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## A Road to Resolution for Federal Whistleblowers' Mixed Case Claims

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**A ROAD TO RESOLUTION FOR FEDERAL WHISTLEBLOWERS’ MIXED CASE CLAIMS**

ABSTRACT

*Since the birth of the United States, whistleblowers have held our nation’s government accountable for illegal, fraudulent, and harmful behavior. The triumphs and failures of whistleblowers are deeply entwined with our nation’s struggle for independence, civil rights, and economic freedom. Nevertheless, employees who bravely expose misdeeds at all levels of our federal government are often bullied and discriminated against on the basis of sex, gender, age, disability, and more. In recent decades, and despite improved whistleblower protections, federal whistleblowers increasingly suffer from adverse employment actions and discrimination as reprisal for their disclosures. Employees looking toward our administrative law systems and our federal judiciary for relief and justice find no efficient, economic, or fair path to adjudicate their claims wholly. Many pursue mixed case claims, which allow an employee to bundle claims of an adverse employment action and discrimination into one suit, only to find that both administrative courts and federal courts reject whistleblowing as a basis for a mixed case claim. This Note argues that, based on the text and purpose of federal whistleblower protection statutes, employees who suffer from both reprisal and discrimination after exposing wrongdoing should be allowed to pursue these claims as mixed cases. This Note addresses the historical context and purpose behind federal whistleblower protections, discusses current whistleblower protection and civil service reform legislation, and examines the current administrative adjudication processes for both pure whistleblower reprisal and mixed case claims. This Note further contemplates the disadvantages to federal employees and, in particular, those living in rural states, presented by the current state of the law. Finally, this Note addresses how administrative agencies, Congress, and the federal judiciary can further enact reforms to protect federal whistleblowers, increase the judicial economy, and promote equitable outcomes among federal employees.*

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## I. INTRODUCTION

Beware,  
The danger is there,  
Watch the fork in the road,  
You better beware.  
—Smokey Robinson

Whistleblowers have captured the attention of Americans for decades. From Richard Marven, who revealed the torture of British prisoners of war by the Continental Navy in 1773,<sup>1</sup> to Edward Snowden, who exposed the NSA's blanket surveillance of United States citizens through secret data-mining operations in 2013,<sup>2</sup> our nation has both celebrated and vilified those who speak truth to power. But unlike most famous—or perhaps, *infamous*—whistleblowers, the vast majority of federal employees who expose fraudulent or illegal conduct go unnoticed by the public. Instead of making a splash on the front page of newspapers, these intrepid federal employees often find themselves suffering from reprisal and discrimination in obscurity.

History is rife with examples of employees punished for disclosing illegal conduct. Career FBI Special Agent Jane Turner was fired after exposing the agency's failure to investigate child sex crimes on North Dakota Indian

<sup>1</sup> *Timeline of U.S. Whistleblowers*, GOV'T ACCOUNTABILITY PROJECT, <https://whistleblower.org/timeline-us-whistleblowers/> (last visited Oct. 27, 2022).

<sup>2</sup> Josh Hicks, *Five of the Most Famous Federal Whistleblowers*, WASH. POST (July 31, 2014, 6:00 AM), <https://www.washingtonpost.com/news/federal-eye/wp/2014/07/31/5-famous-whistleblowers-from-the-federal-government/>.

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Reservations.<sup>3</sup> The same fate awaited Robert Ranghelli, a National Funeral Home employee who disclosed that veterans awaiting burial at Arlington National Cemetery were stored unrefrigerated and left to decompose.<sup>4</sup> Jesselyn Radack, a Department of Justice ethics advisor, was put on the No-Fly List from 2003 through 2009—and even asked to drink her breast milk by a TSA agent—after exposing the FBI’s illegal conduct in the “American Taliban” case.<sup>5</sup> But reprisal in the form of an adverse employment action, such as a demotion or termination, is not the only injustice that befalls whistleblowers. Increasingly, whistleblowers across all levels of government allege complaints of both reprisal *and* discrimination.<sup>6</sup> Often, these cases arise from the same set of facts: for some employees, blowing the whistle on discrimination in their workplace results in reprisal; for others, discrimination only occurs *after* they engage in whistleblowing conduct.<sup>7</sup>

Employees who suffer from discrimination and adverse employment actions<sup>8</sup> arising from the same set of facts confront a fork in the road. They can choose to either bifurcate their claims through two entirely separate administrative procedures or bundle these claims together through a process (albeit a broken one) known as a “mixed case claim.” A mixed case complaint allows an agency to package a removal or demotion with a discrimination complaint and then issue a decision appealable only to the Merit Systems Protection Board (MSPB). A mixed case sounds efficient and effective—until an

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<sup>3</sup> Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 WM. & MARY POL’Y REV. 184, 195 (2012).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 194.

<sup>6</sup> MERIT SYS. PROT. BD., ANNUAL REPORT FOR FY 2021 (2021), [https://www.mspb.gov/about/annual\\_reports/MSPB\\_FY\\_2021\\_Annual\\_Report\\_1900943.pdf](https://www.mspb.gov/about/annual_reports/MSPB_FY_2021_Annual_Report_1900943.pdf) [hereinafter MSPB ANNUAL REPORT].

<sup>7</sup> See Michael Balsamo & Michael R. Sisak, *Whistleblowers Say They’re Being Bullied for Exposing Federal Prison Abuses*, PBS NEWS HOUR (Feb. 24, 2022), <https://www.pbs.org/newshour/politics/whistleblowers-say-theyre-being-bullied-for-exposing-federal-prison-abuses>. Whistleblowers who exposed the existence of “rape clubs,” where staff and wardens sexually abused inmates at women’s prisons, describe the discrimination as “bullying.” Officials have “doxxed” whistleblowers by sharing confidential information (such as their home addresses) with staff, reopened “frivolous” disciplinary investigations, and subjected them to verbal harassment based on race and gender. See also Tyler Pager, *Whistleblower Alleges Bullying, Ethical Lapses at White House Science Office*, WASH. POST (Mar. 10, 2022, 7:39 PM), <https://www.washingtonpost.com/politics/2022/03/10/whistleblower-alleges-bullying-ethical-lapses-white-house-science-office/>. In a complaint submitted to the Office of Special Counsel (OSC), former general counsel Rachel Wallace alleges that nearly 15 female and minority staffers at the White House Office of Science and Technology Policy suffered from retaliation, including verbal abuse and discrimination based on gender and race.

<sup>8</sup> Adverse employment actions are defined as removals, reductions in salary grade or pay, suspension for more than 14 days, and involuntary resignation or retirement. 5 U.S.C.A. §§ 7511–7514 (West 2022).

employee realizes that it surreptitiously allows an agency to effectively ignore a claim of discrimination or reprisal, depending on the mixed case path an employee chooses to take.

In particular, the administrative exhaustion processes for mixed case appeals are not designed to handle Whistleblower Protection Act claims, despite these claims often arising from the same circumstances as traditional mixed case appeals. Neither the MSPB, the agency charged with adjudicating whistleblower protection claims, nor federal courts recognize a whistleblower reprisal claim as a valid basis for a mixed case claim. Even when an employee suffers from discrimination *and* reprisal for whistleblowing arising from the same set of facts, they cannot bundle their claims and present them in one case before a district court. Whistleblowers who experience reprisal and discrimination have nowhere to turn. For these courageous federal employees who speak out against fraud, waste, and abuse, each fork in the mixed case claim process leads to a dead end.

Broad legislative and administrative reforms are necessary to address the disadvantages inherent in the administrative review system that stymie whistleblowers across the nation. In order to provide enhanced protection and broader equity, these reforms must address pitfalls at every stage of a whistleblower's complaint, including after removal to federal court. Judicial economy is squandered on procedural hearings—namely, whether an employee has fully exhausted his or her claim through the proper administrative process. Federal courts, especially in rural jurisdictions, are often ill-equipped to adjudicate whistleblower mixed case claims of reprisal and discrimination. Many federal employees, particularly those residing in rural jurisdictions far from the District of Columbia, do not have access to employment attorneys well-versed in bringing mixed case claims to federal court. For the 80% of federal employees who live outside the District of Columbia, Maryland, and Virginia,<sup>9</sup> relief for a mixed case claim in federal court may be simply out of reach. Reform *must* begin with the administrative bodies that initially decide mixed case claims: the Office of Special Counsel (OSC), Equal Employment Opportunity Commission (EEOC), and MSPB. Increasing equitable outcomes in administrative proceedings for employees who allege discrimination and reprisal for whistleblowing conduct lessens the burden on courts *and* employees who otherwise may choose to remove their cases to the federal judicial system.

Congress has an unprecedented opportunity to reform the convoluted mixed case process to provide more protection and less confusion for federal whistleblowers like Jane, Robert, and Jesselyn by clarifying that the WPA can form the basis for a mixed case claim. This Note proposes both legislative and administrative reforms to improve outcomes for whistleblowers who experience both reprisal and discrimination. First, this Note outlines the history and purpose

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<sup>9</sup> Dennis Vilorio, *Working for the Federal Government: Part 1*, U.S. BUREAU OF LAB. STATS.: CAREER OUTLOOK (Sept. 2014), <https://www.bls.gov/careeroutlook/2014/article/federal-work-part-1.htm>.

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of the Whistleblower Protection Act and subsequent legislation strengthening protections for federal whistleblowers. Next, this Note explains the current administrative exhaustion process for mixed cases of discrimination and adverse employment actions. It examines the justification for excluding Whistleblower Protection Act claims from mixed case appeals and argues that the text and purpose of the Civil Service Reform Act or the Whistleblower Protection Act do support this exclusion. Lastly, this Note examines the fundamental flaws in the current mixed case claims process. It provides actionable legislative and administrative reforms to improve outcomes for whistleblowers who experience reprisal and discrimination—in particular, those who live in far-flung rural areas and are increasingly disadvantaged by a broken and inflexible system.

## II. BEWARE THE FORK IN THE ROAD: ROBERT ZACHARIASIEWICZ'S STORY

Robert Zachariasiewicz is not a household name. But he could be—a quick Google search uncovers photos of a sturdy, severe-looking Drug Enforcement Administration (DEA) agent in a badge and baseball cap hauling off a criminal in handcuffs. These photos could be pulled from a recent Hollywood cop drama, or serve as inspiration for a new, heroic action figure—but instead, they document the real-life capture of one of the world's most devious arms dealers, “The Merchant of Death” Viktor Bout, in a DEA operation headed by Robert's team.<sup>10</sup>



*Robert Zachariasiewicz (left), detains Viktor Bout, a Russian Arms Dealer convicted of conspiring to sell weapons to a foreign terrorist group.<sup>11</sup>*

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<sup>10</sup> See Game of Crimes Podcast, *Part 2: Rob “Zach” Zachariasiewicz and the Hunt for Viktor Bout—The Merchant of Death*, GoC MEDIA L.L.C. (Oct. 23, 2021), <https://gameofcrimespodcast.com/part-2-rob-zach-zachariasiewicz-and-the-hunt-for-viktor-bout-the-merchant-of-death/>.

<sup>11</sup> *Id.*

Like many whistleblowers, Robert's story lives in relative obscurity compared to his long and celebrated career at the DEA.<sup>12</sup> But the challenges stymieing his path to justice are typical of whistleblowers who choose to hold federal agencies accountable for discrimination and reprisal. His case serves as a clear warning for other whistleblowers pursuing mixed case claims of discrimination and reprisal: *beware the fork in the road*. Robert picked the wrong fork in the road to address the reprisal and discrimination he faced—but only because *both* forks available to him, and to all federal employees, fail to adequately address the particular type of case he raised under the Whistleblower Protection Act and Civil Service Reform Act. In his quest for justice, Robert waded for 18 months through a “maze of administrative procedures” within the agency where he served for decades, only for his claims to be dismissed at his final stop for relief: federal district court.<sup>13</sup> Without action from administrative agencies, the MSPB, and Congress, whistleblowers like Robert will continue to fail in their quest for justice, no matter which fork in the road they choose.

For Robert, the road to federal district court begins with his entry into the Drug Enforcement Administration in 1998. For over twenty years, Robert selflessly served his country as a special agent and criminal investigator at the DEA.<sup>14</sup> From the time he entered the DEA, he was rapidly promoted multiple times and served on highly specialized teams, including a unit assembled to investigate the use of narcotics trafficking as a source of income for terrorist organizations.<sup>15</sup> Robert spent a significant portion of his career in this highly skilled unit and eventually served in a supervisory capacity in many multi-jurisdictional and multi-national DEA investigations.<sup>16</sup> He was awarded several prestigious honors for his exemplary work, including the DEA Administrator's Award.<sup>17</sup>

In 2013, the DEA's Bilateral Investigation Unit selected Robert for employment in a supervisory role, widely considered a “stepping-stone to further

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<sup>12</sup> See Robert Zachariasiewicz, LINKEDIN, <https://www.linkedin.com/in/robert-zachariasiewicz-a12672135/> (last visited Oct. 27, 2022).

<sup>13</sup> See *Zachariasiewicz v. U.S. Dep't of Just.*, 395 F. Supp. 3d 734, 741 (E.D. Va. 2019).

<sup>14</sup> Brief for Robert Zachariasiewicz as Amicus Curiae in Opposition to District Court Opinion at 1, *Zachariasiewicz v. U.S. Dep't of Just.*, 48 F.4th 237 (4th Cir. 2022) (No. 19-2343), 2022 WL 620736, ECF No. 46. After Robert submitted his Informal Brief to the Fourth Circuit, the court appointed attorney Andrea R. Butler of Kirkland & Ellis, LLP, as amicus curiae. Butler argued on behalf of Robert during oral argument. See Order Assigning Counsel, *Zachariasiewicz*, 48 F.4th, ECF No. 24-1; see also Appellant's Informal Brief, *Zachariasiewicz*, 48 F.4th, 2020 WL 525617, ECF No. 13.

<sup>15</sup> Amicus Curiae Brief, *supra* note 14, at 9.

<sup>16</sup> *Id.* at 9–10.

<sup>17</sup> *Id.* at 10.

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promotion.”<sup>18</sup> Robert planned to continue his career in the DEA, and, with encouragement from his supervisors, sought a promotion inside his unit when his direct supervisor vacated the position.<sup>19</sup> Despite this encouragement—and in violation of DEA competitive selection policies—Robert learned that this GS-15 position vacancy was never competitively advertised. Instead, the DEA filled this position by a lateral transfer.<sup>20</sup> Robert raised this policy violation to his supervisors in August 2015 in his first protected disclosure under the Whistleblower Protection Act.<sup>21</sup> Shortly after this disclosure, his supervisor informed him that, due to his complaint, the division refused his promotion.<sup>22</sup> Robert continued to protest to unit leadership that the DEA’s initial failure to advertise the position, and the subsequent ban on his promotion, violated Agency policies.<sup>23</sup>

Shortly after this first protected disclosure and his protest of the instant hiring procedures, the DEA informed Robert of a new policy to “involuntarily transfer . . . employees out of the Special Operations Division.”<sup>24</sup> The terms of this policy did not explicitly apply to Robert; nevertheless, the DEA informed Robert of his involuntary transfer to a different position.<sup>25</sup> Robert objected to the transfer as inconsistent with DEA policy and procedure in his second protected disclosure under the Whistleblower Protection Act.<sup>26</sup> In response, his supervisor told him that further objections would be detrimental to his career and that he should “‘be careful or [Deputy Administrator John] Riley could send [him] to the border’—a transfer well recognized as undesirable and one that would be severely detrimental to [his] career.”<sup>27</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (“In January 2016, a new [Assistant Special Agent in Charge], George Papadopolous, informed Zachariasiewicz that the DEA was instituting a new policy . . . to involuntarily transfer Staff Coordinator employees out of the Special Operations Division.”); *see also* *Zachariasiewicz v. U.S. Dep’t of Just.*, 48 F.4th 237, 239 (4th Cir. 2022).

<sup>25</sup> Robert was a Domestic Enforcement Group Supervisor, not a Staff Coordinator. *Id.* On his transfer paperwork, Robert noted that “he should not be subject to the policy because he had already served his required time at DEA Headquarters and because he worked as a Group Supervisor, not a Staff Coordinator.” *Zachariasiewicz*, 48 F.4th at 239. He was “the only Domestic Enforcement Group Supervisor in the entire Agency transferred under the new involuntary transfer policy without being subject to a pending disciplinary investigation.” *Id.* at 14; *see also* *Zachariasiewicz*, 48 F.4th at 239.

<sup>26</sup> *Id.* at 14.

<sup>27</sup> *Id.*



Like Robert, other employees inside and outside the DEA also protested the new involuntary transfer policy as inconsistent with DEA policy and procedure. The U.S. Attorney for the Southern District of New York, Preet Bharara, expressed concern that it would negatively affect the experience and expertise of the agents working with his office to investigate narcoterrorism and other national security efforts by his office.<sup>28</sup> Several agents within Robert's division expressed their concerns about the policy, and about Robert's treatment, directly to DEA Administrator Chuck Rosenberg at the Special Operations Division town-hall.<sup>29</sup> Eventually, the policy was rescinded and reversed.<sup>30</sup> But Robert was still forced into an involuntary transfer to another division—one that was a “significant downward reassignment.”<sup>31</sup> Robert remains the only employee of his grade and position to be transferred without being subject to a pending disciplinary investigation.<sup>32</sup> In his complaint, Robert alleged that the Agency used the involuntary transfer—a *de facto* demotion<sup>33</sup>—as reprisal for raising concerns about the Agency's promotion and hiring policies. Specifically, Robert alleged that he was “blacklisted” from higher grade positions in part because the Agency directed hiring managers to “not list [him] on Recommendation Memos” for promotion.<sup>34</sup> He applied for 32 promotions, but was uniformly denied.<sup>35</sup> In particular, Robert alleged that one non-selection went beyond mere retaliation for protected disclosures and amounted to unlawful discrimination on the basis of race and sex.<sup>36</sup> Despite being ranked as the top choice for a position as the Assistant Special Agent in Charge of the Special Operations Division, the Caribbean and Latin American Section (a section Robert served in for approximately six years), the position was awarded to a different applicant because she “had a lot more diversity.”<sup>37</sup> The chair of the hiring committee later told Robert he was not selected because of his race and sex and claimed Robert was “Mauricio’ed”—a reference to a prior instance in which the DEA selected a

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<sup>28</sup> *Id.* at 13; *see also Zachariasiewicz*, 48 F.4th at 239–40.

<sup>29</sup> *Id.*

<sup>30</sup> *Zachariasiewicz*, 48 F.4th at 240.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 14.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> *Id.* at 43.

<sup>35</sup> *Id.* at 17.

<sup>36</sup> *Id.* at 16.

<sup>37</sup> *Id.* at 32 (quoting the DEA Career Board's minutes, where the DEA's Chief of Operations, Anthony Williams, instructed Board members to vote for a specific candidate because she had “a lot more diversity”).

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less-qualified minority candidate for a position.<sup>38</sup> After this promotion denial, Robert filed a claim with the DEA Equal Employment Office (EEO).<sup>39</sup> He then filed a mixed case appeal and elected to pursue his discrimination claim directly with the MSPB rather than proceeding through the EEO process.<sup>40</sup>

Robert filed a mixed case appeal with the MSPB alleging discrimination and whistleblower protection claims regarding his non-selection to the GS-15 positions for which he had applied.<sup>41</sup> The MSPB's administrative judge dismissed the suit, holding that Robert was required to file his whistleblower protection claims with the OSC.<sup>42</sup> But his claim with the OSC remained unreviewed. Over 120 days after Robert filed his whistleblower complaint with the OSC—the statutory time limit imposed by 5 U.S.C. § 1214(a)(3)(B)—the OSC granted an Individual Right of Action (IRA) to appeal directly to the MSPB.<sup>43</sup> Again, he refiled his claims that he suffered reprisal based on his protected disclosures, engaging in EEO activity, and filing his previous claims with the MSPB.<sup>44</sup> He also claimed he faced discrimination based on his sex and race in violation of Title VII.<sup>45</sup> Robert's Title VII claim, the Whistleblower Protection Act claim, and the Civil Service Reform Act (CSRA) claim are interwoven. Despite arising from the same set of facts, Robert was unable to adjudicate them all before a sole agency. After disregarding his Title VII claims, the MSPB decided his CSRA and WPA claims nearly eighteen months after filing his first complaint. In the end, the MSPB's Administrative Law Judge dismissed his claims without prejudice.<sup>46</sup>

Robert turned to the only avenue that remained: federal district court. He filed suit in the Eastern District of Virginia, bringing ten causes of action: four claims that he was subject to retaliation and reprisal in violation of the WPA, one claim of discrimination in violation of Title VII, and two claims that the DEA violated Office of Personnel Management (OPM) hiring regulations.<sup>47</sup> Before

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<sup>38</sup> *Id.* (quoting DEA Acting Deputy Administrator Robert Patterson, who personally informed Robert that, despite being ranked as the Special Agent in Charge's top candidate, the Board rejected his application in favor of a less-qualified candidate based on race and/or sex).

<sup>39</sup> *Zachariasiewicz v. U.S. Dep't of Just.*, 395 F. Supp. 3d 734, 737 (E.D. Va. 2019).

<sup>40</sup> *Id.* Robert filed three mixed case appeals with the MSPB. The first appeal, filed in October 2017, alleged discrimination and whistleblower protection claims regarding his non-selection to GS-15 positions between November 2015 and July 2017. Amicus Curiae Brief, *supra* note 14, at 17–18.

<sup>41</sup> *Zachariasiewicz*, 395 F. Supp. 3d at 737.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 738.

<sup>44</sup> Amicus Curiae Brief, *supra* note 14, at 18.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See Zachariasiewicz v. U.S. Dep't of Just.*, 395 F. Supp. 3d 734 (E.D. Va. 2019).

considering the case on the merits, the district court granted the government's motion to dismiss all ten claims for lack of subject-matter jurisdiction.<sup>48</sup> The court held that Robert's claim did not constitute a mixed case appeal and thus, the court did not possess jurisdiction pursuant to 5 U.S.C. § 7702.<sup>49</sup> Even if an IRA could serve as the basis for a mixed case appeal, the court held that Robert's filing with the MSPB was untimely because he had not administratively exhausted his claims.<sup>50</sup> The Fourth Circuit affirmed the district court's decision, holding that the court lacked subject matter jurisdiction to consider Robert's WPA claims but remanding his discrimination claims for further review.<sup>51</sup> Ultimately, he was unable to adjudicate his claims of reprisal and discrimination together.

The court's decision begs the question: how, after nearly eighteen months of his claims languishing in the byzantine administrative processes of the MSPB, EEOC, and OSC, did Robert's claims remain entirely unreviewed and administratively unexhausted? How, after an MSPB Administrative Judge recommended that it was "most prudent" to address all of his claims together, was Robert forced to bifurcate his claims in federal district court?<sup>52</sup> What wrong turns did Robert make in his quest for justice? Which fork in the road *should* he have taken?

### III. FEDERAL WHISTLEBLOWER PROTECTIONS

#### A. *The Evolution of Federal Whistleblower Protections*

"Whistleblowing is really in our DNA."<sup>53</sup> Since the earliest days of our democracy, federal employees have held our government accountable for wrongdoing by exposing fraud, waste, and abuse.<sup>54</sup> Protection of whistleblowers is in our DNA, too. Congress intervened on behalf of the first-known

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<sup>48</sup> *Id.* at 741.

<sup>49</sup> *Id.* at 739–40 ("The issue is undoubtedly confounding, because 5 U.S.C. § 7702(a)(1) uses the word 'appeal,' . . . it does not encompass an IRA appeal from an unfavorable OSC decision.") ("[I]n mixed cases . . . the district court is the proper forum for judicial review. Based upon Perry's scope, Plaintiff's case falls short.") (internal quotations omitted).

<sup>50</sup> *Id.* at 740 (Plaintiff does not have a proper "mixed case appeal" that this Court can consider, and even if he did, his case was untimely. Therefore, this Court concludes that it is not the proper forum to consider Plaintiff's case.").

<sup>51</sup> *Zachariasiewicz v. U.S. Dep't Just.*, 48 F.4th 237, 249 (4th Cir. 2022).

<sup>52</sup> Amicus Curiae Brief, *supra* note 14, at 18.

<sup>53</sup> Brian Naylor, "Whistleblowing is Really in Our DNA": A History of Reporting Wrongdoing, NAT'L. PUB. RADIO: MORNING EDITION (Sept. 25, 2019, 5:00 AM), <https://www.npr.org/2019/09/25/764010989/whistleblowing-is-really-in-our-dna-a-history-of-reporting-wrongdoing>.

<sup>54</sup> *Id.*

whistleblowers who exposed the torture of prisoners of war by the Continental Navy in the late 1770s<sup>55</sup> and continued to legislate to protect whistleblowers from that point forward.

When the CSRA passed in 1978, it was widely heralded as a leap forward in protecting federal employees' disclosures of government fraud, waste, and abuse.<sup>56</sup> In addition to establishing a complex statutory scheme for federal employees to seek review of adverse employment actions, the CSRA created rights for federal whistleblowers.<sup>57</sup> The CSRA also gave most federal employees the right to file appeals contesting prohibited personnel practices, such as removals, suspensions, and reductions in pay with the MSPB.<sup>58</sup>

The CSRA was the first time Congress expressly recognized the need to protect federal employees against reprisal for disclosing wrongdoing.<sup>59</sup> With the passage of the CSRA, Congress created the Office of Special Counsel (OSC) to investigate protected disclosures and defend whistleblowers against reprisal.<sup>60</sup> Upon signing the CSRA into law, President Jimmy Carter declared that “[t]he act assures that whistleblowers will be heard and that they will be protected from reprisal.”<sup>61</sup> But in the first ten years of its existence, the OSC did not bring “a single corrective action case” to the MSPB “on behalf of a whistleblower.”<sup>62</sup> The CSRA gave most non-probationary federal employees the right to appeal adverse personnel actions to the Merit Systems Protection Board, an independent federal agency that oversees the federal merit systems.<sup>63</sup> Congress designed the MSPB appeal process to protect federal employees from unfair or arbitrary treatment, including removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less.<sup>64</sup> With the passage of the CSRA, most employees were now able to appeal denials of within-grade salary increases,

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<sup>55</sup> *Id.*

<sup>56</sup> See McCarthy, *supra* note 3 at 185 (quoting S. Rep. 95-969 (1978) (“Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service.”)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Merit System Principle 9: Whistleblower Protection*, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/msp/msp9.htm> (last visited Oct. 28, 2022) [hereinafter *MSPB Principle 9*].

<sup>60</sup> Civil Service Reform Act of 1978, Pub. L. No. 95-454, Sec. 202 (codified at 5 U.S.C.A. §§ 1211–1219) (West 2022).

<sup>61</sup> President Jimmy Carter, *Civil Service Reform Act of 1978 Statement on Signing S. 2640 into Law*, AM. PRESIDENCY PROJECT (Oct. 13, 1978), <https://www.presidency.ucsb.edu/documents/civil-service-reform-act-1978-statement-signing-s-2640-into-law>.

<sup>62</sup> S. REP. NO. 103-358, at 2 (1994).

<sup>63</sup> See MSPB ANNUAL REPORT, *supra* note 6.

<sup>64</sup> *Id.*

reduction-in-force actions, and other adverse employment matters to the MSPB.<sup>65</sup>

Despite the protections proffered by the CSRA, federal employees were still reluctant to blow the whistle on their employers' actions for fear of reprisal.<sup>66</sup> Five years after the enactment of the CSRA, the percentage of federal employees concerned about retaliation from whistleblowing activities increased from 19% to 37%.<sup>67</sup> And these sentiments endured: nearly ten years after the enactment of the CSRA, 20% of federal employees who knew of "at least one incident of illegal or wasteful activity" chose not to report that activity for fear of reprisal.<sup>68</sup>

Eight years later, disaster struck the nation. On January 28, 1986, the Space Shuttle Challenger exploded 73 seconds after launching, killing all crew members on board.<sup>69</sup> In the aftermath of the tragedy, whistleblowers—including engineers employed under a federal contract, like Roger Boisjoly and Allan McDonald—stepped forward to testify before Congress. Boisjoly testified that NASA and federal aeronautics contractors disregarded warnings that launching in cold weather compromised the integrity of the shuttle's O-Rings, placing the shuttle and crew in fatal danger.<sup>70</sup> These whistleblowers faced immediate and harsh reprisals for their candor in Congressional hearings. Boisjoly was removed from his position working directly with NASA and was forced off of the team charged with investigating the crash. He then filed suit against his employer in federal court.<sup>71</sup> Although he alleged violations by his private employer, Morton Thiokol, of Utah state law and the False Act Claims, Boisjoly's case ignited proponents of federal whistleblower reform.<sup>72</sup> After witnessing the reprisals suffered by Boisjoly and his colleagues, federal government employees demanded stricter laws and more comprehensive protections for whistleblowers.

Fierce lobbying for the expansion of federal whistleblower protection and skyrocketing fear of reprisal among federal employees ushered in a new era in whistleblower protections. In 1989, Congress passed the Whistleblower Protection Act (WPA).<sup>73</sup> Congress specifically tailored the WPA to protect the

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<sup>65</sup> See *MSPB Principle 9*, *supra* note 59.

<sup>66</sup> Vilorio, *supra* note 9.

<sup>67</sup> See Gregory D. Sarno & Anne M. Payne, *Prohibition, by Civil Service Reform Act of 1978, of Reprisals Against Civil Service Whistleblowers*, 124 A.L.R. Fed. 381 (2022); see also Ashlee Wendt, *Are South Dakota Employees Afraid to Whistle Their Tune?: An Argument for Expanded Whistleblower Protections in South Dakota*, 59 S.D. L. REV. 90 (2014).

<sup>68</sup> See Vilorio, *supra* note 9.

<sup>69</sup> See SIMON ROBINSON, CASE HISTORIES IN BUSINESS ETHICS, *Challenger Flight 51-L: A Case History in Whistleblowing* (Routledge, 1st ed. 2001).

<sup>70</sup> Wendt, *supra* note 67, at 96.

<sup>71</sup> See *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795 (D. Utah 1988).

<sup>72</sup> *Id.*

<sup>73</sup> McCarthy, *supra* note 3, at 185.

careers of federal employees who chose to disclose wrongdoing.<sup>74</sup> Under the WPA, employees who chose to make specific and detailed allegations of wrongdoing by “disclosing a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a ‘substantial and specific danger’ to public health or safety” are considered whistleblowers.<sup>75</sup> Further, the Act sought to broaden the definition of “prohibited personnel practice” that existed, at the time, only under the CSRA.<sup>76</sup> The Act also lowered the burden of proof for whistleblowers who alleged retaliation and expanded their rights to administrative remedies.<sup>77</sup> In particular, the WPA allowed employees to pursue their own cases in front of the MSPB, rather than requiring the OSC to advocate on their behalf. Although the OSC retained the responsibility to investigate disclosures and assist whistleblowers, employees could finally represent themselves in appeals to the MSPB through a process known as an Individual Right of Appeal (IRA).<sup>78</sup>

In 2012, after a decade rocked with whistleblowing scandals—including disclosures that exposed the horrific torture of prisoners at the Abu Ghraib prison complex in Iraq, the use of the “enhanced interrogation technique” of waterboarding by the CIA on suspected al-Qaeda operatives in Pakistan, and the sale of over 2,000 firearms to Mexican drug cartels through an ATF-sanctioned program<sup>79</sup>—whistleblower protection reform was once again thrust to the forefront of public policy.<sup>80</sup> After nearly two years languishing in Congress, the Whistleblower Protection Enhancement Act (WPEA) was passed in 2012.<sup>81</sup> The WPEA further expanded whistleblower protections for federal employees.<sup>82</sup> It strengthened the ability of OSC to assist whistleblowers and prosecute violations of the WPA.<sup>83</sup> For the first time, it required the MSPB to report annually on the

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<sup>74</sup> Vilorio, *supra* note 9.

<sup>75</sup> *Id.*

<sup>76</sup> Bonds v. Leavitt, 629 F.3d 369, 380 (4th Cir. 2011).

<sup>77</sup> *Id.*

<sup>78</sup> Pub. L. No. 101-12, 103 Stat. 32 (1989); *see also* 5 U.S.C.A. § 1221 (West 2022) (Individual Right of Action).

<sup>79</sup> *Timeline of U.S. Whistleblowers*, *supra* note 1.

<sup>80</sup> Groups who lead the reform efforts include the Government Accountability Project, Project on Government Oversight, Citizens for Responsibility and Ethics in Washington, Public Employees for Environmental Responsibility, the AFL-CIO, and many others. *See, e.g., Our Story*, GOV'T ACCOUNTABILITY PROJECT, <https://whistleblower.org/our-story-2/> (last visited Oct. 28, 2022).

<sup>81</sup> McCarthy, *supra* note 3, at 225.

<sup>82</sup> *Whistleblower Protection Enhancement Act*, U.S. DEP'T OF JUST. (Mar. 9, 2018), <https://www.justice.gov/pardon/whistleblower-protection-enhancement-act>.

<sup>83</sup> McCarthy, *supra* note 3, at 224.

outcomes of whistleblower cases from initial decision through Board appeal.<sup>84</sup> In direct response to biases evinced by the MSPB, the WPEA provided employees with alternate access to federal courts, including a trial period during which employees could take MSPB appeals to a circuit other than the Federal Circuit.<sup>85</sup> Another provision granted access to federal district court jury trials in some instances as an alternative to MSPB review.<sup>86</sup> The inclusion of these provisions in the WPEA effectively ended the Federal Circuit's "monopoly" on appeals of whistleblower claims and allowed employees to pursue their cases in Federal district courts and Circuit Courts of Appeals.<sup>87</sup>

The Whistleblower Protection Act, and its progeny, still serve as the primary means of protection for federal whistleblowers.<sup>88</sup> It is where Robert turned to after he made a protected disclosure about the discrimination he faced in the DEA's hiring process. The WPA protects federal employees, like Robert, who disclose protected information to combat fraudulent or illegal acts and threats to public health or safety.<sup>89</sup>

### B. Reprisal Claims

Consequences for whistleblowing can be severe. Whistleblowing has long been viewed as a "career-limiting phenomenon in the federal workforce."<sup>90</sup> Throughout the history of the United States, retaliation for exposing fraud, waste, and abuse has cost whistleblowers their careers and livelihoods.<sup>91</sup> And although Congress strengthened protections for whistleblowers throughout our nation's history, many whistleblowers still fall victim to adverse personnel actions due to exposing wrongdoing. This Note focuses solely on blended claims of discrimination *and* reprisal for whistleblowing conduct, but to understand the complex process to exhaust a mixed case claim, we must first understand the process for a typical whistleblower protection claim.

In order to trigger whistleblower protections, an employee who suffers an adverse personnel action must first establish that they made a statutorily-

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<sup>84</sup> *Id.* at 225.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Sarah Wood Borak, *The Legacy of "Deep Throat": The Disclosure Process of the Whistleblower Protection Act Amendments of 1994 and the No Fear Act of 2002*, 59 U. MIAMI L. REV. 617 (2005).

<sup>89</sup> JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RSCH. SERV., R42727, WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW (2012).

<sup>90</sup> See Naylor, *supra* note 53.

<sup>91</sup> *Timeline of U.S. Whistleblowers*, *supra* note 1.

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protected disclosure.<sup>92</sup> There are two categories of “protected disclosures” federal whistleblowers can make: first, instances that the whistleblower reasonably believes violates any law, rule, or regulation,<sup>93</sup> and second, instances that he or she reasonably believes to be gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.<sup>94</sup> But not all disclosures are protected under the WPA. Disclosure of information that is required by law or Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs is unprotected, unless made to the agency’s Inspector General, to “another employee designated by the head of the agency to receive such disclosures,” or to the Office of the Special Counsel.<sup>95</sup>

Next, a whistleblower must establish that their protected disclosure was, in part or in whole, the basis for reprisal. A whistleblower can establish that disclosure was a contributing factor in one of two ways: “(1) through the use of the knowledge [and] timing test; or (2) through the use of any other evidence demonstrating that the disclosure was a contributing factor.”<sup>96</sup> To establish that the disclosure contributed to the decision to take a personnel action under the knowledge and timing test, the whistleblower only needs to show that the deciding official knew of the disclosure and that the adverse action was initiated within a reasonable time of that disclosure. Suppose the whistleblower cannot satisfy the knowledge and timing test. In that case, the contributing factor standard is determined by weighing factors such as “the strength or weakness of the agency’s reasons for taking the personnel action, whether the whistleblowing was personally directed at the proposing or deciding officials, and whether these individuals had a desire or motive to retaliate against the appellant.”<sup>97</sup>

A whistleblower who suffers reprisal can appeal the adverse employment action to the MSPB, based on the Board’s jurisdiction conferred by the CSRA and the WPA.<sup>98</sup> There are three avenues for an employee to bring a whistleblowing claim to the MSPB: first, from a complaint filed under the

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<sup>92</sup> 5 U.S.C.A. § 2302(b)(8) (West 2022); *see also* McCarthy, *supra* note 3, at 201–202 (“[A] whistleblower must first disclose information that he or she reasonably believes to be a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. The test for determining whether an employee has a reasonable belief that his or her disclosures revealed wrongdoing is: could a disinterested observer . . . conclude that the actions of the government evidence wrongdoing as defined in 5 U.S.C. § 2302(b)(8)?”) (internal quotations omitted).

<sup>93</sup> *Id.* § 2302(a)(2)(D)(i).

<sup>94</sup> *Id.* § 2302(a)(2)(D)(ii).

<sup>95</sup> *Id.* § 2302(b)(8).

<sup>96</sup> *Id.* § 1221(e)(1)(A), (B) (West 2022).

<sup>97</sup> Powers v. Dep’t of the Navy, 69 M.S.P.R. 150, 156 (M.S.P.B. 1995).

<sup>98</sup> *Id.*



MSPB's original jurisdiction; second, from an "otherwise appealable action" in which an employee with certain statutory appeal rights aside from the WPA contests an adverse personnel action in addition to whistleblower retaliation; or, third, through an Individual Right of Action appeal.<sup>99</sup> In essence, an IRA is a direct appeal route to the MSPB.

An IRA authorizes an employee to appeal an OSC decision directly to the MSPB, after seeking corrective action from the OSC.<sup>100</sup> For OSC to grant an IRA, an employee must first file a complaint of a prohibited personnel practice and raise the defense of reprisal.<sup>101</sup> The employee then has to exhaust their remedies through the OSC.<sup>102</sup> It prevents OSC from intervening in an employee's MSPB appeal without permission.<sup>103</sup> If the OSC terminates an investigation of a complaint, an employee can file an IRA appeal with the MSPB *only after* 120 days pass *without* the OSC seeking corrective action on the employee's behalf.<sup>104</sup>

Once an IRA is initiated by an employee, MSPB regulations define the procedure for appeals of adverse actions.<sup>105</sup> These procedures apply to whistleblower and non-whistleblower claims alike. Upon receipt of an appeal, the MSPB assigns the case to an administrative judge who determines jurisdiction, considers the evidence, and issues an initial decision.<sup>106</sup> The decision is subject to review by a three-member Board of the MSPB<sup>107</sup> and, in turn, is subject to appellate review by the United States Courts of Appeals for the Federal Circuit.<sup>108</sup>

Employees generally favor filing an action in district court to take advantage of having the case reviewed *de novo* and exercise their right to a jury trial. The same is true for employees that pursue pure discrimination claims. However, the pathway for adjudication in district court is much more straightforward for employees only claiming discrimination. In most discrimination cases, claims are reviewed and adjudicated by the Equal

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<sup>99</sup> See McCarthy, *supra* note 3.

<sup>100</sup> How "Mixed" Cases Are Processed, in 2 EMPLOYMENT DISCRIM. COORD. ANALYSIS OF FED. LAW § 81:62 (Thomson Reuters 2022) [hereinafter *How "Mixed" Cases Are Processed*].

<sup>101</sup> Whistleblower Q&A, U.S. MERIT SYS. PROT. BD., <https://www.mspb.gov/appeals/whistleblower.htm#:~:text=Individual%20Right%20of%20Action%3A%20The,was%20taken%20because%20of%20whistleblowing> (last visited Oct. 15, 2022).

<sup>102</sup> Spruill v. Merit Sys. Prot. Bd., 978 F.2d 679, 681 (Fed. Cir. 1992).

<sup>103</sup> *Id.*

<sup>104</sup> How "Mixed" Cases Are Processed, *supra* note 100.

<sup>105</sup> 5 C.F.R. § 1201 (2011).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 5 U.S.C.A. § 7703(b)(1) (West 20022).

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Employment Opportunity Commission (EEOC).<sup>109</sup> Once adjudicated by the EEOC, an employee can elect to bring their claim to a federal district court. Alternatively, an employee claiming discrimination can bypass the EEOC and file an action in federal district court.

The OSC, MSPB, and EEOC processes for adjudicating claims provide relatively clear pathways for administrative exhaustion of individual claims of discrimination, reprisal, or adverse employment actions and are frequently utilized by federal employees to adjudicate common, and separate, claims under the WPA, CSRA, or Title VII. Importantly, these processes allow for employees to seek redress from a jury of their peers if they are not dissatisfied with the result of administrative judgments on their claims.

## IV. MIXED CASE CLAIMS

Employees enter new and murky territory when they bundle two claims for adjudication before the MSPB or EEOC. This “intricate and complex system” allows a federal employee to raise allegations that pair a claim of adverse employment action with unlawful discrimination in a “mixed case.”<sup>110</sup> Although complex, the bundling of reprisal and discrimination claims as a mixed case before a district court is not a rare occurrence.<sup>111</sup> Often, adverse employment actions occur after an employee has already initiated another complaint, such as a claim of reprisal or discrimination. Taking this path appears sensible when an employee alleges that an adverse action is a form of reprisal for a protected disclosure under the WPA or a continuation of discrimination subject to a preexisting EEO complaint<sup>112</sup>: the statute merely requires that the claim constitutes an action that is appealable to the MSPB and that a basis for the action was discrimination.<sup>113</sup>

But employees who embark on a mixed case claim encounter a “complicated tapestry” of statutes and regulations.<sup>114</sup> As the Fifth Circuit mused in *Punch v. Bridenstine*, a better metaphor for this journey is a road with

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<sup>109</sup> See 42 U.S.C.A. § 2000e-16 (West 2022); 29 C.F.R. § 1614.407.

<sup>110</sup> *Kloekner v. Solis*, 568 U.S. 41, 48 (2012).

<sup>111</sup> See, e.g., *Bonds v. Leavitt*, 629 F.3d 369 (4th Cir. 2011); *Seay v. Tennessee Valley Auth.*, 339 F.3d 454 (6th Cir. 2003); *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984); *Hendrix v. Snow*, 170 F. App'x 68 (11th Cir. 2006); *Silveria v. Wilkie*, No. 18-cv-07327, 2019 WL 4345947 (N.D. Cal. Sept. 12, 2019).

<sup>112</sup> Heather White, *Bait and Swindle: Why Federal Employees Should Never File Mixed Case Complaints*, FEDSMITH.COM (Feb. 21, 2020), <https://www.fedsmith.com/2020/02/21/bait-swindle-federal-employees-should-never-file-mixed-case-complaints/>.

<sup>113</sup> 5 U.S.C.A. § 7702(a)(1)(B) (West 2022) (emphasis added). But for employees alleging reprisal and discrimination, the reality is much more complex.

<sup>114</sup> *Butler v. West*, 164 F.3d 634, 637 (D.C. Cir. 1999).

numerous forks—“a trip [that] is not for the easily carsick.”<sup>115</sup> The complexity of the mixed case process begins at the intersection of federal civil rights law and civil service law. This intersection “has produced a complicated, at times confusing, process for resolving discrimination claims in the federal workplace.”<sup>116</sup> This section attempts to simplify this complicated process and provide readers with a smooth, gently winding road to understand mixed case claims. First, this section describes the statutory and regulatory basis for two particular types of mixed case claims: mixed case complaints and mixed case appeals. Next, this section discusses the complicated and, at times, frustrating process an employee must undertake to administratively exhaust a mixed case appeal before the MSPB and describes how an employee can remove a mixed case claim to federal court. Lastly, this section describes the current split over whether an IRA appeal can constitute a mixed case claim and, thus, whether employees can package claims of whistleblower reprisal and discrimination for review by federal district courts.

#### A. *Administrative Processes for Mixed Case Claims*

There are two forks in the road an employee can take to pursue a mixed case claim. First, the employee must choose between a statutory procedure or a negotiated grievance procedure.<sup>117</sup> This Article’s scope only contemplates the procedure for a claim filed under a statutory procedure and provides recommendations for Congress to amend this process. If the employee chooses to pursue a statutory procedure, they must choose between filing a formal complaint with the EEOC or filing an appeal with the MSPB.<sup>118</sup> This choice is irrevocable, and the employee cannot raise a mixed case claim in both processes simultaneously.<sup>119</sup>

A *mixed case appeal* alleges that an appealable personnel action was based wholly or partly on discrimination based on race, color, religion, sex, national origin, disability, age, or genetic information.<sup>120</sup> Although this Article briefly details mixed case complaints, it focuses primarily on mixed case appeals

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<sup>115</sup> *Punch v. Bridenstine*, 945 F.3d 322, 325 (5th Cir. 2019).

<sup>116</sup> *Kloekner v. Solis*, 568 U.S. 41, 48 (2012).

<sup>117</sup> 5 U.S.C.A. § 7121(d) (West 2022).

<sup>118</sup> 29 C.F.R. § 1614.302(b) (West 2022).

<sup>119</sup> *Mixed Case Complaints*, U.S. DEP’T OF COM.: OFF. OF C.R. <https://www.commerce.gov/cr/complaints/complaint-process-manual/mixed-case-complaints> (last visited Oct. 31, 2022).

<sup>120</sup> *Zachariasiewicz v. U.S. Dep’t of Just.*, 395 F. Supp. 3d 734, 738 (E.D. Va. 2019) (citing 29 C.F.R. § 1614.302(a)(2) (“A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color . . . [or] sex.”)).

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because claims of reprisal under the WPA must be reviewed by the MSPB and thus, an employee can *only* pursue this particular type of claim through the OSC and MSPB.<sup>121</sup> Normally, an employee alleging unlawful employment actions by an agency must split his or her claims into separate actions before different administrative entities depending on the nature of the allegations.<sup>122</sup> For example, an agency's EEOC office adjudicates discrimination claims, while whistleblower claims are first presented to the OSC and then to the MSPB.<sup>123</sup>

On the other hand, a *mixed case complaint* is a complaint of employment discrimination based on race, color, religion, sex, national origin, disability, age, or genetic information filed through a federal agency's Equal Employment Opportunity Commission (EEOC) complaint process that is related to, or stems from, an action that could be appealable to the MSPB.<sup>124</sup> If an employee chooses to file a mixed case complaint with the EEOC, the agency must issue a Final Agency Decision (FAD) within 120 days of filing the complaint.<sup>125</sup> FADs are decisions based on the record, including documents, witness statements, and materials collected during an investigation.<sup>126</sup> FADs issued from EEOCs typically dismiss claims outside the EEOC's jurisdiction, such as reprisal claims.<sup>127</sup> Although employees may file a civil action after 120 days of EEOC inaction, their reprisal claims remain administratively unreviewed.<sup>128</sup> This typically results in dismissal for lack of administrative exhaustion once the claims reach a federal district court.<sup>129</sup> Thus, many employees elect to pursue their mixed case claims with the MSPB rather than the EEOC. Federal district

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<sup>121</sup> A federal employee cannot bring WPA claims directly from the EEOC to the district court and instead is required to appeal WPA claims to the Merit Systems Protection Board. *See Kerr v. Jewell*, 836 F.3d 1048 (9th Cir. 2016).

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEO-MD-110, EQUAL EMP. OPPORTUNITY MGMT. DIRECTIVE FOR 29 C.F.R. § 1614: PROC. FOR RELATED PROCESSES 4-1 (2015).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See Toyama v. Merit Sys. Prot. Bd.*, 481 F.3d 1361 (Fed. Cir. 2007) (holding that because the plaintiff elected to pursue her case as an EEO complaint, the EEOC's regulations necessarily governed those proceedings); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEO-MD-110, EQUAL EMP. OPPORTUNITY MGMT. DIRECTIVE FOR 29 C.F.R. § 1614: PROC. FOR RELATED PROCESSES 4-2, n.1, 4-4 (2015).

<sup>128</sup> *See Kerr*, 836 F.3d 1048 (holding that a federal employee cannot bring WPA claims directly from the EEOC to the district court and instead is required to appeal WPA claims to the Merit Systems Protection Board).

<sup>129</sup> *See Bonds v. Leavitt*, 629 F.3d 369 (4th Cir. 2011) (granting summary judgment and dismissal of plaintiff's mixed case complaint); *see also Schneider v. England*, 40 F. App'x 575 (9th Cir. 2002) (dismissing plaintiff's mixed case claim for lack of subject matter jurisdiction because he failed to exhaust all administrative remedies).

courts typically throw out nondiscrimination claims when employees pursue mixed case claims through the EEOC.<sup>130</sup> Still, federal employees desperate for relief choose to pursue cases in federal court.

### *B. Removal to Federal Court*

Unlike in a mixed case complaint, where a claim is ripe for removal to district court after 120 days of inaction, there is no timeline for an appeal to district court for the MSPB's inaction.<sup>131</sup> Employees who pursue a mixed case claim can only appeal wholly reviewed MSPB claims in federal district court.<sup>132</sup>

Federal district courts are now specifically charged with adjudicating administratively exhausted mixed case appeals.<sup>133</sup> Appeal to a district court is the only option for employees who want to appeal the MSPB's decision in a mixed case claim.<sup>134</sup> Moreover, once a district court has jurisdiction over a mixed case, an employee must bring *all* claims arising out of the same facts in that court. If an employee brings their mixed case claim appeal from the MSPB to the Federal Circuit, they waive their right to file discrimination claims.<sup>135</sup> The Court of Appeals for the Federal Circuit is not empowered to decide discrimination claims in mixed case appeals from the MSPB. An employee must abandon discrimination claims in an appeal from an unfavorable decision in a mixed case. However, the court does have authority to entertain an appeal in a case in which the sole issue is whether MSPB erred in dismissing a mixed case as untimely.<sup>136</sup>

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<sup>130</sup> See, e.g., *McAdams v. Reno*, 64 F.3d 1137 (8th Cir. 1995).

<sup>131</sup> See *Butler v. West*, 164 F.3d 634 (D.C. Cir. 1999). Although the MSPB does not lose its jurisdiction over mixed case appeals when 120 days elapse without a final decision, the appropriate federal district court is also granted jurisdiction.

<sup>132</sup> See Trisha Gorman, *MSPB Jurisdictional Appeals Belong in District Court*, *Supreme Court Says*, 2017 WESTLAW LAB. AND EMP. DAILY BRIEFING 5002, 2017 WL 2799971 (June 27, 2017) (summary of *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975 (2017)).

<sup>133</sup> See *Perry*, 137 S. Ct. 1975 (holding that a district court, not the Federal Circuit, is the proper forum for review of a mixed case complaint); see also *Kloeckner v. Solis*, 568 U.S. 41 (2012) (holding that held that a federal employee who claims that an agency action appealable to the MSPB violates a federal anti-discrimination statute listed in the Civil Service Reform Act (CSRA) should seek judicial review in district court, not in the Federal Circuit, regardless of whether the MSPB decided her case on procedural grounds or the merits).

<sup>134</sup> *Chappell v. Chao*, 388 F.3d 1373, 1378 (11th Cir. 2004) (“[A]n employee who wants to preserve both discrimination and nondiscrimination claims after a final order from the MSPB must do so by bringing all his related claims in federal district court.”).

<sup>135</sup> *Pueschel v. Peters*, 577 F.3d 558, 564 (4th Cir. 2009).

<sup>136</sup> See *Lang v. Merit Sys. Prot. Bd.*, 219 F.3d 1345 (Fed. Cir. 2000).

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*C. Impacts to Whistleblowers Nationwide*

The disadvantages of pursuing a mixed case claim arise long before an employee hitches their wagon to an employment attorney and parks their claim in front of a district court. When employees bundle claims in a mixed case, the current administrative justice system blocks a fair hearing of both reprisal and discrimination claims. For the employee who brings a discrimination claim and an adverse employment action claim, courts hold that employees cannot bring both claims directly from the EEOC to a district court.<sup>137</sup> Instead, the employee must bifurcate their claims and appeal the adverse employment actions to the MSPB.<sup>138</sup> Employees “think they are going to be able to take their removal to the EEOC” because it arises from the same set of facts as their discrimination claim, but instead realize that their “EEO claims will go unheard at the MSPB because the Board only has jurisdiction over removals, demotions, or lengthy suspensions.”<sup>139</sup> Instead of the employee presenting a “really compelling and powerful package” of discrimination claims resulting in termination, the termination supersedes all else and effectively prevents the discrimination claims from receiving a hearing.<sup>140</sup> Despite this reality, the Supreme Court clarifies that federal courts should not force employees to bifurcate appeals seeking judicial review of claims arising from overlapping facts and actions.<sup>141</sup> The Court has held that the CSRA, and by extension, the WPA, “should not be read to protract proceedings, increase costs, and stymie employees, but to secure expeditious resolution of the claims employees present.”<sup>142</sup>

V. REPRISAL AND DISCRIMINATION: MIXED CASE CLAIMS UNDER THE WPA

Now that the road is smoother, and the path clearer, for administrative exhaustion of typical mixed case claims, it is time to buckle up. The road to a fair trial in district court is even more treacherous for employees who raise mixed case claims of reprisal for whistleblowing conduct and discrimination. This is primarily because courts often fail to recognize whistleblowing as a basis for a mixed case claim.<sup>143</sup> Courts distinguish between an Individual Right of Appeal (IRA) and a mixed case appeal during mixed case claims. Moreover, although

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1980 (2017).

<sup>142</sup> *Id.*

<sup>143</sup> *See, e.g., Kerr v. Jewell*, 836 F.3d 1048 (9th Cir. 2016); *Bonds v. Leavitt*, 369 F.3d 369 (4th Cir. 2011); *Hendrix v. Snow*, 170 F. App'x 68 (11th Cir. 2006).

both have “appeal” in the name, courts delineate the two processes to bring a mixed case claim in federal court.<sup>144</sup> In doing so, courts limit the ability of whistleblowers to bring claims of reprisal (necessarily exhausted through an IRA) and claims of discrimination (exhausted through either an EEO mixed case complaint or a mixed case appeal to the MSPB). Thus, courts claim that reprisal in violation of the WPA can *never* form the action or basis for a mixed case claim.<sup>145</sup> Whether in the form of termination or demotion, courts do not recognize reprisal as an adverse employment action sufficient to support a mixed case claim as a matter of law.<sup>146</sup> Employees are left with nowhere to take their mixed case claims without explicit recognition of a whistleblower protection claim or an affirmative defense of reprisal. This framework leaves whistleblowers who are ready to hit the gas and speed towards removal to federal district court with nothing but a flat tire, a dead battery, and without any recourse or justice.

#### A. Impacts to Rural Whistleblowers

Why, then, do so many employees claiming reprisal and discrimination start down the road to filing suit in federal court? It is not only because the case law is clear that employees should adjudicate mixed cases in district courts. It is also because of convenience and economics. Nearly 80% of federal employees reside outside of the National Capital Region<sup>147</sup> and are out of reach of experienced employment attorneys capable of presenting their mixed case claims in front of the Federal Circuit. Employees want, and need, to stay close to home for economic and personal reasons. And home for many federal employees is in rural states far from the Beltway and without access to advocacy, information, and expertise necessary to bring successful mixed case claims.

States like Alaska, Wyoming, New Mexico, and West Virginia are classic examples of jurisdictions where federal employees make up a significant

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<sup>144</sup> See *Zachariasiewicz v. U.S. Dep’t of Just.*, 395 F. Supp. 3d 734, 741 (E.D. Va. 2019).

<sup>145</sup> See *Young v. Merit Sys. Prot. Bd.*, 961 F.3d 1323 (Fed. Cir. 2020); accord *Fulkerson v. Comm’r, SSA*, No. 21-2001, 2021 WL 4429036 (10th Cir. 2021); *Marren v. Dep’t of Just.*, 51 M.S.P.R. 632, 638–39 (1991), *aff’d*, 980 F.2d 745 (Fed. Cir. 1992).

<sup>146</sup> See, e.g., *Young*, 961 F.3d at 1327 (holding that an employee’s allegations of retaliation for “exercising any appeal, complaint, or grievance right” did not fall within personnel practices prohibited under the WPA and was not remediable through an IRA appeal to the MSPB) (“The Board explained that IRA appeals are never ‘mixed cases’ . . . This is a petition for review of an IRA appeal, not a petition for review of a ‘mixed case’ appeal in which a claim of discrimination is combined with a challenge to an adverse agency action.”).

<sup>147</sup> For this Note, the National Capital Region refers to Virginia, Maryland, and the District of Columbia. Nicole Ogrysko, *Federal Workforce by the Numbers: Who They Are and Where They Work*, FED. NEWS NETWORK (May 3, 2018), <https://federalnewsnetwork.com/workforce/2018/05/who-they-are-and-where-they-work-the-federal-workforce-by-the-numbers/slide/1/>.

portion of all workers.<sup>148</sup> These four states have the most significant percentage of government employees. In West Virginia, government employees account for nearly a quarter of all workers.<sup>149</sup> Although some employees work for state and local government agencies, federal employment remains essential to most rural economies. West Virginia alone is home to over 70 federal agencies that employ over 21,000 workers.<sup>150</sup> For low-density states like West Virginia, where private industry is not as dominant, federal employment is an integral part of the employment landscape.<sup>151</sup>

Indeed, federal divisions and satellite campuses in rural states experience the same issues as those in the National Capital Region. Fraud, waste, and abuse are not confined to Virginia, Maryland, and the District of Columbia, and neither is whistleblowing. Moreover, when whistleblowers in these states act—and when they suffer from reprisal and discrimination—they are disadvantaged not only by the complexity of the administrative exhaustion process but also by geography. Often, lawyers experienced in garden-variety discrimination or employment claims are not well-versed in pursuing mixed case claims in federal court. And most courts blame employees for failing to understand the mixed case claim process and argue that “it is not the role of the federal judiciary to straighten out [a] mess” they believe an employee created.<sup>152</sup> This leaves rural employees stranded without an attorney to advise them or advocate for their case. It is not that employees in rural states do not have a vehicle to bring a mixed case claim; it is that their gas tank is empty without a fill station in sight.

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<sup>148</sup> WBOY 12 News Staff, *West Virginia Ranks 4th in Largest Percentage of Government Employees*, WBOY 12 NEWS (May 15, 2019), <https://www.wboy.com/news/west-virginia/west-virginia-ranks-4th-in-largest-percentage-of-government-employees/>.

<sup>149</sup> *Id.* According to the U.S. Bureau of Labor Statistics, 21% of West Virginians work for the government. The national average is 15.1%.

<sup>150</sup> Press Release, Sen. Joe Manchin, Manchin Meets with Over 60 Federal Agencies in West Virginia (Feb. 17, 2021), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-meets-with-over-60-federal-agencies-in-west-virginia>.

<sup>151</sup> See generally WBOY 12 News Staff, *supra* note 148 (“[S]tates with a population that is more spread out are more likely to have a higher concentration of government employees because private industry is not as dominant.”); Fiona Hill, *Policy 2020: Public Service and the Federal Government*, THE BROOKINGS INST. (May 27, 2020), <https://www.brookings.edu/policy2020/votervital/public-service-and-the-federal-government/> (“There are federal civilian employees—not just the uniformed military and postal workers—in every state of the union dealing with healthcare, education, housing, disaster management, securing our borders, coastline and waterways, forecasting the weather, protecting and ensuring our food supply, maintaining and staffing national parks, bolstering small businesses, as well as delivering the mail.”).

<sup>152</sup> *Vinieratos v. U.S., Dep’t of Air Force ex rel. Aldridge*, 939 F.2d 762, 773 (9th Cir. 1991).



## VI. SMOOTHING THE SPEED BUMPS: REFORMING THE MIXED CASE PROCESS TO PROTECT FEDERAL WHISTLEBLOWERS

Confusion abounds for federal employees who speak out against illegal, dangerous, or fraudulent acts, no matter where or when they choose to speak truth to power. Confusion surrounding mixed case claims begins with an employee's requirement to exhaust each claim administratively before bringing a case to federal court. First, the current process forces employees to choose a fork in the road—and neither fork can fully exhaust both discrimination and WPA reprisal claims. An employee believes in good faith that their claims are administratively exhausted, only to find out that *half* of their claims are presented as “entirely unreviewed” by a district court or that the method they chose to present their case (an IRA) does not form the basis for a mixed case claim.<sup>153</sup> Employees face speed bumps that slow down their progression towards a fair and just outcome at each turn. In order to avoid these potholes and protect federal whistleblowers from reprisal and discrimination, both Congress and administrative agencies need to chart and construct entirely new roads to equity and justice.

Route 66 was not paved in a day. Likewise, creating a new road leading to justice for federal whistleblowers impacted by reprisal and discrimination will take time. First, administrative agencies need to cut a path through the woods to confront the implicit biases of their administrative judges. Next, administrative agencies need to construct a bridge that connects the two forks—one leading to the EEOC, the other to the MSPB—in the current mixed case claim process. Courts should return to the text and purpose of the CSRA and WPA to find that it addresses bundled whistleblower reprisal claims and discrimination claims, and shift their jurisprudence to recognize that reprisal for whistleblower conduct is not just a “prohibited personnel practice” but also an “adverse employment action” that can form the basis for a mixed case complaint.<sup>154</sup> If courts continue to refuse to follow the text and purpose of whistleblower protection statutes, Congress must amend currently proposed whistleblower protection legislation to clarify that employees can bundle reprisal and discrimination in a singular mixed case claim. Lastly, Congress must pave an entirely new road—in essence, a new “whistleblower superhighway”—by codifying a clear path to administratively exhausting mixed case claims that allow for reprisal *and* discrimination. Without

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<sup>153</sup> See *Zachariasiewicz v. U.S. Dep't of Just.*, 395 F. Supp. 3d 734, 741 (E.D. Va. 2019).

<sup>154</sup> See *Zachariasiewicz v. U.S. Dep't of Just.*, 48 F.4th 237, 250–51 (4th Cir. 2022) (Diaz, J., dissenting) (“[T]he majority’s reading imposes limitations absent from (and contrary to) the statutory text. I would instead take Congress at its word that an employee need only allege agency action he can appeal to the Board, directly or not, to sustain a mixed case—as is true in an IRA appeal . . . . In my view, § 7702(a)(1)(A)’s plain language resolves this case. To make out a mixed-case appeal, the statute requires an employee to allege that he’s been subjected to agency action that he “may appeal” to the Board. 5 U.S.C. § 7702(a)(1)(A). An IRA appeal of whistleblower claims clears that hurdle.”).

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reimagining an employee's path to justice for reprisal and discrimination, employees alleging both reprisal and discrimination are left at a dead end.

*A. Addressing Bias: A Path Through the Woods*

First, administrative agencies, including the MSPB, need to address the inherent flaws in the mixed case exhaustion system. These issues impact both Individual Right of Appeals proceedings and mixed case appeals. Before Congress and the judiciary can authorize employees to bring mixed case claims bundling reprisal and discrimination, the MSPB must confront rampant bias in their administrative system. In the administrative exhaustion phase, biased judgments result in more appeals to district courts. Moreover, even if a district court dismisses these appeals because they are not truly exhausted, the necessary procedural motions still eat away at judicial economy. In order to prevent dismissals of mixed case claims, we must first reform the administrative exhaustion process. The first step is for administrative agencies to address issues plaguing their internal systems. Chief among these issues in the MSPB is the effect of bias in administrative judgments. The data clearly shows that MSPB administrative judges are “astoundingly biased” against federal employees.<sup>155</sup> MSPB statistics on cases decided in favor of federal whistleblowers are abysmal: the National Whistleblowers Legal Defense & Education fund found that the MSPB decides only 1 to 2% of cases in favor of an employee.<sup>156</sup> The MSPB's Annual Report confirms this analysis: Federal agencies prevailed nearly 95% of the time in cases that the board did not dismiss or settle.<sup>157</sup>

Administrative law judges have “vast discretion” on whether to grant a stay of the personnel action pending the appeal, determine legal and factual issues, control discovery scope and timelines, decide evidentiary motions, rule on objections, and determine witness credibility.<sup>158</sup> An employee can appeal MSPB rulings, but the current administrative process accords administrative law judges' decisions considerable deference.<sup>159</sup> The current process forces an

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<sup>155</sup> See McCarthy, *supra* note 3, at 205.

<sup>156</sup> See David Colapinto, *Federal Employees Have Less than 2% Chance of Success before MSPB Judges*, NAT'L WHISTLEBLOWERS LEGAL DEFENSE & ED. FUND (March 11, 2010), <https://whistleblowersblog.org/whistleblower-legislation/federal-employees-have-less-than-2-chance-of-success-before-mspb-judges/>.

<sup>157</sup> McCarthy, *supra* note 3, at 206–07 (“[W]hen you add in cases dismissed (initial decisions erroneously dismissing appeals are frequently remanded by the Board . . . ), the agency prevailed in a shocking 95 percent of all initial decisions.”).

<sup>158</sup> *Id.* at 207.

<sup>159</sup> *Id.*

employee to appeal an administrative law judge's decision to a Board panel.<sup>160</sup> This process burdens most employees and virtually all whistleblowers by saddling them with a record that a biased administrative judge has created. Unsurprisingly, the bias of administrative judges has been "the cause of much spilled ink over many decades."<sup>161</sup> Critics observe that most administrative judges are dependent on the agencies they serve<sup>162</sup> and note that many are motivated not by a sense of justice but by agency performance evaluation policies and the promise of job tenure.<sup>163</sup> Minorities, women, and disabled individuals are historically underrepresented in the ranks of the administrative judiciary, and, accordingly, the potential for racial, class, and gender bias exists.<sup>164</sup>

Even if the administrative system and the judiciary recognized reprisal<sup>165</sup> against whistleblowers as a proper basis for a mixed case claim, employees like Robert still face an uphill battle in front of the MSPB. Robert's case, and his allegations that the DEA violated both Title VII and the WPA, fall into the majority of cases decided against employees by the MSPB. He alleged in his initial complaint that the administrative law judge assigned to his case "did not consider relevant regulations."<sup>166</sup> Unfortunately, this fate befalls many employees who seek justice and relief in front of the MSPB. That is primarily because current whistleblower protection legislation, including the Whistleblower Protection Enhancement Act of 2012, leaves most employees at the mercy of administrative judges. Although the WPEA created an opportunity for whistleblowers to file for an appeal of the MSPB's decision in federal court if the MSPB does not issue a final decision within 270 days after the request for corrective action was submitted, the complexity and bias of the administrative exhaustion process still disadvantage employees. In the absence of fundamental reform to the administrative appeals process, biased administrative judges will

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<sup>160</sup> *Id.* ("[A]s the Board is fond of saying, '[t]he credibility determinations of an administrative judge are virtually unreviewable on appeal.'").

<sup>161</sup> *Id.* at 210.

<sup>162</sup> See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456–57, 499–500 (1986); see also Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 782 n.76 (2005).

<sup>163</sup> L. Hope O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591, 602 (1986).

<sup>164</sup> Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995).

<sup>165</sup> In a claim arising from an alleged violation of the Whistleblower Protection Act, reprisal is an affirmative defense against prohibited personnel practices (PPP). This Note uses the term "reprisal" to denote a prohibited personnel practice against an employee who engages in whistleblowing conduct.

<sup>166</sup> *Zachariasiewicz v. U.S. Dep't of Just.*, 395 F. Supp. 3d 734, 739 (E.D. Va. 2019).

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continue to support the agencies that pay their salaries and punish whistleblowers. On appeal, the MSPB will continue to rubber-stamp the decisions of these administrative judges. Even if an employee can overcome the administrative exhaustion hurdles and is afforded a jury trial in federal district court, courts will continue to give undue deference to administrative judges' decisions. At the end of a long and winding road, the outcome remains the same: Whistleblowers who experience reprisal and discrimination for their courageous conduct never receive relief from personal, professional, and economic suffering.

*B. Legislative Reform: A Bridge Between Two Disparate Processes*

In the absence of administrative reforms adopted by agencies, legislative reform can streamline the exhaustion process for mixed case claims. This reform starts with recognizing that reprisal for whistleblower conduct is not just a “prohibited personnel practice” but also an “adverse employment action” that can form the basis for a mixed case complaint. Congress must clarify the textual support for reprisal, and grant employees the ability to bundle their reprisal claims with discrimination claims in front of the MSPB, regardless of the avenue they choose (or, in the case of whistleblowers, are forced) to follow.

At bottom, the IRA exhaustion procedures a whistleblower is forced to pursue satisfy the statutory requirements of a mixed case claim. The provision creating IRAs clarifies that the purpose of an IRA is to grant federal employees the right to seek corrective action from the Merit System Protection Board. Moreover, the ability for an employee to appeal the MSPB's decision in federal district court “is not confined to cases an employee may successfully appeal to the Board.”<sup>167</sup> 5 U.S.C. §§ 7702(a)(1) and 7703(b)(2) govern whether a federal employment case is a mixed case appealable to a federal district court. Section 7703(b) states that an IRA appeal is subject to the *same* judicial review process as any other appeal to the MSPB involving discrimination claims. Under this framework, a claim of an adverse employment action and a violation of the Whistleblower Protection Act does, in fact, constitute a mixed case. Nothing in the text or the structure of the CSRA or WPA leads to a different conclusion. The WPA's jurisdictional provisions contemplate that an employee granted an IRA should follow the same procedures as any other MSPB appeal. Thus, an IRA appeal is subject to the same judicial review process as any other appeal to the MSPB involving discrimination claims.

Although the Fourth Circuit has endorsed this interpretation in *Bonds v. Leavitt*, where the court held that an employee's exhaustion of whistleblower protection claims through the OSC could serve as the basis for jurisdiction over

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<sup>167</sup> Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1984 (2017).

a mixed case claim,<sup>168</sup> lower courts often do not recognize reprisal as a basis for a mixed case claim. In Robert's case, the Eastern District of Virginia confronted this issue. To confront Robert's claims on the merits, the court first contemplated the issue of whether Robert's WPA claim could satisfy as a basis for a mixed case claim.<sup>169</sup> The court held that an action appealable to the MSPB does not encompass an IRA appeal from an unfavorable OSC decision.<sup>170</sup>

This decision disregards the charge that courts determine judicial review of an agency action not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and nature of the administrative action involved.<sup>171</sup> Importantly, this interpretation completely ignores textual support for whistleblowing as a basis for a mixed case claim. But, unfortunately, the Fourth Circuit's decision is indicative of most mixed case claim jurisprudence. Courts will continue to improperly delineate between mixed case appeals and IRAs unless Congress clarifies through amendments to current legislation. And Congress should do just that. Currently, an unprecedented opportunity exists to amend proposed whistleblower protection legislation, including the Whistleblower Protection Improvement Act introduced to the House in 2021. Rather than introducing new legislation, Congress should seek to amend currently proposed legislation that enjoys bipartisan support. First, prohibited personnel practices challenged by whistleblowers as reprisal for protected disclosures should be made textually synonymous with adverse employment actions. Clarifying that any reprisal for whistleblowing conduct constitutes an adverse employment action allows whistleblowers to pursue a mixed case appeal through the MSPB instead of requiring an appeal through an IRA. Courts will no longer be able to refuse to hear mixed case appeals by claiming that an IRA appeal of a whistleblower protection claim does not form a basis for a mixed case claim. This change empowers employees to proceed through the statutory scheme created by Congress for handling mixed case appeals and allows employees to follow one standard exhaustion process to remove their claims to a federal district court. Without action from Congress to explicitly clarify that reprisal can form the basis for a mixed case claim, whistleblowing will continue to be a career-limiting phenomenon in the federal workforce, and courageous whistleblowers will continue to suffer from discrimination and reprisal.

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<sup>168</sup> See *Bonds v. Leavitt*, 629 F.3d 369, 379, 383 (4th Cir. 2011) (reversing the district court's dismissal of Bonds's CSRA claim and the court's grant of summary judgment against her on her WPA claim, noting that the WPA claim is "properly one for a jury to resolve").

<sup>169</sup> *Zachariasiewicz*, 395 F. Supp. 3d at 739.

<sup>170</sup> *Id.*

<sup>171</sup> *Pinar v. Dole*, 747 F.2d 899, 912 (4th Cir. 1984).

*C. New Inroads for Mixed Case Claims: Providing a Superhighway for Administrative Exhaustion*

Clarifying the scope of a mixed case claim does not preclude Congress from continuing to require exhaustion for each separate claim. But there is a vast chasm between the administrative review processes of the EEOC and MSPB. Even if a court recognizes reprisal as a basis for a mixed case claim, employees are still required to exhaust both claims administratively. Moreover, although mixed case claims purport to give an employee their choice of venue to pursue their claims, each fork in the road results in *a court dismissing half* of their allegations for lack of jurisdiction. Either an agency EEOC reviews an employee's discrimination claims during an EEO mixed case complaint process, or the OSC and MSPB deem the claims outside its scope. Likewise, if employees choose to pursue a mixed case appeal or Individual Right of Action Appeal, their EEO claims remain unreviewed by the OSC and MSPB. Thus, a new, comprehensive road is necessary for whistleblowers who bring mixed case claims to travel down. A whistleblower can only find proper protection from reprisal and discrimination if Congress completely reimagines the MSPB's and EEOC's administrative process to provide one comprehensive path to review and exhaustion.

Congress should legislate a new governing body that exists solely to review and adjudicate mixed case claims arising under the Whistleblower Protection Act and Civil Service Reform Act. Even if subordinate to the MSPB, this body should be charged solely with reviewing and adjudicating mixed case claims that allege both reprisal from whistleblowing and discrimination. These mixed cases are complex and require the synchronization of multiple administrative processes, including review processes from the EEOC, OSC, and MSPB. It follows that a body explicitly charged with reviewing these claims would be able to provide whistleblowers with the expertise and attention complex mixed cases require, thus increasing equitable outcomes and improving judicial efficiency. Administrative Law Judges appointed to this court would have the authority to review the full scope of the employee's claim, including both reprisal or prohibited personnel practice and discrimination. This likely requires the transfer of jurisdiction from the EEOC administrative review process and may require the appointment of an Administrative Law Judge who is granted specific duties from both the EEOC and the MSPB.

Under this new structure, an employee who alleges reprisal through an Individual Right of Action appeal would then appeal their claim to a specific administrative court subordinate to the MSPB. Prior to entry into this court, an employee would still need to exhaust their administrative remedies with the OSC. Likewise, an agency's EEOC would need to review the employee's discrimination claims initially. But, unlike the current system that forces employees to choose a singular path to the exclusion of all others, this court could review mixed case claims without forcing an employee to review in *only* the mixed case complaint process or *only* the mixed case appeal process. Rather than

forcing an employee to bifurcate their EEOC and reprisal claims, this court would be able to review all claims arising from the same set of facts. While this “superhighway” may seem untenable to some, it would provide whistleblowers with the most significant level of protection by assuring they are both heard and protected from reprisal. Under this framework, a broken system no longer forces employees like Robert to choose a fork in the road. Instead, a clear path to review, adjudication, and exhaustion of his mixed case claim would exist.

## VII. CONCLUSION

In conclusion, Whistleblower Protection Act claims cannot form the basis for a federal employee’s mixed case claim. Undoubtedly, federal whistleblowers who experience reprisal and discrimination need the protection of a mixed case claim. But currently, employees who claim both reprisal for a protected disclosure and discrimination on the basis of age, sex, or another protected category are forced to bifurcate their discrimination and reprisal claims through two separate administrative exhaustion processes. This inflexible and confusing process disadvantages all federal employees from start to finish. Requiring employees to bifurcate their claims in federal court stymies judicial economy and disadvantages employees who make legitimate claims of reprisal and discrimination arising from a single set of facts.

Whistleblowers are part of the very fabric of our nation. They are part of our DNA. The strength and bravery of their actions to expose wrongdoing, illegalities, and harmful acts in our government resonates across generations. We must protect those who protect us – especially those intrepid federal employees who risk their careers and livelihoods by speaking truth to power. For that reason, Congress must construct new roads for federal whistleblowers to report, investigate, and adjudicate claims of reprisal and discrimination together. The strength of our democracy depends on it.

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\*J.D. Candidate, West Virginia University College of Law, 2023; B.S. Environmental Science, United States Military Academy, 2012. This Author would like to thank Judge Irene M. Keeley and Elizabeth L. Stryker for introducing her to this topic and for their mentorship during the initial stages of this Note, which would not have been possible without their invaluable feedback and guidance. Thank you to my family—especially Michael Swenson, Kelly Dempsey, and Martin Redding—for their unwavering support, constant encouragement, and unconditional love. Lastly, thank you to the incredible editorial staff of the West Virginia Law Review for their tireless work and dedication to revising, editing, and publishing this Note. Any errors contained herein are the Author’s alone.