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Expedited Removal Authority for VA Senior Executives (38 U.S.C. § 713): Selected Legal Issues

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Summary

This report discusses selected legal issues relating to the authority for summary removal of individuals in senior executive positions at the Department of Veterans Affairs. Section 707 of the Veterans Access, Choice, and Accountability Act, P.L. 113-146, enacted on August 7, 2014, created this authority by adding Section 713 to Title 38 of the United States Code. It authorizes the Secretary of Veterans Affairs to remove an individual in a senior executive position from federal service or transfer him or her to a position in the General Schedule if the Secretary determines that the individual's performance or misconduct warrants removal.

This report addresses whether this authority raises a constitutional question under the Due Process Clause of the Fifth Amendment as a deprivation of a property right to continued federal employment and whether a court would have jurisdiction to hear a case brought by a senior executive who had been removed pursuant to it.

The Supreme Court has held that a nonprobationary government employee who is removable for cause, as distinguished from at-will, has a property right in continued employment. The Fifth Amendment of the Constitution states that property may not be deprived without due process of law. According to the Court, an agency may not remove such an employee from government employment without due process rights of notice and an opportunity to respond to charges. The employee also is entitled to a hearing either before or after removal. A hearing must be provided at a meaningful time and in a meaningful manner.

Section 713 of Title 38 does not expressly provide for notice and an opportunity to respond, but the Department of Veterans Affairs has issued guidelines that grant advance notice of five days and an opportunity to respond to charges in writing. Section 713 provides for a hearing after removal by an administrative judge of the Merit Systems Protection Board if a decision can be issued in 21 days and that this decision is not subject to further appeal. If an administrative judge does not issue a decision in that period, the Secretary's removal or transfer is final.

A senior executive whose removal from federal service pursuant to this authority was upheld by an administrative judge has filed an appeal to the Court of Appeals for the Federal Circuit. This appeal alleges that these limited time periods for notice and an opportunity to respond to charges, as well as for an appeal to an administrative judge, do not provide meaningful due process. The court is considering whether to accept jurisdiction of this case because the Department of Veterans Affairs, citing the finality clause in Section 713, asserts that an administrative judge's decision is not subject to judicial review.

In challenging the constitutionality of Section 713, the removed senior executive also maintains that granting an administrative judge of the Merit Systems Protection Board authority conclusively to determine whether or not to uphold a removal contravenes the Appointments Clause of the Constitution. She asserts that to comply with the Clause, an administrative judge's decision should be supervised or be subject to review by members of the Merit Systems Protection Board or another officer or officers who are principal officers of the United States whom the President appoints and the Senate confirms. An administrative judge is an employee who is not appointed in the manner that the Appointments Clause prescribes, she contends. This report will be updated to reflect later developments.

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Expedited Removal Authority at Department of Veterans Affairs

Section 707 of the Veterans Access, Choice, and Accountability Act of 2014, P.L. 113-146, enacted on August 7, 2014, creates new authority for removing an individual in a senior executive position in the Department of Veterans Affairs.

Section 707(a) of P.L. 113-146 adds a new Section 713 to Title 38 of U.S. Code. Section 713(a)(1) authorizes the Secretary of Veterans Affairs to remove an individual employed in a Senior Executive Service (SES) position if the Secretary determines that the individual's performance or misconduct merits removal. The Secretary may remove the individual from federal service or transfer him or her to a General Schedule (GS) position for which the individual is qualified and determined appropriate.

Section 713(g)(1) defines an "individual in a senior executive position" as not only a career appointee in the Senior Executive Service, but also a departmental SES equivalent (i.e., a health care professional such as a physician or dentist in an administrative or executive position in the Department's Veterans Health Administration who was appointed under 38 U.S.C. Sections 7306(a) or 7401(1)).

Sections 713(d)(2)(A) and (B) provide that any removal or transfer may be appealed to the Merit Systems Protection Board (MSPB or Board) if an appeal is filed not later than seven days after the removal or transfer date. The Board is required to refer any appeal to an administrative judge, who must expedite it and issue a decision not later than 21 days after the appeal date. If an administrative judge cannot issue a decision within that time, the Secretary's removal or transfer decision is final.

Under Section 713(e)(4), the MSPB or administrative judge may not stay (i.e., suspend) any removal from federal service or transfer to a GS position. A senior executive who is transferred to a GS position, beginning on the transfer date, receives the annual pay rate applicable to that position only if he or she reports for duty. While an appeal is pending, the senior executive may not be paid if placed on administrative leave or any other category of leave which otherwise would be paid. During the period beginning on the date that the senior executive appeals a removal from federal service and ending on the date that an MSPB administrative judge issues a final decision, he or she may not receive any pay, awards, bonuses, incentives, allowances, differentials, student loan repayments, special payments, or benefits.[1]

Authority provided by 38 U.S.C. §713 does not preclude the Secretary from using other authorities to transfer career SES members to GS positions or remove them from federal service; Section 713(f)(1) states that authority provided by Section 713 is in addition to authority provided by 5 U.S.C. §3592 or §§7541, 7542, and 7543, which relate to removing career members from the SES[2] or adverse actions to remove them from federal service, respectively.

Nevertheless, Section 713(d)(1) provides that if the Secretary exercises authority under 38 U.S.C. §713 rather than regular adverse action authority for removing a career member of the SES from federal service, the procedures in 5 U.S.C. §7543(b) shall not apply. This subsection entitles a

[1] 38 U.S.C. §713(e)(5).

[2] Section 3594 of title 5 provides that a career senior executive who meets certain criteria and is removed from the Senior Executive Service under 5 U.S.C. §3592 shall be entitled to guaranteed placement in a non-SES position such as one in the General Schedule.

career SES member to (1) at least 30 days of advance written notice; (2) a reasonable time, but not less than seven days to answer orally or in writing; (3) representation by an attorney or other representative at the senior executive's expense; and (4) a written decision from the agency with specific reasons therefor at the earliest practicable date. Moreover, a career senior executive may appeal an agency decision to the Merit Systems Protection Board (MSPB).[3] A decision of the MSPB may be subject to judicial review under 5 U.S.C. §7703.

Section 713(b)(2) provides that Section 3592(b)(1) of U.S. Code Title 5 shall not apply to the expedited removal procedure. This paragraph, designed to apply to situations including changes in administrations, states that a career senior executive may not be removed involuntarily from the SES within 120 days after an appointment of an agency head or the career appointee's most immediate supervisor if that supervisor is a noncareer SES appointee and has authority to remove the career appointee.

Section 707(b) of P.L. 113-146 directs the Merit Systems Protection Board within 14 days after enactment to issue regulations to implement Section 713's authority. On August 19, 2014, the Board published Part 1210 of Title 5 of the Code of Federal Regulations as an interim final rule with request for comments.[4] It published a technical correction on August 21, 2014.[5] MSPB responded to comments, rejected them, and adopted the interim final rule, as corrected, as a final rule on October 22, 2014.[6] MSPB's regulations address practices and procedures such as discovery, hearings, and standards of proof. They provide that an administrative judge may uphold or reject a Secretary's decision to remove or transfer a senior executive based on the reasonableness of the Secretary's decision, but may not mitigate it.

Section 707(c) of P.L. 113-146 authorizes the Secretary of Veterans Affairs to initiate an adverse action under the regular procedure in 5 U.S.C. §7543 to remove an individual from the Senior Executive Service, notwithstanding 5 U.S.C. §3592(b) or any other provision of law. Subsection(c) of Section 707 of P.L. 113-146 waives the time limitation on removing career senior executives. As noted above, Section 3592(b) prohibits removing a career senior executive within 120 days after the appointment of an agency head or the career appointee's most immediate supervisor if that supervisor is a noncareer SES appointee and has the authority to remove the career appointee.

Section 707(d) of P.L. 113-146 provides that nothing in Section 707 or 38 U.S.C. §713, as added by Section 707(a), shall be construed to apply to an appeal of a removal, transfer, or other personnel action that was pending before that public law was enacted. It adds that the authority provided in 38 U.S.C. §713 is in addition to authority provided by 5 U.S.C. §3592, which relates to removing a career SES member from the Senior Executive Service, or subchapter V of U.S. Code Title 5 Chapter 75 (i.e., Sections 7541-7543) which relate to adverse action removal from federal service or suspension of more than 14 days of a career member of the Senior Executive Service.

[3] 5 U.S.C. §7513(d).

[4] 79 *Federal Register* 48941 (August 19, 2014). The Board also amended 5 C.F.R. §1201 to add this authority to a regulation listing subjects of its appellate jurisdiction.

[5] 79 *Federal Register* 49423 (August 21, 2014).

[6] 79 *Federal Register* 763031 (October 22, 2014). *See* http://www.mspb.gov/vases/index.htm#reldocs for these federal register notices as well as other documents relevant to this expedited removal authority including decisions of administrative judges on appeals.

Due Process Considerations

Generally

Because Section 713 of Title 38 authorizes the Secretary of Veterans Affairs to remove an individual in a senior executive position from that position or from federal service, it appears to raise a constitutional question. The Fifth Amendment of the Constitution provides, in relevant part, that, "No person shall be ... deprived of life, liberty, or property without due process of law;.... " Some Supreme Court cases have interpreted this language to determine (1) whether a nonprobationary government employee who is removable for cause, as distinguished from at-will, has a constitutionally protected property interest in continued government employment; (2) whether due process applies to deprivation of such an interest; and (3) if due process applies, what kind of process is constitutionally sufficient?[7]

In *Board of Regents* v. *Roth*,[8] the Court noted that, "To have a property interest in a benefit, a person must ... have a legitimate claim of entitlement to it.... Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as ... law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[9] The Court acknowledged that a public employee under some circumstances has a property interest in continued employment that is safeguarded by due process.[10]

In *Arnett* v. *Kennedy*,[11] a nonprobationary federal Office of Economic Opportunity (OEO) employee in the competitive service named Kennedy was removed from federal service in an adverse action proceeding under the standard in the Lloyd-La Follette Act: "such cause as will promote the efficiency of the service." He allegedly slandered his supervisor by accusing him of bribing or attempting to bribe a community organization's representative with an OEO grant in exchange for signing a statement against Kennedy.[12]

Kennedy argued that removing him from federal service *before* OEO held a hearing deprived him of a property right to continued employment that was protected by the Due Process Clause and

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[7] *See* Merit System Protection Board Study, *What is Due Process in Federal Civil Service Employment?* (May 2015), for a summary of these cases, available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT.

See also another MSPB Study, *Removing Poor Performers in the Federal Service* (1995) for a discussion of procedural protections for unacceptable performance and adverse actions, available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253662&version=253949&application=ACROBAT.

[8] 408 U.S. 564 (1972).

[9] *Id.* at 576-577.

[10] *Id.* at 576, *citing* Slochower v. Board of Education, 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952); and Connell v. Higginbotham, 403 U.S. 207 (1971).

Although a tenured employee has been held to have a property interest in continued employment, he or she can be separated from federal service in a reduction in force (RIF) caused by factors such as lack of work or shortage of funds. 5 U.S.C. Chapter 35 and 5 C.F.R. Part 351.

See Patrick M. Garry, The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine, 81 St. Johns L. R. 797 (2007), for a comparison of the property right to continued government employment with a government employer's right to discipline an employee for speech in the work place, available at http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1192&context=lawreview.

[11] 416 U.S. 134 (1974).

[12] *Id.* at 137.

that the "such cause" standard was vague because it did not apprise him of the kind of speech that could result in removal.

The Supreme Court upheld Kennedy's removal, reversing a decision by a three-judge district court that had accepted his constitutional challenge. The district court in *Kennedy* v. *Sanchez*[13] held that Kennedy had a property right to continued employment that was protected from deprivation by the Due Process Clause because he was a nonprobationary employee in the competitive service who was removable for cause. It added that to comply with the Clause, OEO should have granted Kennedy a hearing *before* removing him from federal service. The district court based its conclusion on the Supreme Court's decision in *Goldberg* v. *Kelly*, which held that a recipient could not be deprived of welfare benefits before receiving a hearing on eligibility for continued benefits.[14] It also held that the "for such cause" standard was vague.

All Supreme Court justices agreed with the district court that Kennedy had a property right in continued employment subject to the Due Process Clause. Because OEO's regulations and practice provided that a removed employee was entitled to a trial-type hearing a*fter* removal either at OEO or the Civil Service Commission, the predecessor to the Merit Systems Protection Board, the Court focused on whether a hearing before or after removal provided adequate due process under the Clause.[15] By a vote of 5 to 4, the Court concluded that a hearing after removal sufficed and that the "such cause" standard was not vague.

Although this conclusion garnered a majority, the justices disagreed on the reason for it. A plurality opinion representing views of three justices held that,

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet.
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> . . .
>
> To conclude otherwise would require us to hold that although Congress chose to enact what was essentially a legislative compromise, and with unmistakable clarity granted governmental employees security against being dismissed without 'cause,' but refused to accord them a full evidentiary hearing for the determination of 'cause,' it was disabled from making such a choice. We would be holding that federal employees had been granted, as a result of the enactment of the Lloyd-LaFollette Act, not merely that which Congress had given them in the first part of the sentence, but that which Congress had expressly withheld from them in the latter part of the same sentence. Neither the language of the Due Process Clause nor our cases construing it require any such hobbling restrictions on legislative authority in this area.[16]
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> . . .

[13] 349 F.Supp. 863 (N.D. Ill. 1972).

[14] 397 U.S. 254 (1970). In *Goldberg*, the Supreme Court reached its conclusion based on the view that a welfare recipient had no means of support other than welfare cash assistance.

[15] *See Arnett*, 416 U.S. at 142, n. 8, which indicates that the Veterans Preference Act authorized an employee who was a veteran to appeal an agency removal to the Commission and that Executive Order No. 11490 extended this appeal right to nonveterans in the competitive service.

[16] *Id.* at 153-154. *See Arnett* at 150 for the text of the Lloyd-LaFollette Act, which provided that no person in the classified, *i.e.*, competitive, civil service may be removed except for such cause as will promote the efficiency of the (civil) service and provided rights to notice of charges and an opportunity to respond to them and, at the discretion of the employee's agency, a pre-disciplinary hearing, This standard for disciplinary actions and these procedural protections are now codified in Chapter 75 of Title 5 of the U.S. Code.

> Here, the property interest which the appellee had in his employment was conditioned by the procedural limitations which had accompanied the grant of that interest. The government might, then, under our holdings dealing with government employees in *Roth supra* and *Sinderman*, *supra*, constitutionally deal with appellee's claims as it proposed to do here.[17]

This "bitter with the sweet" formulation[18] appears to link the procedures that a legislative body has established for removing a government position to the nature of the right to continue to hold it. It, in effect, would appear to allow a summary or expedited removal authority to transform public employees who are removable for cause into employees who can be terminated pursuant to whatever removal authorities that a legislative body provides.

In an opinion that concurred in the plurality opinion's conclusion but not its reasoning, Justice Powell wrote that,

> The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may claim. *It seems that this approach ... would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time*. (Emphasis supplied.)[19]

Justice White addressed the authority of Congress to confer or not to confer a property right in continued government employment in an opinion that concurred in part and dissented in part in the plurality opinion. "While the state may define what is and what is not property, once having defined those rights, the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition."[20] In this passage, Justice White referred to the six members of the Court who did not subscribe to the bitter with the sweet formulation in the plurality opinion.

The Court expressly rejected this formulation in *Cleveland Board of Education* v. *Loudermill*.[21] It held that,

> the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: The Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. Property cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to

[17] *Id.* at 155, this opinion referred to Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972).

[18] *See* Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 112-9, 112th Cong., 2d Sess. 1938-1949 (2012), (hereinafter *Constitution Annotated*) for a discussion of this formulation at http://www.crs.gov/conan/details.aspx?mode=topic&doc=Amendment14.xml&t=5%7c2%7c2&s=1.

[19] Arnett v. Kennedy, 416 U.S. 134, 166-167 (1974). The internal quotation at the end is taken from Justice Powell's opinion in the *Arnett* case.

[20] *Id.* at 185.

[21] 470 U.S. 532 (1985).

> confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'[22]

While Justice Powell's formulation adopted in *Loudermill* superficially may appear to differ from the "bitter with the sweet" formulation, the two do not appear to be diametrically opposite; in many situations they could overlap. As Justice Powell said in his *Arnett* concurrence, to accept the latter formulation for a nonprobationary government employee who is removable for cause would permit the government to deprive that employee of notice of charges, an opportunity to respond, and a hearing *at any time*. Where these procedures are provided, applying the bitter with the sweet formulation in many cases would not appear to yield a conclusion that would differ from one reached by applying Justice Powell's formulation.

The Court in the *Loudermill* case balanced interests it had asserted in *Mathews* v. *Eldridge*:[23] (1) the individual's private interest in retaining employment or a benefit, (2) the government's interest in expeditiously removing an unsatisfactory employee or benefit and avoiding administrative burdens; and (3) the risk of an erroneous termination of employment or a benefit.[24] *Eldridge* concluded that a hearing after termination of disability benefits provided sufficient due process.[25]

The Court in *Eldridge* added that, " ... [d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481 (1972)."[26]

In *Loudermill*, the Court concluded that,

> The tenured public employee [*i.e.* a nonprobationary employee who is removable for cause rather than at-will] is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.... To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. [27]

The Court indicated that the Due Process Clause requires that these procedures, which do not need to be elaborate, must be afforded before removal provided that a removed employee receives an evidentiary hearing within a reasonable time after removal. It cited an earlier opinion, *Armstrong* v. *Manzo*,[28] to note that this post-removal hearing must be given "at a meaningful time" and "in a meaningful manner."[29]

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[22] *Id.* at 541.

[23] *Id.* at 542-543, *citing Eldridge*, 424 U.S. 319, 343 (1976).

[24] 424 U.S. at 335. *See Arnett*, 416 U.S. at 166-170 in the concurring opinion of Justice Powell for an elaboration on these competing interests.

[25] This conclusion differed from the Court's result in Goldberg v. Kelly, 397 U.S. 254 (1970), which required a hearing before welfare benefits could be terminated. The Court in *Eldridge* believed that a recipient of disability benefits could find a different source of income while awaiting a post-termination hearing, but a welfare recipient could not.

[26] 424 U.S. at 334.

[27] 470 U.S. at 546.

[28] *Id.* at 547, *citing Manzo*, 380 U.S. 545, 552 (1965).

[29] *Id.*

In a case decided after *Loudermill*, *Gilbert* v. *Homar*,[30] the Court reiterated *Loudermill's* conclusion that a public employee who can be dismissed only for cause is entitled to a limited hearing prior to termination to be followed by a more comprehensive termination hearing after it.[31]

Application to Section 713

Section 713 of Title 38, as added by Section 707 of the Veterans Access, Choice, and Accountability Act of 2014, does not expressly provide for notice and an opportunity to respond. In fact, Section 713(d)(1) states that these procedures, which are provided to a career member of the Senior Executive Service in Section 7543(b) of Title 5 for regular adverse actions, "... shall not apply" in a proceeding under Section 713 of Title 38.[32] If viewed in isolation, this section's lack of those procedures would appear to contravene the Due Process Clause of the Fifth Amendment as interpreted in the *Loudermill* case and reaffirmed in *Gilbert*.

Nevertheless, the Department of Veterans Affairs has issued guidelines which mandate that an individual in a senior executive position whom it seeks to remove from federal service or from such a position pursuant to 38 U.S.C. §713 will receive prior notice of five days and an opportunity to respond to charges in writing in advance of removal.[33] These guidelines acknowledge that, "Unlike many private sector employees who may be terminated 'at-will,' career federal employees whether at the VA or other federal agency, have a constitutionally protected right in continued employment." The implication is that the Fifth Amendment requires that this right cannot be deprived without due process.

Section 713(d)(2)(A) of Title 38 provides that an individual whom the Secretary seeks to remove from federal service or transfer to a non-senior executive position may file an appeal with the Merit Systems Protection Board within seven days after removal or transfer. The Board must assign this appeal to an administrative judge for a hearing. An administrative judge must decide the appeal within 21 days, that decision is final and not subject to further appeal. Section 713(e)(2)(3) states that if an administrative judge cannot issue an opinion in that period, the Secretary's decision becomes final.

This post-removal hearing along with the notice and opportunity to respond in writing procedures mandated by the Department's guidelines comply with the basic elements of due process prescribed in the *Loudermill* case and reaffirmed in *Gilbert*: The focus, then, turns to whether a court would consider these procedures "meaningful" if it should agree to adjudicate a due process challenge to Section713 of Title 38. In the *Manzo* case cited in *Loudermill*, the Court said that a

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[30] 520 U.S. 924 (1997).

[31] *Id.* at 929, *referring to Loudermill*, 470 U.S. 532, 545-546.

[32]The House amendment that went to a conference as part of H.R. 3230, 113th Congress, originally was agreed to by suspension of the rules as H.R. 4031. 161 Cong. Rec. H4751 (daily ed. May 21, 2014). It would have authorized the Secretary of Veterans Affairs, notwithstanding any other law, to remove an individual in the Senior Executive Service from federal service or transfer him or her to a suitable General Schedule position if the Secretary determined that the individual's performance warranted removal or transfer and to notify the House and Senate Committees on Veterans Affairs within 30 days. It also provided that a removal or transfer " ... should be done in the same manner as a removal of a professional staff member employed by a Member of Congress[,]" implying removal at-will.

[33]Department of Veterans Affairs, "Disciplinary Procedures Applicable to VA Senior Executives" available at http://www.crs.gov/analysis/legalsidebar/Documents/100714cc1.pdf.

These guidelines were discussed at a November 13, 2014 hearing of the House Committee on Veterans Affairs available at http://www.cq.com/doc/hcongressionaltranscripts-4572793?4.

post-termination hearing must be provided not only at a meaningful time, but also in a meaningful manner.[34]

While the due process elements are present, the time limits in 38 U.S. C. §713 differ from those in the adverse action procedures that apply to career members of the Senior Executive Service in 5 U.S.C. §7543(b). This subsection states that a career member of the Senior Executive Service is entitled to (1) generally advance notice of 30 days; (2) a reasonable time, but not less than seven days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of an answer; (3) be represented by an attorney or other representative; and (4) a written decision and specific reasons therefor at the earliest practicable date.

In MSPB Removal Appeals

Two senior executives who were removed from federal service pursuant to the expedited removal authority in 38 U.S. C §713 filed appeals with the MSPB and raised due process arguments to administrative judges.[35] In *Helman* v. *Department of Veterans Affairs*,[36] the former Director of the Phoenix Veterans Administration Health Care System asserted that the Department denied her a pre-removal right to due process by failing to give her meaningful notice and an opportunity to respond to the action against her and that the post-removal proceeding before the administrative judge violated her right to due process because of its abbreviated nature. She elaborated that the Department may have removed her because of pressure from Members of Congress and that the Department's five day notice period was not long enough for her to prepare an adequate defense. The administrative judge rejected these pre-removal due process arguments. With respect to the assertion of a post-removal due process violation, the judge ruled that the Board lacks authority to declare 38 U.S.C. §713 unconstitutional.[37]

In *Talton* v. *Department of Veterans Affairs*,[38] the former Director of the Central Alabama Veterans Administration Health Care System maintained that the Department contravened his right to due process by failing meaningfully to consider his reply to the proposed removal notice and that the Secretary's expedited removal authority in 38 U.S.C. §713 should have been exercised by the Secretary himself and should not have been delegated to the Deputy Secretary. The administrative judge rejected both of these arguments.

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[34] *Loudermill*, 470 U.S. at 380, *citing* Manzo, 380 U.S. 545, 552.

[35] The compilation of cases appealed to the Board lists a number of cases. One was sealed and is not publicly available and another was settled. *See* http://www.mspb.gov/vases/index.htm for this list and texts of all appealed expedited removal cases.

See also "Questions Remain Over Settlement Reached with Fired VA Director: Case Files Gives Some Details," *Pittsburgh Post-Gazette* (February 15, 2015) for information about the sealed case involving Therese G. Wolf, the former Director of the Pittsburgh Veterans Health Care System, available at http://www.post-gazette.com/local/region/2015/02/21/Questions-remain-over-settlement-reached-with-fired-Pittsburgh-VA-director-Terry-Wolf/stories/201502210024.

[36] The *Helman* case is available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1122129&version=1126602&application=ACROBAT.

[37] *See* Debra Roth, "The New VA Statute: What It Means for You," *Federal Times: Legal Matters* (January 20, 2015), for a discussion of the constitutional issues involved in this case by the attorney who represented Sharon Helman, available at http://askthelawyer.federaltimes.com/2015/01/20/the-new-va-statute-what-does-it-mean-for-you. Roth is an attorney in private practice who also serves as the General Counsel of the Senior Executives Association.

[38] The *Talton* case is available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1108829&version=1113263&application=ACROBAT.

Another senior executive, the former Director of the New York Stratton Veterans Administration Medical Center, was removed from federal service pursuant to 38 U.S.C. §713. She appealed her removal and challenged it on grounds other than denial of due process. In *Weiss* v. *Department of Veterans Affairs*,[39] the administrative judge sustained the Department's charge of misconduct, specifically, that she failed to take timely action to transfer from direct patient care a nursing assistant whom a review board found to have mistreated patients. The penalty of removal from federal service, however, was reversed because the administrative judge determined that it was not reasonable based on the information in the record. The administrative judge concluded that he would have mitigated this penalty, but because the expedited removal procedure in Section 713 did not allow mitigation, he only had authority to approve or disapprove the Department's penalty. Weiss reportedly has retired.[40]

Two senior executives who were removed from the Senior Executive Service and transferred to lower paying positions in the General Schedule appealed their demotions. In *Graves* v. *Department of Veterans Affairs*,[41] the former Director of the St. Paul Regional Office of the Veterans Benefits Administration (VBA) argued that the Department denied due process to her by failing to give full and impartial consideration to her reply to its charge and to all evidence in the record. The Department had charged that she created an appearance of impropriety by recommending reassignment of a senior executive who was the Director of VBA's St Paul Regional Office to Baltimore and then taking the vacated St. Paul position herself. Pursuant to Section 713 of title 38, the Department imposed a penalty of removal from the Senior Executive Service and transfer to a General Schedule position. The administrative judge rejected her due process contention and sustained the Department's charge.

Nevertheless, the administrative judge reversed the Department's penalty as not reasonable on the ground that it subjected her to disparate treatment; the Department also should have brought the same charge against some other senior executives who were involved in the reassignment and placement and, like Graves, did not question the propriety of these actions.

In *Rubens* v. *Department of Veterans Affairs*,[42] the former Director of VBA's Philadelphia Regional Office, like Graves, contended that the Department denied her due process; it did not give fair and impartial consideration to her reply and to all evidence in the record. She was charged with failing to exercise sound judgment when she participated in facilitating a reassignment of the Director of VBA's Regional Office in Philadelphia to the one in Los Angeles and assuming the vacated Philadelphia position. The administrative judge rejected her due process contention. The penalty, however, was reversed as unreasonable because the Department did not seek to discipline other senior executives who were involved in this reassignment and placement.

In both the *Graves* and *Rubens* cases, the administrative judges ordered the Department to cancel their removals from the Senior Executive Service and transfers to General Schedule positions, restore them to their former positions, and pay the correct amount of back pay and interest on

[39] The *Weiss* case is available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1270807&version=1275891&application=ACROBAT.

[40] Nicole Ogrysco, "2 VA Execs. Return to Work, Could Still Face Additional Punishments," *Federal News Radio* (February 22, 2016), available at http://federalnewsradio.com/agency-oversight/2016/02/2-va-exes-return-work-still-face-additional-punishments/ (hereinafter "2 VA Execs").

[41] The *Graves* case is available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1265690&version=1270744&application=ACROBAT.

[42] The *Rubens* case is available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1266364&version=1271420&application=ACROBAT.

back pay. They were notified that they could apply for fees for attorneys and expert witnesses and litigation costs where applicable. The Department reportedly reinstated them in their former positions in St. Paul and Philadelphia.[43]

Following these Merit Systems Protection Board decisions, the Deputy Secretary of the Department of Veterans Affairs noted that administrative judges upheld the Department's charges that Graves and Rubens created appearances of impropriety, but reversed their penalties as unreasonable because other senior executives who were involved in reassignments and placements were not charged. He ordered an investigation to determine whether the Department should bring the same charge against other senior executives and charge Graves and Rubens a second time.[44]

Judicial Review

Section 713(e)(2) of Title 38 states that,

> Notwithstanding any other provision of law, including section 7703 of [U.S. Code] Title 5, the decision of an administrative judge [of the MSPB] shall be final and shall not be subject to any further appeal.

Could an individual in a senior executive position at the Department of Veterans Affairs who is removed from federal service or transferred to a non-senior executive position pursuant to the Secretary's expedited authority in 38 U.S.C. §713 obtain review to challenge the constitutionality of that authority?

Pending Appeal

This question currently is before the U.S. Court of Appeals for the Federal Circuit because the former Director of the Phoenix VA Health Care System appealed her removal from federal service.[45] On April 27, 2015, the Department of Veterans Affairs filed a motion to dismiss this appeal for lack of jurisdiction. It acknowledged that the court generally has jurisdiction to hear an appeal from an MSPB final decision under 28 U.S.C. §1295(a)(9) and 5 U.S.C. §7703(b)(1) and (d), but maintained that the finality provision in 38 U.S.C. §713(e)(2), quoted above, precludes an appeal of an MSPB administrative judge's decision on an expedited removal.

Responding to this motion, Helman cited three constitutional arguments. First, the expedited removal procedure in 38 U.S.C. §713, on its face and as applied to her, violates her Fifth Amendment due process right by severely limiting the pre-removal and post-removal processes that she received. Second, Section 713, facially and as applied, contravenes the Appointments Clause, Article II, Section 2, Clause 2 of the Constitution. It allows an MSPB administrative judge, an employee who is not appointed by the President and confirmed by the Senate, to render a final decision of the United States without any review by the presidentially appointed, Senate-confirmed members of the Board or any other executive officer.[46] Third, Section 713, facially and

[43] "2 VA Execs."

[44] *Id.*

[45] The U.S. Court of Appeals for the Federal Circuit docketed this case as Helman v. Department of Veterans Affairs, No. 15-3086 (2015).

[46] The Appointments Clause, in relevant part, provides that the President has power to nominate, and by and with advice and consent of the Senate, to appoint principal officers of the United States, but Congress may by law vest the appointment of inferior officers in the President alone, or in heads of departments. Some cases interpreting this clause have held that significant authority of the United States must be exercised by principal or inferior officers appointed pursuant to the Clause. *See, for example,* Buckley v. Valeo, 424 U.S. 1, 126 (1976) ("We think its fair import is that

as applied, violates Helman's Fifth Amendment right against self-incrimination and her due process rights. This section, she alleged, forced an immediate appeal of her removal to MSPB and provided that her removal would be final within 21 days even though a criminal investigation into the same conduct was pending at that time and the administrative judge denied a motion to postpone the appeal.

In a reply to Helman's arguments, the Department asserted that preclusion of judicial review is clear from the language, objectives, and legislative history of 38 U.S.C. §713. It added that the court does not have jurisdiction because Helman failed to present colorable constitutional claims and has no constitutionally protected interest in her continued employment.[47] Moreover, even if Helman has a property right to continued employment, she would have no colorable due process claim to receive an opportunity for discovery and the right against self-incrimination and to assert that Section 713 violates the Appointments Clause or Article III of the Constitution.

On July 15, 2015, the court issued an order directing Helman to file a brief on jurisdiction. In her principal brief filed on October 9, 2015,[48] Helman argued that the Court of Appeals for the Federal Circuit has jurisdiction to review the decision of the MSPB administrative judge. She added that Section 713 of Title 38 does not deny the court all jurisdiction and does not clearly strip the court of jurisdiction to review constitutional claims. According to Helman, if Section 713 precludes all judicial review, it violates Article III of the Constitution, which vests federal judicial power in the Supreme Court and in such inferior courts as Congress may establish, whose judges must be appointed consistent with the Appointments Clause.

She maintained that the MSPB administrative judge who approved the Secretary's removal decision lacked constitutional authority to preside at her removal hearing because he was not appointed in the manner prescribed in the Appointments Clause of the Constitution, relating to the appointment of principal and inferior officers who exercise significant authority of the United States. Moreover, the removal restrictions on administrative judges violated separation of powers principles. Finally, Helman asserted that her removal contravened the Due Process Clause of the Fifth Amendment because she had a constitutionally protected property interest in continued federal employment that could not be deprived without due process of law and that the pre-termination and post-termination processes did not adequately provide due process.

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any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by §2, cl. 2, of that Article."); and Edmond v. United States, 520 U.S. 651, 663, 665 (1997) (" ... in the context of a clause designed to preserve political accountability relative to important government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate..")

[47] This assertion appears directly to contradict the Department's explanation for issuing guidelines to provide to a senior executive an advance notice of five days and an opportunity to respond to charges in writing. "Unlike many private sector employees who may be terminated 'at-will,' career federal employees whether at the VA or other federal agency, have a constitutionally protected right in continued employment." Department of Veterans Affairs, "Disciplinary Procedures Applicable to VA Senior Executives" available at http://www.crs.gov/analysis/legalsidebar/Documents/100714cc1.pdf.

[48] Helman v. Department of Veterans Affairs, *Corrected Principal Brief of Petitioner Sharon M. Helman* at 35-63, Court of Appeals for the Federal Circuit No. 15-3086 (October 9, 2015).

Generally

Does the finality language in 38 U.S.C. §713(e)(2) quoted above preclude an appeal beyond a decision by an administrative judge issued within 21 days only within MSPB (i.e., to the three-member Board), or does it also preclude any judicial review?

The intent to preclude Board review appears straightforward. The conference report states that,

> The substitute requires that the expedited review by the MSPB be conducted by an administrative judge at the MSPB, and if the MSPB administrative judge does not conclude their review within 21 days then the removal or demotion is final. The substitute does not allow for any further appeal beyond the administrative judge, and *does not allow for a second level review by the three-person board at the MSPB*. (Emphasis supplied.) [49]

On January 22, 2015, after the administrative judge upheld the department's decision to remove Helman from federal service, she submitted a request for an extension of time to file an appeal to the Merit Systems Protection Board. The Board on January 26 informed her that the administrative judge's decision was final and that it would not accept further submissions on this case.[50]

Whether this finality passage in 38 U.S.C. §713(e)(2) would preclude any judicial review is more complicated. Before reaching that question, it might be asked whether Congress constitutionally can preclude judicial review. The answer appears to be a qualified yes. Article III, Section 1 of the Constitution states, in relevant part, that, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time establish." The power that this section grants Congress to establish inferior courts implies that it may preclude jurisdiction over certain subjects. Article III, Section 2 identifies subjects of the Supreme Court's original jurisdiction and adds that, "... in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." This provision suggests that Congress may limit the Supreme Court's appellate jurisdiction, but not its original jurisdiction which the Constitution itself bestows.

In the Reconstruction era case E*x parte McCardle*,[51] the Court dismissed an appeal of a circuit court's denial of a *habeas corpus* petition because Congress had enacted over the President's veto a provision that repealed the act authorizing the appeal. In the modern era, the Court in *Felker* v. *Turpin*[52] upheld a statutory limitation on its jurisdiction to review second or successive *habeas corpus* petitions appealed from courts of appeals. It also held that this limitation did not deny the Court authority to consider petitions that were submitted to it as original matters because the statutory limitation did not attempt to preclude them.[53]

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[49] H.Rept. 113-561, 80 (2014).

[50] *See* Helman v. Department of Veterans Affairs, *Respondent's Motion to Dismiss for Lack of Jurisdiction* at 3-4, Court of Appeals for the Federal Circuit No. 15-3083 (April 27, 2015).

[51] 73 U.S. (6 Wall) U.S. 318 (1868).

[52] 518 U.S. 651 (1996).

[53] *See Constitution Annotated* at 861-874 for a discussion of the power of Congress to control the federal courts, available at http://www.crs.gov/conan/details.aspx?mode=topic&doc=Article03.xml&t=2|2|2&s=2&c=2.

It concludes that Congress has great discretion in conferring, withdrawing, and structuring the original and appellate jurisdiction of inferior federal courts and the appellate jurisdiction of the Supreme Court. It adds, however, that it is not clear whether the relevant constitutional text or court interpretations would extend to permitting Congress in these ways to accomplish ends which it could not do directly.

Would a court interpret Section 713's finality language quoted above effectively to preclude any judicial review? Its operative language is preceded by "[n]otwithstanding any other provision of law, including Section 7703 of Title 5." Section 7703 is the judicial review provision of the Civil Service Reform Act of 1978 that generally authorizes judicial review of MSPB final orders and decisions by the U.S. Court of Appeals for the Federal Circuit. It also provides for trials *de novo* in district courts for cases subject to antidiscrimination statutes. The intent of including the phrase "[n]otwithstanding any other law" may have been to waive other jurisdictional statutes including 28 U.S.C. §1295(a)(9), which grants the Federal Circuit jurisdiction over final MSPB action.

Some Supreme Court cases have analyzed whether statutory language that appears intended to preclude judicial review legally achieves this effect. In *Webster* v. *Doe*,[54] the Court addressed whether Section 102(c) of the National Security Act of 1947, which authorized the Director of Central Intelligence summarily to remove an employee from federal service, precluded judicial review.[55] This subsection stated that,

> Notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.... [56]

The employee asserted that his removal pursuant to this provision, among other things, deprived him of a property right to continued employment without due process of law mandated by the Fifth Amendment.[57] The Court held that this section did not preclude judicial review of his colorable constitutional claims.

> We do not think section 102(c) may be read to exclude review of constitutional claims. We emphasized in *Johnson* v. *Robison*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-374. In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986).[58]

See also, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to an Ongoing Debate*, 36 Stan. L. Rev. 895 (1984) at n. 113 "[A]ll agree that Congress cannot bar all remedies for enforcing federal constitutional rights." The Supreme Court quoted this statement in Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986).

[54] 486 U.S. 592 (1988).

[55] P.L. 80-495 (1947). When the *Webster* case was decided, this section appeared in section 403(c) of title 50 of the U.S. Code. It now is codified at 50 U.S.C. §3036(e).

[56] *Id.* at 594. Section 6 of the Act of August 24, 1912 is the Lloyd-Lafollette Act.

[57] The employee, an intelligence technician who was removed after voluntarily disclosing his sexual orientation, also asserted violations of the First, Fourth, and Ninth Amendments, as well as the equal protection component of the Fifth Amendment.

[58] 486 U.S. at 603. The Court previously had expressed the need for clarity of congressional intent to preclude any judicial review in Abbot Laboratories v. Gardner, 387 U.S. 136, 140-141 (1967), "The Court [has] held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." The internal quotation is taken from Cort v. Rusk, 369 U.S. 367, 380 (1962).

After the Supreme Court remanded the *Webster* case, the Court of Appeals for the D.C. Circuit upheld the CIA Director's removal in Doe v. Gates, 981 F.2d 1316, 1320-1321 (D.C.Cir.1993), saying that, "The law is clear that if a statute relegates termination decisions to the discretion of the Director, no property entitlement exists, *see* Chilingirian v. Boris, 882 F.2d 200, 205 (6th Cir. 1989); Windsor v. The Tennessean, 719 F.2d 155, 159 (1983), *cert. denied* 469

In the *Johnson* case, an individual who had completed conscientious objector service and was denied veterans' educational benefits filed a constitutional challenge under the equal protection component of the Fifth Amendment to a statute that limited those benefits to veterans who had served on active military duty. The statute governing this denial provided, in relevant part, that,

> the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing veterans to benefits ... shall be final and conclusive and no ... court of the United States shall have power or jurisdiction to review any such decision.... [59]

The Court concluded that this language did not bar judicial review under the federal question jurisdictional statute in 28 U.S.C. §1331 of a challenge to the constitutionality of the statute. It reasoned that the district court would not review a decision of the Administrator in denying the benefits, but rather whether Congress had enacted an unconstitutional condition on them.[60] This approach has been termed a collateral challenge.

In another case cited in the *Webster* case, *Weinberger* v. *Salfi*, which involved a challenge to the constitutionality of a Medicare provision in the Social Security Act, the Court reaffirmed its holding in *Johnson*. Nevertheless, it held that the claimants could not obtain jurisdiction pursuant to the federal question jurisdiction statute in 28 U.S.C. §1331 because another provision of the act granted court jurisdiction only after administrative remedies were exhausted. Consequently, the claimant in the *Salfi* case, unlike the *Johnson* claimant, would receive a judicial forum to hear a constitutional challenge to the act and did not need to obtain jurisdiction under the federal question statute.

The Court in *Webster* also cited the *Michigan Academy* case, which stated that a "serious constitutional question" would arise if it should construe a statute to deny *any* judicial forum for constitutional claims.[61] The Court in *Michigan Academy* quoted this phrase from *Salfi*, which took it from a passage in *Johnson* in which the Court declined to accept an interpretation that would have denied any judicial review of a constitutional challenge to the applicable statute. Doing so, it said in *Johnson*, "... would, of course, raise serious questions and in such a case it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question[s] may be avoided."[62] This passage illustrates the doctrine of constitutional avoidance.

The Court has reached conclusions similar to those in the *Webster* case and the other cases it cited. In *McNary* v. *Haitian Refugee Center*,[63] for example, the Court considered whether the Immigration Reform and Control Act of 1986[64] precluded judicial review of Immigration and Naturalization Service denials of special status for individuals except those related to deportation orders. The Court held that this limitation on reviewing denials did not preclude district courts

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U.S. 826 (1984), and any employee's statements to the contrary have no binding force. *See Bollow*, 650 F.2d at 1100; *Baden*, 638 F.2d at 493." The Supreme Court declined to review this decision in Doe v. Woolsey, 510 U.S. 928 (1993).

[59] 38 U.S.C. §211(a) *cited in Johnson*, 415 U.S. 361, 367 (1974).

[60] *See* 486 U.S. at 619-620 in Justice Scalia's dissent in *Webster* for this characterization of the Court's reasoning in the *Johnson* case.

[61] *Webster*, 486 U.S. at 603 *citing Michigan Academy*, 476 U.S. 667, 681 (1986).

[62] *Johnson*, 415 U.S. 361, 366-367 (1974), *quoting* United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971) (Brackets in original).

[63] 498 U.S. 479 (1991).

[64] P.L. 99-106 (1986).

from hearing suits brought to determine whether the agency's procedures for reviewing denials contravened the act and the Due Process Clause.

In *Lindahl* v. *Office of Personnel Management*,[65] the Court held that 5 U.S.C. §8377(c), which stated that decisions of the Office of Personnel Management on retirement matters "are final and conclusive and are not subject to review" barred judicial review of OPM's factual determinations. It did not, however, deny jurisdiction to the Court of Appeals for the Federal Circuit to review whether there had been a substantial departure from important procedural rights or whether the governing legislation had been misconstrued.

The Court said that when Congress intends to preclude any kind of judicial review, it "typically employs language far more unambiguous and comprehensive than the text of section 8347(c)."[66] It quoted the following language from 5 U.S.C. §8128(b), relating to compensation for work injuries, as an example of unambiguous preclusive language:

> The action of the Secretary [of Labor] or his designee in allowing or denying a payment under this subchapter is—(1) final and conclusive for all purposes and with respect to all questions of law and fact: and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.[67]

In a recent case, *Elgin* v. *Department of the Treasury*,[68] the Court addressed issues that would appear relevant to whether a court may have jurisdiction to hear a case challenging the constitutionality of the expedited removal authority in 38 U.S.C. §713. Elgin and the other petitioners were removed from federal service because they failed to register with the Selective Service prior to reaching age 26. Section 3328 of U.S. Code Title 5 bars from executive agency employment an individual who has knowingly and willfully failed to register for the Selective Service as required by the Military Service Act.[69]

They challenged their removal pursuant to this statutory bar before an MSPB administrative judge on the ground that it was unconstitutional. They argued that the registration requirement contravened the equal protection component of the Fifth Amendment because it did not apply to women and the Constitution's prohibition against bills of attainder (i.e., a legislative punishment). They sought reinstatement with back pay. Asserting that the Board did not have jurisdiction to hear this challenge because removal was based on a statutory bar, the administrative judge dismissed it. The judge also maintained that the Board did not have power to declare a federal statute unconstitutional.

Rather than file a petition for review, that is, an appeal, of this initial decision to the three member Merit Systems Protection Board pursuant to 5 U.S.C. §7701 or to the Court of Appeals for the Federal Circuit, as they could have done under 5 U.S.C. §7703, Elgin and some other Supreme Court petitioners filed an equitable claim in district court. They asserted that the court had jurisdiction to hear their case pursuant to the federal question jurisdictional statute, 28 U.S.C. §1331. They added that the Court in *Webster* v. *Doe*[70] held that a suit challenging the constitutionality of a statute is subject to judicial review.

The Supreme Court in a 6-3 decision concluded that the district court did not have federal question jurisdiction because the petitioners could have sought judicial review of a final MSPB

[65] 470 U.S. 768 (1985).

[66] *Id.* at 780.

[67] *Id.* at n. 13.

[68] 567 U.S.___, 132 S.Ct. 2126 (2012).

[69] 50 U.S.C. App. §453.

[70] 486 U.S. 592 (1988).

decision before the Court of Appeals for the Federal Circuit under 5 U.S.C. §7703. It rejected the petitioners' argument that despite the Federal Circuit's jurisdiction, they were not barred from also challenging a statute's constitutionality in a district court. The Court added that the scheme provided in the Civil Service Reform Act, particularly 5 U.S.C. §7703, is the exclusive avenue to judicial review when a qualifying employee challenges the constitutionality of a federal employment statute.

In reaching this conclusion, the Court declined to accept the petitioners' contention that a statute does not preclude district court federal question jurisdiction unless Congress explicitly directs otherwise. To support their contention, the petitioners cited language from the *Webster* case which said that a statute will not be found to preclude district court review without a "heightened showing" that Congress intended to preclude it.

The Court stated that the petitioners' argument overlooked a "necessary predicate" to applying *Webster's* heightened standard: To obtain judicial review under 28 U.S.C. §1331, a statute must purport to deny *any* judicial forum for a colorable constitutional claim. "*Webster's* standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court."[71]

The Court appears to have adopted a distinction that had been proffered in the government's brief between the level of congressional intent that must be shown before a court will find preclusion. A statute that channels or postpones judicial review will be held to preclude judicial review if Congress's intent is "fairly discernable." A statute that purports to preclude any judicial review, however, will not be held to preclude it without a "heightened showing" (i.e., "clear and convincing evidence") of that intent.[72]

The reasoning that the Court's applied in the *Elgin* case appears to have been strongly influenced by its significant decision in *United States* v. *Fausto*,[73] a statutory construction case. A nonpreference eligible[74] employee in the excepted service filed suit in the Court of Claims[75] for back pay under the Back Pay Act[76] alleging that his agency violated its regulations when it suspended him. The Court held that the Court of Claims did not have jurisdiction to hear his claim because at that time the Civil Service Reform Act (CSRA) provision that defined an employee who was eligible for judicial review of agency action did not include a nonpreference

[71] 132 S.Ct. at 2122.

[72] Brief for Respondent Department of the Treasury in Elgin v. Department of the Treasury at 19, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-45_respondent.authcheckdam.pdf *citing* Shalala v. Illinois Council on Long Term Care Inc., 529 U.S. 1, 19 (2000), which identified cases that made these distinctions.

In Lindahl v/ Office of Personnel Management, 470 U.S. 768, 779-780 (1985), the Court observed that, " ... the 'clear and convincing" standard has never turned on a talismanic test. Block v. Community Nutrition Institute, 467 U.S. 340, 345-346 (1984). Rather, the question regarding whether a statute precludes judicial review " ... is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved."

[73] 484 U.S. 439 (1988). *See* Barbara A. Atkin, Elaine Kaplan, and Gregory O'Duden,, *Wedging Open the Courthouse Doors: Federal Employee Access to Judicial Review of Constitutional and Statutory Claims*, 12 Emp. Rts. and Empl. Pol'y. J. 233 (2008); and Elizabeth A. Wells, *Note: Injunctive Relief for Constitutional Violations: Does the Civil Service Reform Act Preclude Equitable Remedies?*, 90 Mich. L. Rev. 2612 (1992), for discussions of the effect of the Civil Service Reform Act on access to courts.

[74] Section 2108(3) of title 5 defines a preference eligible to include a veteran and some family members of veterans.

[75] The Court of Claims subsequently was renamed the Court of Federal Claims.

[76] 5 U.S.C. §5396.

eligible in the excepted service such as Mr. Fausto; it limited review to competitive service employees and to preference eligibles in the excepted service.[77]

The Court in *Fausto* said that the act's purpose, entirety of text, and structure all indicated congressional intent to "replace the haphazard arrangements for administrative and judicial review that had built up over almost a century."[78] It rejected the contention that Congress's decision not to grant an MSPB administrative appeal right and judicial review of Board decisions to nonpreference eligible excepted service employees was an oversight. The Court viewed this noninclusion as manifesting a considered congressional judgment that they should not have statutory entitlement to these forms of review and, therefore, that pre-CSRA judicial access to courts for matters covered by the act were repealed impliedly.

The Court added that the structure of the CSRA gave a preferred position to competitive service employees and to excepted service preference eligibles. It also gave primacy to the Merit Systems Protection Board for administrative resolution of adverse personnel action disputes and primacy to the Court of Appeals for the Federal Circuit for judicial review. These structural elements permitted the Board to develop a unitary and consistent executive branch position on personnel matters. Moreover, the Federal Circuit's primacy avoided an unnecessary layer of judicial review in lower federal courts and encouraged more consistent judicial decisions than would have been true if district courts could hear them with appeals to regional courts of appeals.

Although the finality clause in 38 U.S.C. §713(e)(2) quoted above waives Section 7703 of Title 5 of the U.S. Code, which grants judicial review of MSPB final decisions, as well as "any other provision of law," it does not expressly preclude any judicial review. It provides that a decision of an administrative judge "shall be final and shall not be subject to any further appeal."

In this respect, it lacks the clarity of the finality language in the *Johnson* case which stated, in relevant part, that "... no court ... of the United States shall have power or jurisdiction" to review a decision of the Administrator of the Veterans Administration in denying benefits. This language, the Court in *Johnson* held, did not preclude judicial review of a challenge to the constitutionality of a statute that limited educational benefits to veterans of active military service. The Court reasoned that it was not reviewing a decision by the Administrator regarding whether or not to grant benefits, but rather whether Congress had enacted an unconstitutional statute (i.e., a collateral issue).

In the *Webster* case, the Court reviewed the CIA Director's summary removal authority. Citing *Johnson* and some other cases, it held that judicial review of colorable constitutional claims including deprivation of continued employment without due process of law in contravention of the Fifth Amendment could not be precluded without a "heightened showing" of Congress's intent to preclude. It reached this conclusion to avoid a "serious constitutional question" that would arise if a federal statute were to be construed to deny any judicial forum for a colorable constitutional claim. The *Elgin* case narrowed the scope of the holding in *Webster*, saying that it applied to cases that precluded *any* judicial review.

Without judicial review, a senior executive who is removed pursuant to Section 713 would have no opportunity to challenge removal as a deprivation of a property right to continued employment

[77] After the Court decided Fausto in 1988, Congress extended judicial review of adverse actions to nonpreference eligible excepted service employees in the Civil Service Due Process Amendments, P.L. 101-376 (1990).

[78] 484 U.S. at 444.

without meaningful due process of law. The only review would be in an administrative proceeding before an MSPB administrative judge.[79]

A court would have to decide whether the language of the finality clause in Section 713(e)(2) clearly and convincingly provides evidence of that intent. A court's determination arguably could be influenced in part by the legislative history of that clause. The conferees generally accepted the Senate provision,[80] which would have authorized the Merit Systems Protection Board to hear a timely filed appeal from a removed senior executive. This provision would have directed the Board to expedite adjudicating an appeal within 21 days, but if it could not complete action in that time, it would have to notify Congress why it could not do it. Significantly, the Senate language provided no express sanction for failing to complete an appeal in that time; the Board arguably may have been able to continue to adjudicate an appeal until completing it.

The Senate provision, however, did have a finality provision which stated that, "A decision made by the Merit Systems Protection Board with respect to a removal or transfer under subsection (a) shall not be subject to any further appeal."

In the conference, the conferees amended the Senate appeal provision by substituting an MSPB administrative judge in place of the Board itself and adding language about 5 U.S.C. §7703 so that Section 713(e)(2) provides that, "Notwithstanding any other provision of law, including section 7703 of title 5, the decision of an administrative judge under paragraph 1 [directing the MSPB to refer an appeal to an administrative judge] shall be final and shall not be subject to any further appeal." The conferees also added the following language in Section 713(e)(3): "In any case in which the administrative judge cannot issue a decision in accordance with the 21-day requirement under paragraph (1), the removal or transfer is final....."

By waiving the judicial review provision in 5 U.S.C. §7703 and "any other law" as well as making the Secretary's decision final if an administrative judge did not issue an opinion within 21 days, the conferees strengthened the finality language in the Senate provision. A court would have to decide whether these changes when compared to the earlier version provided clear and convincing evidence of congressional intent to preclude any judicial review.

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[79] When the former Director of the Phoenix VA Health Care System asserted in her MSPB appeal that she was denied post-removal due process, the administrative judge responded that he lacked the power to rule on the constitutionality of the enabling statute and cited Special Counsel v. Bianchi, 57 M.S.P.R. 627, 632 (1993). Helman v. Department of Veterans Affairs at 35-36, MSPB Administrative Judge (2014, available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1122129&version=1126602&application=ACROBAT.

The Supreme Court in Califano v. Sanders, 430 U.S. 99, 139 (1971), addressed the limitation of an administrative tribunal to adjudicate constitutional claims. "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures, and, therefore, access to the courts is essential to the decision of such questions; ... [w]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress's intent to do so is manifested by 'clear and convincing' evidence."

[80] H.Rept. 113-564 at 79-80 (2014). The Senate provision was in S. 2450, 113th Congress, 2d Sess., which was incorporated into H.R. 3230 on June 11, 2014. 160 Cong. Rec. S3565 (daily ed. June 11, 2014). *See* section 409 of H.R. 3230 as engrossed in the Senate for the Senate provision, available at http://www.gpo.gov/fdsys/pkg/BILLS-113hr3230eas/pdf/BILLS-113hr3230eas.pdf.

The House amendment in H.R. 3230 originally passed by suspension of the rules as H.R. 4031 on May 21, 2014. 160 Cong. Rec. H4751 (daily ed. May 21, 2014). It authorized the Secretary of Veterans Affairs to remove an individual in the Senior Executive Service from federal service or transfer him or her to a suitable General Schedule position for performance; such removal or transfer " ... should be done in the same manner as a removal of a professional staff member employed by a Member of Congress," implying removal or transfer at-will. *See* Section 7 of H.R. 3230 as engrossed by the House, available at http://www.gpo.gov/fdsys/pkg/BILLS-113hr3230eah/pdf/BILLS-113hr3230eah.pdf.

Legislation

H.R. 1994 and a companion, S. 1082, both named the Department of Veterans Affairs Accountability Act of 2015, and S. 1117, Ensuring Veterans Safety Through Accountability Act, have been introduced in the 114th Congress. They would extend to all officers and employees in the Department of Veterans Affairs the expedited removal-demotion authority that 38 U.S.C. §713 grants to the Secretary for individuals in senior executive positions. Hearings have been held on these bills.[81] On July 15, 2015, the House Committee on Veterans Affairs reported H.R. 1994 to the House.[82] The Senate Committee on Veterans Affairs reported S. 1082 to the Senate on July 22, 2015.[83] On July 28, 2015, senior advisors recommended that the President should veto H.R. 1994.[84] The House agreed to H.R. 1994 by a vote of 256 to 170 on July 29, 2015.[85] No floor action has been taken on S. 1082.

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[81] *See* "Debate over Making It Easier to Fire Feds Dominates VA Hearing," GovExec.(June 2, 2015), for a discussion of the hearing on H.R. 1994, available at http://www.govexec.com/oversight/2015/06/debate-over-making-it-easier-fire-feds-dominates-va-hearing/114301/?oref=relatedstories.

See also Susan Tsui Grundmann, Chairman, U.S. Merit Systems Protection Board, *Statement for the Hearing Record* for the Senate Committee on Veterans Affairs (June 24, 2015), for comments on S. 1082 and S. 1117, available at http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=1191921&version=1196542&application=ACROBAT.

[82] *See* Eric Katz, "House Panel Approves Bill to Ease Firing 300K Feds," GovExec (July 15, 2015), available at http://www.govexec.com/oversight/2015/07/house-panel-approves-bill-opponents-say-will-abolish-civil-service/117856/?oref=top-story.

See also Thomas J. Nicola, Coordinator, Maeve P. Carey, Katelin P. Isaacs, Barbara L. Schwemle, and Jon O. Shimabukuro, "VA Accountability Act of 2015 (H.R. 1994) as Passed by the House," CRS Report R44123, *VA Accountability Act of 2015 (H.R. 1994) as Passed by the House*, coordinated by Thomas J. Nicola, for a description of this bill, available at http://www.congress.gov by title and number.

[83] Kelly Lunney, "Bill Making It Easier to Fire VA Employees Heads to Senate Floor," GovExec (July 22, 2015), available at http://www.govexec.com/management/2015/07/bill-making-it-easier-fire-va-employees-heads-senate-floor/118395/?oref=relatedstories.

[84] Statement of Administration Policy: H.R. 1994, VA Accountability Act of 2015, available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr1994r_20150728.pdf.

[85] 161 Cong. Rec. H5653 (daily ed. July 29, 2015).

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