69	17	6
Clerical and Sales	10	69	13	8
Manual Workers	12	66	13	9
Labor Union and Non-Labor Union Families				
Labor Union Families	10	68	15	7
Non-Labor Union Families	9	67	15	9

Source: Gallup, op. cit. p. 1112-1113.

The last of the Gallup Surveys of 1977 questioned the people about the number of employees in the Federal Government and whether or not that is too many for the actual work that must be done. In this poll the question was asked: How do you feel about the number of people employed by the Federal Government? In general do you think the Federal Government employs too many people or too few people to do the work that must be done? The results are illustrated in Figure 4.

Figure 4

How do you feel about the number of people employed by the Federal Government? In general do you think the Federal Government employs too many people or too few people to do the work that must be done?

	Too Many	Too Few	About Right	No Opinion
Total	67%	12%	10%	11%
By Education				
College	78	7	10	5
High School	66	14	9	11
Grade School	52	12	13	23
By Politics				
Republicans	76	6	8	9
Democrats	59	15	11	15
Independents	75	9	10	6
By Occupation				
Professional and Business	76	6	8	9
Clerical and Sales	68	12	12	8
Manual Workers	61	14	11	14
Labor Union and Non-Labor Union Families				
Labor Union Families	70	13	9	8
Non-Labor Union Families	66	12	10	12

Source: Gallup, op. cit. p. 1114-1115.

In spite of the findings presented in Figure 4, there seems to have been a stabilization in the number of employees during the nineteen seventies. Although measured since the Eisenhower Administration, the number had increased steadily through the Nixon Administration and stabilized thereafter. The Gallup findings were matched by other measures of public opinion. The University of Michigan has conducted a series on political cynicism through the Center for Political Studies at the Survey Research Center. Since 1958, these surveys have included a political cynicism scale comprised of the following questions:[4]

(1) Would you say the government is pretty much run by a few big interests looking out for themselves or that it is run for the benefit of all people?

(2) Do you think that people in the government waste a lot of the money we pay in taxes, waste some of it, or don't waste very much of it?

(3) Do you feel that almost all of the people running the government are smart people who usually know what they are doing, or do you think that quite a few of them don't seem to know what they are doing?

(4) How much of the time do you think you can trust the government in Washington to do what is right-just about always, most of the time or only some of the time?

(5) Do you think that quite a few of the people running the government are a little crooked, not very many are, or do you think hardly any of them are crooked at all?

The above five refer to the trust that people have in their government, but there were three additional questions which dealt with the control or lack of it that people have over their government. It refers to personal efficacy-the sense that a person can influence the political system or governmental decision-making. The Michigan three point scale asked:[5]

(1) People like me don't have any say about what the government does.

Figure 5

Trends in Political Trust, Political Efficacy, and Other Measures of Public Attitudes Toward the Federal Government, 1952-1976

Survey Questions	Percentage Agreeing with Each Statement, Year										
	1952	1956	1958	1960	1964	1966	1968	1970	1972	1974	1976
Political Trust											
1. Special Interests Rule					30.9	38.5	43.6	55.1	58.6	72.9	73.4
2. Taxes Wasted			45.1		48.1		60.6	69.7	67.0	75.8	76.4
3. Leaders not Smart			39.3		27.8		39.2	46.2	42.2	48.0	53.0
4. Untrustworthy			24.3		22.3		37.3	45.3	45.9	63.1	65.5
5. Crooked			25.6		30.0		26.3	32.7	37.7	46.8	44.1
Political Efficacy											
1. Have no Say	31.5	28.3		27.4	29.6		41.2	35.8	40.5	41.3	42.2
2. Politics too Complicated	71.3	63.8		58.8	67.9		71.3	73.8	73.9	73.3	72.7
3. Voting is Only Recourse	82.7	74.5		74.3	74.0		57.4	60.6	62.3	61.5	56.5

Source: Carol H. Weiss and Allen H. Barton, Making Bureaucracies Work (Beverly Hills, California: Sage Publications, 1980), p. 47.

(2) Sometimes politics and government seem so complicated that a person like me can't really understand what's going on.

(3) Voting is the only way that people like me can have any say about how government runs things.

Figure 5 illustrates the responses over approximately a quarter of a century, and the results found in the nineteen-seventies support the findings of the Gallup Polls cited earlier.

While the University of Michigan surveys measured cynicism, Lou Harris in a series of surveys measured alienation. Harris alienation index was measured by a five item scale which asked people to agree or disagree with the following statements:[6]

(1) The people running the country don't really care what happens to you.

(2) The rich get richer and the poor get poorer.

(3) What you think doesn't count very much anymore.

(4) You're left out of things going on around you.

(5) Most people with power try to take advantage of people like yourself.

The results of these measures of alienation are illustrated in Figure 6:

Figure 6

Trends in the Harris Alienation Index, 1972-1978

Survey Questions	Percentage Agreeing, Date						
	10/72	9/73	8/74	9/74	9/74	2/76	3/78
1. Public Officials Don't Care	38.6	54.9	47.7	55.2	55.3	61.2	51.3
2. Rich Get Richer	60.3	75.4	77.0	77.6	77.4	77.3	73.8
3. Your Thoughts Don't Count	45.1	61.0	53.6	58.2	57.0	64.0	55.1
4. Feel Left Out of Things	17.8	28.1	31.6	39.2	39.9	42.1	28.3
5. Powerful Take Advantage	36.6	54.1	55.9	60.4	59.3	63.1	55.6

In Figure 6 the dates were associated with certain key events and periods. The October, 1972 was the final month of the Nixon-McGovern contest for the Presidency. In the second date of September, 1973, that was the month when the Agnew investigation was announced, the Watergate hearings were being conducted and Nixon accepted blame for Watergate, but he refused to resign. The month of August, 1974, was when President Ford was inaugarated after Nixon had resigned. The following month of September, 1973, Ford pardoned Nixon. February, 1976, was when the primaries began, and March, 1978, was a little over a year into the Carter Presidency when he still retained much good will and confidence.[7]

What has shaped public opinion to take such a view of the federal work-force. Some popular books have contributed to the image of the bureaucrat as an incompetent. The most famous of these was the Peter Principle written by Laurence J. Peter and Raymond Hull. In this work the authors argue that whenever a person does a job in a highly competent manner a promotion is usually the result and eventually people are promoted to their level of incompetence. As it was stated: "...each employee rise to, and remains at, his level of competence." Peter's corollary states: "in time every post tends to be occupied by an employee who is incompetent to carry out his duties."[8]

Another tendency which has been noted has been the multiplication of officials without good reason. This was observed by C. Northcote Parkinson when he noted that "the number of ships and men in the British Navy between 1914 and 1928 decreased by 68 percent and 32 percent respectively. Meanwhile the number of officials in the Admiralty increased by 78 percent. He also notes, for the same period, that the dockworkers increased by only 10 percent, while the dockyard officials and clerks

increased 40 percent.[9] An observation was made by Senator William Proxmire that the Department of Housing and Urban Development spending almost doubled when HUD assisted housing starts almost halved.[10]

Probably at the root cause of the public's dissatisfaction with their government has been its sheer size and growth. In 1902, the government spent 1.7 billion, and in 1982 the spending level is at 1 trillion.[11] When inflation is taken into account, there may be a distortion, but even controlling for inflation government expenditures have increased by over 4600 percent. In terms of other measures, it has also grown substantially. Population has tripled since 1900, and we can see when measured on a per capita basis, substantial growth has occurred since the turn of the century. In 1902 government spending was 7.7 percent of the Gross National Product (GNP) while it was 36.7 percent in 1976.[12]

While this growth in the size of government angers the public, it might be explainable in terms of what has happened since 1902. In that period there had been two world wars, two limited wars, sustained defense spending since World War II and a major worldwide depression. Wars generate expenditures which continue after the war. For example, the government spent $9,062,032 prior to World War II; during the war spending rose to $98,416,220, and the postwar low was $33,068,709, considerably above the pre-war expenditures.[13] The same has been true for every war in twentieth century. New sources of revenue are developed and after the war the government is quite reluctant to relinquish them. Wars obligate expenditures for an indefinite period because of the payments for service connected disabilities and other financial obligations which arise from wars.

Footnotes

[1] U.S. President, Civil Service Reform, Message from the President of the United States, 1978, p. 1.

[2] Ibid.

[3] George H. Gallup, The Gallup Poll: Public Opinion 1972-1977, 2 Vols (Wilmington, Delaware: Scholarly Resources Inc., 1978) p. 1112.

[4] Carol H. Weiss and Allen H. Barton, Making Bureaucracies Work (Beverly Hills, California: Sage Publications, 1980), p. 58.

[5] Ibid.

[6] Ibid.

[7] Ibid., p. 42.

[8] The Peter Principle, Laurence J. Peter and Raymond Hull in Albert C. Hyde and Jay M. Shafritz ed., Classics of Public Administration (Oak Park, Illinois: Moore Publishing Company, Inc., 1978), p. 347.

[9] Grover Starling, Managing the Public Sector (Homewood Illinois: The Dorsey Press, 1977), p. 189.

[10] Ibid.

[11] Robert D. Pursley and Neil Snortland, Managing Government Organizations (North Scituate, Mass: Duxbury Press, 1980), p. 29.

[12] Ibid.

[13] Ibid., p. 492.

CHAPTER 4

PROVISIONS OF THE CIVIL SERVICE REFORM ACT OF 1978

The Civil Service Reform Act of 1978 comprehensively reformed the Civil Service system of the Federal Government, the most comprehensive reform since the passage of the Pendleton Act of 1883. The Civil Service Commission was replaced with two new units of government: the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). Under this new arrangement the OPM will have the primary responsibility of performing the administrative acts of the Executive Branch by conducting examinations, keeping the necessary records and making reports to the President and the Congress. Unlike the Civil Service Commission, it will not be responsible for handling employee grievances which may occur because of adverse personnel actions. It will have the overall responsibility to promulgate the rules and administer them, and even though it will manage the system it may delegate more freely than its predecessor which had most of the actions centralized within the Civil Service Commission.

The MSPB will have the primary responsibility of dealing with grievances and insuring protection of the merit system. It will conduct hearings and adjudicate the cases involving personnel decisions of the federal Civil Service. It will also from time to time conduct special studies in order to determine the effectiveness of the new system. There is a Special Counsel of the MSPB who will have the responsibility of investigating violations of any prohibited personnel practice, and will have the responsibility of dealing with persons within the service who may have information dealing with waste, fraud and mismanagement and to insure that such persons are protected from any type of reprisals from superiors.

OPM's principal office is located in Washington, D.C., with field offices elsewhere in the nation. The Director is appointed by the President and confirmed by the Senate for a four year term which is coterminous with that of the President and may be removed only for cause. There is a Deputy Director appointed by the President and confirmed by the Senate. He may perform such functions as the Director determines and is authorized to act for him in his absence or disability or if the office is vacated. The Director may appoint up to five associate directors as he determines.

The Director of OPM performs several different functions through the staff of his office including: (1) assisting the President in preparing Civil Service rules, and advising the President in promoting an efficient Civil Service and providing protection for merit system principles; (2) executing, administering, and enforcing the Civil Service statutes and regulations (including classification and retirement activities) except for those activities which are directly the responsibility of the MSPB and the Special Counsel; (3) securing accuracy, uniformity and justice in the functions of the office; (4) appointing employees of the office; (5) directing and supervising employees of the office, assigning work to employees and organizational units, and directing the internal management of the office; (6) directing the preparation of the office budget and the use of funds; (7) reviewing operations under the insurance provisions of the law; (8) conducting or arranging for research into improved methods of personnel management.[1]

The OPM should not encounter the same problem that the previous Civil Service Commission had with the combination of administrative and

adjudicatory powers. It was difficult for the Civil Service Commission to be a fair judge when its own regulations or actions were under attack. Those adjudicatory functions fall within the jurisdiction of the MSPB and the Special Counsel. This is one of the most important improvements of the new legislation in separating the functions of administration and adjudication. Since the MSPB is primarily concerned with the due process of employee decision, we will examine it in some detail.

In January, 1979, the MSPB came into being as a result of the President's Reorganization Plan 2 pursuant to the Civil Service Reform Act of 1978.[2] The Board created an organizational structure to carry out the duties. The following are the organizational units of the Board.[3]

(1) Office of Managing Director

(2) Office of General Counsel

(3) Office of Appeals

(4) Office of Administrative Law Judge

(5) Office of Secretary

(6) Office of Merit Systems Review and Studies

(7) Office of Administration

(8) Office of Legislative Counsel

(9) Field Office

For purposes of this paper the Office of General Counsel, Appeals and Administrative Law Judge are the most important. The General Counsel provides legal advice to the Board and its staff and represents the Board in civil actions which might result from any of its functions.

The Office of Appeals reviews decisions and appeals and makes its recommendations to the Board. It prepares proposed decisions for the Board to consider and reviews actions brought under the appellate jurisdiction of the Board.[4]

Ultimately it is the members of the MSPB who make the decision on appeals. There are three members with not more than two being members of the same political party. The advice and consent of the Senate is needed to confirm these appointees to a single seven year term. The President also selects with the advice and consent of the Senate the Chairman and Vice-Chairman of the Board. Removal powers are limited since the President may remove members of the Board only for inefficiency, neglect of duty or malfeasance in office. If the members of the Board find that cases are either sensitive or difficult then the case may be assigned to the Office of the Administrative Law Judge. These cases may arise out of either the Board's appellate or original jurisdiction.

The rules, regulations and rulings which emanate from the MSPB are important features of the new law, but the bulk of the activity will occur within the various federal agencies. It will be noted that under the old system the due process requirements differed from agency to agency while under the new law there is a uniformity of minimum procedures for all agencies to follow. Any unfair personnel actions will be dealt with by either the MSPB or the Special Counsel.

If an agency determines that it must reduce in grade or remove an employee, there are procedures to be followed which conform to the contemporary standards of due process in employment matters. The employee is entitled to thirty days written notice specifying instances of unacceptable performance which has occurred within the past twelve months. This provision states that there must be documentation for such action, and the employee who is subject to an adverse action is entitled to be represented by an attorney and have a reasonable opportunity to reply either orally or in writing.[5]

Unacceptable performance is defined, and it means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.[6] Each agency must develop one or more performance appraisal systems and involve the employees in establishing such appraisal systems. The results of these performance appraisal systems provides the basis for training, rewarding, reassigning, promoting, reducing in grade, retaining and removing an employee.

The performance standards established shall be to the maximum extent feasible permit the accurate evaluation of the job performance on the basis of objective criteria related to the position in question for each employee or position under the system. Courtesy to the public may be included in the criteria. Before any employees can be reassigned, reduced in grade or removed for unacceptable performance, they must be provided an opportunity to demonstrate acceptable performance. Any of the adverse actions must be accompanied by the due process protections of notice, representation and response. The law also provides that suspensions of 14 days or less will have the same due process protections as to the other adverse actions.

The MSPB shall sustain a decision of an agency only if it is supported by substantial evidence or by a preponderance of the evidence. The agency's decision will not stand if the affected party can demonstrate harmful error in the application of the agency's procedures in arriving at the decision; the decision was based upon any prohibited personnel action under the new legislation; or the decision was not in accord with the law.[7] These sanctions will deter the agency from engaging in prohibited personnel practices because of the likelihood of losing the case before the MSPB.

In order to be certain that the agencies do not run afoul of the new law the various criteria have been defined. For example, substantial evidence is "That degree of relevant evidence which a reasonable mind, considering the record as whole, might accept as adequate to support a conclusion that the matter asserted is true."[8] A preponderance of evidence is: "That degree of relevant evidence which a reasonable mind might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true."[9] Harmful error is "Error by the agency in the application of its procedures which, in the absence or cure of the error, would have caused the agency to reach a conclusion different than the one reached."[10] The burden falls upon the appellant to show that the harmful error caused substantial harm or prejudice to his or her rights.[11]

The rules of evidence for hearings contain a number of features which guarantee a fair hearing. All documents referred to in the pleadings shall be served upon all parties to the proceeding.[12] This allows a fair response to the documents. Evidence or testimony may be excluded by the Presiding Official, but any such evidence excluded shall be made part of the record of the proceedings.[13] The Presiding Official may request further evidence and require its submission if he believes this to be necessary.[14]

Whenever a witness testifies directly in a hearing, any party may move for production of a statement in whole or part of such a witness which has been reduced to writing, and it must be signed by the witness. If one of the parties refused to furnish the statement, that testimony shall be stricken from the record.[15] The Presiding Officer may also order any party to respond to the genuineness of any of the relevant

documents submitted.[16] Parties may stipulate as to any matter of fact or law except for the jurisdiction of the Board, and the Presiding Official may take official notice of matters of common knowledge provided the parties have a choice to oppose it.[17]

The discovery process which involves the opportunity to present and request what information and evidence is necessary provides for the opportunity for a complete record without entailing unnecessary delays. The Presiding Officer within some limitation may order depositions, and if it appears that the procedure is not adequate the Federal Rules of Procedure may be used.[18]

Subpena power is a part of the procedure with either the Presiding Official, Administrative Law Judge or member of the MSPB issuing it. Motions for subpenas must be submitted in writing and served on all parties, specifying with particularity the books, papers and documents desired and facts to be proven.[19] All subpenas requested must show the relevance and a person against whom it is directed may make a motion to quash it.[20]

When there is a hearing, the record shall be closed at the conclusion of that hearing except for additional arguments or briefs concerning previously identified evidence. Once the record is closed no additional evidence may be submitted unless one can show they have new material which was not available prior to the close of the hearing.

After the closing of the record, the Presiding Official shall issue the initial decision within 25 days indicating the findings of fact and conclusions as well as the reasons. Unless one of the parties files an appeal the decision becomes final in 30 days. It is possible that an appellant may petition the Board, and whenever the Board denies or disposes of the petition all administrative remedies are exhausted. The

Board may reaffirm, reverse, remand, modify or vacate the decision in whole or part. There is no provision for appeal from the decision of the Board, and the next step is to the federal courts for Judicial Review.

Unlike the situation under the Civil Service Commission where the appeal could be in the U.S. District Court, the current requirements provide the filing must be in either the U.S. Court of Claims or the Court of Appeals for the District of Columbia. This procedure eliminates the confusion that existed when many district court decisions on these cases were cited.

If any Civil Service law, rule or regulation under the jurisdiction of the Office of Personnel Management is the subject of interpretation in any of these cases and the Director of the Office of Personnel is of the opinion that an erroneous decision would have a substantial impact on any such law, rule or regulation under the jurisdiction of his office, he as a matter of right may intervene and participate in the proceeding before the Board. This should be done as early as possible, but in no way would it grant the right of the Director to interfere with the independent decision making authority of the MSPB.

One of the truly important improvements under the new law is the timelines and deadlines established for the appellate process. Under the old appellate process, it generally took 48 days to process a removal within the agency, and the Federal Employees Appeals Authority took 152 days on average to reach decisions on removal actions.[21]

Strict timelines are a part of the new law. Whenever any appeal is filed with the MSPB, the Board will estimate the amount of time it expects a particular case will take, and it will announce publicly the date it intends to complete action on it.[22] There will be a 30 day

grace period, but if the Board fails to complete action by the announced date plus 30 days, it will publicly announce a new date by which it intends to complete action. This procedure should expedite the appellate procedure on the part of the MSPB. As mentioned earlier, the appellant must file any appeal from the MSPB within a 30 day period.

There is one area where the proceedings could remain complicated and drawn out, and this is in those cases where any type of discrimination is alleged. This type of litigation involves the Equal Employment Opportunity Commission (EEOC). The Civil Service Reform Act of 1978 did not authorize the MSPB to supersede the EEOC.

The potential conflict between the MSPB and the EEOC was an issue of controversy in the Congress when the legislation was being debated. As the Committee report stated: "neither agency would have the authority to over-rule the view of the other.[23] This differed from the draft legislation proposed by President Carter who favored granting final authority to the EEOC. The Report of the Committee on Governmental Affairs of the U.S. Senate contained the minority views of Senator John Glenn who objected to this sharing of authority between the MSPB and EEOC:

> An alternative procedure, which I urged the Committee to adopt but which it rejected, would allow both the MSPB and the EEOC to rule on such discrimination questions in a manner similar to that provided by the Committee, but would designate the EEOC as the final authority at the administrative level on such questions. Under this procedure which was originally proposed by the Administration the EEOC would review the MSPB's action insofar as they related to discrimination and render a decision which could be implemented immediately and, if reviewed, treated by the Court with deference normally accorded to final agency actions.[24]

Whenever any employee appeals an adverse action and alleges that a basis for the decision against him is discrimination prohibited by the Civil Rights Act of 1974, the Fair Labor Standards Act of 1938, the

Age Discrimination in Employment Act of 1967 and the Rehabilitation Act of 1973, the MSPB must decide the issue within 120 days, and if the appellant is still dissatisfied with the decision, it may be appealed to the EEOC.[25] These various pieces of legislation contain sweeping provisions that could be used by almost any employee with the possible exception of the white male under the age of 40 who is not handicapped.

The Civil Rights Act of 1964 stated: "It shall be the policy of the United States to insure equal employment opportunity." Such a law would obviously provide some basis for any female, Black person or one who is foreign born to challenge a personnel decision. The Age Discrimination Act and the Rehabilitation Acts provide a basis of age and handicapped condition as a cause of discrimination.

With the extent of legislation on various types of discrimination on various conditions, it is likely that a number of cases alleging discrimination will be appealed to the MSPB. In such a case, the appellant will be able to appeal to the EEOC if dissatisfied with the decision of the MSPB in one-hundred-eighty (180) calendar days from the date of filing a petition for consideration with the Commission if there is not a decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.[26]

In any case alleging discrimination, the Board shall decide it within 120 days from the date of filing.[27] The employee has 30 days from the date of the decision to petition the Commission to consider the decision and the Commission shall within 30 days determine whether or not it will consider the case.[28] If it decides to consider the case, it will consider the entire record of the proceedings of the Board on the basis of the evidentiary record presented. It is also permitted

to make a decision or to take additional evidence to the extent it considers necessary to supplement the record.[29] In any event, the Commission shall render its decision within 60 days.

In rendering its decision, the Commission has three possible courses of action. (1) It may concur in the decision of the Board. (2) Issue another decision which differs from that of the Board to the extent the Commission finds that as a matter of law the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation or policy directive referred to in the Civil Service Reform Act of 1978 or the decision involving such a provision is not supported in the record as a whole.[30]

Since neither the MSPB nor the EEOC has authority over the other, disagreement between the two must be resolved before there is a final administrative decision. If the Board rejects the Commission's decision then the case is immediately certified to a Special Panel which shall within 45 days render its decision which becomes the final administrative determination of the case and thus will be a judicially reviewable action in the federal courts. The Special Panel will consider the factual record, the decisions issued by the MSPB and the EEOC and or legal briefs filed before the MSPB or the EEOC. In considering the case the Special Panel is mandated to give due deference to the expertise of both the MSPB and EEOC.

The Special Panel is an ad hoc group which is formed each time that it is necessary for it to make a determination. It has one permanent member appointed by the President for a six year term, and two others who are appointed by the respective chairman of the MSPB and EEOC. The member appointed by the President serves as the Chairman each time the

Special Panel is convened. Administrative assistance is to be provided equally by the MSPB and EEOC.

There are some strict timelines to be observed in the discrimination cases. If the MSPB, EEOC or the Special Panel do not act by the statutory defined time limits, the individual is entitled to file a civil action in an appropriate U.S. District Court under the following circumstances: if 120 days have elapsed since the filing of a case with the MSPB alleging discrimination; if 180 days have elapsed from the date of filing a petition for consideration with the Commission and there is no decision by the EEOC, reconsideration by the MSPB or decision by the Special Panel.[31]

In many respects the law with its many built in protections for the employees is not as likely to be as favorable to them because of the elaborate definitions that exist in the law. There are not likely to be victories based upon technicalities because the employee must demonstrate that any procedural error was harmful to him. This means that cases which revolve around the issues of a substantive nature are much more difficult to win against the administrators. One important new feature is that the successful appellee will be able to recover attorney fees.

One of the important new features of the law is the Special Counsel which is an independent part of the MSPB which provides protection to employees who may unjustly be subjected to prohibited personnel policies or who may have important information to divulge concerning the operations of government waste, fraud and mismanagement. Both the MSPB and the Special Counsel deal with prohibited personnel practices with the Special Counsel investigating such practices and the likelihood that an agency

will lose a case if any of the administrators engage in prohibited personnel practices. In order to insure due process, prohibited personnel practices have been defined in the law.

Under the legislation personnel actions refer to an appointment, promotion, adverse action, detail, transfer, reassignment, reinstatement, restoration, re-employment, performance evaluation and a decision concerning pay or awards. There are a number of prohibited personnel practices that can be the subjects of complaints to the Special Counsel. Prohibited personnel practices can be committed by an employee who has the authority to take, direct others to take, recommend, or approve any personnel action that discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, handicapping condition, marital status or political affiliation as prohibited by certain specified laws.

It is a prohibited personnel practice to solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless the recommendation or statement is based upon the personal knowledge or records of the person furnishing it and consists of evaluation of the work performance, ability, aptitude, or general qualification of the individual or an evaluation of the character, loyalty or suitability of such an individual.

In regard to applicants for employment, it shall be an unlawful personnel practice to deceive or willfully obstruct any person with respect to such person's right to compete for employment or to influence any person to withdraw from competition from any position for the purpose of improving or injuring the prospects of any other person for employment

to grant any preference or advantage not authorized by law, rule or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position for the prupose of improving or injuring the prospects of any particular person for employment).

Nepotism is also a forbidden practice under the law, for it is a prohibited personnel practice to appoint, employ, promote, advance, or advocate for appointment, promotion, or advancement in or to a civil position any individual who is a relative of the employee if the position is in the agency in which the employee excercises jurisdiction or control as an official.

It is a prohibited personnel practice to discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or the applicant or the performance of others to take or fail to take any other personnel action if the taking or failure to take such action violates any law, rule or regulation implementing or directly concerning the merit system principles.

Obviously the new law addresses the major problem dealt with in the Pendleton Act of 1883 by making it an unlawful personnel practice to coerce the political activity of any person including the providing of any political contribution or service. It is also a prohibited personnel practice to take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in any of the prohibited political activities.

Most of these prohibitions reflect the standard of due process for employees which have resulted from court cases in recent years. It is clear that the new law meets and in many cases exceeds these standards.

One of the new features is the protection provided whistleblowers who divulge information concerning waste, fraud or mismanagement. There have been some serious injustices against some of the whistleblowers of the past. The Office of Special Counsel provides protection to employees who may be subjected to prohibited personnel practices under the legislation or who may have important information to divulge concerning the operations of government.

Reprisals against employees for exercising legal rights is prohibited in the form of taking or failing to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower as is taking or failing to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule or regulation.

There are some well known examples of whistleblowing. Probably the most publicized was A. Ernest Fitzgerald who was a cost control specialist in the Pentagon. He revealed that the Air Force's C5A aircraft program had a $2 billion cost overrun which was known but hidden by the Air Force. After he revealed this, his position was abolished and he was removed from employment on the ground of reduction in force. Pursuant to Civil Service regulations, he appealed and eventually won, but at great expense to himself.

The Fitzgerald case generated the most publicity, but from a legal standpoint the most definitive Supreme Court case of Arnett v. Kennedy involved the problems of a whistleblower. Wayne Kennedy, who was field representative in the Chicago Regional Field Office of the Office of Economic Opportunity (OEO), made charges concerning members within his office. Of the several charges he made, the most serious was that the

Regional Director and his administrative assistant attempted to bribe a representative of a community action organization.[32] Specifically the charge was that a $100,000 grant of OEO funds was offered in return for statement against Mr. Kennedy and another employee.[33]

Kennedy was advised of his rights under the regulations of the Civil Service Commission and the OEO to reply to the charges orally and in writing and to inspect the evidence to be used against him. He argued that his First Amendment rights were the issue, and he was entitled to a trial type hearing before he could be removed. Ultimately the members of the Supreme Court did not agree with Kennedy and ruled that he was not entitled to a predismissal type hearing although at sometime he was entitled to one. Thus Kennedy lost, but his case was the definitive one dealing with the Civil Service system of laws, rules and regulations as they existed at that time.

The Fitzgerald and Kennedy cases illustrated one of the major deficiencies of the old system regarding Civil Service employees who reveal information about waste and fraud. At that time there was no provision to independently investigate the charges made by either Fitzgerald or Kennedy. The Civil Service Act of 1978 provides a remedy.

The new law defines whistleblowing. It refers to present or former federal employees or applicants for employment who disclose information they believe involve a violation of any law, rule or regulation. It may also involve mismanagement, a gross waste of funds, an abuse of authority or a substantial or specific danger to public health or safety. Employees may not make disclosures which are specifically prohibited by statute, required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

If in any of these cases the Special Counsel determines there are reasonable grounds to believe that a prohibited personnel action has occurred, exists or is to be taken which requires corrective action, he reports his determinations, findings and recommendations to the agency, MSPB, OPM and may report to the President.

In the case of whistleblowing, the Special Counsel makes a determination as to whether there is any substance to the allegations. If there is substance, he will require the head of the agency to conduct an investigation about the allegations and submit a written report setting forth the findings within a 60 day period.

While the Special Counsel will investigate any agency where the whistleblower provisions apply, it does not apply to certain agencies. These are: a government corporation, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency and certain other intelligence agencies excepted by the President, the General Accounting Office, the United States Postal Service, and the District of Columbia government.

In the performance of his duties the Special Counsel may issue subpenas requiring the attendance of and testimony of witnesses and the production of documentary or other evidence. The subpena may be served by the representative of the Special Counsel, a U.S. Marshal or Deputy Marshal. Anyone refusing to obey the subpena may be held in contempt.

The general authority of the Special Counsel provides important checks to arbitrariness or abuse of authority by managers. He may recommend corrective action to the agency involved when it is determined that there is reasonable ground to believe that a prohibited personnel practice has occurred and if the agency has not taken the corrective action

recommended after a reasonable period of time, he may file with the MSPB a request to order corrective action and request stays of prohibited personnel actions or disciplinary actions.[34]

There were two other provisions in the 1978 legislation dealing with a new Senior Executive Service (SES) and Labor-Management Relations. The SES established a top corps of executives within the Federal Government. After the law was passed, managers had the option of joining the SES or remaining under the system which applies to the remainder of the employees. Over 90 percent elected to join the new service.

The emphasis of the SES is "mobility, managerial discretion in assignments, accountability and performance of a very high order, and a reward system balanced against a certain amount of risk taking and initiative.[35] It was designed to strengthen the top leadership of the Federal Government which has to have the flexibility to respond to rapidly changing circumstances and still be able to pursue a course which takes into account the national interest, the achievement of presidential and congressional goals while maintaining sound management.[36]

Reward for meritorious service was to be the keystone of the SES with higher levels of salary and bonuses for distinguished service. The main goal of the SES was to make the manager of government more like those of private enterprise where incentives and rewards will motivate for greater performance. Under the old system, managers were locked into a system where they could do as well whether they performed or not.

In the Labor-Management Relations area, the law established a Federal Labor Management Relations Authority which will carry out the current duties of the Federal Labor Relations Council and Assistant Secretary of Labor for Labor-Management Relations.[37] It permits labor

unions to bargain collectively over personnel policies, practices and matters affecting working conditions. Certain areas of decision-making are reserved to management and may not be subjected to the bargaining process. Unfair labor practices for both agencies and unions are set forth, and a Federal Service Impasses Panel provides for the resolution of impasses between agencies and unions.

Congress formalized in statute what has become an established right for employees in the United States government to join a labor union which represents them collectively. Congress also found that the existence of unions was compatible with the highest standards of employee performance demanded by the national interest. Further, it was found that employees had the right to participate in unions in order to organize and bargain collectively, and that this contributes to effective conduct of public business.

The Federal Labor-Relations Authority is comprised of a chairman and two other members with the provision that not more than two of the three may be from the same political party. These individuals are independent representing neither management nor labor which is an improvement over the former system with its bias toward management. The members are appointed by the President with the advice and consent of the Senate. Any member may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty or malfeasance in office.

A general counsel of the Authority, who may investigate alleged unfair labor practices, file and prosecute complaints and exercise other powers, shall be appointed by the President with the advice and consent of the Senate for a term of five years and may be removed any time by the President.

The Federal Labor Relations Authority has the following functions. It may hold hearings, administer oaths, take testimony or depositions of persons under oath and issue subpenas.[38] It may also require an agency or a union to cease and desist from violations and require the offender to take remedial actions it considers appropriate.[39]

Footnotes

[1] U.S. Congress, Senate Civil Service Reform Act of 1978: Report of the Committee on Governmental Affairs United States Senate, 95th Congress 2d. Session, 1978, p. 1.

[2] James McGrath, Civil Service Reform: Implementation Library of Congress, Congressional Research Service, Major Issues System, p. 9.

[3] Civil Service Act of 1978 92 Stat 1129.

[4] McGrath, p. 9.

[5] Andrew Baran, "Federal Employment-the Civil Service Reform Act of 1978-Removing Incompetents and Protecting 'Whistleblowers,' Wayne Law Review (November, 1979), p. 102.

[6] Ibid.

[7] Ibid.

[8] Federal Register, March 23, 1979, p. 17972.

[9] Ibid.

[10] Ibid., p. 17972-73.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Ibid., p. 17974.

[20] Ibid.

[21] U.S. Senate Report of the Committee of Governmental Affairs, p. 9.

[22] Civil Service Act of 1978 92 Stat 1129.

[23] Senate Report p. 129.

[24] Ibid.

[25] David H. Rosenbloom, Federal Equal Employment Opportunity (New York: Praeger Publishers, 1977), p. 69.

[26] Federal Register, July 29, 1980, p. 50328.

[27] Civil Service Act of 1978 92 Stat 1129.

[28] Federal Register, July 29, 1980, p. 50328.

[29] Civil Service Act of 1978 92 Stat 1129.

[30] Ibid.

[31] Federal Register, July 29, 1980, p. 50328.

[32] Arnett v. Kennedy 416 U.S. 137.

[33] Ibid.

[34] Civil Service Act of 1978 92 Stat 1129.

[35] McGrath, p. 9.

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] Ibid.

CHAPTER 5

SUMMARY AND CONCLUSIONS

As this is written the Civil Service Reform Act (CSRA) of 1978 has been in effect for three years. These include the last two years of the Carter Administration and the first year of the Reagan Administration. The political turn of events has posed a serious threat to the Civil Service, for clearly the Reagan Administration is hostile to the federal bureaucracy. The new legislation provides the Administration with greater latitude to work its will.

The smug arrogance of federal workers is not longer present. Within this frame of reference, we must consider the impact of the CSRA. It has provided a managerial flexibility that was lacking under the old system. Managers now have the tools to motivate their subordinates to accomplish the goals of the government's programs. Along with this flexibility, there is an accountability of the managers.

It was truly a comprehensive piece of legislation with the development of performance appraisal systems which establish standards for employees to meet. The Office of Personnel Management is overseeing the implementation of these performance appraisal systems. They must meet the minimum criteria set forth in the new law, but there is room for diversity and flexibility from agency to agency.

Employees must be provided a fair chance to demonstrate their performance, and if they don't they will face adverse actions. The CSRA provides streamlined methods for removing employees or reducing them in grade for unacceptable performance. Such procedures will make it easier for agencies to initiate adverse actions based upon unacceptable performance.

While providing for managerial flexibility, it has also provided for truly substantive rights for employees by statute. Managerial flexibility can expose employees to arbitrary and unfair personnel decisions, but the new law has built-in protections which should prevent that from happening.

The new law provides that there are guaranteed certain procedural rights in the event of an adverse action. A hearing is guaranteed to all workers and if they are successful in their appeal, they may recover reasonable attorney fees. Another important right for federal employees is that any decision regarding reduction in grade or removal must be based upon specific instances of unacceptable performance and the critical elements of the employee's position in each instance of unacceptable performance.

After receiving notice of unacceptable performance, the employee has one year to improve performance before any final action. If improvement is made and the employee is no longer subject to the adverse action, any entry or record of the prior notice shall be removed from the files of the agency.

With such protections employees should have ample opportunity to be guaranteed fair treatment and only those who deserve it will be the subjects of adverse actions. The Merit Systems Protection Board has published its final regulations which governs the process by which employees of the federal agencies may appeal personnel actions to the MSPB.

While overall the law has worked well, two provisions of the CSRA have encountered difficulty. These are the Office of Special Counsel and the new Senior Executive Service. The Special Counsel has experienced a

great deal of difficulty for a variety of reasons. The first individual appointed to the position of Special Counsel resigned within his first year on the job, and Congress reduced the funding by 50 percent in June, 1980.

In addition, there have been criticisms of the Office's operations. The General Accounting Office found major deficiences in its first report. In June, 1980, it found there was little improvement from October, 1979. The MSPB has also been critical of the Special Counsel, especially in its handling of one case. It involved an official of the Small Business Administration who was charged with engaging in a prohibited personnel practice with politically motivated transfers within the agency. In that case the MSPB found in favor of the official and against the Special Counsel.

The National Academy of Public Administration, a more objective party, issued a report criticizing the quality of the investigative work and called for a more professionally qualified staff. The OSC acknowledged its weaknesses and pledged renewed efforts at improvements.

Another area with problems is the Senior Executive Service which results from promises which have not been kept. Over 90 percent of the government executives joined the SES under the assumption that performance would be rewarded, but a pay freeze has severely crippled this effort. An organization representing the SES has filed suit in the U.S. District Court charging the government with breach of promise because of the pay freeze and the limitations upon the number of SES bonuses.

Despite the growing pains, the CSRA is being implemented in all of its phases. The GAO found that there has been good progress in the implementation of the law. Full implementation will take several years,

but the process is well underway. Executives, managers and employees have been fully informed of the changes, and it is a matter of time to see if these changes will achieve the goals of the legislation.

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