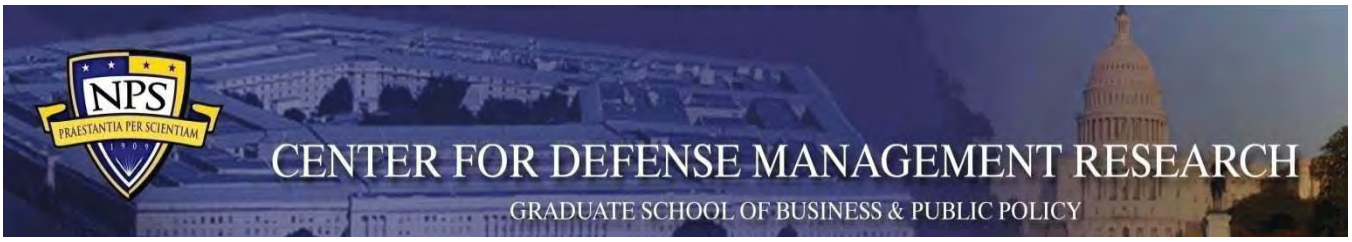

National Security Personnel System

The Period of Implementation (November 24, 2003 – January 16, 2009)

Abstract

This report addresses the implementation of NSPS in the Department of Defense (DoD) from the time of enactment to the point where the last NSPS regulations were published at the end of the George W. Bus Administration. Three distinct temporal periods are identified in the implementation phase of NSPS history. The initial DoD implementation strategy immediately following enactment of the FY 2004 Defense Authorization Act was led by the Office of the Under Secretary of Defense (Personnel and Readiness). It focused on rapid deployment of a new personnel system, including pay for performance and pay banding, based on a prior study of best practices. In Spring, 2004 the Department decided on a "strategic pause" in the face of implementation issues and criticism from the Office of Personnel Management (OPM) . During this period, the Department developed a new structure to facilitate implementation and address the OPM's concerns. This strategic pause was followed by the third period of implementation with the formation of the Program Executive Office for NSPS. Implementation of NSPS was impacted by strong opposition from public sector unions, increasing congressional oversight, and by court cases brought by the unions that slowed and narrowed DoD's roll out of NSPS. Nevertheless, the Department persisted. The final portion of NSPS regulations of the Bush administration were published in the January 16, 2009, *Federal Register*.

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January 23, 2010

Table of Contents

Introduction

Forward

This report is a continuation of a series of studies begun in 2005 to examine an important period of policy formulation, enactment, and implementation in federal civilian personnel management. Earlier studies focused on enactment of the personnel management authorities for the new Department of Homeland Security[1] (DHS) and enactment of the National Security Personnel System (NSPS) for the Department of Defense (DoD).[2] These studies and subsequent papers[3] argued that the events of 9/11 served as a triggering mechanism that allowed the Bush Administration to design and achieve Congressional approval for significant federal personnel management policy changes. These policy decisions were made for reasons of national security and were adopted in non-traditional ways by the Congress, written in general language leaving the details for later, and adopted over strong opposition from public sector unions. Though the formulation and adoption of these new policies was successfully managed, there was a lack of overall political or policy consensus among the usual actors in the federal personnel management. We suggested in our previous research that this lack of consensus could eventually affect the successful implementation of both the DHS system and NSPS.

This report addresses the implementation of NSPS in the Department of Defense from the time of enactment to the point where final regulations on NSPS staffing and employment were printed in the *Federal Register* in January, 2009. It examines the processes used to design and implement the new system under the broad authorities granted in the legislation, and it reports on the legal cases brought by the unions which affected the scope and substance of NSPS implementation. To assemble this report, we reviewed nearly 500 public documents, interviewed key participants, and consulted previous interview transcripts provided by the DoD historian.

> *"Transforming is not an event. There is no moment at which the Department of Defense moves from being untransformed to 'transformed.' We will need to be continuously looking for ways to improve both the military and civilian sides of the department."*
>
> *--Donald Rumsfeld, Secretary of Defense*[4]

Introduction

Secretary Rumsfeld viewed NSPS as a key element of defense transformation. DoD consistently emphasized the new civilian personnel management system as part of a "total force" approach to fight the Global War on Terror. Rumsfeld argued that NSPS would make the Department flexible enough to respond to the ever changing global environment.[5] Despite the Department's rhetorical emphasis on the importance of NSPS for national security, it was not clear in November 2003 how the policy would be implemented. In the beginning, the policy had little in the way of a specific design for implementation—the legislation that enacted NSPS gave broad discretion to the Secretary of Defense and the Director of the Office of Personnel Management, with limited Congressional oversight. Congress had imposed limited structural conditions on how NSPS should be

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[1] Douglas A. Brook, Cynthia L. King, David W. Anderson and Joshua P. Bahr, *Legislating Civil Service Reform: The Homeland Security Act of 2002,* Naval Postgraduate School Technical Report Series NPS-CDMR-HR-06-006, June 2006.

[2] Douglas A. Brook, Cynthia L. King, Shane Prater and Eric Timmerman, *National Security Personnel System: A History of the Creation and Enactment of the NSPS Legislation,* Center for Defense Management Reform Technical Report Series, December 2008.

[3] See Douglas A. Brook and Cynthia L. King, "Federal Personnel Management Reform: From the Civil Service Reform Act to National Security Reforms," *Review of Public Personnel Administration*, vol. 28 (September 2008): 205-211; Douglas A. Brook and Cynthia L. King, "Civil Service Reform as National Security," *Public Administration Review*, May-June 2007: 397-405; andDouglas A. Brook and Cynthia L. King, "Legislating Innovation in Human Capital Management: Lessons From The Department of Homeland Security," in Hannah Sistare and Terry Buss, eds., *Innovations in Human Capital Management* (New York: M.E. Sharpe, 2009): 277-291.

[4] Donald Rumsfeld, "A 21st-Century DoD," *Wall Street Journal*, November 24, 2003.

[5] Rumsfeld

designed and implemented, including such issues as safeguarding employees' rights and ensuring that the system and its implementation was "fair, credible, and transparent."[6] The Department's implementation strategy evolved and changed over time.

There are three distinct temporal periods following enactment of NSPS during which DoD utilized different implementation strategies to confront the obstacles and challenges faced by the Department. Phase one, or the first period of implementation led by the Office of the Under Secretary of Defense (Personnel and Readiness), was the initial DoD implementation strategy that immediately followed enactment of the FY 2004 Defense Authorization Act. Phase two, the next period, began in spring, 2004, when the Department decided on a "strategic pause" in the face of implementation issues and criticism from the Office of Personnel Management (OPM). During the strategic pause period, the Department tried to regroup and develop a new structure to facilitate implementation and address the concerns expressed by OPM. Following the strategic pause, the third period is characterized by the formation of the Program Executive Office (PEO), an office designed to orchestrate NSPS implementation. Finally, in Phase three, NSPS faced the most challenges, during which the PEO had to continuously adjust the implementation strategy and timetable.

National Defense Authorization Act FY 2004: A starting point

The legislation that authorized NSPS gave the Secretary of Defense and the Director of OPM wide joint discretion for the design and implementation of the new personnel system, but it did have a few specific guidelines for DoD and OPM to follow. The legislation mandated that the design of the system be a "fair, credible and transparent employee performance appraisal system."[7] For the implementation of NSPS, it required a "means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system."[8] It also mandated that there be "a means for ensuring employee involvement" and that "adequate training and retraining for supervisors, managers, and employees" be provided.[9] Later, the employee involvement guidelines became key points of debate over the efficacy and value of NSPS. Federal employee labor unions worked to stop the implementation of NSPS on the grounds that DoD had broken these statutory obligations, and the unions claimed to have been marginalized and ignored by DoD. Unions first took their case to the judicial branch through a series of court cases. After the majority in Congress shifted following the 2006 midterm elections, the unions gained traction in their lobbying efforts for Congress to constrain and potentially abolish NSPS.

Phase One: A False Start (November 24, 2003 – March 11, 2004)

The design: following "Best Practices"

The initial implementation strategy followed the statutory requirements and Task Force recommendations from the Best Practices Initiative. The Best Practices Task Force was directed by the office of Dr. David S. C. Chu, the Under Secretary of Defense (Personnel and Readiness). It was chartered to "compile the most promising human resources practices in the government, both within and outside the Department, that would form the basis for a new human resources management system suited to DoD's national security challenges."[10] The Best Practices Task Force examined nine demonstration projects and two alternative personnel demonstration projects,[11] and it provided recommendations in the following areas: 1) pay banding;

[6] Congressional Research Service (CRS), "Pay for Performance: The National Security Personnel System," CRS Report for Congress, (September 17, 2008), 4.
[7] CRS (September 17, 2008), 4.
[8] CRS (September 17, 2008)
[9] CRS (September 17, 2008), 16.
[10] DoD, Assessment of Existing Civilian Personnel Demonstration Authorities, (Washington, DC: July 2003), 7.
[11] OSD. Federal Register, Vol. 68, No. 63, 16120.

2) classification; 3) hiring and appointment; 4) pay-for-performance; 5) sabbatical authority; 6) volunteer service; and 7) reduction in force procedures.[12] Chu described the Best Practices initiative as DoD's effort to "boil down the best human resources management concepts and practices from those in and outside of the Department," and a plan "to expand tested personnel flexibilities through the Department."[13] The Best Practices Initiative was intended to serve as a "detailed blueprint for a new system of hiring, assigning, rewarding, and replacing employees,"[14] and it became the basis for the initial design for NSPS.[15]

The initial design of NSPS introduced two key design features that remained, in varying forms, as core to the system: pay banding and pay-for-performance. The Department used the structure of pay banding from Best Practices, but it was unclear how the General Schedule (GS) pay structure would convert to the NSPS pay bands.[16] Under the initial design of NSPS, employees would be classified on the pay schedule by three broad pay bands called "career groups" (CG) based on their job description: CG1) Professional and Administrative Management; CG2) Engineering, Scientific, Medical Support; and, CG3) Business and Administrative Support.[17] Within each of the career groups, there would be four pay bands. In a departure from the GS system, NSPS pay bands would not be based on length of employment, but would instead be based on job performance and qualifications. Among other perceived advantages, proponents asserted that this system would allow the Department to offer incentives to recruit well-qualified candidates by offering them higher salaries than would be allowed for new employees under GS.

The pay-for-performance feature of the initial design was a means to recognize high-performing employees through economic incentives of higher annual salary increases and annual bonuses. Pay-for-performance was based on the model used by the private sector. Each year employees and supervisors under NSPS would complete an evaluation process, during which employee and supervisor would agree on Department or Agency mission-based objectives that the employee would work towards over the course of the year. At the end of the year, the supervisor would evaluate how well the employee performed in seven areas: 1) technical competence/problem solving; 2) cooperation/teamwork; 3) communication; 4) customer care; 5) resource management; 6) leadership/supervision; and 7) contribution to mission.[18] The scores would be weighted out of 100 and then converted to a score from 1-5 indicating the employee's overall performance where a "1" was unsatisfactory performance and a "5" was a role-model. The rating received by an employee would determine annual pay increases: an employee who received a "1" would receive no increase in pay and an employee receiving a "5" would receive the largest increase.[19] Employees who performed well would also receive bonuses that would be based on a complicated formula that determined an employee's "performance payout" using the performance score. An employee's performance payout is a share of a unit's "pay pool"—group "of employees who work in an organization and share funding for performance payouts."[20] Each employee would be in only one pay pool at a time.

NSPS initial implementation strategy

The initial strategy was to get NSPS implemented as quickly as possible using Best Practices as a guide. The outlined strategy was released in November 2003, and it included an estimated timetable and broad strategy

[12] DoD, Assessment of Existing Civilian Personnel Demonstration Authorities, (Washington, DC: July 2003), 8.
[13] House Subcommittee, Transforming the DoD, 15, 19
[14] Senate Subcommittee, Overlooked Asset, 58.
[15] Ginger Groeber (former Deputy Under Secretary of Defense for Civilian Personnel Policy), in phone interview with Dr. Douglas A. Brook, Dr. Cynthia L. King, Maj Shane Prater, and CPT Eric Timmerman, August 20, 2007.
[16] Rebecca L. Davies, "Department of Defense National Security Personnel System: The transition to Pay for Performance," Massachusetts Institute of Technology Thesis (June 2004), 37
[17] OSD, 2004,3.
[18] Davies, 38.
[19] Davies, 39.
[20] NSPS, "Pay Pool Process at a Glance," (June 2006), accessible online at http://www.cpms.osd.mil/nsps/docs/paypoolbrochure062006.pdf, (accessed on August 5, 2009).

for implementation.[21] The strategy called for complete cooperation and coordination with OPM, but it didn't outline the process for that coordination or how they could achieve it. Additionally, the process called for employees and their representatives to collaborate with the Department and be involved in the design of NSPS regulations. Formal discussions with employee representatives were expected to begin in early December 2003 and statutorily had to occur within 60 days of enactment.[22] The Department set up working groups "to look at the labor employee relations aspects of NSPS, which had not been designed."[23] DoD estimated that NSPS implementation would cost $158 million up to 2008. The Department did not seek any additional funding for NSPS implementation; instead, it intended to shift money within the existing budget to cover all transition costs.[24] This initial strategy was entirely focused on getting NSPS implemented as quickly as possible.[25]

Even though the Department was focused on a speedy implementation, the timetable was continuously changing (see Appendix A for a timeline of NSPS implementation). Chu said that DoD's initial theory was "deploy now," and all efforts were made to implement NSPS within the shortest timetable.[26] Chu was certainly not alone in his goal to move rapidly—the desire to implement the policy as quickly as possible originated from Secretary Rumsfeld himself.[27] The initial timetable was very aggressive and was created without input from OPM or employee representatives. In this initial strategy, implementation of NSPS would be activated once performance management systems and training were in place, activities that were expected to occur early in 2004. According to the strategy, after the final NSPS regulations were published, DoD would implement NSPS by converting its employees in phases beginning April 2004.[28] According to Secretary Chu, the initial phase would convert 300,000 civilian GS employees to NSPS by October 1, 2004. The original estimate was that it would take less than two years to convert the bulk of DoD civilians to NSPS.[29] When discussing his strategy of a quick deployment, Chu explained, "we should not be afraid to step on people's toes, but, of course, don't stomp on them just to be vicious."[30]

The NSPS Implementation Office was established December 1, 2004 and was charged with the task of designing and implementing NSPS within the desired two-year timetable. The Office was headed by Bradley Bunn, who reported to Ginger Groeber, the Deputy Under Secretary of Defense for Civilian Personnel Policy. It consisted of staff on detail from the Department of Defense Civilian Personnel Management Service (CPMS) and from other DoD offices. Bunn's job was to get the system implemented: "I was selected primarily because the focus at the time was implementation of the system. It was not heavily focused on design at that point."[31] The Office was meant to create the training for management, employees, and supervisors, as well as to determine the composition and date of each implementation wave.[32]

At this point, there appears to have been limited or no collaboration or communication between the Implementation Office and the service components or employees. In her June 2004 MIT thesis, Rebecca Davies critiqued the lack of strategic planning: "during my research period, I found that very little information on NSPS is flowing from the NSPS Program Office to the Services and in turn to their departments and field

[21] U.S. Office of Deputy Under-Secretary of Defense (CPP), NSPS: National Security Personnel System, *National Security Personnel System: Opening Doors for Defense Transformation: November 2003* (November 24, 2003).
[22] ODUSD (CPP), NSPS, "Opening Doors for Defense Transformation," PowerPoint presentation, (November 2003).
[23] Bradley Bunn (Program Executive Officer, NSPS). Interview by Diane Putney (NSPS Office, Arlington, VA: September 12, 2008).
[24] Stephen Barr, "Defense, Homeland Security Proceed with Pay and Personnel Reorganizations," *Washington Post,* (February 4, 2004).
[25] Sharon Seymour Interview
[26] Dr. David S. C. Chu (former Under Secretary of Defense of Personnel and Readiness), Interview by Diane T. Putney (RAND Office, Arlington, VA: March 25, 2009).
[27] Bunn Interview
[28] Refer to Bunn, Chu, and Curry Interviews
[29] U.S. Congressional Research Services. CRS Report for Congress, *Pay-for-Performance: The National Security Personnel System*, Wendy Ginsberg, Order Code RL34673 (September 17, 2008), 4.
[30] Chu Interview
[31] Bunn interview
[32] Bunn Interview

activities. The Department should address in the strategic plan a means to get the Services involved 'up front and early.'"[33] Davies also argued that for NSPS implementation to be successful, DoD "must develop and coordinate a comprehensive NSPS strategic plan that includes a detailed program schedule, an appropriate budget, and an independent risk assessment."[34]

One problem raised in two interviews by the DoD Historian was that the initial strategy was conducted almost entirely through internal communication and made little allowance for substantive input from labor representatives or OPM.[35] Rebecca Davies heavily criticized the Department's communication with employees and the public, noting that the original website contained only basic information and was "far from comprehensive." She went on to argue that, to make the implementation successful, DoD would have to create a new comprehensive website that would "generate more interest, create more discussion, and ultimately result in earlier involvement and acceptance by managers and employees." [36] Bunn's description of the initial strategy supports the criticism that the Department was not concerned with input to the system's design: "this wasn't really about policy design; this was about implementing a system that had already been designed, which was Best Practices."[37] During this initial strategy, the Department employed the services of a public relations firm to develop strategies for communicating with employees, but after the strategic pause phase the PEO "pretty much got rid of them" and hired Joyce Frank from the Air Force to take over communication strategies.[38]

The Implementation Office itself was improvised. Timothy Curry, Executive Director, Labor Management and Employee Relations at the DoD, said the Office had no central location for staff: "we were putting them wherever we had any empty space," which meant that there were staff members scattered throughout the floors of Federal buildings.[39]

The most pressing task for the Implementation Office was to draft the proposed NSPS Human Resources (HR) and Labor Relations (LR) regulations for review by employee representatives by the statutory deadline. Despite the importance of requirement, Curry acknowledged that DoD "didn't have anybody initially doing labor and employee relations," and so he filled in the role, calling himself "two-hatted."[40] In December 2003, Curry initiated a labor relations work group to brainstorm the design of NSPS LR.

The unions

Labor unions representing Federal government employees have been key players in any efforts to reform the Federal civil service since the John F. Kennedy administration acknowledged certain bargaining rights through executive order.[41] Employees' rights were codified into law under Chapter 71 of Title 5 of the US Code with enactment of the 1978 Civil Service Reform Act (CSRA). Federal employee unions cannot strike and are limited on what is negotiable for collective bargaining purposes. Curry noted, "anything that's specifically provided for by law already cannot be bargained over, and probably the biggest example is pay."[42] Also, unions may not bargain over things that fall under "management rights" in the labor relations statute; this

[33] Davies, 53
[34] Davies, 53
[35] Sanders Interview, Seymour Interview
[36] Davies, 54
[37] Bunn Interview
[38] Bunn Interview
[39] Curry Interview
[40] Timothy F. Curry (Executive Director, Labor Management and Employee Relations, Department of Defense), Interview by Diane T. Putney, (NSPS Office, Arlington, VA: July 30, 2008).
[41] Executive Order 10988: Robert Tobias said in a speech that this executive order launched the "golden age" of labor organizing in the federal sector. (Robert Tobias, Speech at "FLRA 20th Anniversary Luncheon," (June 14, 1999), accessible online at http://www.flra.gov/reports/20yr_sp1.html (accessed July 29, 2009).)
[42] Curry Interview

includes decisions to hire, fire, and assign work to employees.[43] Supervisors, managers, and personnel specialists can never be represented by unions, and certain employees whose work directly supports DoD national security missions may also be excluded. Curry estimated that about 60 percent of the DoD workforce (about 450,000 employees) is unionized and is represented by 45 unions and about 1,600 local bargaining units.[44]

The Federal employee unions have been vocal opponents of NSPS. Unions were suspicious of the George W. Bush Administration from its outset when President Bush revoked President Clinton's executive order on labor management partnerships.[45] The unions were suspicious of how the Department was designing and implementing NSPS. In the 2003 American Federation of Government Employees (AFGE) presidential elections, John Gage beat incumbent Robert (Bobby) Harnage on the issue that Harnage did not "do enough to stop the Department from getting the NSPS legislative authority."[46]

The legislation did not specify which unions the Department needed to consult during the design phase. At the time, 8 of the 45 unions had national consultation rights (NCR), meaning they had the right "to be consulted on agency-wide regulations before they were promulgated."[47]For the first meeting, on January 22, 2004, the Department decided to invite only the NCR unions plus one union representing the others. According to Curry, "there was a strong desire to deal only with the national consultation rights unions," but after complaints from the excluded unions, DoD decided it would be best to invite all unions.[48] In subsequent meetings, however, all unions were invited. Curry said that the first meeting went okay, but "veiled statements by one union official in particular suggested if we didn't play nice with them, dangerous things could happen."[49]

The unions publicly voiced their opposition to the system immediately after the Department issued the "National Security Personnel System Pre-Collaboration Labor Relations System Options" on February 6, 2004.[50] The proposal highlighted in the memo was pre-decisional and was intended to outline possibilities for a labor relations policy in order to facilitate talks with union leaders at a scheduled February 26-27, 2004, meeting between the Department, OPM, and employee representatives. Union leaders viewed the proposal as a direct attack on employees' rights to organize and bargain collectively, and they perceived a number of of what they called "union busting" clauses.[51] The proposal had a clause that would allow the Department to waive collective bargaining rights in times of national security emergencies, and an additional clause proposed to disallow employees from attending union-related meetings during the work day.[52] Another provision that angered union leaders was one that would allow a "fee for service" option that enabled employees to solicit the representation and aid of a union for singular incidences, but didn't require them to

[43] Curry Interview
[44] Curry Interview
[45] President Bush dissolved President Clinton's EO 12871 as amended by EO 12983 and EO 13156 on February 17, 2001. (White House Press Release, "Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships," (February 17, 2001), accessible online at www.arguard.org/hro/docs/18.doc (accessed July 29, 2009)
[46] Curry Interview; Chu also discussed the AFGE election in his interview: "Mr. Gage ran on the slogan that Mr. Harnage was being too nice to us [DoD]."
[47] U.S. Office of Personnel Management, "Labor-Management Relations Glossary," accessible at http://www.opm.gov/LMR/glossary/glossaryn.asp (accessed 26 December 2009).
[48] At the time of the meetings Curry says there were seven unions that had national consultation rights and ten had NCR by 2008. See Curry Interview
[49] Curry Interview
[50] DoD,"National Security Personnel System Pre-Collaboration Labor Relations System Options," (February 6, 2004) accessible online at http://www.fed-fop.org/nsps/nsps_precollaboration_options.pdf. See Appendix C for the DoD Options. See Appendix D for the unions' response to and analysis of the proposal.
[51] John Gage quoted in: Christopher Lee, "Employees to Protest Pentagon Labor Plan," *Washington Post*, (February 10, 2004).
[52] Shawn Zeller, "Unions Object to Pentagon Labor-Management Proposal," *Government Executive Magazine*, (February 6, 2004), accessed online at http://www.govexec.com/dailyfed/0204/020604sz1.htm (accessed: February 7, 2004).

be union members.[53] AFGE President John Gage said that DoD's proposal was "a union-busting approach to collective bargaining and labor relations,"[54] and he pledged to oppose NSPS and to lobby Congress to "block the first step to the wholesale destruction of the civil service system."[55] AFGE was also concerned with provisions that would allow an agency to conduct reductions in force without considering veterans preference, and that would eliminate all provisions of the Department's old labor-relations system under government-wide rules.[56] AFGE held a protest rally on February 11, 2004, at the US Capitol urging Congress to take action to protect employee rights.

In reaction, the Department decided to create a communication channel with the unions. To facilitate dealing with the unions, on February 12, 2004, Secretary Rumsfeld appointed then-Secretary of the Navy, Gordon England, as the official Department interface with unions concerning the development and implementation of NSPS.[57] England was appointed to this position for two reasons: 1) he was committed to NSPS and had pledged units of the Navy to be in the first wave of implementation; and, 2) his experience with unions as an executive with General Dynamics Corporation.[58] Sharon Seymour, former Air Force Associate Director Personnel Policy for NSPS, said OSD made little effort to get the unions onboard: "we just tried to jam it through before [the unions] noticed. And that just made it worse."[59]

Over the course of two days, February 26 and 27, 2004, DoD and OPM met with union leaders in a meeting of more than 100 people, moderated by the Federal Mediation and Conciliation Service (FMCS),[60] to discuss the pre-decisional labor relations proposal. From meeting minutes published on both the AFGE and the Fraternal Order of Police websites, it is clear that the unions were frustrated by their role in the process of developing NSPS labor relations regulations. They also indicated that the Department was circumventing existing labor laws and defying NSPS enactment legislation and Congressional intent.[61] According to AFGE, the Department immediately put OPM and union representatives in the role of subordinates by calling the meeting a "DoD meeting," and by stating that the meeting was not statutorily required but rather that the Department "extended the invitation to the unions to gain their input to the proposal."[62] Although DoD claimed to want input, it emphasized that they did not want the consultation meeting to turn into formal negotiations.[63] Union leaders, however, wanted to treat the consultation like collective bargaining, but the Department insisted that the meeting was for collaboration, as required in the authorization act, not bargaining.[64] Union leaders criticized the Department's apparent unilateral development of NSPS and claimed the Department's actions were contrary to a letter sent to a number of union leaders by Secretary Rumsfeld immediately after 9/11 in which he stated that he looked forward to their future input and collaboration on how to reform the civil service to improve national security.[65]

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[53] Shawn Zeller

[54] John Gage quoted in: Christopher Lee, "Employees to Protest Pentagon Labor Plan," *Washington Post*, (February 10, 2004).

[55] John Gage quoted in: Shawn Zeller

[56] Shawn Zeller

[57] Stephen Barr, "Pentagon Puts New Face on Overhaul of Personnel System," *Washington Post*, (February 13, 2004).

[58] Stephen Barr (February 13, 2004)

[59] Sharon Seymour (retired, former Associate Director, Personnel Plans and Programs for NSPS), Interviewed by Senior Master Sergeant Al Garver (Air Staff Office), (Springfield, Virginia: July 29, 2008).

[60] Curry said in his interview that the Federal mediator was necessary because "we recognized early on that this was going to be a challenging process with the unions." Because "the unions believed interventions by the mediator during the meetings suggested support for DoD", the mediator "didn't do a lot of active intervention during the meetings. They would wait until breaks and do off-line interventions with people."

[61] AFGE, "DOD MEETING February 26, 2004," (February 26/27, 2004), accessed at: http://www.afgedefcon.org/Docs/NSPS/20040226DoDNSPSMeeting.htm, (accessed July 10, 2009).

[62] AFGE, 1.

[63] AFGE, 1: Also see Curry and Bunn interviews

[64] AFGE: confirmed by Curry Interview

[65] AFGE, 11.

There were many issues raised by the unions in the first day of the meeting that they saw as infringing upon employees' rights. One was the Department's intention to redefine much of the terminology and processes used in labor law including collective bargaining, consultation, and the adversarial process.[66] According to AFGE, the Department claimed that "we are redefining the terms and how the process will work."[67] Although the Department argued that the changes were created with national security and management needs in mind, AFGE asserted that the Department was unwilling to explain how any provision was related to national security: whenever asked, the Department would allegedly explain with a phrase similar to "we are only here to address the concepts" and "we are not going to enter into debate on why we believe this impacts national security."[68] Union representatives were frustrated by the Department's refusal to explain how each condition pertained to national security, or, conversely, how collective bargaining had ever hindered national security. According to AFGE, when they demanded proof of such a hindrance, DoD failed to answer them. [69]

The second day's discussions centered on the proposed Defense Labor Relations Board (DLRB).[70] Under the existing system, Federal sector labor disputes are primarily adjudicated by the Federal Labor Relations Authority (FLRA)—an "independent administrative agency that was created by Title VII of the CSRA."[71] The proposed DLRB would be an independent review board operated within DoD to adjudicate DoD employee grievances, and members of the DLRB would be appointed by the Secretary. The unions, however, were concerned about the independence of the proposed DLRB.[72] They additionally claimed that Senator George V. Voinovich (R-OH) and other senators had also expressed concern over the proposed DLRB, and unions demanded to know what role OPM played in the development of the DLRB.[73] According to meeting notes from the Fraternal Order of Police, whose representatives were present at the meeting, the Department said "we are here to talk about concepts, not whether [DLRB] is legal or not."[74]

It was at this point in the discussions that the Department admitted it had drafted the proposal without any input by OPM. According to AFGE, OPM said that it had just gotten involved and that it could really only speak to the DHS personnel system because it had no role in the development of NSPS before the week of the meeting.[75] To subsequent questions directed at OPM, the AFGE minutes claim that "DoD is not allowing OPM to respond."[76] The unions then urged OPM to take a more active role in the process and to defend employee rights.

The conclusion of the two-day meeting did not end amicably. The unions asserted the letter inviting them to the meeting was disingenuous: "[the letter] states that you will take our input and consider [it] but we are hearing that this is a done deal—you cannot eliminate employee rights while simplifying the system."[77] The unions indicated that they were being addressed as though they were children.[78] Bunn noted the tension at the meetings: "the unions […] by the second day were downright hostile and inflammatory."[79] One illustration

[66] Enid Doggett, AFGE, "DoD's Conceptual Destruction of Collective Bargaining: Background Analysis of 2/6/04 DoD Paper 'NSPS Pre-Collaboration Labor Relations Systems Options,'" (February 2004).
[67] AFGE, 8.
[68] AFGE, 7.
[69] AFGE, 10.
[70] Before NSPS LR regulations were written, the proposed board was called the DLRB, but when the NSPS LR regulations were published the name was changed to the National Security Labor Relations Board (NSLRB).
[71] US Federal Relations Authority, "Federal Labor Relations Authority homepage," accessible at http://www.flra.gov/index.html (accessed July 22, 2009).
[72] AFGE, 12.
[73] AFGE
[74] Fraternal Order of Police, "Notes from DoD/Union Meeting 2/26-2/27/2004," (February 2004).
[75] AFGE, 13.
[76] AFGE
[77] AFGE, 19.
[78] AFGE
[79] Bunn interview

of this hostility appears in the AFGE minutes. At the close of the meeting on the second day, a representative of "DEFCON[80] Steering Group" of AFGE said:

> *"I have sat here for the last two days listening to your bullshit. I represent over 600,000 DoD employees. We are not going to be part of this dog and pony show anymore. We will leave our labor relations and attorneys here to finish this."*[81]

Union leadership was careful to make Congress aware of the meetings with DoD. Before the meeting concluded, union leaders issued a letter to "All Members of Congress" outlining their concerns with the Department's proposal. In turn, a series of three letters were sent to DoD from members of both houses of Congress expressing concern with NSPS. One letter from Congress was sent the day before the scheduled meeting between unions and DoD, and the other two were sent after the meeting. (See Appendix E).

The role of OPM in the initial strategy

Although the outlined strategy and the FY2004 NDAA stated that DoD and OPM would collaboratively design and implement NSPS, the OPM role during this period was not well understood and DoD moved forward on its own in designing and implementing NSPS. There was no OPM input in the earliest NSPS design and implementation time period, nor at the first formal discussion with DoD employee representatives on January 22. OPM was not approached for input until the February 26-27 meeting, three months after the November 24, 2003 enactment.[82] In a February 6, 2004, conference call with reporters to discuss the OPM budget request, OPM Associate Director Clarence Crawford acknowledged that OPM and DoD were not partners in the development of NSPS when he said, "we're now just beginning to have some conversations with the Department of Defense. I don't believe we've quite figured out what the level and nature of the support will be."[83] Dr. Ronald P. Sanders, OPM Associate Director for Strategic Human Resources Policy at the time, puts it more bluntly: "OPM was largely locked out of the room [...] OPM, from the Director on down, was concerned that this was moving down a path that we weren't comfortable with and, more importantly, [a path that] we didn't think comported with the law."[84] As for the DoD's view, Bunn explained OPM's role this way:

> *"When there were discussions at the OMB level, it was clear that, yes, OPM is your partner, but DoD, you're going to be driving this train. That thinking facilitated our approach to how we did this, so at the time, in my role, I didn't feel it necessary to run everything by OPM. Ms. Groeber didn't feel it was necessary to run everything by OPM. That was the way it was working. Clearly OPM had different thoughts about that."*[85]

Despite statutory requirements to the contrary, the Department appeared to be designing NSPS on its own without any input from OPM.

Evidence that the Department was not involving OPM can be found in a March 9, 2004, letter (and its 41 pages of attachments) from OPM Director Kay Coles James to Secretary Rumsfeld (See Appendix B). OPM had been asked by DoD to evaluate the pay and staffing features of NSPS that DoD had developed and to respond by March 9. Bunn explained that OPM had aired its concerns with the implementation strategy before the letter but only at levels below political appointees, and that the letter was the culmination of the complaints

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[80] DEFCON is "a coalition of AFGE local union offices representing DoD employees." (PR Newswire US, "AFGE Takes Vote of 'No Confidence' Against DoD's Rumsfeld Over Appeal of NSPS Ruling; AFGE's Defense Conference Says Rumsfeld Broke 'Bones of Trust' with Employees," (March 7, 2006), accessed through LexisNexis, (accessed on July 29, 2009).)

[81] AFGE, 28.

[82] Tim Kauffman, "Union-Busting, DoD Style," *Federal Times*, (February 16, 2004).

[83] Kauffman

[84] Dr. Ronald P. Sanders (currently Associate Director of National Intelligence for Human Capital, formerly Associate Director for Strategic Human Resources Policy at OPM), interviewed by Diane T. Putney, (OSD Historical Office: July 14, 2008).

[85] Bunn Interview

made at lower levels.[86] Sanders said that Director James' intention was to "for the record, put DoD on notice."[87] In the letter, James said that her staff has "no higher priority" than NSPS, and, because of that commitment, they were very critical of the DoD proposal. Specifically, OPM chastised DoD for ignoring the statutory provisions of NSPS and warned that "failure to execute [NSPS] correctly could undermine everything we are trying to achieve with NSPS," to include giving congressional and union opponents ammunition to use against the DHS system and other agencies' efforts to implement pay-for-performance."[88] She stated that the proposal went against the intent expressed by Congress and the Administration by abolishing veteran's preferences and by ignoring union contributions, and she further asserted that "the NSPS proposal undermines the Administration's efforts to modernize the Federal civil service."[89] According to James, the labor-management proposal was developed "without any prior OPM involvement or union input," which she said was in direct contradiction to the enacting legislation.[90,91] James also expressed concern that the Department's efforts to redefine collective bargaining or replace it with "consultation" could be illegal.[92] However, James seemed to be supportive of giving management more rights over employees: "we strongly support the objective of assuring DoD's discretion to act without being burdened by collective bargaining obligations," she said, adding that using broader enabling regulations would put DoD in a position "to issue as many standardized, detailed internal NSPS implementing directives as and when you see fit, including the [NSPS proposal] you have provided us for comment—generally without further public comment, formal collaboration with unions, or OPM approval."[93]

When he first saw the letter, Curry thought that it was, "only a matter of time before this becomes public." Even though it was several months before it did actually become public, Curry noted that the unions responded negatively when it did: "it was, from the union's perspective, a road map for us to avoid collective bargaining."[94] In earlier meetings, the unions had seen OPM as an advocate for labor rights; however, after seeing this letter, OPM was then seen by the unions as participant in the Bush Administration's perceived quest to bust unions.[95] According to an AFGE publication: "The letter and attachments provided the Secretary a blueprint on evading both collective bargaining and the full scope of the 'meet and confer' obligation in NSPS."[96]

Director James concluded her letter by encouraging the Department to reconsider its current strategy for implementing NSPS; specifically, she called for them to include OPM as an equal partner in any future implementation strategy and to establish a mechanism to receive and incorporate any employee input. Sanders explained that OPM was especially concerned that DoD was only focused on the pay-for-performance aspect of NSPS and was not using the legislation's authority to its maximum potential: "we really wanted to look at labor markets and match jobs and take full advantage of the tremendous flexibility that the NSPS statues gave us."[97] This letter is early evidence of discord within the Administration on NSPS implementation. In this direct message to the Department—and to Secretary Rumsfeld in particular—OPM asserted that DoD needed to change its strategy if it wanted NSPS to be a successful program. In addition to the criticism,

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[86] Bunn Interview
[87] Sanders Interview
[88] Kay Coles James, letter to Secretary of Defense Donald Rumsfeld, March 9, 2004.
[89] James
[90] James
[91] During the initial phase, DoD would provide information about the system being developed to labor representatives only when explicitly requested to do so by the unions. Curry recalled that the LR concepts document was developed and provided to the unions only in response to the unions' request for something in writing before the first meeting in January 2004
[92] James
[93] James
[94] Curry Interview
[95] AFGE, "NSPS: Deceiving Congress: What a Tangled Web They Weave…DoD's Unlawful Evisceration of Collective Bargaining and Employee Appeal Rights," (2005).
[96] AFGE, "NSPS: Deceiving Congress: What a Tangled Web They Weave…DoD's Unlawful Evisceration of Collective Bargaining and Employee Appeal Rights," (2005).
[97] Sanders Interview

however, James was also pledging to devote her resources to implementation and urging the Department to accept her help.

Phase one wrap up

A defining characteristic of the Department's initial strategy was its unilateral approach. In an interview, Seymour faulted the Department leadership's effort to try to "jam through" the implementation of NSPS without consulting anyone outside of the senior leadership as a major contributing factor to the failure of the initial implementation strategy.[98] Bunn also acknowledged the challenges: "there was clearly a disconnect between the expectations of DoD, OPM, and those of the union attendees."[99]

On March 11, 2004, OPM and DoD had a meeting to discuss the concerns raised in Director James' letter. The following day Secretary Rumsfeld directed the establishment of a strategic and comprehensive review of NSPS development.

Phase Two: Strategic Pause (March 12 – April 27, 2004)

On March 12, 2004—the day after DoD leaders met with OPM Director James—Secretary Rumsfeld directed the Department to freeze NSPS and to review the design and implementation plan. It is important to note that while this period is characterized as the strategic pause phase, there was also a period of "strategic engagement" that happened within this phase. Specifically, the "strategic pause" refers to Secretary Rumsfeld directing the official cessation of the initial implementation strategy; no action was to be taken to further develop NSPS under the old strategy.[100] The "strategic engagement" refers to a series of meetings that took place, during the pause, between senior leaders at the level of assistant secretary and above, "with some heavy hitters brought in from their staffs and organizations from DoD that weren't necessarily personnel types or manpower/readiness types."[101] Nonetheless, the strategic engagement period illustrates that the term "pause" is potentially misleading—there was still much activity happening during this phase. While the original strategy was put on hold, the Department did not stop working on NSPS. As Seymour put it, "they [DoD] continued moving, they just didn't move towards implementation directly."[102] Many of the people interviewed indicated that this phase was, ironically, the most hectic and important time of NSPS development; it was during the strategic pause that DoD set up the foundations for eventual NSPS implementation.[103] Bunn described the pause as "something new every day and lots to do because even though there was this pause, there was still a recognition that we had to get moving, that we needed to maintain the momentum that we needed to get it back on track."[104]

Why pause?

A number of external and internal factors made Department leadership conclude that a strategic pause was necessary. The concerns with the initial strategy were primarily focused on key issues such as employee involvement, OPM collaboration, the aggressive and rigid timetable, and internal and external communication. Many in DoD, who would be involved in implementing NSPS but were below the leadership level, indicated they were not being included in the design and implementation process even though they would be responsible to roll out the system.[105] In addition, the service components felt left out. Sanders explained that while OPM, OMB, and the unions were causing external pressure from outside the Department,

[98] Seymour Interview.
[99] Bunn Interview
[100] Bunn Interview
[101] Bunn Interview
[102] Seymour Interview
[103] Seymour, Bunn, Brown, Chu Interviews
[104] Bunn Interview
[105] Seymour Interview

the services were also frustrated: "military services were just as vocal inside the Department: they had not been engaged or consulted."[106]

Congress also had begun to urge the Department to reconsider its strategy for implementing NSPS. Letters from several congressional leaders to Secretary Rumsfeld urged him to review the implementation strategy and charged him with not following Congress' intent (see Appendix E). For example, on the same day of the decision to freeze NSPS—March 12, 2004—US Senator Daniel K. Akaka (D-Hawaii), Ranking Member of the Senate Governmental Affairs Subcommittee on Financial Management, the Budget, and International Security (FMBIS), sent a letter to Secretary Rumsfeld urging that the Department publish any and all personnel proposals jointly with OPM in the *Federal Register* rather than unilaterally issuing them as internal regulations.[107] Senator Akaka said, "the devil is in the details, the best intentions may be overcome by wrongheaded implementation," adding that the Department should rethink its implementation strategy.[108]

OPM's role

Whereas OPM hadn't been involved in the first phase, the Department did include them during the strategic pause. In response to the various sources of pressure, the Department needed to make OPM a true partner and not fall back on, as Sanders put it, the argument of "in the interest of national security, I win."[109] DoD had been criticized both by Congress and unions as ignoring OPM, whose role was to protect government-wide interests. Leaving OPM out of the process, critics charged, was contrary to Congressional intent. [110] So, one of the key actions necessary during the strategic pause was "that the DoD was going to more actively engage OPM."[111] James named former congressional staffer George Nesterczuk as Senior Advisor for Department of Defense matters, and she offered his services to DoD and granted him full access to OPM resources. According to Sanders, James offered Nesterczuk to DoD on the basis that, "'Here, this is our person. He speaks for me. He's there for you.'"[112]

Perhaps the largest issue to be addressed between OPM and DoD was how to release the new Human Resources (NSPS HR) and Labor Relations (NSPS LR) regulations. The Department believed that reforming its personnel system was an internal process, and they wanted to release any regulations as internal departmental policies. OPM urged publication of any regulations in the *Federal Register* to protect NSPS against potential litigation on the issue of transparency. Bunn described this debate by saying, "we can do it quickly and recognize that NSPS is a DoD system, or we could do it via the *Federal Register* process, which might give us a bit more protection if the regulations were challenged."[113] The Department and OPM jointly concluded that, in the interest of addressing some of the concerns raised by Congress and union leadership, all regulations would be published in the *Federal Register* for public review and comment. Bunn said that the decision to publish the regulations was probably the most significant decision made during the strategic pause because it made the final regulations transparent and thus ended the unilateral approach that the Department had previously followed.[114]

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[106] Sanders Interview
[107] Daniel Kahikina Akaka (US Senator D-HI), "Akaka Queries Agencies on Personnel System Changes," (3/23/2004) accessed online at http://akaka.senate.gov/public/index.cfm?FuseAction=pressreleases.home&month=3&year=2004&release_id=270 (accessed on July 9, 2009).
[108] Akaka
[109] Sanders Interview
[110] AFGE, "NSPS: Deceiving Congress: What a Tangled Web They Weave…DoD's Unlawful Evisceration of Collective Bargaining and Employee Appeal Rights," (2005).
[111] Sanders Interview
[112] Sanders Interview
[113] Bunn Interview
[114] Bunn Interview

Structure of pause

A total review of NSPS design and implementation was conducted through five work groups, each consisting of twenty-four to thirty people with expertise in the topic and representing OPM and DoD entities.[115] Each of the work groups was assigned a specific core element of NSPS to review, evaluate, and recommend how to make improvements.[116] Later work groups addressed specific NSPS regulations. Bunn served on a number of the work groups and described them as involving a "series of all-day meetings with specific deliverables." He said that the work groups addressed one broad question: "Is the whole effort going to stay within the Under Secretary of Personnel and Readiness […] or is it going to be put under something different like Secretary of Navy?"[117]

In an April 1, 2004, open letter to DoD civilian employees from Chu and England, the Department outlined its objectives in the strategic pause phase. Importantly, at the time of the letter it was undecided who would govern the implementation of NSPS—the Undersecretary (P&R) or the Department of the Navy. As a result, the letter was issued without official letterhead but signed by both Chu and England. The letter tried to ease tensions with civilian personnel by saying that the Department was committed to taking whatever time was necessary to implement NSPS correctly. The Secretaries also addressed the concerns of transparency: "[we] want to ensure that all stakeholders in the new system—including civilian employees, managers, and exclusive representatives—have an opportunity to provide their thoughts, ideas and concerns."[118] The letter emphasized that the Department's national security mission was its primary objective, but that it also sought to treat employees fairly and to protect their rights.[119]

Findings of work groups and the new strategy

The recommendations made by the work groups changed the course of NSPS. The work groups concluded that the Department should abandon Best Practices as its model, start the NSPS design from scratch, and design and implement the program under a new organization. This proposal created some interoffice stress because Chu's office had developed Best Practices and had been responsible for implementing NSPS under the initial strategy. As Chu explained, "there were some hurt feeling in my office about this change because we had earlier been in the lead."[120] Nonetheless, Chu and many of his subordinates continued to play roles in the development of NSPS. On April 13, 2004, the NSPS implementation recommendations were presented to the DoD Senior Leader Review Group (SLRG) and approved by Secretary Rumsfeld.

The new strategy adopted a familiar model of program implementation that was widely understood and accepted across the Department. The new model established the Program Executive Office (PEO) to be responsible for designing and implementing NSPS and outlined a new governance structure that allowed both the Department and OPM to serve as overseers of the implementation process. Pete Brown, who was eventually selected as interim Program Executive Officer (PEO), emphasized the importance of adopting the new model because the "whole DoD structure recognizes [it] as an entity put in place to deploy something."[121]

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[115] The work groups included: Requirements Team, headed by Pat Adams (Navy); Personnel Team, headed by Dave Snyder (Army); Process Team, headed by Roger Blanchard (Air Force); Program Team, headed by Pete Brown (Navy); and Communications Team, headed by Eric Ruff (OSD, Public Affairs). Participating NSPS staff included: Bradley Bunn (assigned to Requirements, Program, Process); Sharon Stewart (assigned to Requirements, Program); Stephanie Olson (assigned to Communications); Janice Lander, Helen Sullivan, Judy Mayrose (assigned to Process); and Paula Hartzoge (assigned to Program).

[116] K.L. Vantran, "Senior Leadership Approves New Civilian Personnel System Plan," Department of Defense Press Service (April 15, 2004), accessed online at http://www.militaryphotos.net/forums/archive/index.php/t-9264.html (accessed on July 9, 2009).

[117] Bunn Interview

[118] Dr. David S.C. Chu (Under Secretary of Defense for Personnel and Readiness) and Gordon England (Secretary of the Navy), letter to Department of Defense civilian employees, (April 1, 2004), accessible online at http://eeoa.army.pentagon.mil/web/doc_library/NSPS_04_2004.pdf.

[119] Chu and England

[120] Chu Interview

[121] Brown interview

Unions

The unions also used the strategic pause to regroup and rethink their NSPS strategy. At the earlier February meetings with DoD, each union leader represented an individual union's position and there was no solidarity among them. With no sense of unity, the unions could only react to what was presented by DoD without a common objective or strategy. The result was unexpected and unusual: the Department's approach to dealing with the unions had an effect that Curry said he thought could never happen: "we united unions."[122] During the strategic pause phase, a majority of the unions joined forces and formed the United Defense Workers Coalition (UDWC). Although there were many internal disagreements about how the unions should handle DoD and OPM, the UDWC had a unified purpose of revising or repealing NSPS. To maintain its uniformity, the Coalition adopted many of the AFL-CIO internal rules including the provision that, under penalty of expulsion from the Coalition, no union shall independently confer with management or raid other bargaining units. [123]

The Coalition quickly began its fight against NSPS. Even though the Department did not meet with the unions until after the strategic pause had concluded and the PEO was fully in place, the Coalition immediately began lobbying Congress to revise or repeal NSPS.[124] As Bunn put it, "the unions were knocking on doors in Congress expressing their concern rather vigorously that NSPS was off the rails, was terrible and a bad idea, and the way we were running it was bad."[125]

Phase Three: NSPS Implementation under the Program Executive Office (April 28, 2004 – January 16, 2009)

Design of NSPS under PEO

During this phase of NSPS implementation, a new governance structure was created under the PEO and NSPS HR was finalized. The final design of NSPS was also completed. The two core elements of NSPS first introduced by the Best Practices model—pay-for-performance and pay banding—remained the cornerstones of NSPS, but they were slightly modified in the final phase.

A change in pay banding came largely from input from the Office of Management and Budget (OMB). The Department invited input from OMB in the design of NSPS in the summer of 2004. Including OMB ensured that the Administration was on board and supportive of NSPS. In response to an OMB critique, the pay banding system was modified so that there were four career groups: Standard Career Group (most white collar workers: by far the largest group represented in DoD); Investigative and Protective Services Career Group; Medical Career Group; and Scientific and Engineering Group. Figure 1 is a diagram from the online training course "NSPS 101" and shows the proportion of the 205,000 NSPS employees categorized as each of the career groups. [126] The PEO finalized the structure of the pay bands, and outlined the structure in "NSPS 101." Each of the four career groups is divided into pay schedules, and each pay schedule is then divided into pay bands. This structure is meant to give DoD flexibility to offer varying salaries to employees based on their experience and qualifications rather than their seniority within the Department. As Figure 3 shows,[127] the pay schedules depend on what type of work an employee does within a career group. Under each pay schedule, the pay bands enumerate the minimum and maximum salaries attainable within each pay schedule.

[122] Curry Interview
[123] Curry Interview
[124] The Coalition spokesman at DoD and Congressional meetings was Byron Charlton.
[125] Bunn Interview
[126] Figure from: "NSPS 101," NSPS, accessible at http://www.cpms.osd.mil/nsps/NSPS101/
[127] Figure 3 from: "NSPS 101," NSPS, accessible at http://www.cpms.osd.mil/nsps/NSPS101/

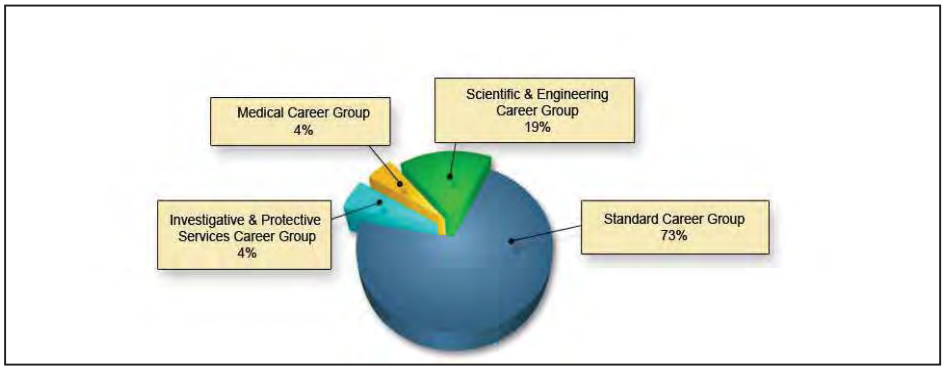
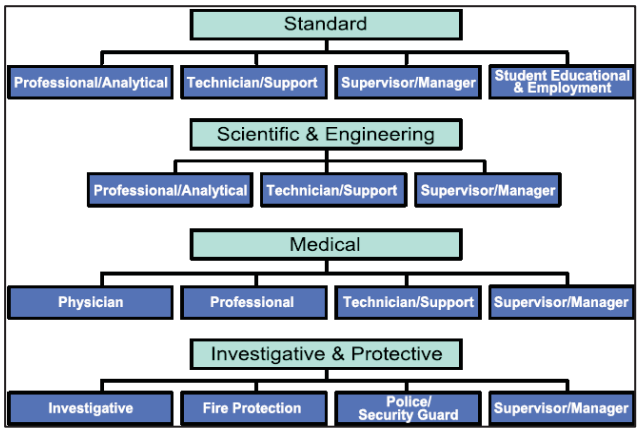


Figure 1: NSPS employees broken down by career group

NSPS 101 states that the career group and pay schedule are determined by the nature of the work performed, career patterns, department/agency mission, and job competencies.[128] This design was intended to allow employees to be paid based on the contribution they make to the overall mission of the department or agency for which they work.

The design of the pay-for-performance aspect was also modified from the original design. Originally there was no provision requiring employees receive the annual government-wide pay increase authorized by Congress. In fact, it would be possible for an employee to receive less than the standard increase. After later congressional action, the regulation was modified so NSPS employees would receive a guaranteed 60% of the general increase, and 40% of their annual salary adjustment would be based strictly on job performance.



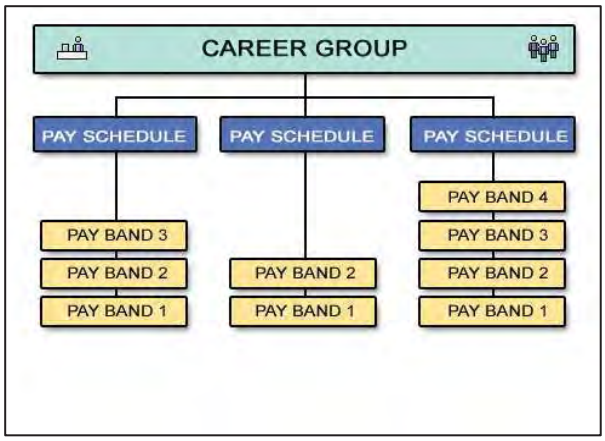


Figure 2 (left): The four career groups are broken into pay schedules determined by an employee's type of work.
Figure 3 (Right): Each pay schedule is broken down into pay bands that determine the maximum and minimum salaries for employees under each career group.

Also, NSPS employees were not guaranteed the local market supplement increase that was utilized under GS to compensate employees who live in regions with higher cost of living. However, DoD had authority to create targeted local market supplements in response to relevant factors and it retained this authority. And, as a matter of policy, DoD did provide the local market supplement. But after congressional action, the final regulations ensured that, as illustrated in Figure 4,[129] only employees who scored a "1" would not be eligible for the Local Market Supplement Increase or the general pay raise.

[128] "NSPS 101," NSPS, accessible at http://www.cpms.osd.mil/nsps/NSPS101/
[129] Figure 4 from: NSPS 101," NSPS, accessible at http://www.cpms.osd.mil/nsps/NSPS101/

Final Raing of Record	Employee eligible to receive:
5 - Role Model 4 - Exceeds Expecations 3 - Valued Performer	• Performance-based payout • General Salary Increase (GSI) • Local Market Supplement increase
2 - Fair	• No Performance-based payout • Generaly Salary Increase (GSI) • Local Market Supplement increase
1 - Unacceptable	• No increase

Figure 4: Definitions of the five-point employee performance scores.

Structure of PEO

At the conclusion of the "strategic pause," Secretary England announced the formation of the PEO on April 27, 2004. Although he would not officially be designated as the NSPS Senior Executive until May 19, Secretary England led the Department's efforts to form the PEO.[130] Even though the PEO charter wouldn't be formalized until later, England announced the structure as part of the way forward after the strategic pause. The governance structure designed for PEO-NSPS is shown in Figure 5.[131] The Director of OPM and the Secretary of Defense are structured as equals during the "jointly prescribed" design phase." To further show collaboration between the agencies, OPM had permanent staff people at the PEO office who served as representatives of the Director. Sanders explained that OPM was much more involved now: "[OPM] went

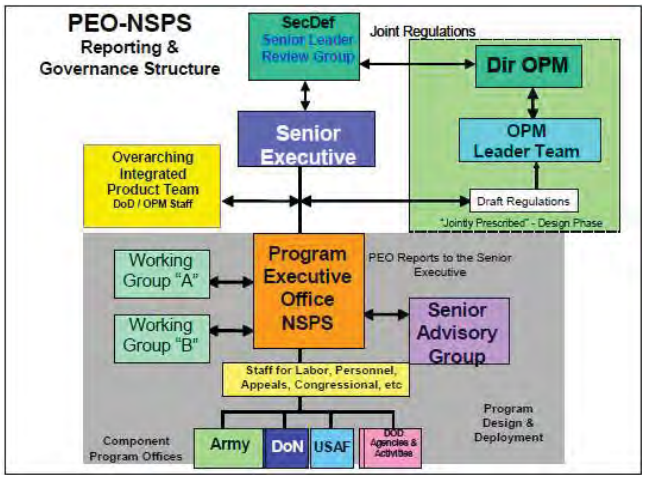


Figure 5: PEO-NSPS Governance Structure.

from locked outside the doors to intimate involvement and essentially co-drafting the regulations."[132] Before all subsequent meetings with unions, DoD and OPM met ahead of time to coordinate, and the meetings would be co-led by both agencies. The PEO was chartered to "establish a central, DoD-wide office to design, develop,

[130] Gordon England was a major force behind NSPS implementation, and remained involved with NSPS through his tenure in the Bush Administration: Secretary of the Navy (May 24, 2001-January 24, 2003/October 1, 2003-January 3, 2006); Deputy Secretary of Homeland Security (January 24, 2003-October 1, 2003); Deputy Secretary of Defense (January 4, 2006-February 1, 2009).

[131] Figure 5 from: US Army, "Annex A NSPS Program and Management and Governance Structure," (Sept 30, 2005) accessible at http://www.cpol.army.mil/library/general/nsps/docs/campaign-plan-annexes.pdf, (accessed July 17,2009).

[132] Sanders interview

and implement NSPS,"[133] and to lead the components and all design/implementation offices for designing and implementing NSPS.

The Overarching Integrated Product Team (OIPT)—formally chartered on May 27, 2004—was a key part of the PEO strategy. Essentially, the OIPT was meant to serve as an executive body to the PEO with which the PEO could consult before or in lieu of consulting the senior executive. The OIPT was "a forum for quickly raising and resolving choices that we had to confront in terms of design, reaching interagency agreement on what the design features would be, or if we couldn't agree there, rapidly escalating to the NSPS senior executive."[134] The OIPT made many of the important decisions throughout the implementation process, including those about the organizational/agency members of each phase of implementation and the dates the spirals would be converted to NSPS.

Interim PEO

Many of the policies and standard operating procedures used by the PEO were established by the Interim PEO, Pete Brown. Brown was the Executive Director at Naval Sea Systems Command (NAVSEA). He had been involved with the work groups during the strategic pause and was familiar with the PEO structure of governance. Brown's role was to set up the working groups that would design the system under the PEO. Secretary England described the work groups as "working with us, providing assistance and expertise, in developing regulations, which are to be signed by the Defense Secretary and the Director of OPM."[135] Eventually, the work groups would produce recommended regulations for the Department and OPM to consider adopting. Brown also set up the entire NSPS-PEO infrastructure so that the first PEO could come onto the job and start immediately: "I set things up but I didn't pull the triggers. Best kind of job to have."[136] Brown stressed that he wanted to set up the PEO without leaving his mark on the organization: "I did not want to put my fingerprint on anything when I know somebody else was coming behind me, even when I didn't know who it was."[137] He also wanted the PEO to have the flexibility to evolve and not be confined to his design: "you don't want the organization to be branded to you, so it's got to learn to brand itself."[138] During the set-up phase, OSD was very concerned that the project be implemented correctly. Brown noted that OSD wanted to be highly involved: "they [PEO-NSPS] couldn't even figure out how to get help to set up a website without the central DoD public affairs crowd wanting to look over their shoulders."[139] Brown also said that "you had to kiss the ring"—that is, pay tribute to certain key central DoD people—because a few people would derail the project if they were not included.[140] Bunn gave Brown a significant amount of credit for the PEO's successes, noting that Brown had the perfect strategy to implement the PEO.[141]

PEO-NSPS implementation strategy

One important part of the new PEO implementation strategy was communication with employees and interest groups. The cornerstone of this new communication strategy was the development and release of the new NSPS website, which was launched on June 8, 2004. The website was used as a forum for discussion on all future proposals and regulations issued by the PEO. It served as a location where employees could take online training on NSPS, where news and updates would be released to the public, and where employees could access the steps to complete the assessment reports and other necessary documents once they were under NSPS.[142] The other form of communication adopted by the PEO was the use of town hall meetings to

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[133] Patricia Bradshaw (Deputy Under Secretary of Defense CPP), "Beyond the PEO: Transitioning NSPS from Design and Deployment to Long Term Sustainment," NSPS Leader Workshop, (June 6, 2007), accessible online at

[134] Dominguez Interview

[135] Vantran

[136] Brown Interview

[137] Brown Interview

[138] Brown Interview

[139] Brown Interview

[140] Brown Interview

[141] Bunn Interview

[142] The NSPS Website is http://www.cpms.osd.mil/NSPS/.

gain input and feedback from employees during the design phase, and to answer any questions and allay any fears during the implementation phase. The first town hall meeting was conducted by Secretary England at the Pentagon on July 7, 2004, to introduce the system and process to employees. Over the next several years hundreds of town hall meetings were held across the country.[143] Feedback to the PEO indicated that employees appreciated the outreach because it made the new system much less foreign.[144]

Working groups were created to gain a cross-component collaborative effort in designing NSPS. During the initial implementation effort, service components indicated that NSPS was being imposed on them from above and that they had no direct influence on the system's design. The PEO hoped to alleviate the impression of an imposed system by including personnel from each service component at every level of the Department through working groups. Nonetheless, even though the new strategy was more inclusive, not all service components were entirely enthusiastic about the transition.[145]

Like the initial strategy, the PEO implementation strategy was to roll out NSPS in phases, or "spirals." Each spiral would include a specified number of employees to be converted from GS to NSPS. The strategy called for three spirals to be rolled out in succession. In the period following each spiral, NSPS could be modified to address any problems that may have occurred during the previous spiral.[146] The quality of the decisions about which employees would fall into what spiral was highly dependent on both the supervisor's individual commitment to NSPS and the organization's readiness as a whole. Michael Dominguez said that the "dominant consideration in the selection of NSPS was organizational readiness and organizational leadership. So, Spiral 1.1 was a handpicked group of people because they had leaders who were passionate about the change."[147] Although Dominguez suggests that the leaders in Spiral 1.1 were enthusiastic to convert their units, Seymour confessed that "we twisted some arms to get some organizations to be in the first wave."[148]

The switch to NSPS was a dramatic cultural change for DoD. Before NSPS, DoD operated within a culture where longevity and seniority were valued more than experience or performance. Under NSPS, the new culture was performance-based, and DoD realized that it had to assure its employees that the culture change was a good thing; many believed that the best way to do that was through training. Dominguez stressed that there needed to be "lots and lots of training about how the system would work and how it would affect [employees]."[149] The PEO developed online training that anyone could access to become acquainted with the new system. The online training course, "NSPS 101," introduced all of the characteristics and processes of NSPS and explained the Department's goals for having a more flexible and accountable workforce. The PEO also developed tools for local NSPS officials to train employees months before transition to NSPS so that, by the time of conversion, the employees would be reasonably comfortable with the concept of a new personnel system.

The new PEO

Mary Lacey was selected by Secretary England as the first permanent PEO on May 24, 2004. She assumed the PEO responsibilities on June 8. Lacey had worked in DoD for more than 30 years, first in the Navy laboratory system and then as technical director at the Naval Surface Warfare Center.[150] Pete Brown said that Lacey was his first choice to succeed him because she had had experience working within DoD and with unions as a

[143] Bunn Interview
[144] Bunn Interview
[145] Seymour Interview
[146] Within each spiral employees were converted in waves to allow further flexibility in adjusting NSPS as needed.
[147] Michael Dominguez (Under Secretary of Defense for Personnel and Readiness), Interviewed by Randy Richardson (Air Force Staff History Office) (August 1, 2008).
[148] Seymour interview
[149] Dominguez interview
[150] Bob Brewin, "Mary Lacey: Agent of Change," Federal Computer Week, (March 6, 2005), accessible online at http://fcw.com/articles/2005/03/06/mary-lacey-agent-of-change.aspx, (accessed on July 24, 2009).

manager of a very large workforce, and because she was comfortable with the Department's way of doing business.[151] Secretary England saw Lacey's laboratory career as "the ideal launching pad for her NSPS job because she also ran a pilot pay-for-performance program that covered about 26,000 employees."[152] Lacey herself said that her engineering background would give her an advantage during the designing of NSPS because NSPS is a very complex system and, as an engineer, she routinely designed and operated complex systems.[153]

However, Sanders said that leaders at OPM felt uncomfortable when, during meetings in the summer of 2004, Lacey would say that the PEO was "going dark" to write the regulations. Sanders added that this was not a good word choice because to the unions and OPM it sounded as though DoD was going to ignore all input.[154] Bunn explained that Lacey used the term to indicate that the PEO was going to operate internally within the Administration until the NSPS draft regulations were completed, at which time communication with unions and others would resume.[155] Bunn also said that Lacey was a very skilled bureaucrat and personnelist, and she knew that at some point the PEO would have to sit down and actually write the regulations; it was during this writing phase, he explained, that the PEO would "go dark."[156]

Unions

The Department, through the PEO, was much more inclusive towards the unions and hosted a number of meetings in summer and fall 2004, during the "meet and confer" stage of NSPS design. Bunn described the purpose of this stage as the following:

> *"the idea for meet and confer was to put a proposal on the table that the union comments on, have interchange, have dialogue about it, see where there might be common interests that we can come to agreement on, but ultimately finalize a design or a set of rules that we thought was best for the Department"*[157]

The meetings were jointly led by Charles Abell (DoD) and George Nesterczuk (OPM).[158] In stark contrast to the initial meetings between DoD and unions, Curry said that Abell handled the unions well and "had a calming effect on the unions, particularly in those early meetings, trying to show that we're really trying to work with them on this stuff."[159] Sanders explained that even though unions were calmer in discussions with DoD and OPM, some of the exchanges were still volatile at times: "a couple times we exchanged words, but that's the nature of those meetings."[160] The unions continued to worry that the design of the rules and regulations was really in the hands of the Secretary of Defense and the OPM Director. Curry noted that the unions wanted the process to be different: "we started getting the sense from [the unions] that they wanted the meet and confer and collaboration process to look like a collective bargaining process."[161]

The unions had two major issues that they wanted to have resolved before the Department finalized the regulations. First, union leaders insisted that the Department could not redefine collective bargaining. Not only did the unions argue to keep existing bargaining rights, they also maintained

[151] Brown interview
[152] Brewin
[153] Brewin
[154] Sanders Interview
[155] Bradley Bunn Interview Part 2(PEO-NSPS), Interview by Diane T. Putney (NSPS Office, Arlington, VA: September 12, 2008)
[156] Bunn Interview Part 2
[157] Bunn Interview Part 1
[158] Also at the table: Dr. Ronald Sanders (OPM); Mary Lacey (PEO); Bradley Bunn (PEO); Timothy Curry (DoD).
[159] Curry Interview
[160] Sanders Interview
[161] Curry Interview

that those rights should be expanded.[162] The second major issue was about the use of focus groups to get feedback from the workforce. Initially, the Department proposed that the focus groups would be a forum for employees to directly provide feedback to managers about issues that might impact development of NSPS regulations. However, the unions argued that "management doesn't have the right to talk to its workforce" and that the Department should deal with the employees through their representatives, the unions.[163] In response, the Department argued that it was okay to consult the workforce for information as long as the Department wasn't negotiating directly with employees in lieu of their exclusive representative.[164] The two groups were unable to come to a consensus on either of these points. Regardless, the Department maintained its plans for focus groups and its position on redefining collective bargaining. If bargaining unit employees participated in any focus groups, the PEO advised the components to invite local union representatives to attend these sessions.

The proposed NSPS HR regulations were published on February 14, 2005, for public comment and review. The Coalition orchestrated a well-organized campaign to submit comments through letters, email, and the NSPS website: NSPS received more than 58,000 comments.[165] While most of the comments were a generic form letter criticizing NSPS produced by the Coalition, there were many additional comments that gave light to the emerging problems with NSPS. The Department had adopted the OPM suggestion raised in James' letter to use broad and vague regulations, and the most common comment from employees was that there was not enough detail in the regulations.[166] Another major issue raised in the comments was the impression that the Department was dismantling collective bargaining. The unions were especially vocal in their claims that the regulations did not reflect any of their suggestions. Curry disagreed: "we certainly made changes, particularly some changes in the labor relations regulations, in response to things they've said."[167]

At this point, the Department and the unions began the statutory meet and confer process to discuss the NSPS regulations. From the beginning, Curry said, the unions wanted to treat the meetings like bargaining meetings and opened the meeting with ground rules as though it were a negotiation.[168] The Department reiterated that the meetings were for conferring, not for bargaining and they "weren't going to sign away the Secretary's and the Director's authority to ultimately make the decision about what the system looks like."[169] Federal mediators were present at all of the meetings, but by most accounts they did not play an active role, did not intervene directly in the meetings themselves, and preferred to mediate in the halls.[170] The unions opened each meeting by stating that they were not going to discuss the labor relations aspect of NSPS, but would only discuss the human resources regulations. Nonetheless, labor relations was a topic in the meetings: "Every day we talked about labor relations, even when we talked about human resources or adverse actions and appeals," Curry said.[171] After meeting for almost two months, the two sides appeared to encounter an impasse, and several union leaders gave prepared speeches and then walked out of the meet and confer process.[172] The Department agreed to grant the unions "one last opportunity to make their case about what they wanted, directly to Deputy Secretary England, the NSPS director."[173]

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[162] Curry Interview
[163] Curry Interview
[164] Curry Interview
[165] Sanders Interview
[166] Curry Interview
[167] Curry Interview
[168] Curry Interview
[169] Curry Interview
[170] Curry discusses the role of the Federal mediators in his interview. Dr. Ronald Sanders also discusses the mediators. From the AFGE transcript it is clear that the mediator did not play much of an active role in the discussions.
[171] Curry Interview
[172] Curry Interview
[173] Curry Interview

The final regulations were printed in the *Federal Register* on November 1, 2005. The implementing issuances were subsequently published shortly before Thanksgiving 2005. However, the unions accused DoD of making it intentionally difficult to review the document. In a statement before the Defense Business Board Task Group on The National Security Personnel System, John Gage commented:

> *"…shortly before Thanksgiving, in November 2005, we were deluged with 369 pages of highly technical Implementing Issuances, with just a 30-day period for us to comment. Clearly, DoD had decided on many of the details that went into these Issuances, but withheld them from us during the very process Congress had intended for the unions and DoD to collaborate on the development of NSPS."*[174]

Indeed, the draft implementing issuances were released to unions via email after the end of business the Tuesday before the Thanksgiving Holiday, 2005. The Department requested that the unions meet to discuss the regulations the first week of December 2005, and the unions perceived the timing as designed to slip the implementing issuances past the unions by giving only giving them 30 days in the middle of the holiday season to review hundreds of pages of policy.[175] Curry explained that the Department wanted the collaboration phase to be complete by the end of December. Despite their objections, most of the unions attended the meeting with the Department during the first week of December. The Department also held another meeting in the middle of December at which only two Coalition unions showed up—the rest boycotted the meeting. The unions insisted that because of the holiday season they needed until February to properly analyze the regulations.[176]

The Department responded to the unions' request for more time, and the two sides continued to meet from December 2005 to April 2006 through a process the Department created for continued collaboration. During this time, however, the Department decided not to support the costs associated with union participation in the meetings: "As a matter of policy, we weren't going to pay travel and per diem for union attendees anymore."[177] The costs that the Department had accrued hosting the meetings over the years had gotten to a point where the Department concluded it had paid enough.[178] This change in policy created a situation where representatives of smaller unions were unable to afford to attend the meetings, which had consequences within the Coalition. The Coalition continued to be a voice of all the unions, but only the large unions were present at the meetings.

While the unions continued to express concerns for collective bargaining and questioned whether the General Schedule needed to be abolished, they also became increasingly concerned about the lack of independence of the National Security Labor Relations Board NSLRB. The unions argued that because the Secretary had full discretion as to who served on the NSLRB, and because the board would operate within DoD, there was no way that the NSLRB could be unbiased when hearing employees' grievances.[179] The unions saw the NSLRB as an institutionalized means through which the DoD could ignore employee concerns in any future labor-management relations disputes or policy changes. In short, the unions saw this board as eliminating due process during adjudication proceedings.

Going to court

On November 7, 2005, after publication of the final NSPS regulations but before the release of the implementing issuances, AFGE and other Coalition unions—representing more than 350,000 employees—filed suit against the Secretary of Defense and the Director of OPM in the case known as *AFGE et al v. Rumsfeld et al*. The case was essentially the Coalition unions vs. DoD and OPM, and it centered on the legality of the

[174] John Gage, "Statement before the Defense Business Board Task Group on the National Security Personnel System," (June 25, 2009, 6).
[175] Curry Interview
[176] Curry Interview
[177] Curry Interview
[178] Curry Interview
[179] This is discussed in the interviews of: Chu, Sanders, Bunn and Curry.

regulations released by DoD on collective bargaining rights, the independence of the NSLRB, and whether due process was provided in the employee appeals procedures.[180] The plaintiffs raised five challenges to the NSPS system: 1) defendants did not comply with statutory requirements that it work in collaboration with and ensure participation of employee representation;[181] 2) NSPS LR does not comply with "independent third party review" that is mandated by statute;[182] 3) "labor relations system established by the new rule violates Congress' requirement that the NSPS 'ensure that employees may organize, bargain collectively;'"[183] 4) NSLRB "established by the new rule does not satisfy Congress' requirement that the new labor relations system provide for an 'independent third party review' to review labor relations decisions;"[184] and, 5) "contrary to the statute, the regulations establishing an appeals process for disciplined employees fails to provide for 'fair treatment' and 'due process' as required by statute."[185] The defendants motioned for dismissal of the case for "lack of jurisdiction" and "failure to state a claim"[186]

Because of the complexity of the statute, Judge Sullivan of the Court highly recommended that the Department not implement NSPS LR until the Court had time to consider and rule on congressional intent. The Department acquiesced to the Court's request. Curry explained why the Department decided to follow the court's recommendation and postpone implementation of some NSPS elements:

> *We didn't want to upset the court who was looking for us to delay, and if the judge is dropping hints that this would be a good idea, [and] if we said no, more than likely the judge was going to order an injunction anyway. So we agreed to do that voluntarily. It just didn't serve our interests to antagonize the court, and certainly didn't serve our interests to go ahead and implement a system that we weren't sure how the court would eventually rule on, anyway.*

The case was heard by the United States District Court for the District of Columbia on January 24, 2006, and the ruling was handed down on February 27. The District Court ruled in favor of the unions and ordered that NSPS LR and employee appeals procedures implementation be frozen. The Court ruling had five parts:

> *1) defendants satisfied their statutory obligation to collaborate with plaintiffs; 2) defendants lawfully departed from chapter 71 in establishing a labor relations system; 3) the new rule fails to ensure that employees can bargain collectively; 4) the NSLRB does not meet Congress' requirement for 'independent third party review' of labor relations decisions; and 5) the process for appealing adverse actions fails to provide employees with 'fair treatment' as required by statute.*

[180] The DLRB was renamed the NSLRB in the final regulations. The structure of the board remained the same.
[181] 5 USC § 9902 (m)(3)
[182] 5 USC §§7101 (Chapter 71)
[183] as provided in 5 USC §9902(b)(4)
[184] 5 USC §9902(m)(6)
[185] Required by 5 USC §9902 (h)(1)(A) and (B)(i).
[186] *American Federation of Government Employees, AFL-CIO, et. Al. v. Donald H. Rumsfeld, et. Al.,* 422 F. Supp. 2d 16 (US District Court for the District of Colombia: February 27, 2006)

The Court then ordered that NSPS LR be frozen and no further action be taken to implement the labor relations element of the system unless the Defendants could present a proposal that conformed to congressional intent and ensured collective bargaining. Figure 6 shows which elements were enjoined by the Court, and which elements of NSPS were underway.[187] John Gage considered the Court's ruling a major victory for unions, and said, "I think the judge very clearly showed in his decision that this was not collective bargaining by anyone's definition," and AFGE General Counsel, Joseph Goldberg, said that the ruling "eviscerates the core of NSPS, leaving but a hollow shell of provisions that simply cannot stand on their own."[188] Several Democratic congressional leaders made statements praising the Court's decision. Saying the

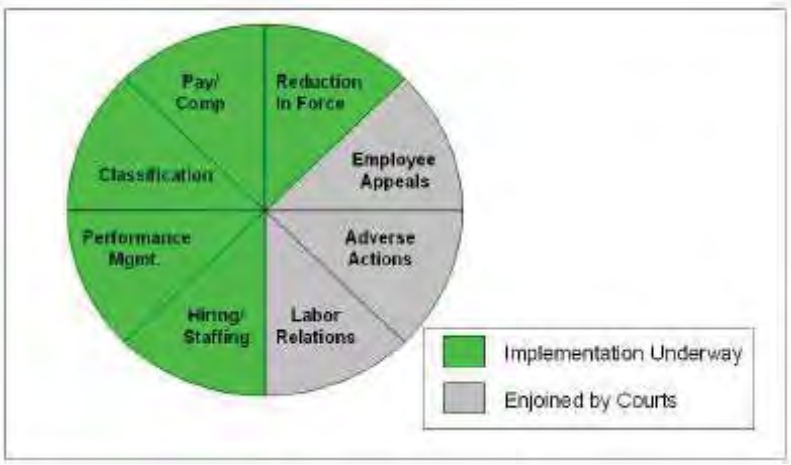

Figure 6: NSPS implementation elements enjoined by the Court.

decision was "great news for American workers," Congressman Tom Allen (D-ME) stated: "It is the second time a federal court has determined that the Bush Administration overstepped its authority by attempting to deny Defense and Homeland Security Department employees the same collective bargaining rights guaranteed to all federal employees."[189] Mary Lacey said that the Court's ruling would not stop the Department from rolling out Spiral 1.1 and converting 11,000 GS employees to NSPS because the rollout involved non-bargaining unit employees who would not partake in collective bargaining, adding, "I believe we're right, and we are going to proceed."[190] The Department decided to proceed with the rollout of NSPS for all non-bargaining unit civilian employees while the case was being appealed. After the Department declared that it intended to appeal the previous decision, union officials—representing 200,000 employees—issued a vote of no-confidence and urged Secretary Rumsfeld to step down, the first time that federal workers called for a defense secretary to resign.[191]

The Department appealed the Court's decision to the US Court of Appeals for the District of Columbia, and the Court overturned the District Court's ruling allowing the Department to resume NSPS LR and employee appeals procedures implementation. The decision on appeal was handed down on May 18, 2007. The Court ruled 2-1 to overturn the District Court's ruling and reinstate NSPS. Circuit Judge Kavanaugh presented the opinion of the Court saying that the primary legal question before the Court was whether FY2004 NDAA

[187] Figure 6 from: OPM, "Creating a Foundation for the 21st Century Federal Workforce: An Assessment of the Implementation of the Department of Defense National Security Personnel System," May 2007, accessible online at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA476637&Location=U2&doc=GetTRDoc.pdf, 4.
[188] Christopher Lee, "Court Blocks DoD's New Rules for Workers; Collective Bargaining Hurt, Judge Says," The Washington Post, (February 28, 2006), accessed through LexisNexis (accessed on July 29, 2009).
[189] Tom Allen, (US Congressman), "Statement on Federal Court Decision Backing Defense Department Employees Collective Bargaining Rights," (February 28, 2006), accessed through LexisNexis, (accessed (July 29, 2009).
[190] Christopher Lee
[191] Drew Brown, Knight Ridder Washington Bureau, "Union Leaders Call for Rumsfeld to Resign," (March 7, 2006), access through LexisNexis (accessed (July 29, 2009).

"authorizes DoD to curtail collective bargaining rights that DoD's civilian employees otherwise possess under the Civil Service Reform Act of 1978."[192]

The Court recognized the law as a "statutory puzzle,"[193] but concluded because there was a sunset provision imposed on NSPS, it was clear that Congress intended to grant *temporary* authority to DoD to curtail collective bargaining rights, but that after November, 2009, either those rights must be reinstated or the sunset extended.[194] The unions had argued that the NSPS case was identical to the court's decision in *Chertoff*[195] where it was decided that the DHS HR program illegally curtailed bargaining rights; however, the court ruled that the two cases were not identical because DHS did not have a sunset provision, and it was this distinction that showed congressional intent for authority to curtail bargaining rights to be temporary in DoD.[196]

The unions pledged to continue the court battle until they had exhausted all possible avenues. John Gage lamented that the Court's decision "opens the door for everything – all aspects of NSPS," but, he pledged, "we're never going to stop fighting this thing."[197] The unions filed a petition for the case to be reheard *en banc* —heard by the entire Appeals Court—but the motion was denied on August 10, 2007. In January, 2008, AFGE filed a *writ of certiorari* to have their case heard by the US Supreme Court, but the Court refused to hear the case.[198] The unions tried to appeal the denial, but were once again denied. On September 17, 2007, the Court of Appeals lifted the injunctions against NSPS LR. On the same day, DoD announced it was moving ahead with NSPS HR implementation, but—for the time being—it was only going to apply to non-bargaining unit employees.

Taking the battle to Congress

Many Democratic congressional leaders opposed the NSPS legislation in 2003 and became vocal advocates for union rights preceding the 2006 midterm elections. These midterm elections transferred power in Congress as Democrats gained control in both the House of Representatives and Senate. Candidates and policies associated with the unpopular Bush Administration were targeted throughout the campaign season—NSPS became a rallying point for Democrats to accuse Republicans and the Bush Administration of conspiring to abolish union rights. In response to the February 2006 court ruling, Rep. Tom Allen stated, "I have opposed these rules since the Administration first proposed them and the Congressional majority adopted them, and will continue to work with my colleagues to fight this assault on the rights of federal employees."[199] After the Democratic victories, the unions turned their efforts to lobbying Congress.

The new Congress began congressional oversight of NSPS. In March, 2007, the House Armed Services Readiness Subcommittee started a series of committee hearings on the progress of NSPS implementation.[200] The Chairman of the Subcommittee, Solomon P. Ortiz (D-TX), argued that timely oversight was necessary—even though only a fraction of the GS employees had been converted to NSPS—because of the large number of

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[192] *AFGE v. Gates*, 2007 U.S. App. No 06-5113 (D.C. Cir., May 18, 2007), 2.
[193] Stephen Barr, "Court Backs Defense Workplace Changes – For Now," Every Edition, (May 21,2007), accessible through LexisNexis,(accessed July 1, 2009).
[194] Stephen Barr, "Court Backs Defense Workplace Changes – For Now," Every Edition, (May 21,2007), accessible through LexisNexis,(accessed July 1, 2009).
[195] In *AFGE et al v. Michael Chertoff et al*, the Court ruled that DHS could not unilaterally abrogate negotiated and enacted agreements was unlawful, and that the statute does not allow DHS to limit collective bargaining.
[196] *AFGE v. Gates,* 17
[197] Stephen Barr (May 21, 2007)
[198] Stephen Losey, "Union to Take Fight Against DoD Personnel System to High Court," Federal Times, (January 3, 20008), accessed on line at http://federaltimes.com/index.php?S=3284260, (accessed June 19, 2009).
[199] Tom Allen, US Congressman, "Statement on Federal Court Decision Backing Defense Department Employees Collective Bargaining Rights," (February 28, 2006), accessed through LexisNexis, (accessed (July 29, 2009).
[200] Witnesses included: Michael Luis Domingues (Principal Deputy Undersecretary of Defense, for Personnel and Readiness); John Gage (AFGE National President); Max Steir (President and CEO, Partnership for Public Service); Marick Masters (Professor of Business, Katz Graduate School of Business, U of Pittsburgh); Mary Lacey (PEO NSPS)

DoD civilian personnel to be converted and the importance of DoD within the Federal Government.[201] The comments of Chairman Ortiz suggested his alliance with the union position: "Our unions are an important partner in managing the workforce so [we] must understand their views on the system, and listen to their voices […] we heard a great deal from the employee representatives themselves who found many problems, leading them to file a lawsuit."[202] At one of the March 2007 hearings, John Gage, AFGE National President, urged Congress to "repeal the statutory authority for NSPS as provided under the 2004 Defense Authorization Act."[203] Gage made the same arguments presented during the court cases: the NSLRB is not an independent board, DoD ignores union input, and the Administration is attempting to bust the unions. The oversight committee stated that the court rulings indicated an impasse between unions and DoD, and that Congress was the place "to find common ground" by modifying the statute.[204] In an effort to resolve the dispute, the committee produced draft legislation in the FY 2008 Defense Authorization Bill that "would restore employee collective bargaining rights and access to an appeals process."[205]

The day before the May 18, 2007, court ruling, the House passed its FY2008 Defense Authorization Bill (H.R. 1585), which included language that would remove most NSPS flexibilities and completely revoke the adverse actions, appeals and labor relations portions of NSPS.[206] OMB issued the Administration's opposition to the bill, claiming that the bill would "eviscerate our effort to make civilians equal partners in a Department at war."[207] Immediately following the May 18 court decision, the unions sent out press releases urging that the "Senate must take immediate action" to stop NSPS and save employees' rights and pass a bill similar to the House's version of the Authorization Act.[208] AFGE also devoted its May 25, 2007, *Inside Government* radio broadcast to discussing the next step in the congressional fight against NSPS.[209] On the radio broadcast, Senator Patty Murray (D-WA) discussed her distrust for the Bush Administration's motives for removing collective bargaining rights, and she emphasized that she would lobby her colleagues to pass a version of FY2008 NDAA similar to that passed by the House.[210] In December 2007, the President vetoed the FY 2008 NDAA on grounds independent of NSPS.[211]

The final version of the FY2008 NDAA that was signed into law on January 28, 2008, dramatically reduced the scope of civil service reform under NSPS and made significant changes to the system. The Act essentially eliminated NSPS LR by imposing the use of "government-wide rules for several portions of NSPS regulations that have never been implemented," and voiding provisions for adverse actions (Subpart G), appeals (subpart

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[201] "Oversight Begins for Civil Service System," States News Service, (March 3, 2007), accessed online through LexisNexis, (accessed (July 1, 2009).

[202] "Oversight Begins for Civil Service System," States News Service, (March 3, 2007), accessed online through LexisNexis, (accessed (July 1, 2009).

[203] House Armed Services Committee: Subcommittee on Readiness, "Rep Solomon P. Ortiz Holds A Hearing on the National Security Personnel System," CQ Transcripts, accessed through LexisNexis, (accessed July 1, 2009).

[204] Subcommittee on Readiness, House Armed Services Committee (Chair Solomon P. Ortiz), "Hearing on National Security Personnel System," (March 6, 2007)CQ Transcriptions, accessed online through LexisNexis, (accessed July 1, 2009), 26 of 34.

[205] "Readiness Subcommittee Chairman Ortiz Issues Statement on National Defense Authorization Act for FY2008," (May 8, 2007), US Fed News, accessed online through LexisNexis (accessed July 1, 2009).

[206] OMB Statement, "OMB Issues Statement of Administration Policy Regarding HR 1585 – National Defense Authorization Act for FY2008," (May 16, 2007), accessed through LexisNexis (accessed July 1, 2009).

[207] OMB Statement

[208] "Senate Must Take Immediate Action on NSPS, says AFGE," PR Newswire Public Interest Services, (May 18, 2007), accessible online through LexisNexis, (accessed July 1, 2009).

[209] John Gage (AFGE President), Mark Roth (AFGE General Council), Beth Moten (AFGE Legislative and Political Director) and Senator Patty Murray (D-WA) were the participants in the on air discussion

[210] Patty Murray, US Senator, on AFGE's radio program *Inside Government* (May 25, 2007).

[211] A provision in the vetoed FY 2008 NDAA would have expanded rights for American victims of acts of terrorism to sue current and former state sponsors of terrorism for damages in US courts. "Bush aired concerns that [the] little-publicized provision would freeze billions of dollars in Iraqi assets held in US financial institutions and ultimately devastate Iraqi reconstruction plans" by making the new Iraqi government liable to suits against the Saddam Hussein government. (Megan cully, "House Approves Revised FY08 Defense Authorization Bill," *CongressDaily*, (January 17, 2008), accessible online at http://thegate.nationaljournal.com/2008/01/house_approves_revised_fy08_de.php, (accessed August 3, 2009).

H), and Labor-management Relations (Subpart I). With these provisions voided, DoD was forced to continue operating "under the government-wide authorities governing adverse actions, appeals, and labor-management relations,"[212] and NSPS LR, adverse actions and employee appeals had to be abandoned. The Act also required that NSPS follow existing government-wide rules and regulations regarding reduction-in-force (RIF) and workforce shaping including transfer of functions (TOF) (this voided Subpart F –workforce shaping, and Subchapter 1960-workforce shaping). Chu said that the FY 2008 NDAA made the November 2009 sunset on NSPS LR moot because it essentially forced NSPS to conform to existing labor relations.[213] NSPS was required by the Act to follow Title 5 employment laws "while preserving the flexibility to establish NSPS-unique regulations in lieu of Government-wide regulations."[214]

The Act modified NSPS pay-for-performance by mandating that "all employees with a performance rating above 'unacceptable' receive at least 60 percent of the annual General Schedule (GS) Government-wide pay increase as a base salary increase," and required that all employees who are rated above 'unacceptable' receive locality-based comparability payments "in the same manner and to the same extent as employees eligible for locality pay under the General Schedule."[215] Under the Act, Federal Wage System (FWS) employees were exempted from NSPS HR, which meant that NSPS would only apply to white-collar employees. Congress, apparently responsive to the unions' lobbying efforts, included a provision that eliminated the "collaboration" aspect of NSPS LR and reinstated collective bargaining rights for employee representatives during the implementation phases. The Act also put a limit of 100,000 employees who could be converted to NSPS in any calendar year, and it required the Comptroller General to conduct an annual review of employee satisfaction with NSPS. Although many changes were made to NSPS, the core elements of pay-for-performance and pay banding largely remained, albeit modified. On May 22, 2008, DoD and OPM issued proposed joint regulations in the *Federal Register* modifying NSPS to conform to the new legislation.[216]

Congressional interest in NSPS continued during this period as well, and both England and Lacey were regularly engaged in meetings and briefings with Members of Congress and their staffs to keep them informed and respond to questions. The Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia also held hearings to discuss Federal workers' compensation and NSPS. The Subcommittee met in Chairman Akaka's (D) home state of Hawaii on May 27-30, 2008, in six hearings about Federal workers' compensation. NSPS was the topic for the May 29, 2008, hearing, and Bunn, who had been appointed PEO by Deputy Defense Secretary England on May 11, 2008, represented DoD in the subcommittee hearing.

Senator Carl Levin and Rep. Ike Skelton—chairmen of the Senate and House Armed Services Committees, respectively—sent a letter to Secretary England on September 10, 2008, requesting DoD "refrain from taking any action to finalize the proposed rule issued May 22, 2008 regarding the National Security Personnel System (NSPS) until a new Administration has an opportunity to review and make decisions with regard to the proposed rule."[217] The committee chairs asserted that they "strongly believe that the proposed regulations go beyond the intent of the revisions made to NSPS" in the FY2008 NDAA.[218] In the letter, they opposed regulations that limited employee representatives' rights, and they additionally argued that the "proposed regulations would restrict such rights by unilaterally removing negotiable issues from the scope of collective bargaining […] that clearly was not the intent of Congress."[219] Levin and Skelton also criticized the "uncertainty" that was created by the Department's repeatedly changing the NSPS regulations—even though

[212] NSPS, "National Security Personnel System, National Defense Authorization Act for FY 2008: Impact on NSPS Regulations," (February 1, 2008), accessible online at http://www.cpms.osd.mil/nsps/docs/ndaaimpact021408.pdf, (accessed August 3, 2009).
[213] interview
[214] NSPS (August 3, 2009)
[215] NSPS (August 3, 2009)
[216] "DoD Submits Proposed NSPS Regulation to Federal Register," US Fed News, (May 22, 2008), accessed through LexisNexis, (accessed on July 2, 2009).
[217] Carl Levin (Senator) and Ike Skelton (Congressman), letter to Gordon England (Deputy Secretary of Defense) (September 10, 2008).
[218] Carl Levin and Ike Skelton
[219] Carl Levin and Ike Skelton

many of the changes were largely due to congressional action—claiming that such changes are not good for either the Department or its employees.[220]

In his September 19, 2008, response to the letter, Secretary England assured that DoD was "making some modifications to the 'rate of pay' definition" after the FY2008 NDAA indicated that Congress wanted such a definition. He also assured them their concerns around collective bargaining were unwarranted because no collective bargaining units had been converted to NSPS. England essentially declined the request to freeze NSPS implementation: "the Department believes the prudent course of action is to complete the rulemaking process, which brings the NSPS regulations into conformance with law, and stabilizes the policies under which over 180,000 of our employees are operating."[221]

Government reports on NSPS implementation

A number of government reports were published at the request of Congress that reviewed and analyzed NSPS implementation. In May, 2007, OPM published *Creating a Foundation for the 21st Century Federal Workforce: An Assessment of the Implementation of the Department of Defense National Security Personnel System*. In the report, OPM concluded the following:

- DoD effectively planned for implementing NSPS.
- DoD implemented NSPS in a relatively small portion of the workforce and data are not yet available to assess several of the progress metrics. The data thus far indicate the Department is on track to meet milestones.
- The establishment of the Program Executive Office has been central to successful implementation of NSPS. DoD has structured a well-organized and integrated phased implementation approach.
- DoD should anticipate and plan for the risk of losing implementation momentum, given future senior leadership turnover[222]

The report gave a relatively good report of NSPS progress and generally accounts for any deficiencies as resulting from the lack of data. Agencies that were not as closely involved as OPM in NSPS implementation produced reports that were not as positive, but which nonetheless confirmed there was not enough evidence to reach a strong conclusion about NSPS.

In July 2007, GAO released a report, *Human Capital: DoD Needs Better Internal Controls and Visibility over Costs for Implementing Its National Security Personnel System*, in which the GAO concluded that the Department's initial estimate of $158 million for implementation costs through 2008 was underestimated, and added, "without an effective oversight mechanism to ensure that the official accounting systems capture all appropriate costs, DoD and Congress do not have visibility over the actual cost to design and implement NSPS."[223]

In September, 2008, the GAO released another NSPS evaluation report to Congress concluding that DoD needed to improve its implementation strategy and its communication to employees. The report found that while "DoD has taken some steps to implement internal safeguards to ensure that NSPS is fair, effective, and credible, the implementation of some safeguards could be improved."[224] In the report, the GAO identifies eight "safeguards" that DoD "could improve": 1) involve employees in

[220] Carl Levin and Ike Skelton

[221] Gordon England (Deputy Secretary of Defense) letter to Ike Skelton (Congressman) (September 19, 2008).

[222] OPM, "Creating a Foundation for the 21st Century Federal Workforce: An Assessment of the Implementation of the Department of Defense National Security Personnel System," (May 2007):viii

[223] GAO, "Human Capital: DoD Needs Better Internal Controls and Visibility over Costs for Implementing Its National Security Personnel System," GAO-07-851, (July 2007)

[224] GAO, "Human Capital: DoD Needs to Improve Implementation of and Address Employee Concerns about Its National Security Personnel System," GAO-08-773, (September 2008).

the system's design and implementation; 2) link employee objectives and agency goals; 3) train employees on the system's operation; 4) require ongoing performance feedback between supervisors and employees; 5) better link individual pay to performance; 6) allocate agency resources for the system; 7) include pre-decisional safeguards to determine if rating results are fair and nondiscriminatory; 8) provide reasonable transparency; and 9) provide meaningful distinctions in employee performance.[225] The report also criticized DoD for not having "an action plan to address the generally negative employee perceptions of NSPS."[226] Although employees had positive perceptions about some parts of NSPS, the GAO found that "employees who had the most experience under NSPS showed a negative movement in their perceptions," and that those employees under NSPS with positive perceptions of the system fell from 40 percent in 2006 to 23 percent in 2007.[227]

On September 17, 2008, the Congressional Research Service (CRS) released a report for Congress that was more historical, but nonetheless concluded that because NSPS was created by statute, Congress should assume the responsibility to ensure that the system and implementation process was transparent and fair. The report also agreed that NSPS might be used to demonstrate pay-for-performance across the Federal Government.[228]

In November 2008,[229] the Congressional Budget Office (CBO) released *A Review of the Department of Defense's National Security Personnel System*, which they produced at the request of the Chairman of the Subcommittee on Readiness of the House Committee on Armed Services. The purpose of the report was "to examine the extent to which NSPS has achieved, or has the prospect of achieving, the most salient goals stated in the [FY]2004 NDAA."[230] The CBO report was similar to the CRS report in that it gave the history of NSPS, but it conducted a more critical analysis by comparing the stated NSPS goals in 2003 to its accomplishments of 2008. The report concluded: "Given that NSPS is ongoing, sufficient data do not yet exist to enable the Congressional Budget Office to determine precisely what success NSPS has had to date in achieving its intended objectives."[231]

A New President and Published Final Regulations

During the 2008 presidential election campaign, candidate Barack Obama responded to a letter submitted to him by Gregory Junemann,[232] National President of the International Federation of Professional & Technical Engineers, which asked the candidate whether or not he supported NSPS. In his letter, Obama agreed with Junemann that it was "inappropriate and unwise for DoD to implement such a highly contentious, ill-conceived program so late in this administration, particularly following the vast revisions to the program

[225] GAO, "Human Capital: DoD Needs to Improve Implementation of and Address Employee Concerns about Its National Security Personnel System," GAO-08-773, (September 2008): 2.
[226] GAO, "Human Capital: DoD Needs to Improve Implementation of and Address Employee Concerns about Its National Security Personnel System," GAO-08-773, (September 2008): 2.
[227] GAO, "Human Capital: DoD Needs to Improve Implementation of and Address Employee Concerns about Its National Security Personnel System," GAO-08-773, (September 2008):2.
[228] Wendy Ginsberg (Analyst in American National Government and Finance), CRS, "CRS Report for Congress: Pay-for-Performance: The National Security Personnel System," (September 17, 2008): 23.
[229] Also in November 2008, the GAO released a report to congressional requestors examining agencies' policies and procedures regarding Senior Executive Service (SES) pay, and concluded that OPM and DoD could strengthen communication to agencies on certification decisions and to improve the efficiency of the certification process. GAO, "Report to Congressional Requestors: Results-Oriented Management: Opportunities Exist for Refining the Oversight and Implementation of the Senior Executive Performance-Based Pay System," GAO-09-82 (November 2008).
[230] CBO, "A Review of the Department of Defense's National Security Personnel System," Pub No 3056 (November 2008), preface.
[231] CBO, "A Review of the Department of Defense's National Security Personnel System," Pub No 3056 (November 2008), 34.
[232] Candidate Barack Obama also responded on September 9, 2008 to a letter from AFGE President John Gage using the same form letter as he sent to Junemann.

included in the FY 08 National Defense Authorization Act."[233] Obama outlined his major concerns with NSPS, including its restrictions of bargaining rights, a disconnection between pay and performance, the use of a forced distribution to determine performance ratings, the suppression of wages and benefits as a result of bonuses in lieu of raises, and what he termed as the "virtual elimination of merit consideration in the promotion process."[234] Obama said that he "cannot and will not support a pay system which discriminates against employees," and he promised that if he were elected President he would "substantially revise these NSPS regulations, and strongly consider a complete repeal."[235] Barack Obama was elected President of the United States on November 4, 2008.

The final portion of NSPS regulations were published in the January 16, 2009, *Federal Register*. The January 16 regulations built on the regulations published in the September 26, 2008 *Federal Register* by adding Subpart E, "staffing and employment" to NSPS.[236] With all of the regulations published, NSPS was set up for the Department to complete rolling out the new system. Nevertheless, its long-term future remained uncertain because four days after the regulations were published, President-elect Obama would take the oath of office.

Conclusions

Implementation of NSPS has taken place in a policy environment that is much different from that of the time when NSPS was formulated and enacted. In 2004, a Republican administration and Republican-controlled Congress were successful in drafting and enacting legislation to overhaul the DoD civilian personnel system in the name of national security. Promoting reform in the name of national security instilled a sense of urgency that convinced Congress to grant the Department far reaching powers over the objections of organized labor. As time passed, however, some of the factors that contributed to the legislative success of NSPS either were fading from memory—national security was no longer a policymakers' 'trump card'—and others became liabilities; for example, general language and broad grants of authority made congressional intent difficult to discern. This became an issue when the details of NSPS were revealed. Moreover, as shown in our previous reports, the policy making process did not produce a consensus for reform among key stakeholders in the personnel management policy community. Thus, the unions and their supporters continued the fight over NSPS during the implementation phase, first by moving the policy debate to a different venue: the courts. The courts slowed NSPS implementation, and it became politically vulnerable when both houses of Congress came under Democratic control in 2006. Union leaders gained political traction in the Democratic Congress, and Congress began to look at changing or eliminating NSPS.

Nevertheless, DoD was undeterred in its efforts to implement NSPS where it could. The strategic pause may have changed the timeline to a somewhat slower pace, but the shift to the PEO structure put NSPS implementation into an established system whose processes for implementation pushed forward even as criticism and change was coming from outside the Department.

Although the political tide seemed to have turned against NSPS, there is inadequate evidence to conclude whether or not the system has reached its intended objectives. Nearly all of the studies produced at Congress' request concluded that due to the low number of employees who have been converted and the short timeframe of NSPS implementation, it is unwarranted to make a conclusion about the efficacy of NSPS.

On January 16, 2009, DoD was still moving forward to implement NSPS even as they awaited a new presidential administration and the possibility of a new direction in civilian personnel management.

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[233] Barack Obama (Candidate for US Presidency), Letter to Gregory Junemann (September 16, 2008)
[234] Barack Obama, Letter to Gregory Junemann (September 16, 2008)
[235] Barack Obama, Letter to Gregory Junemann (September 16, 2008)
[236] *Federal Register*, Vol 74, No 11 (January 16, 2009), 2757.

Postscript

President Obama was sworn into office on January 20, 2009. On Inauguration Day, the Obama White House issued a memorandum that froze the advancement of any pending programs from the previous administration. The memo instructed agency and department leadership that "no proposed or final regulation should be sent to the Office of the Federal Register (the 'OFR') for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon on January 20, 2009, or in the case of the Department of Defense, the Secretary of Defense."[237] This memo effectively froze the advancement of any programs for which regulations had not been published by the Bush Administration. NSPS final regulations had been published four days prior to the issuance of this memo; however, the regulations had not yet gone into effect, and consequently NSPS was effectively frozen from expanding or implementing the finalized regulations without review from the Obama Administration.

Congressional leaders maintained their opposition to NSPS and urged the Administration to freeze or end NSPS. A February 11, 2009, letter from Congressmen Ike Skelton (Chairman of the House Armed Services Committee) and Solomon Ortiz (Chairman of the Readiness Subcommittee) to Secretary Gates stressed that "because it will take some time for a review and a determination of the best course of action to occur, we urge you to immediately halt the conversion of any additional employees to NSPS at any level or any location until the Administration and Congress can properly address the future of the Department's personnel system." The Congressmen argued that NSPS created "distrust and discontent" among DoD employees, and that the President should follow through on his campaign assurance to unions that he would consider a repeal or complete overhaul of NSPS.[238]

OPM released a report on February 11, 2009, that concluded that the DoD "has built a strong foundation for implementing its performance-based personnel system and provides consistent approach for supporting the National Security Personnel System across its agencies that have adopted it."[239] However, the report indicated that "a growing number of employees do not trust the system to ensure fairness in pay or performance ratings."[240] In the report the OPM confirmed what was suggested in a 2008 GAO report on workforce attitudes, performance system safeguards and accountability mechanisms that "when there is a major change to a personnel system, employee attitudes and perceptions typically decline initially as it generally takes from three to five years for employees to fully understand and accept the new system.[241]

On March 16, 2009, Deputy Defense Secretary William J. Lynn III announced that DoD and OPM initiated a complete review of NSPS. The review would address Congressional and union concerns of NSPS by focusing on NSPS's "fairness, transparency, underlying policies, and effectiveness."[242] In his April 1 testimony before the readiness subcommittee, Bradley Bunn said that the review could take months and that DoD would not advance NSPS until the review was complete.[243] In response to the DoD's decision, eight Democratic Congressional leaders[244] signed an April 3 letter to OPM Director Peter Orszag commending the

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[237] Rahm Emanuel. "Memorandum for the Heads of Executive Departments and Agencies." The White House. (January 20, 2009).
[238] Ike Skelton and Solomon P. Ortiz. Letter to Secretary Gates. (February 11, 2009).
[239] Mary Mosquera. "OPM Cites Progress in DoD Pay-for-Performance System." *Federal Computer Week.* (February 13, 2009).
[240] AFGE. "AFGE Responds to DoD Decision to Review National Security Personnel System." (March 16, 2009).
[241] Bradley Bunn. "Statement before the House Committee on Armed Services Readiness Subcommittee." (April 1, 2009).
[242] Mary Mosquera. "Fed Officials See Uncertain Future for NSPS." *Federal Computer Week*. (April 2, 2009)
[243] Bradley Bunn (April 1, 2009).
[244] The signatories of the letter were: Edolphus Towns (Chairman, Committee on Oversight and Government Reform), Stephen F. Lynch (Chairman, Subcommittee on Federal Workforce, Postal Service and District of Columbia), Ike Skelton (Chairman, Committee on Armed Services Committee), Solomon P. Ortiz (Chairman of the Readiness Subcommittee), Bennie G. Thompson (Chairman, Committee on Homeland Security), Christopher P. Carney (Chairman, Subcommittee on Management, Investigations and Oversight), Silvestre Reyes (Chairman, Permanent Select Committee on Intelligence), and Anna G. Eshoo (Chairman, Subcommittee on Intelligence Community Management).

Postscript

Administration's decision to freeze NSPS, and urging the Administration "to put on hold further advancement of any pay-for-performance measures in the federal government and conduct a government-wide review to determine the best way forward to improve performance management while preserving merit principles."[245] Orszag responded on May 29 to the letter saying "the Administration does not feel that it is necessary at this time to put an across-the-board hold on further advancement of other pay-for-performance systems in the Federal government," but that "the Administration will not support any pay system that is unfair or has the effect of suppressing wages or discriminating against employees."[246]

Secretary Lynn and OPM Director John Berry announced on May 14, 2009 that the Defense Business Board (DBB) was asked to form a task group to review NSPS. Lynn wrote in his instructions to the DBB that the "task group should deliver recommendations aimed at helping the department determine if the underlying design principles and methodology for implementation are reflected in the program objectives, whether the program objectives are being met, and whether NSPS is operating in a fair, transparent and effective manner."[247] The Task Group was chaired by Rudy DeLeon and consisted of two other members, Robert Tobias and Michael Bayer. COL Kevin Doxey served as the task group's Secretariat Representative.[248]

After extensive examination of NSPS, the Task Group released its findings on August 25, 2009. The Task Group reviewed a number of sources from within DoD, Congress, public panels and unions. The Task Group presented seven recommendations for DoD and OPM regarding NSPS:

- Initiate a reconstruction of NSPS within DoD that begins with a challenge to the assumptions and design of NSPS…A 'fix' could not address the depth of the systemic problems discovered. The Task Force does not recommend an abolishment of NSPS because the performance management system that has been created is achieving alignment of employee goals with organizational goals.
- Reestablish a DoD commitment to partnership and collaborating with employees through their unions.
- Establish DoD's commitment to strategic management and investment in career civil servants.
- Continue the existing moratorium on transitions of more work units into NSPS until DoD can present a corrective action plan to address identified issues, supported by data that the implemented corrective actions will address the identified issues.
- The following areas of identified concern must be addressed: Pay pool, pay bands, trust, and best practices.
- Continued GAO monitoring of NSPS implementation, with specific analysis of indicators of unintended Equal Employment Opportunity consequences in the NSPS workforce, would be beneficial.
- Create a collaborative process for DoD managers and employees currently in the General Schedule system to design and implement a performance management system that ties individual employee performance goals to organizational goals. Explore the replacement or the current General Schedule classification system.[249]

Robert Tobias conceded in an interview that "[NSPS] should be reconstructed from scratch."[250] In response to the Task Group's findings, William Dougan, President of the National Federation of Federal Employees, said "the Pentagon has had six years to get NSPS right, and they have failed miserably to do so. If the recommendation is to scrap NSPS as it exists today, we should not bother creating a new NSPS in its place."[251]

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[245] Edolphus Towns et al. Letter to OPM Director Peter Orszag. (April 3, 2009).

[246] Joe Davidson. "Performance Pay for Federal Employees Still a Matter of Debate." *The Washington Post*. (June 23, 2009).

[247] William Lynn quoted in: "Business Leaders to Review DoD Personnel System." Office of the Secretary of Defense Public Affairs. (May 17, 2009).

[248] Defense Business Board. "Review of the National Security Personnel System." Report FY09-06. (July 2009)

[249] Defense Business Board.

[250] Joe Davidson. "Rebuild Pay-for-Performance System, Panel Says." *Washington Post*. (August 26, 2009).

[251] Doug Beizer. "National Security Personnel System Needs Redesign, OPM Says." *Federal Computer Week*. (August 25, 2009).

Postscript

While the Task Group's review was underway, Congressional leaders were actively moving to end NSPS through the National Defense Authorization Act FY 2010. Representative Carol Shea-Porter (D-NH) introduced an amendment in June that would mandate that all NSPS employees receive 100 percent of the GS annual raise; "require the Defense Secretary to prepare to end to controversial system, or submit a report to Congress demonstrating why it should remain"; and abolish NSPS within a year unless Congress decided to act on it.[252] The Administration did not voice an opinion on the amendment to end NSPS, and only threatened to veto NDAA FY2010 due to the inclusion of funding for F-22s despite the Department's opposition to the program. Prompted by the amendment, in September 2009, the Department announced that in light of the ongoing review and concerns with NSPS employees covered by NSPS would receive the same salary adjustment as their GS counterparts.[253]

The conference committee working on the NDAA FY 2010 released a report of the final legislation on October 7, 2009, that called for the repeal of the law that authorized NSPS and the reconversion of all employees covered by NSPS back to the GS system by January 1, 2012. Senator Daniel Akaka (D-Hawaii) praised the conference committee's decision and said "I am pleased my fellow Armed Service conferees agreed that it is time to end this short-sighted policy, which threatens the rights and protections of the DoD civilian workforce. Employees throughout the federal government, especially those charged with defending the nation, deserve a fair personnel system. I believe this agreement will more appropriately protect DoD employee rights while giving DoD the additional performance management and hiring flexibility it needs."[254] The agreement required the Secretary of Defense to begin returning the 200,000 NSPS employees to the GS system within six months of the law's enactment. The conference report also required that "no employee shall suffer any loss of or decrease in pay" when they revert to the GS system.[255] "While the conference report does not give the Defense Secretary authority to establish a new pay system unilaterally, it does direct him to make substantial changes to performance management within the department."[256] The agreement also gives the Secretary the authority to create a "Department of Defense Civilian Workforce Incentive Fund" that can be used to award employee performance, and hiring/retention bonuses for Defense employees.

President Obama signed NDAA FY 2010 into law on October 28, 2009, which set the timetable for the destruction of NSPS and the reversion of NSPS employees to the GS system. Tim Curry, acting NSPS-PEO, said, "The Department is going to proceed deliberately and cautiously without unnecessary delay," and that the transition back to GS would take place organization by organization.[257]

[252] Alex M. Parker. "Panel Backs Bill that Could Spell End of Defense Pay System." *Government Executive*. (June 16, 2009).
[253] Alyssa Rosenberg. "Most NSPS Employees Headed for Full 2010 Pay Raise." *Government Executive.* (September 25, 2009).
[254] Alyssa Rosenberg. "Congress Moves to Repeal Pentagon Pay-for-Performance System." *Government Executive.* (October 7, 2009).
[255] Alyssa Rosenberg (Oct 7, 2009)
[256] Alyssa Rosenberg (Oct 7, 2009)
[257] Tim Curry quoted in: Jim Garamone. "Act Ends Controversial Personnel System." *American Forces Press Service.* (October 28, 2009).

Appendix A

NSPS Implementation Timeline

2003

Nov 24 – National Defense Authorization Act, Public Law 108-136, becomes effective, providing authority to establish NSPS.

Dec 1 – NSPS Implementation Office established.

Dec 19 - First meeting of NSPS Implementation Team

- Pursue aggressive policy of including all of DoD within two year period
- FWS and NSPS HR proposal for unions are initial projects
- One system – no Army, Navy or AF version
- Team will develop overall training plan and basic module to deliver the training

2004

Jan 5-10 - Labor Relations Working Group meets on the bargaining process

Jan 6-7 - Meeting with Ogilvy/SRA on NSPS marketing strategy

Jan 14 – Staff Meeting

- Training Group convened Jan 16 to review training strategy

Jan 15 – Tim Curry, Staff Director for Labor and Employee Relations, CPMS FAS, telephones eight unions with national consultation rights and one without national consultation rights advising them of letter inviting them to a meeting on the DoD labor relations system

Jan 16 – NSPS HR Proposal Development Team Meeting

- Initially established a completion date based on Jan 31 delivery to unions

Jan 16 – Date of the letters notifying the unions of the Jan 22 meeting on DoD's labor relations system

Jan 20 – Collaboration/Proposal/Implementation Process milestones established

- NSPS HR Proposal provided to unions- scheduled March 23 to begin collaborative process
- Overall collaboration process (respond to union questions, meet with union to reach agreement, notify Congress of implementation) scheduled for March 23 – Aug 6
- NSPS Implementation scheduled for October 1

Jan 22 – Initial meeting with unions (Ginger Groeber, Charlie Rogers, Marilee Fitzgerald, Brad Bunn, and Tim Curry representing DoD) to discuss the procedures to be used to collaborate on the NSPS labor relations system. Unions requested a written outline of what DoD would propose changing regarding labor relations rules. Outline would be basis for discussion for next meeting in February.

Feb 6 – DoD unions are provided by e-mail or fax a document entitled "National Security Personnel System Pre-Collaboration Labor Relations System Options"

Feb 11 – Reg/Mod BP Meeting

- Schedule conversion of 300,000 civilian employees by Oct 04
- Focus on white collar (GS/GM) conversion by Oct 4

Appendix A

Feb 12 – SECDEF Rumsfeld designates SEC England to be serve as the interface with unions concerning the development and implementation of the NSPS labor relations system

Feb 12 – Draft of NSPS human resources management proposal provided for review

Feb 17-20 – Meeting/Discussion of Supervisory Architecture/Pay

- Development of supervisory adjustment and basic criteria

Feb 18 – Staff Meeting

- Brad Bunn's initial meeting with Gordon England (main problem: no comprehensive program to deal with media, unions, etc. on NSPS)
- Bunn needs supervisory adjustment proposal by Feb 20

Feb 22 – George Nesterczuk begins work as OPM senior advisor to NSPS

Feb 23 – Draft NSPS Proposal finalized

Feb 23 – Brief of Executive Steering Group (Groeber, Rogers, etc.) by Dennis Turner on Proposed Supervisory Adjustment

Feb 26-27 – DoD and OPM meeting with DoD unions at Hyatt Hotel, Rosslyn, on the labor relations system options.

- Unions are strongly opposed to the concept document provided to them prior to the meeting.

Feb 27 – On second day of meeting, DoD unions develop a letter to "All Members of Congress" protesting the concepts presented to the unions

- Letter from Chris Van Hollen and Frank Wolf, et al
- Letter from Representative Henry Waxman, Senator Joseph Lieberman, et al
- Letter from Senator Frank Lautenberg, Senator Joseph Biden, et al

Mar 1 – OPM/OMB Briefing Meeting (George Nesterczuk, Ron Sanders, Jeff Goldstein, etc.)

- Issues:
  - Cannot presume FLSA exempt/nonexempt for all positions in a specific CG/level;
  - Lack of restraints on pay setting within band – need guidance;
  - SSR needs clarification;
  - Need additional technical information of pay retention;
  - Pay pool budgeting;
  - Disagree with only 30% vets floating to top of category in which they are rated/appears no preference is given to anyone other than 30% veterans.
- NSPS HR Proposal was to be provided to unions on March 23 as the statutory regulation;
  - Discussed: either issue proposals as internal DoD regulations (DoD Civilian Personnel Manual) or as CFR regs. If issued as internal regulations, they would not be released until after statutory collaboration (Summer 04)

Mar 2 – OMB Comments received

- Annual pay raises (performance and scheduled) that exceed President's guidance for GPI
- Width of CG1 pay band
- Cost of supervisory adjustment
- Budgeting WGI buy in

Mar 9 – OPM Memo to Defense Secy Rumsfeld Providing Comments to NSPS Draft HR Proposal

Appendix A

Mar 11 – OPM Comments meeting
OPM Issues:

- NSPS proposal diminishes veterans' preference, e.g., proposal eliminates protection for veterans under RIF unless they have the most severe service-connected disabilities
- NSPS proposal does not take full advantage of flexibilities afforded DoD, and may pressure DHS to pull back some innovative parts of their personnel system
- DoD's labor-management proposal was developed without OPM involvement or union input
- NSPS should be established by "regulations jointly prescribed", i.e., joint publication of proposed NSPS regs in the Federal Register

Mar 12 – Secy Rumsfeld directs the establishment of a strategic and comprehensive review of NSPS development.

Mar 17- Initial Structuring and Meeting of the Strategic Engagement Teams

- Teams established to re-think the NSPS structure and mission as it relates to individual DoD stakeholders
  - Requirements Team (Pat Adams – Navy)
  - Personnel Team (Dave Snyder – Army)
  - Process Team (Roger Blanchard – Air Force)
  - Program Team (Pete Brown – Navy)
  - Communications Team (Eric Ruff – OSD, Public Affairs)
    - Participating NSPS staff:
      - Brad Bunn – Requirements, Program, Process
      - Sharon Stewart – Requirements, Program
      - Stephanie Olson - Communications
      - Janice Lander, Helen Sullivan, Judy Mayrose – Process
      - Paula Hartzoge - Program

Apr 1 – Secy Chu and Secy England open letter to DoD workforce on strategic engagement.

Apr 7 – Strategic Engagement Brief to Navy Secy Gordon England and Dr. Chu on NSPS Design Recommendations

Apr13 – NSPS Implementation Recommendations presented to Senior Level Review Group – Defense Secy Rumsfeld approves the recommendations

Apr 15 – Secy England introduces to DoD personnel at Pentagon the NSPS Design and Implementation Brief; Pete Brown, Program Team Lead, provides brief

Apr 19 – NSPS Design and Implementation Plan briefed to Union Representatives by Secy England

Apr 27 – Secy England Announces Program Executive Office for NSPS Created

- Pete Brown, Executive Director at NAVSEA, appointed as Interim Program Executive Officer
- Dave Snyder, Army HR Director, named as Interim Director of Labor Relations and Appeal Process Team
- Brad Bunn named as Interim Director of Human Resources and Pay-for-Performance Team

Apr 30 – Pete Brown chairs initial Component Program Managers Meeting

- Discussion of interim PEO operating strategy
- Discussion of interim PEO roles, responsibilities, and expectations
- Work plans for specific project areas are presented by NSPS members

May 7 – Program Managers Meeting

- Feedback provided on May 6 Secy England meeting
- Update on OIPT issues, PEO admin matters (e.g. PEO organization chart, staffing, etc.), HR planning team meetings, and LR and Appeals work group
- Emphasis on discussion of six union consultation sessions and need to start focus on pilot program and IT

May 12 – Draft of NSPS Requirements Document provided to PEO members for review and comment

May 19 – DEPSECDEF officially delegates authority for NSPS Senior Executive to Secretary England

May 21 – PEO-NSPS Staff Meeting
- Planned re-launch of NSPS web site after June 7 union meeting

May 24 – Secy England names Mary E. Lacey, technical director of Naval Surface Warfare Center, as program executive officer for NSPS (news release)

May 26 – Pete Brown, Interim PEO, extends e-mail invitations to all DoD unions to meet with DoD and OPM in Crystal City. Purpose of meeting is to:
- Establish desired outcomes for this and future meetings
- Understand working groups, focus groups, union meetings and timelines
- Provide opportunity for unions to share concerns on process and timelines

May 27 – Secy England approves formal NSPS OIPT charter

May 27 – Pete Brown Memo on Union Dialogue for Senior Leaders

Jun 4 – PEO-NSPS Staff Meeting
- Web site "release" planned for June 8; existing NSPS web text requires review and editing prior to release

Jun 7- First consultation session with union leaders representing DoD personnel on NSPS is held; session co-hosted by Charles Abell, Principal Deputy Under Secretary of Defense (P&R) and George Nesterczuk, OPM
- Unions indicate that discussion of current human resources system, appeals process, and labor relations system is too broad
- DoD agrees to provide unions with information on what changes in the current system, and NSPS impact on bargaining units and Chapter 71, title 5

Jun 8 – Mary Lacey physically on board as PEO for the NSPS staff meeting to discuss 7 June Consultation

Jun 8 – Revised NSPS Web Site launched

Jun 14 – Brad Bunn selected as the Deputy PEO for NSPS (memo)

Jun 24 – In response to the unions' June 7 request for information to identify the problems in the current system, DoD unions receive a document, "Interests and Concerns about Current Human Resources Management System"

Jun 25 – PEO-NSPS Staff Meeting
- Received "thumbs up" from OPM on NSPS requirements document

Jun 29 – Second in a series of consultation sessions with DoD, OPM, and union leaders.

Jun 30 – PEO-NSPS Staff Meeting (Update of June 29 union meeting)
- Conveyed to unions that NSPS is not eliminating Chapter 71

- Union plans to address concerns and suggestions on focus/work groups by COB July 2
- AFL-CIO becomes active participant at end of meeting
- OIPT told that pilot sessions will contain no bargaining unit employees

Jul 1 – DoD unions provide DoD and OPM with a written proposal that is concerned with how the proposed NSPS regulation on Human Resources, Appeals, and Labor-Management Relations should be developed

Jul 7 – Mary Lacey e-mails a letter to Byron Charlton, AFL-CIO, emphasizing that the procedures proposed and discussed at the June 7 and 29 meetings offered the unions opportunities to provide input and to have that input fully considered in the development of the NSPS regulations

Jul 7 – Pentagon Town Hall Meeting on NSPS hosted by Secy England

Jul 8 – Byron Charlton response to the July 7 e-mail indicates that the unions object to DoD's plan to proceed with focus groups

Jul 6-8 – Three initial pilot Focus Groups meet

Jul 9 – Mary Lacey responds to the union coalition objections to focus groups by offering to schedule a discussion with a small group on how to proceed with the discussions on NSPS

Jul 14 – Mary Lacey and Brad Bunn have initial meeting with Charlie Rogers, CPMS Director, and Cheryl Fuller, Regionalization and Systems Modernization (RegMod) Div., CPMS

Jul 16 – PEO-NSPS Staff Meeting
- 89 responses to NSPS questions put on web site July 15
- Work group schedules presented for July 27-29
- Army and Navy (D. Snyder and K. Ott) discuss experiences with Town Hall meetings
- Discuss with Defense Business Board on hiring PR firm to present NSPS core message

Jul 28 – Memo from PEO to all component Program Managers:
- Mary Lacey requests service component nominations for NSPS Spiral One.
- Requests "highly motivated, high performing organizations" to nominate themselves by 31 August, 2004.

Jul 28 – PEO Working Groups convene at One Lafayette Center, Washington, DC to develop and explore options and alternatives as the basis for NSPS design (since May **labor relations, adverse actions and appeals working groups had also been meeting in a separate location.**

- Compensation Architecture – Dennis Turner
- Hiring/Assignment/Workforce Shaping – Karen Lebing
- Performance Management – Jim Irwin
- Employee Engagement – Steve Sommers

Aug 16 – Sec England formally charters PEO

Aug 16 – Twelve-page document that outlines various issues and provides some potential design options for NSPS Labor Management Relations and Employee Appeals is presented to DoD union representatives

Aug 24 – DoD union coalition provides a written response to the Aug 16 document by reiterating that the unions' position that the labor relations system must operate within the constraints of Chapter 71, and asks DoD and OPM to justify each identified interest and concern

Appendix A

Aug 25/26 – DoD/OPM consultation meeting with the DoD unions focuses on labor relations and appeals. Working groups are briefly discussed; no request to participate in these groups is made by the unions

Sep 3 – DoD unions are provided a document that outlines various issues and some potential design options for the NSPS Human Resources system

Sep 9 – PEO distributes HR Options paper for Capitol Hill, unions, website

Sep 9 – Deputy PEO sends draft Focus Group report and supplemental background on LR/Appeals to employee representatives

Sep 9 – DoD responds to the Aug 24 union coalition statement regarding the NSPS Labor Relations System and Employee Appeals process

Sep 9 – DoD and OPM conduct a meeting with DoD unions identified as non-coalition unions and focus on labor relations and appeals (NAIL and FOP attend)

Sep 10 – DoD/OPM consultation meeting with the DoD coalition unions intends to focus on the document "Discussion of Human Resources Options and Union Interests and Concerns", but is spent discussing NSPS timeline and process due to issues raised by the unions.

Sep 14 – PEO formally charters SAG

Sep 14 – Non-coalition unions invited to attend DoD/OPM meeting regarding "Discussion of Human Resource Options and Union Interests and Concerns" (NAIL and FOP attend)

Sep 16 – PEO Working Groups disband and initial brief of PEO Working Group options provided to OIPT

Sep 22 – DoD/OPM consultation meeting with non-coalition unions

Sep 25 – NSPS Requirements Document approved and signed by Secy England

Oct 1 – All DoD unions are provided a copy of the NSPS Requirements Document

Oct 5 – DoD/OPM consultation meeting with the DoD coalition unions focuses on their request for an advance copy of the NSPS regulations, a discussion of the Human Resources system, and the working groups; unions are advised that working groups are no longer formally meeting, but that working group members attend the union meetings, and that changes have already been made to options based on union input

Oct 14-15 – Individual Work Group experts (leaders) provide presentations at OIPT HR Decision Brief

Nov 10 – OIPT Recommendations to the Senior Executive

Nov 19 – draft NSPS enabling regulation sent to OIPT for review

Nov – PBD 704 (page 32) funds PEO-NSPS for FY05 through FY11, including program development, DCPDS system modifications, and office administration

Dec 1 – Financial Management function implemented in PEO with full time program lead detailed

Appendix A

Dec 13 – DoD/OPM meeting with DoD non-coalition unions focuses on the impact of pay banding and pay-for-performance on firefighter and law enforcement pay (NAIL and FOP attend)

Dec 14 – DoD/OPM consultation meeting with the DoD coalition unions focuses on:

- the timetable for coalition input into the NSPS design
- the coalition response to DoD's Sep 9 letter
- the Spiral One implementation

Dec 15 – Pentagon press conference announcing Spiral One

- Secretary England announces that Spiral One will be rolled out in three phases over an 18-month period beginning as early as July 2005.
    - Spiral One includes GS, GM, Acquisition Demonstration project employees in the Continental US, Alaska and Hawaii, up to 300,000 employees.

2005

Jan 13 – DoD coalition unions submit recommendations and comments concerning NSPS

Jan 21 - Secy Rumsfeld meets with Secy England and certifies draft enabling regulation for OMB submission

Jan 30 – Kay Cole James, OPM Director, certifies draft enabling regulation

Feb 10 – Secretary England and OPM Acting Director Dan Blair hold press conference on the soon to be published NSPS proposed regulations.

Feb 10 – DoD and OPM conduct informational briefing at OPM for union representative on soon to be published NSPS proposed regulations.

Feb 11 – PEO formally charters Financial Management IPT

Feb 14 – NSPS proposed regulations issued for employee representative and public review and comment

Feb 14 - PEO provides cost estimate ($158 million) to implement NSPS

Mar 9 – Sec England approves NSPS financial policies covering base pay adjustments upon conversion to NSPS, January 2006 pay adjustments for Spiral 1.1 employees, and protection of pay pool funding

Mar 10 – DoD and OPM meet with unions to discuss the meet and confer process and procedures

Mar 15 – Senate Subcommittee on oversight of Government Management, the Federal Workforce and the District of Columbia Hearing on NSPS

- Witnesses: Charles Abell, Principal Deputy for Personnel and Readiness and Co-Chair of the OIPT, and George Nesterczuk, Senior Advisor to the Director of OPM on defense matters.

Mar 16 – Review and comment period for proposed regulations ends – comment consolidation for NSPS website begins

Mar 28 – Congressional notification provided on meet and confer

Apr 8 – NSPS/Labor Management consultation to discuss meet and confer schedule and process

Appendix A

Apr 12 – House Committee on Government Reform, Subcommittee on Federal Workforce and Agency Organization Hearing on NSPS

- Witnesses: Charles Abell and George Nesterczuk.

Apr 14 – Senate Armed Services Committee Hearing on NSPS

- DoD Witness: Hon. Gordon England, Secy of the Navy and NSPS Senior Executive, and Dan Blair, Acting Director of OPM.

Apr 18 - NSPS/Labor Management Collaboration Meeting (California/Texas Rooms) as meet and confer process officially begins with first face-to-face meeting between the DoD/OPM team and union representatives

Apr19-22/Apr 25-28 – Additional face-to-face meet and confer sessions

May 3-4/May 9-10/May 16-19 – Additional face-to-face meet and confer sessions

May 5-6/May 11-13 – Union only meeting days for meet and confer issues

May 13 – President designates Secy England as Acting Secy of Defense

May 23 – Meet and Confer extended to June 2

Jun 1-2 – DoD/OPM face-to-face meetings with unions are concluded

Jun 12 – Brad Bunn assumes "dual-hatted" role as both CPMS Director and Deputy PEO

Jun 16 - Secy England and Acting Director of OPM, Dan Blair, meet with 16 union representatives to discuss the proposed NSPS regulations.

- United Defense Workers Coalition presented Secy England with a paper outlining their recommended changes to the proposed regulations.
- Secy England and Mr. Blair state their commitment to reviewing the unions' recommendations and giving them full consideration. (Meeting considered as concluding meet and confer.)

Jun 23 – RegMod releases instructions for coding positions with a Pre-NSPS Spiral Indicator. These codes are to be assigned to both Position and Person and allow tracking NSPS participants with a specific spiral increment prior to and after conversion.

Jun 28 – Linda Springer sworn in as OPM Director

Jul – GAO Report to Congressional Committees: Human Capital—DOD's National Security Personnel System Faces Implementation Challenges

Jul 14 – England-Blair letter to Byron Charlton, United DoD Workers Coalition

Jul 15 – PEO formally announces the release of the web-based Readiness Assessment Tool for Spiral 1.1 units.

- Tool has 10 topical areas outlining the major tasks to be completed prior to conversion and after conversion to NSPS. PEO monitoring of progress will be via the tool.

Jul 20 – ICF Consulting provides final compilation report (hard copy and electronic) of the major public comments to the NSPS proposed regulation

Appendix A

Jul 29 – Principal Deputy Under Secretary of Defense for Personnel and Readiness Abell announces he has accepted Senator Warners's offer to be Staff Director for the Senate Armed Services Committee.

Aug 12 – U.S. District Court Judge Rosemary Collyer rules that DHS personnel system does not adequately provide for collective bargaining

Aug 29 – Appointment of Michael Dominguez as co-chair of NSPS OIPT

Oct 7 – Collyer rules that DHS cannot streamline its personnel system until DHS collective bargaining produces a contract agreeable to the unions

Oct 24 – PEO receives final OMB clearance on the final NSPS regulations

Oct 26 – Secy England and OPM Director Linda Springer press conference announces availability of final NSPS regulations and the notification of Congress--Secy England Memo to the NSPS Workforce

Oct 27 – NSPS final regulations filed with Federal Register for publication and 30 –day congressional notification period begins

Nov 1 – NSPS final regulations published by Federal Register

Nov 7 – Ten unions file lawsuit with Judge Emmet Sullivan, U.S. District Court, to stop NSPS implementation (AFGE et al vs Rumsfeld et al)

Nov 16 – Unions reach agreement with Dept of Justice, DoD, and OPM to delay implementation of major portions of NSPS until Feb 1, 2006. DoD and unions request a court hearing in January 2006 on the lawsuit.

Nov 17 – Senate Homeland Security and Governmental Affairs Committee conducts NSPS hearing with Secy England , Brad Bunn , Linda Springer, and George Nesterczuk.

Nov 18 – Secy England approves NSPS pay pool funding policy establishing single DoD-wide minimum pay pool funding floor

Nov 23 – January 24, 2006 – hearing date scheduled on union lawsuit against NSPS

Nov 23 – Draft NSPS implementing regulations made available to the public

Nov 29 – PEO Memo to NSPS OIPT and Program Managers informing them delayed implementation of portions of NSPS until Feb 1, 2006, and the case hearing scheduled for Jan 24, 2006

Dec 1 and 2- PEO conducts information briefings for union representatives on draft implementing regulations

Dec 5- Federal Education Association, Inc. (FEA) files suit against DoD and OPM. FEA represents teachers and support staff in domestic and overseas schools.

Dec 13 - PEO (T. Curry, J. Hansohn, D. Turner, et. al.) conducts continuing collaboration session by teleconference with three Fraternal Order of Police (F.O.P.) members

Dec 23 – PEO Memo to NSPS Program Managers informing them of PEO focus on re-evaluation of performance management and placing hold on January NSPS-specific content training.

Appendix A

Dec 28 – PBD 723 (pages 14-15) funds National Security Labor Relations Board (NSLRB) for FY06 through FY11

Dec 29 – Acting Deputy Defense Secy England relinquishes Navy Secy post

Dec 30 – DoD received comments from United Department of Defense Workers Coalition on proposed implementing issuances.

Dec 30 – President signs FY06 NDAA; start-up of NSLRB now possible

2006

Jan 5 – PEO briefs OIPT and receives additional direction on projected work plan for the Performance Management System (PMS) Redesign and Spiral 1 Deployment

Jan 12 – OIPT approves a reduced Spiral 1.1 implementation plan

Jan 24 – Judge Emmet Sullivan, U.S. District Court, accepts a deal to rule on the merits of the union lawsuit (AFGE v. Rumsfeld) by March 1 (thereby delaying NSPS implementation until at least that date); although the PEO can begin standing up the NSLRB, there is no information yet as to when that may begin

Jan 31 – PEO sends memo to Dep Secy requesting that Dep Secy determine the effective date for establishing the NSLRB

Feb 1 – Dep Secy England approves PEO memo requesting the determination of the effective date of the establishment of the NSLRB and the issuance of interim rules for the Board's operation

Feb 15-16 – As part of the continuing collaboration process, PEO conducts training for union reps on the NSPS HR Elements, including a brief on the proposed performance management system design.

Feb 27 – U.S. District Judge Emmet G. Sullivan hands down court opinion that NSPS fails to ensure collective bargaining rights, does not provide independent third-party review of labor relations decisions, and would leave employees without a fair process for appealing disciplinary actions.

Feb 28 – NSPS OIPT meets with OSD Counsel Helen Sullivan and unanimously agrees to implement a previously-approved contingency strategy--moving quickly to appeal the District Court ruling. OIPT authorizes Ms. Sullivan to ask the Dept of Justice to proceed with an appeal; estimates the appeal process will take about one year to play through to a conclusion.

Mar 17 – Formatted NSPS draft implementing issuances provided to NSPS PMs.

Mar 24 – Union Coalition responds on proposed NSPS performance management system with comments

Mar 27 – Website release of HR Elements for Managers, Supervisors, and Employees: A Guide to NSPS (HRMagazineS1.1)

Mar 28-30 – Spiral 1.1 Train the Trainer (T3) sessions held at DFAS, Columbus, Ohio.

April 3 – Website release of introductory course, NSPS 101 .

April 17 – Department of Justice files Notice of Appeal on behalf of DoD and OPM to the U.S. District Court of Appeals for the District of Columbia circuit court.

Appendix A

Apr 26 – Deputy PEO notifies unions that the Department has completed continuing collaboration and in the response to their comments and recommendations, informs them of the disposition.

Apr 28 – DepSecDef England approves NSPS Financial Management Policies for Spiral 1.1

Apr 28 – DepSecDef England signs the directive implementing portions of the National Security Personnel System effective April 30, 2006.

- The directive established the NSPS Implementing Issuances, or Subchapters, for the Human Resources elements of NSPS and provides the details for carrying out certain provisions of the NSPS regulations.

Apr 30 – Spiral implementation commences.

May 1-5 – Spiral 1.1 completed on time to include the conversion of 4,258 Navy employees along with almost 7,000 other DoD employees.

Jun 13-16 – PEO convenes an NSPS Spiral 2 Planning Team in Rosslyn to develop the overarching strategy, to identify and resolve any high-level issues, and to insure an integrated approach in the development of the expanded NSPS HR system.

Jun 21-22 – PEO conducts Spiral 1.1 Lessons Learned Workshop

Jun 22 – CPMS Director's memo announcing CPMS implementation of NSPS in January 2007

Jun 27 – U.S. Court of appeals for the District of Columbia rules that the Homeland Security Department's new personnel system violates laws guaranteeing workers the right to collectively bargain with their employers over workplace matters.

Jul 18-Aug 1 – Hiring/Workforce Shaping/Pay Administration Working Groups under the NSPS Spiral 2 initiative meet during this time frame on the design of the NSPS blue collar system.

Aug 10 – Dept. of Justice on behalf of DoD files opening appeal brief with U.S. District Court of Appeals regarding the January 27 Sullivan decision.

Oct 1 – Spiral 1.2 commences implementation.

Oct 26 – Meeting with the unions as part of the continuing collaboration obligations regarding the FWS design. Briefings highlight the proposed design options.

Dec 11— An oral argument is scheduled with the U.S. Court of Appeals.

Dec 22 – PEO receives newly modified NSPS assessment criteria for review.

2007

Jan 18 – Teleconference with OPM on Jan 16 assessment criteria finally spawns agreement and overall NSPS review schedule is discussed.

Jan 31 – Sen. George V. Voinovich introduces S. 457 to extend the date on which the NSPS will first apply to certain defense laboratories until 2011. Bill was cosponsored by Sens. Shrod Brown, D-Ohio; Jeff Sessions, R – Alabama; Jeff Bingaman, D – New Mexico; Hillary Clinton, D-New York; Pete V. Domenici, R- New Mexico; Edward M. Kennedy, D-Massachusetts; Joe Lieberman, D-Connecticut; Trent Lott, R-Mississippi; and Jack Reed, D-Rhode Island.

Appendix A

Feb 18 - Spiral 1.2j, last of the Spiral 1.2 increments, is implemented.

Mar 1 – Secy of USN Donald Winter testified before the Committee on House Armed Services.

- more than 50,000 employees are schedule to transition to NSPS from GS at the start of FY 2008.

Mar 2 – Rep Solomon P. Ortiz (D-Texas) and other members of the House Armed Services Readiness Subcommittee announces the beginning of Congressional oversight over the NSPS. This is the first oversight of the system.

- A hearing date is set for March 6 and hear testimony from: Dep Under Secy of Defense P&R Michael Luis Dominguez; John Gage, National President, AFGE; Max Stier, President and CEO, Partnership for Public Service; and Dr. Marick Masters, Professor of Business, Katz Graduate school of Business.

Mar 2 – Serco Inc. wins a contract to provide training to military and civilian employees on the NSPS.

Mar 6 – Spiral 1.3 commences implementation.

Mar 6 – The House Armed Services readiness subcommittee debated the new National Security Personnel System

- In addition, the House Appropriations Financial Services and General Government subcommittee, a new panel, held a hearing on "issues in the federal workforce."

Mar 28 – Under Secy of Defense (P&R) David S. C. Chu testifies before the Committee on Senate Armed Services Subcommittee on Personnel.

- NSPS allows managers to take constructive steps to match the workforce to the demands of the workplace
- Provides a performance management system that aligns performance objectives with DOD's mission and strategic goals
- In April 2006 DoD began implementing NSPS and converted approx. 11,000 non-bargaining unit employees, followed by 66,000 in Oct 2006 through Feb 2007, this spring an additional 35,000 will transition to NSPS: for a total of approx 113,000 employees.
- Initial 11,000 employees recently completed the first appraisal cycle under performance management systems. Both supervisors and employees expressed the need for more training.

Apr 23 – Rep. Michael Turner (R-Ohio) introduces HR 2007 to "amend title 5, US Code, to provide that the NSPS shall not apply with respect to certain laboratories within DoD."

- Co-sponsors Reps: Frank Wolf (R-Virginia); Dave Hobson (R-Ohio); Jim Moran, (D-Virginia); and John Boehner (R-Ohio).
- Referred to the House Oversight and Government Reform Committee.

May 1 – OPM provides their completed assessment report of NSPS

May 3 – US Fed News article: "CPAC Meeting the Challenges of NSPS"

- Civilian Personnel Advisory Center has been training NSPS since Aug 2006. Trained more than 1,916 employees and 582 supervisors in Spirals 1.2, 1.3.
- Soon Spiral 2 will begin and training will continue.

May 4 – AFGE radio show ("Inside Government") features Mark Roth, AFGE General Counsel who discusses the NSPS, the Federal Labor Relations Authority, and AFGE's Legal Rights Attorney Program.

May 8 – House Armed Services readiness subcommittee voted to roll back contentious workplace changes planned for DoD. Readiness Subcommittee Chairman Solomon Ortiz issues statement on subcommittee's decision on the National Defense Authorization Act FY 08 (HR 1585).

- About 114,000 non-union workers have been converted to new system.

May 16 – OMB Issues statement of Administration policy regarding HR 1585. The Administration has "a number of significant concerns" with the bill. Administration strongly opposes section 1106, which would significantly change NSPS.

May 18 —The United States Court of Appeals for the District of Columbia Circuit released its decision in AFGE vs. Gates (formerly AFGE v. Rumsfeld) regarding the adverse actions, appeals, and labor relations portions of NSPS.

- The Court reversed the judgment of the District Court and upheld all aspects of the regulations in the appeal. One of the judges from the 3 member panel issued a dissenting opinion.
- Judge Brett M. Kavanaugh, who filed the majority opinion, called the law that established NSPS a "statutory puzzle."

May 18—AFGE lobbies Senate to severely modify or eradicate NSPS.

May 24— Senate panel approves language that would significantly limit the implementation of NSPS.

- In a markup of the fiscal 2008 Defense authorization bill the Senate Armed Services Committee voted to repeal the existing authority of the Defense Department to move forward on the labor relations portions of NSPS.
- The House approved similar language the previous week. The Senate provision would permit Defense to continue developing a pay-for-performance system, as long as such a system is consistent with existing federal labor relations law.

May 25 –AFGE radio program ("Inside Government") has AFGE national President, John Gage; General Counsel, Mark Roth; and Legislative and Political Director Beth Moten to discuss AFGE's next steps in fighting NSPS. The program also includes Sen. Patty Murray (D-Wash.) to address NSPS and issues facing veterans.

Jun 4-8 – PEO conducts a Senior Leaders Workshop in Columbus, Ohio.

- Approximately 300 senior civilian and military leaders attend from units converting to NSPS. Technical and policy staff of the PEO, Deputy Undersecretary for Civilian Personnel Policy, and the Civilian Personnel Management Service (CPMS) also attend.

Jul 2 – Union coalition files a petition for rehearing before the U.S. District Court of Appeals for the District of Columbia.

Jul 16 – GAO Report (GAO-07-851) released. Derek B. Steward (Director, Defense Capabilities and Management) issues statement to Congress.

- Important for DoD and Congress to be aware of the total (direct and indirect) costs of implementing NSPS.
- NSPS is essential for DoD because, if implemented successfully, it could serve as a model for government-wide human capital transformation.
- DOD's Nov 2005 estimate that it will cost $158 million to implement NSPS between 2005 and 2008 does not include full costs that DoD expects to incur as a result of implementing the new system. ($158M estimate includes $51M for PEO and $107M for the military services' and Washington HQs Services' NSPS management offices. DOES NOT include all direct costs (full salary costs of all civilian and military personnel who directly support NSPS activities department-wide) AND DOES NOT include any of the typical indirect costs associated with the design and implementation of NSPS (general administrative services, general research and technical support, rent, and operating and maintenance costs for buildings, equipment, and utilities.
- Before developing its estimate, DoD did not fully define all the direct and indirect costs needed to manage NSPS.

- PEO required service components to estimate costs in several broad cost categories resulting in Depts of Army, Navy and Air Force and Washing HQS using different approaches to estimate NSPS funding requirements.
- Without accurate cost estimates, Congress and DoD cannot contrast and compare or otherwise evaluate implementation costs: DoD and Congress DO NOT have adequate visibility over the actual costs to design and implement NSPS.
- DoD has not established an effective oversight mechanism to ensure that all costs are fully captured in the components' official accounting systems.
- GAO recommends that DoD define ALL direct and indirect costs needed to manage NSPS, prepare a revised estimate of these implementation costs in accordance with the established definitions and federal financial accounting standards, and develop comprehensive oversight framework to ensure that all funds expended or obligated to design and implement NSPS are fully captured and reported.

Jul 20 – AFGE Radio program ("Inside Government") discusses NSPS with AFGE National Secretary-Treasurer J. David Cox.

Jul 23 – The Department of Justice files an opposition to the union coalition petition for rehearing on behalf of DoD and OPM.

Aug 4 – US Reps Jay Inslee (D-Wash.), Walter Jones (R-N.C.), and Chris Van Hollen (D-MD) introduce an amendment to FY08 Defense Appropriation bill that would block funding for DoD's proposed personnel system. Added by voice vote.

- Van Hollen says: "our concern is that the DoD has not implemented the law consistent with Congressional intent.
- Third effort underway to rein in NSPS. House Armed Service passed a version that the White House called " in essence a total revocation" of the new system. The Senate Armed Services Committee's version of the bill would ensure full bargaining rights for unions and would exempt blue-collar employees from NSPS.
- DoD concerned that the House funding ban would probably impede other personnel programs at DoD, not just NSPS.
- No House member spoke to support NSPS.

Aug 10 – U.S. Court of Appeals for District of Columbia denies a motion filed by the AFGE and UDWC for an *en banc* (or full court) review of the Court's May 18 decision.

Aug 13 – Initial GAO meeting with PEO is held to discuss review of adequate safeguards to ensure fairness and lack of abuse under NSPS.

Aug 23 – Union coalition files an appeal of U.S. Court of Appeals August 10 denial

Aug 23 –NSPS web-based tool (the Performance Appraisal Application) has been updated with several improvement that should make it easier to navigate and more user-friendly.

Sep 7 – DepSecy Gordon England announces in a memorandum that for January 2008 the 110,000 DoD employees who are Spiral 1 of NSPS, half of January's government-wide pay increase will be used to adjust base salaries of those with an acceptable performance rating, and half will be added to performance pay pools and distributed based on performance. For January 2009, NSPS all of the GPI will be used in the pay pool for NSPS employees – no pay increase for employees who score a 1.

Sep 17 - The U.S. Court of Appeals lifts its injunction against the labor relations, adverse actions, and employee appeals portions of NSPS.

Oct 10 – Members of Congress Republicans Frank Wolf, Thomas Davis III, and Democrat James P. Morgan, Jr. write letter of DOD Secy Gates. The letter expressed concern over the September 7 memo's announcement to the transition to performance pay.

- The primary concern is that their constituents who now face this GPI cut "reportedly were informed from the outset that for the first year in the NSPS they would at least receive their base pay increase."

Oct 14 – Spiral 2.1 commences implementation.

Oct 31—DoD announces that about 75,000 civilian employees will transfer into NSPS by March 2009 bringing the total number of employees under the system to 184,000.

- 18,000 will convert before January, and more than 56,900 will follow them by end of March 2009.
- Lacey explained that concerns about workload and business operations has delayed the transfer of an additional 32,000 DoD employees. Instead of spring, they may transfer late next year.

Dec 7 – House-Senate negotiators unveil the NSPS compromise in legislation that would restore collective bargaining rights to unions at DoD, and permit the Pentagon to go forward with new pay rules. (12/10/2007 Washington Post) (12/12/2007 US Fed News)

- Would guarantee that NSPS employees receive 60 percent of the annual pay raise that most other government workers get. The remaining 40 percent would be used for performance raises.
- Permit the unions and Pentagon to agree to "national level bargaining" where department-wide policies could be settled in talks attended by all union reps. It also permits unions to bargain over implementation of new rules at the local level.
- Does not allow unions to bargain over pay, and would deny pay to those employees that receive an unacceptable job performance rating.
- Part of the FY08 Defense Authorization Act
- NSPS changes have bipartisan support and predicted acceptance by White House
- John Gage (AFGE), Gregory J. Jenemann (IFPTE) and Ron Ault (MTD-AFL-CIO) have all said the compromise is acceptable and that the unions don't see NSPS lasting much longer (claiming victory).

Dec 31—Secy England changes NSPS pay policy to reflect the FY2008 Defense Authorization Bill Senate-House compromise. Employees covered by NSPS will receive 60 percent of the base salary increase that will be received by GS employees, and the remaining 40 percent of the raise will depend on job evaluations.

- Most federal employees under GS will see an average raise of 3.5% (2.5% increase in base pay and 1 percent locality pay supplement)
- Officials used website to post NSPS will be eligible for 1.5 percent raise, a 1 percent raise tied to their job performance and a 1 percent locality pay supplement that will mirror the GS geographic-based payments. Employees who are rated "unacceptable" will see no adjustment to their salary. (Jan 4 2008 Washington Post)
- 2008 NSPS pay scales effective Jan 6 (Jan 8 2008, Regulatory Intelligence Data)
- 60/40 split will remain for 2009

2008

Jan 6 – 2008 NSPS pay schedules effective: 60/40 schedule

Jan 7 – AFGE files a petition for certiorari in the Supreme Court. The government's response is due in March 2008.

Jan 28 - President Bush Signs H.R. 4986, the National Defense Authorization Act (NDAA) for Fiscal Year 2008 into law. The FY 2008 NDAA retained basic authorities for NSPS pay for performance and other human resources matters, but imposed government-wide rules for adverse actions, employee appeals, labor-management relations, and workforce shaping.

Appendix A

Jan 29 – AFGE drops its legal challenge to NSPS. John Gage says that the 2008 Defense Authorization Act, which the President signed, contains all the changes to the NSPS that AFGE sought. "we got everything we're suing for, this is a good day for AFGE and DoD employee" (Jan 29 Federal Times). "There are not many wins in our history bigger than this one" (January 30, Washington Post)

Feb12 – Committee on House Oversight and Government Reform Subcommittee on Federal Workforce, Postal Service, and the District of Columbia hears testimony from John Gage (AFGE), Gregory Junemann(IFPT),Carol Bonosaro (Senior Executive Association), Prof. Charles Tiefer (Baltimore Law), Prof. Charles Fay (Rutgers) on the merits and potential of pay for performance as an HR model in the Federal Government.

Feb 27 – Under Secy Chu testifies before the Committee on Senate Armed Services Subcommittee on Personnel to discuss FY 2009 Defense Authorization.

Mar 11 – PEO announces that DoD expects to start bringing its first bargaining-unit employees under NSPS by fall 2009. (March 12 Federal Times).

Apr 22 – Secy Gates Announces Bradley B. Bunn, director, Civilian Personnel Management Service, is to be reassigned to the PEO NSPS.

May 11 – Secy Gordon England names Brad Bunn to succeed Mary Lacey as the PEO NSPS. (May 27, Washington Post)

May 12 – At the Excellence in Government conference in Washington DC, Secy Chu argued that pay reforms will continue and pointed to the fact that while congressional Democrats altered portions of NSPS in the FY 2008 Authorization Act, they did not repeal the system as evidence that Congress wants reform.

- Secy Chu and OPM Director Linda Springer said they believe both parties recognize that linking pay raises and bonuses to employee's performance is necessary to allow the government to compete with the private sector for talented employees. (March 12 Federal Times)

May 22 – DoD and OPM issue proposed regulations, as directed by Congress, revising NSPS. The Proposed regulation governs compensation, classification and performance management under NSPS. Specifically (Public Law 110-181) would:

- Bring NSPS under government-wide labor-management relations rues
- Excludes Federal Wage System (blue collar) employees from coverage under NSPS
- Requires DoD to collectively bargain procedures and appropriate arrangements for brining DoD bargaining unit employees under NSPS prior to conversion of these employees
- Brings NSPS under government-wide rules for disciplinary actions and employee appeals of adverse actions
- Brings NSPS under government-wide rules for workforce shaping (reduction in force, furlough, and transfer of function)
- Requires that this rule be considered a major rule for the purposes of section 801 of title 5, USC, with advance Congressional notification for OPM/DoD jointly-prescribed NSPS regulations
- Gives these rules the status of government-wide rules for the purpose of collective bargaining under chapter 71 when these rules are uniformly applicable to all organizational of functional units included in NSPS.

May 27-30 – Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Colombia holds a series of meetings in Hawaii to discuss recent proposals to phase-out non-foreign COLA and phase-in locality pay for federal employees in Hawaii, Alaska and the US territories.

- May 29 Bradley Bunn, PEO NSPS, participates in Panel I to discuss the effects of the COLA changes on NSPS (See testimony May 29, 2008 "Non-foreign Cost of Living Allowance")

Appendix A

Jul 22 – Senate Homeland Security and Governmental Affairs Committee: Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Colombia meet: "Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government."

- OPM Director Linda M. Springer testified on the positive impact of pay-for-performance in the federal government.
- PEO-NSPS Bunn testified that NSPS is working and that the DoD is seeing a "powerful return on investment."
- John Gage, AFGE, testified.

Sep – GAO-08-773 released and concludes that employees are generally not positive about NSPS: "employees who had the most experience under NSPS showed a negative movement in their perceptions" (40% in 2006 were positive, 23 % in 2007).

Sep 16 – Presidential Candidate Barack Obama responds to letter from Gregory Junemann (International Federation of Professional and Technical Engineers).

- Obama largely agrees with Junemann's criticisms of NSPS and concludes that if/when elected President he will "substantially revise these NSPS regulations, and strongly consider a complete repeal."

Sep 26 – DoD releases final NSPS regulations, published in the Sept. 26 Federal Register. The core features of the personnel system remain intact, but regulations conform to the NDAA FY2008.

Oct 9 – OPM final rule on NSPS sent to House: received by House Oversight and Government Reform Committee.

Oct 14 – GAO memo to Senators Lieberman, Susan M. Collins, Carl Levin, John McCain, Reps Henry Waxman, Thomas Davis III, Ike Skelton and Duncan Hunter discusses the DoD and OPM final rules of NSPS. NDAA 2008 required that rules implementing NSPS be treated as major rules under the Congressional Review Act. (GAO-09-84R)

Nov – Congressional Budget Office releases, "A Review of the Department of Defense's National Security Personnel System," a report requested by the Chairman of the Subcommittee on Readiness of the House Committee on Armed Services to determine if NSPS has been achieving its goals stated in NDAA FY2004.

Nov – GAO-09-82 released, "Results-Oriented Management: Opportunities Exist for Refining the Oversight and Implementation of the Senior Executive Performance-Based Pay system."

- Concludes that while generally satisfied with OPM's and OMB's oversight, officials at the selected agencies said OPM could strengthen its communication with agencies and executive on how it uses the SES performance appraisal data…further communication from OPM is important."

Dec 3 – DoD and OPM issue a proposed regulation adding subpart E, staffing and Employment to the NSPS regulation published in the Federal Register on Sept 26, 2008.

Dec 19 – "To increase the efficiency in filling civilian vacancies, effective Jan 1, selecting officials will have 45 days instead of 90 to choose the best-qualified candidate… The 90-day rule was put in place in June 2007 to ease the transition into the NSPS. A review of policy showed managers were more comfortable with the system and could make the decision in 45 days or less…hiring officials also are encouraged to submit a personnel action as soon as they are aware there will be a vacancy" (Dec 19, 2008 Policy Update to Make Civilian Hiring Quicker).

Dec 30 – Military personnel and civilian employees under both the General Schedule and NSPS pay plans are receiving raises. Civilians under the GS system get an across-the-board pay raise of 2.9 percent in 2009. Civilians under NSPS will see an increase of 1.74 percent and can earn additional performance-based salary increases

through the NSPS "pay pool" process. All civilian employees rate a locality pay that for 2009 range from about 13.86 percent to 34.35 percent of an employee's base pay.

2009

Jan 16 – DoD issues final rules to expand hiring and promotion flexibilities available to managers under NSPS. The rules are published in the January 16 Federal Register.

Jan 20 – President Barack Obama sworn into office. Memo issued from White House freezing all programs from previous Administration whose regulations have either not been published or not been implemented until the Administration could review each policy.

Feb 11 – Letter from Congressmen Skelton and Ortiz to Secretary Gates stressing that NSPS be frozen until further review by the Administration and Congress.

Feb 11 – OPM report released. Concluded that while DoD laid a strong foundation for NSPS implementation it was still unpopular among employees and cause mistrust between supervisors and employees.

March 16 – Deputy Secretary of Defense Lynn announces that DoD and OPM will initiate a complete and joint review of NSPS.

April 3 – Letter from eight Democratic Congressional leaders to OPM Director Orszag urging that the Administration freeze *all* pay-for-performance programs across the Federal government.

May 14 – OPM Director John Berry announces that the Defense Business Board was asked to form a task group to review NSPS.

May 29 – Orszag responds to Congressional letter and says that the Administration does not feel that it is necessary to freeze all pay-for-performance programs across the government. The Administration Administration "will not support any pay system that is unfair or has the effect of suppressing wages or discriminating against employees."

June – Representative Carol Shea-Porter introduced amendment to the NDAA FY 2010 that moved towards repealing NSPS authorization.

August 25 – Task Group releases report with seven recommendations for the Department to reconstruct NSPS.

September – Department announces that *all* employees, regardless of pay schedule, will receive same salary adjustments provided for GS employees.

Oct 7 – Conference report released on final legislation for NDAA FY 2010 calling for the repeal of the law that authorized NSPS and mandating all employees who had been converted to NSPS to be reconverted to the GS by January 1, 2012.

Oct 28 – President Obama signs NDAA FY 2010 and sets six month timetable for DoD to plan how to revert more than 200,000 NSPS employees to the GS system by 2012.

Appendix B

March 9, 2004 Letter from Director James to Secretary Rumsfeld

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, DC 20415-1000

OFFICE OF THE DIRECTOR

March 9, 2004

The Honorable Donald H. Rumsfeld
Secretary of Defense
The Pentagon
Washington, DC 20301-1155

Dear Mr. Secretary:

On February 25, 2004, we received the proposed pay and staffing components of the National Security Personnel System (NSPS) for Office of Personnel Management (OPM) review. We were asked to complete that review and provide comments by March 9, 2004. I know how critical this effort is to you and the Department, and I want to ensure that we in OPM do our part as members of the NSPS team. My staff has no higher priority, and in an effort to provide you with as much support as we could within that limited time frame, I have attached an initial set of detailed policy and technical comments based upon our preliminary analysis of the proposal. As we continue to work together in this historic endeavor, we will be providing additional analysis, guidance, comments, and recommendations.

I trust that you can appreciate that since this is our first opportunity to, in any way, review the Department's concepts or proposal, our staff experts have identified a broad range of legal, policy, and technical issues that need to be addressed. In addition, we have a number of concerns about the impact of the proposal on other Federal agencies, particularly the Department of Homeland Security (DHS). Many of these issues have profound tactical and strategic implications for the Department of Defense (DoD), OPM, and the Administration, and I would like to call the most critical of them to your immediate attention.

First, the NSPS proposal significantly diminishes veterans' preference, contrary to the express policy of the President, and what I believe to be your intent. For example, the proposal eliminates protection for veterans affected by reduction-in-force (RIF), unless they have the most severe of service-connected disabilities. Compared to current law, it also diminishes hiring preference for even the most severely disabled veterans. Finally, the proposal eliminates every veteran's right to a pre-termination notice and hearing after one year of Federal service; instead, it treats veterans and non-veterans alike, requiring both to have at least three years of service before such rights accrue. In this latter regard, you should know that the Administration struck a similar proposal in the draft regulations initially developed for DHS because it could have been construed as diminishing the protections accorded those who have served our Nation.

Second, the NSPS proposal undermines the Administration's efforts to modernize the Federal civil service, and in particular, the Department of Homeland Security's personnel system. Thus, although the pay and performance management provisions of the proposal do offer some improvements over the law and regulations that govern most Federal

employees, they do not take full advantage of the flexibilities afforded DoD. This is in sharp contrast to the proposed DHS personnel system, and as a result, the NSPS proposal may give congressional and union critics ammunition to pressure DHS to "pull back" on the more far-reaching and innovative elements of its proposed personnel system.

For example, unlike the pay system proposed by Homeland Security, the NSPS proposal remains firmly tied to the General Schedule, a scheme we all know to be outdated and obsolete, and it fails to move the Department to greater occupational and local labor market precision in matching Federal pay to the private sector. In addition, the NSPS proposal continues to require rigid employee performance standards and lengthy improvement periods as the means for dealing with poor performers, and may even grant additional procedural protections in this regard; in comparison, the DHS system dramatically streamlines and simplifies that process, reducing the managerial burden rather than raising it.

Third, while provided to us under separate cover and not part of our attached comments, the Department's labor-management relations proposal also warrants your reconsideration. That proposal was distributed to the Department's unions on February 27, amid much controversy and criticism; it too was developed without any prior OPM involvement or union input, and the unions' negative reaction was both predictable and public. We strongly support the objective of assuring DoD's discretion to act without being burdened by collective bargaining obligations; such discretion is both needed and justified for national security reasons and is similar to that provided by the proposed DHS regulations. However, we believe the proposal may be contrary to law, insofar as it attempts to replace collective bargaining with "consultation" and eliminate collective bargaining agreements altogether. In addition, other elements of the proposal – for example, those dealing with union elections and dues withholding – lack a clear and defensible national security nexus and jeopardize those parts that do.

Finally, perhaps the most important issue raised by the NSPS proposal is a legal one, but that issue also has profound strategic and tactical implications for the future of the system itself. As you know, the law requires that NSPS be established by "regulations jointly prescribed" by the Secretary of Defense and the Director of OPM. I have maintained from the beginning that this means the joint publication of broad, proposed NSPS regulations in the *Federal Register*; the opportunity for the public to review and comment on their content; the involvement of labor unions through the formal collaboration process set forth in the law; and their final issuance as a chapter in the Code of Federal Regulations (CFR). All of these steps can be accomplished within the time frames you have established, and in the end, such an approach gives you far more flexibility and freedom of movement than the one that is currently being pursued by DoD.

Mr. Secretary, this is not a case of form over substance. Failure to execute correctly could undermine everything we are trying to achieve with NSPS. I understand that your staff believes this to be a matter of policy and not simply a legal question. I agree. The attorneys at OMB and OPM have concluded that the language in the law is clear and unambiguous on this point, and so is congressional intent. I believe the merits of the approach I have described are equally compelling. In point of fact, the issuance of broad "enabling" regulations will give you far more internal flexibility as you implement NSPS.

Once those enabling regulations are published in the CFR, you will be in a position to issue as many standardized, detailed internal NSPS implementing directives as and when you see fit, including the document you have provided us for comment – generally *without* further public comment, formal collaboration with unions, or OPM approval.

In contrast, if issued in its present form, the NSPS proposal will be as rigid and inflexible as the system we are trying to transform. Its excessive and unnecessary detail, once locked in regulation, will be extremely difficult to change. By law, each time DoD needs to modify its content in *any* substantive way, it will be required to invoke the statutory union notification and collaboration process, obtain formal OPM approval, and notify Congress. Surely this is not the result you intended; it certainly is not what we envisioned when we fought for NSPS.

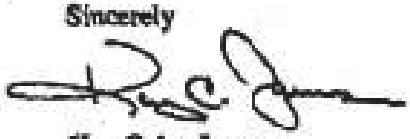
So that our choices are clear in this regard, I have asked my staff to prepar, as an example, a draft set of broad enabling NSPS regulations for our consideration by the end of this week. These draft regulations will be designed to establish the parameters for far more detailed internal DoD directives governing compensation, classification, and performance management – in short, just the sort of highly detailed internal operating directives that you have provided us for comment. Once enabling regulations are issued, you would be free to make those internal directives as uniform or as flexible as you see fit; for example, to the extent that those internal directives need to be tailored to address the unique needs of a particular military department or functional community within DoD, you could do so without triggering the cumbersome procedures established by the statute.

Thus, while the law supports the approach I have advocated, I also believe that it makes the best sense from a tactical and strategic standpoint. It also offers one other important advantage. By starting with broad, enabling regulations, we are in a better position to involve and engage critical stakeholders, especially the Department's civilian employees, in a far more substantive and meaningful way. At the risk of stating the obvious, their input and "buy in" is essential to the successful implementation of NSPS, and presenting the workforce with what amounts to a fait accompli, crafted with only token employee involvement, will just serve to provoke even more resistance from those who are most crucial to its success. I certainly intend to conduct such communications and outreach to better inform OPM's input to DOD. However, I firmly believe it would be far better for DOD and OPM to conduct this process together so that the overall Administration is reaching out.

I have noted the high level of concern already expressed by congressional oversight committees and by affected stakeholders and constituent groups monitoring our progress. It is therefore vital to the Administration and our respective agencies that we develop and execute a joint strategy that maximizes the chances for successful NSPS implementation. While a great deal of emphasis has been placed on implementation deadlines, not enough attention seems to be focused on the fundamental efficacy of the proposal and its acceptance by the Congress and DoD's civilian workforce – particularly if it is your intent to have it apply to 300,000 employees all at once.

Thank you for the opportunity to comment on the NSPS pay, staffing, and labor relations proposals. I look forward to working with you and Secretary England in creating an NSPS that we can all be proud of, and whatever the outcome of the issues I have raised above, you can rest assured that I will do everything within my authority to support you and the Department. In the end, we are one team with the same goal of providing the Department with a personnel system that supports your mission to safeguard the security of our Nation.

Sincerely



Kay Coles James
Director

cc: DOD Deputy Secretary Paul Wolfowitz
Navy Secretary Gordon England
OMB Deputy Director Clay Johnson

Enclosure

Appendix C

"National Security Personnel System Pre-Collaboration Labor Relations System Options" (February 6, 2004)

National Security Personnel System
Pre-Collaboration Labor Relations System Options

Introduction
This document outlines concepts that the Department of Defense (DoD) has developed as part of th beginning of the collaborative process of designing and building a new labor management relations system for DoD civilian employees.

Purpose
Th concepts in this table represent descriptions of potential elements of a new labor relations system that the Department of Defense could adopt. The system concepts described are not necessarily all-inclusive, but represent the major elements of what could be adopted. These proposed ideas d not represent any decision of the Department of Defense on the content or details of a new labor relations system. The Department will consider these options, as well as ideas and concepts provided by the various exclusive representatives prior to drafting the system proposal, which will be provided at a later date to begin the official collaboration proc ss.

Next Steps
As agreed to in our meeting on January 22, 2004, DoD union representatives will provide an outline of their ideas and concepts for a new labor relations system by February 23, 2004, followed by meetings on February 26 and 27, 2004, to discuss these proposals. The Department looks forward to receiving input from the union representatives, and anticipates a meaningful interchange on our respective concepts.

NSPS Labor Relations Outline
February 6, 2004

OUTLINE OF PROPOSED NSPS LABOR RELATIONS SYSTEM CONCEPTS

SYSTEM ELEMENTS	DESCRIPTION OF PROPOSED CONCEPTS
1. Labor Relations Administration (Who will resolve labor-management disputes?) *Guiding principle: Establish an independent third party that provides for an efficient and streamlined resolution of disputes and appropriately balances the Department's national security mission and employee and union rights.*	• Establish a Defense Labor Relations Board (DLRB) to make final published decisions as the independent third party. • DLRB operates with independence and autonomy within the Department. • There will be 5 to 7 members on the DLRB with some members nominated by the unions. • DLRB will also adjudicate employee appeals in the NSPS appeals process.
2. Employee Rights (What rights will bargaining unit employees have?) *Guiding principle: Provide fairness and equity concerning labor organizations' obligations to represent bargaining unit employees who choose not to become dues paying members.*	The NSPS Labor Relations System ensures that employees may organize, bargain collectively as provided for in NSPS, and participate through labor organizations of their own choosing in decisions that affect them, subject to the provisions of NSPS. **PARTICIPATION IN LABOR ORGANIZATIONS** • Establish a fee-for-service arrangement (bargaining unit members not required to join union). • Non-dues paying bargaining unit members must pay a fee-for-service for any union representation provided on individual representation. • Fees would be determined by unions.

NSPS Labor Relations Outline
February 6, 2004

3. Bargaining Units (What are appropriate bargaining units and how are disputes over the make up of bargaining units resolved?) *Guiding principle: Establish criteria for determining appropriate bargaining units that provides for collective bargaining balanced against considerations of agency mission and organizational structure allowing for more effective and efficient dealings between labor and management.*	• Bargaining Unit coverage determinations are based on a standard that the bargaining unit provides for collective bargaining AND efficient and effective administration of the mission of DoD and its Components. • Bargaining units may be described in terms of command structure, geographic location, and/or Component. • When there is a disagreement on the status of the bargaining unit (as it meets the defined standard), the parties may submit to the DLRB to make unit determinations, make determinations on bargaining unit status, and oversee the local election processes using the most efficient method available for the ballot process. • When elections are required for new or existing bargaining units, more than 50% of potential or existing bargaining unit members must participate in a vote with over 50% of actual bargaining unit votes cast in favor of union representation or the bargaining unit. • An outside third party could participate in decisions on a case-by-case basis on sensitive or significant cases and if invited to participate by the DLRB.

Bargaining Units - Continued	Bargaining units may not include the following categories of employees: • management officials; • supervisory employees (including supervisors of military members); • work leaders; • confidential employees; • human resources employees (to include clerical); • employees performing intelligence or counter-intelligence, investigative, and security work that impacts or affects in a significant way DoD physical, personnel, and information security; • Attorneys; • Employees on time limited appointments of 2 years or less; • Students; • Professional employees and employees requiring certification (i.e. DAWIA, accountants, teachers) (unless a majority of the employees vote for inclusion in the unit). • Employees engaged in administering the provisions of NSPS labor relations regulations.
4. Union Dues (What will the process be for collection of union dues?) *Guiding principle: Provide a mechanism that allows for efficient collection of union dues balancing considerations of impact on unit employees and agency resources utilized to collect such dues.*	• Retain current union dues allotment collection procedures (dues allotments through payroll deductions) with the following changes: o Bargaining unit employees may cancel dues at any time after one year has passed since initial dues allotment commenced. o Management will not be held fiscally responsible for administrative errors related to dues withholding. o Disputes between the union and union members concerning dues are not included in any agency complaints procedures.

5. Duty to Bargain (When is management obligated to bargain?) *Guiding principle: Provide for collective bargaining that allows the parties to collaborate by focusing bargaining on issues of significant impact and ensuring that critical agency resources are used in a constructive manner.*	General requirements: Bargaining shall be accomplished in good faith. Both parties must give due consideration to each other's concerns, interests, and perspectives. Under the NSPS labor relations system, collective bargaining means the use of a collaborative, issue-based approach where the parties have a mutual obligation to consult on matters concerning conditions of employment. **Duty to Bargain – Management Initiated Changes** *(When must management bargain on changes to conditions of employment initiated by management?)* • Bargaining is required when management makes changes to conditions of employment that have a significant impact on the bargaining unit. • "Significant" will be clarified in NSPS labor relations regulations. • As a point of information, but not to imply bargaining rights, the exclusive representative will be informed of changes to conditions of employment that do not have a significant impact on the bargaining unit. **Duty to Bargain – Union Initiated Changes** *(When must management bargain on changes to conditions of employment proposed by the union and not initiated by management?)* Union initiated bargaining occurs on matters significantly affecting conditions of employment for the bargaining unit and not covered by existing policies or national level bargaining unless conditions are substantially altered by new events or circumstances.

6. Scope of Bargaining (Once a duty to bargain is established, what are the parameters of what must be bargained?) *Guiding principle: Simplifies the parameters of what must be bargained when collective bargaining does occur by eliminating complex and confusing legal standards that have resulted in extensive disputes and litigation.*	**AGENCY REGULATIONS** – Existing and new DoD-wide and Component-wide regulations, policies and other similar issuances will supersede any conflicting provisions of collective bargaining agreements and past practice issues. **MANAGEMENT RIGHTS** – • Management retains the right to take whatever actions may be necessary to carry out the agency mission during emergencies or for national security reasons (not subject to any bargaining obligations prior to implementation). • Management retains existing rights, and also has the right to: a) Determine cash awards & incentives b) Determine performance ratings and payouts c) Set pay d) Determine pay and allowances, and differentials e) Offer VERA/VSIP f) Make FLSA determinations The exercise of these rights is subject only the NSPS bargaining process.

7. Bargaining Processes – At the Level of Recognition (When there is a duty to bargain, what processes are used to meet this obligation?) *Guiding principle: Provide for an efficient and effective local bargaining process that balances the need for a meaningful exchange of interests and concerns and the need to accomplish mission requirements in a timely manner.*	Bargaining is accomplished through a form of local "consultation" with the exclusive representative when there is a "duty to bargain" on a matter and the union has timely requested to bargain. Consultation means a form of collective bargaining that is an issue-based process of collaborating over changes to conditions of employment that have a significant impact on the bargaining unit. Consultation affords the employee representatives and management the opportunity to have a meaningful exchange of views in an attempt to reach agreement on the resulting policy document that is issued. • Immediate implementation for emergencies and national security with post-implementation consultation. • Consultation process in all cases lasts no more than 60 calendar days (notification period and consult period combined). If no agreement is reached after good faith efforts (within the time limits provided), management may implement the proposed changes. • A copy of any resulting policy will be provided to the union(s) with the reasons for taking the final action. • Post-implementation consultation may continue by mutual agreement. • Union will have opportunity to seek a review of procedural compliance with the DLRB. There are no status quo ante remedies.

8. Bargaining Processes – Above the Level of Recognition (National Level Bargaining) (When there is a duty to bargain, what processes are used to meet this obligation?) *Guiding principle: Provide for an efficient and effective national level bargaining process that streamlines bargaining on Department-wide and Component-wide issues and allows for a meaningful exchange of interests and concerns balanced with the need to accomplish mission requirements in a timely manner.*	National level bargaining replaces both the traditional national consultation process and local bargaining on the issue. National level bargaining can occur at the DoD level on DoD policy changes or at the Component level on Component level policy changes not covered at the DoD level. Such bargaining is accomplished through a form of consultation with the exclusive representative when there is a duty to bargain on a matter and the union has timely requested to bargain. National level bargaining will use the same process as the local bargaining.

9. Union Rights and Obligations	UNION PARTICIPATION IN MEETINGS WITH EMPLOYEES
(What rights does the union have when representing bargaining unit employees and what are its obligations when doing so?) *Guiding principle: Provide simplified criteria of union rights and obligations that ensure the union may represent the interests of the bargaining unit balanced with effective and efficient accomplishment of mission requirements.*	**Formal Discussions** *(Addresses exclusive representative's independent right to be present at certain discussions held with bargaining unit employees)* • Retain the "formal discussion" concept with modifications: o Management will invite the union to meetings where it is known in advance that there will be a discussion of changes in general conditions of employment having a significant impact on the bargaining unit. o Any matters concerning any employee complaint(s) will not be considered a formal discussion. There is no automatic right for union attendance at such meetings. However, employees may invite union attendance. o Witness preparation or interviews will not be considered a formal discussion in any formal complaint process. o No portion of the EEO process will be considered a formal discussion in any administrative or statutory process.

Union Rights and Obligations – Cont'd	**Investigations (a.ka. Weingarten rights)** *(Addresses exclusive representative's right to be present at certain investigatory meetings held with bargaining unit employees)* • Employees have a right to union representation during management investigations (and the employee reasonably believes will result in discipline and requests representation); however, management may limit delays to investigations awaiting union representation. This determination is based on geographic location of closest steward, security, health, safety, and integrity of the interview process. • Unions do not have a right to be present during investigations by CID, AFOSI, DCIA, NCIS, DCIS, IG, and similar investigative organizations. • Conflict of interest will be considered a reason for disapproval of a particular union representative's involvement. **UNION ACCESS TO INFORMATION MAINTAINED BY THE AGENCY** The Freedom of Information Act (FOIA) procedures will be used as the method for union requests for information. **UNION DUTY TO REPRESENT BARGAINING UNIT EMPLOYEES** • The union has the right to not represent a bargaining unit member if a fee is required and not received. If a fee is received, the union must fairly and competently represent the member. • Failure by the union to adequately adhere to this provision will not result in the reversal of any management action.

10. Official Time (What duty status is the union representative in while representing an employee or the bargaining unit during duty hours?) *Guiding principle: Simplify the criteria for when official time may be granted minimizing disputes between labor and management on official time use.*	• Official time is available only for designated uses as specified below with advance approval by the appropriate supervisor. • Designated uses for official time: o Consultation (negotiations) o Preparation time for consultation (negotiations) o Presentation of labor disputes o Management initiated meetings o For other situations as requested by the union and approved by management at its sole and exclusive discretion.
11. All Inclusive Complaints Review (What dispute process will management, unions and employees use?) *Guiding principle: Streamline and expedite processing of complaints providing for quicker resolution of labor disputes.*	**Employee Individual Complaints** Under NSPS, employee complaints (currently filed under negotiated grievance procedures, administrative grievance procedures, and the statutory MSPB appeals process) are consolidated into a new NSPS appeals system. **Local Union and Management Complaints** (in lieu of union and management grievances filed under negotiated grievance procedures or unfair labor practice charges). • An alleged violation of NSPS labor relations regulations is appealable to DLRB, with a copy furnished to charged party. • These complaints must be filed within 15 calendar days of the event or the date the charging party became aware of the event.

All Inclusive Complaints Review – Cont'd	In addition - • An alleged violation of the local application of agency policy is reviewable by an appropriate management official as determined by the Component or designee or by an appropriate union official if a management initiated complaint. • The complaint process lasts no more than 30 calendar days (time to file and time to make decisions). This will not preclude extension of individual time limits as necessary. • Decisions in the complaint process are final and binding unless mediation is invoked by either party. • The DLRB may do a limited, substantive review of the original complaint decision. **Bargaining Unit Employee Complaints Against the Union** • A complaint by a bargaining unit member against the exclusive representative will be filed with the DLRB with a copy furnished to charged party. • These complaints must be filed within 15 calendar days of the event or the date the charging party became aware of the event. • Decisions on these complaints will not direct the taking of any action by management. **National Level Management and Union Complaints** • Alleged procedural violations at the national level of the NSPS labor relations regulations are appealable to the DLRB, with a copy furnished to charged party. These complaints must be filed within 15 calendar days of the event or the date the charging party became aware of the event.

MISCELLANEOUS ISSUES *Guiding principle: Establish a collaborative, issue-based approach to bargaining while minimizing disruption to existing policies and collective bargaining agreements when transitioning to the NSPS labor relations system.* *Guiding principle: Provide the parties a single, streamlined labor relations system that is effective and efficient.* *Guiding principle: Ensure that the Department's national security mission is accomplished without disruption due to labor disputes.*	**Term Collective Bargaining Agreements** • Provisions in current term collective bargaining agreements at the time NSPS is implemented will remain in effect until they expire or their current rollover expires except: o When there is a conflict with existing or subsequently issued NSPS, DoD, or Component regulations; or o When there is a conflict with other laws or government-wide regulations. • No term collective bargaining agreement can be renewed, rolled-over or negotiated at the time NSPS is implemented. • Provisions in expired term collective bargaining agreements may continue until they are replaced by policy or regulations issued at any level subject to the consultation process. **Status of 5 USC Chapter 71** The new NSPS labor relations system will not employ any provisions of 5 USC Chapter 71. **Prohibition on Striking** It will be a violation of NSPS regulations for employees or labor unions to call or participate in a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations. It will be a violation of NSPS regulations for a labor union to condone any activity described above by failing to take action to prevent or stop such activity.

Appendix D

AFGE Response to NSPS February 6, 2004 Pre-Collaboration Memo

AFGE

American Federation of Government Employees, AFL-CIO

DOD'S CONCEPTUAL DESTRUCTION OF COLLECTIVE BARGAINING

BACKGROUND ANALYSIS of 2/6/04 DOD Paper "NSPS Pre-Collaboration Labor Relations Systems Options"

Prepared by AFGE Office of Labor Management Relations

On February 6, 2004, the Department of Defense published a list of 'concepts' which, according to them, should govern any DOD labor relations under the National Security Personnel System. The NSPS is a DOD specific personnel system, to be jointly developed by the Secretary of Defense and the Director of the Office of Personnel Management, not bound by the details of many of the basic civil service laws.

The key concept in DOD's paper, reiterated in several different ways, is that there would be no collective bargaining at all.

Existing collective bargaining agreements would remain in place, on paper, until their expiration. However, nothing in those agreements would be binding on management, and management could unilaterally issue regulations superseding provisions of those contracts.

As contracts expire, they would not be renewed or renegotiated.

There would be a mock collective bargaining process in some circumstances. Management would notify the union of planned changes, and then 60 days later management would implement those changes. During the 60 day period management would, at most, consult with the union over these issues.

There would be no jointly controlled grievance procedure, culminating in decisions by independent third-parties.

The system of non-bargaining would be administered by a management controlled board.

The concepts announced by DOD on February 6 do not meet the standard set by the new law. They do not seek to change the a labor relations system to allow it to better address the unique role that the DOD civilian workforce plays in supporting the Department's national security mission, they instead constitute a wholesale repudiation of collective bargaining. they do not allow for a collaborative issue-based approach to labor-management relations; they do not provide for independent third party review of decisions; and they do not ensure that employees may bargain collectively, participating through unions of their own choosing in decisions which affect them. All of these are criteria established by law to govern any labor relations program under the National Security Personnel System.

The concepts were presented long after the January 23, 2004, deadline for DOD and the Office of Personnel Management to have presented concrete proposals for improving the DOD labor relations system and, moreover, OPM was actually barred from participating in developing the concepts.

A more detailed, point-by-point, analysis follows.

1

Appendix D

Pre-Collaboration Labor Relations Options
Under the NSPS

On February 6, DOD sent us what they called its concepts for building a labor relations system for DOD civilian employees. Here is an analysis of those concepts.

1. Labor Relations Administration

The outline proposes creation of a Defense Labor Relations Board (DLRB) to make final published decisions as the independent third party. The DLRB would operate "with independence and autonomy within the Department." 5-7 members would sit, with "some members nominated by the unions." DLRB would also adjudicate employee appeals in the NSPS appeals process.

The proposal does not say how the DLRB members would be appointed, but one can assume that they would all be appointed by the Secretary. No matter how much "independence and autonomy" DOD promises, a body appointed entirely by the Employer is not a neutral third party, for either labor relations or employee appeals.

It is uncertain what is meant by the idea that some members of the DLRB would be "nominated" by the unions. Perhaps the unions would be allowed to submit some suggestions from which the Secretary would select. This would not be a jointly selected panel.

2. Employee Rights

The outline proposes that bargaining unit employees would not be required to join the union. Unions could establish fee-for-service arrangements for nonmember bargaining unit employees who are provided individual representation. Fees would be determined by the unions.

This would be something less than an agency shop, in which all employees must either join the union as regular members, or if they chose not to join, pay an agency fee to the union that is essentially equivalent to Union dues. Under the outline, only those nonmember employees who wanted individual assistance would have to pay a fee. Normally, this would leave the 'free-rider problem,' i.e., the fact that employees benefit from a union-negotiated contract even though they do not financially or otherwise support the union. Under the DOD plan, however, there will be no union contracts, so this problem is less important.

3. Bargaining Units

Bargaining unit coverage determinations would be based on a standard that the unit provides for collective bargaining AND efficient and effective administration of DOD and its components. Units may be described in terms of command structure, geographic location, or component. DLRB would make determinations on bargaining unit status and oversee unit determination election processes, using the most efficient method available for the ballot process. When elections are required for new or existing units, more than 50% of the potential or existing bargaining unit members (the employees eligible to vote) must participate in a vote. To be elected as exclusive representative, the union must receive over 50% or actual bargaining unit votes cast. An outside third party could participate in

decisions on a case-by-case basis on sensitive or significant cases and if invited to participate by the DLRB.

The proposed standard for bargaining units differs from the current standard, perhaps because no bargaining would occur regardless of the definition of bargaining units. The FLRA standard is that there be a clear and identifiable community of interest among the unit employees and that it promotes effective dealings with and efficiency of the operations of the agency. The requirement that more than 50% of the potential or existing employees participate in representation elections would make it next to impossible for unions to gain recognition. The American system for more than 200 years has left citizens free to decide whether or not to participate in elections, and the decisions of those who vote are binding on the entire effected body. If DOD's proposed standard were applied to general elections, no one would be able to govern at the national level, in any state, or in practically any local jurisdiction. This proposed idea is intended to prevent unions from gaining recognition. The participation of any other body (FLRA) in representation matters, at the option of the DLRB is superfluous. It goes without saying that the body charged with conducting representation elections could seek advice or assistance from anyone it chose.

The outline expands the list of employees who are excluded from bargaining units. Among those added would be employees who supervise military members (though not necessarily civilians), work leaders, clerical workers in human resource offices, employees performing intelligence or counter-intelligence, investigative, and security work that "impacts or affects in a significant way DOD physical, personnel, and information security," attorneys, employees on time limited appointments of 2 years or less, and professional employees and those requiring certifications (unless a majority of the employees vote to be included).

This would remove a substantial number of employees that we have historically been able to represent. It would shrink the scope of coverage far beyond that of the private sector and beyond state and local government systems. We currently represent work leaders, clerical human resources employees, attorneys, and temporary employees or those with term appointments of less than 2 years. The proposal concerning security workers goes beyond the current standard, which removes these workers from unit coverage if their work "directly affects national security." The proposal would remove far more workers from the unit than the current standard does. Similarly, the proposal would remove more employees than the current definition of "professional employee" does. For example, skilled craft workers such as electricians or boiler plant operators often need to be "certified." DOD could exclude positions from bargaining units simply because the positions require "certifications."

We note, however, that since the DOD plan does not allow bargaining on behalf of any employees, the question of inclusions and exclusions from bargaining units is not as important as it would be under a genuine labor-management relations system.

4. Union Dues

The outline retains current procedures for dues allotment and collection, with a few changes. Unit employees may cancel dues at any time after one year has passed since dues withholding began. Management may not be held financially responsible for any

administrative errors related to dues withholding. Disputes between the union and union members concerning dues are not included in any agency complaint procedure.

The current system allows employees to cancel their dues withholding only once per year. If the employee misses that date, dues withholding continues until the next year. The change will allow employees to quit the union at any time after one year of membership. It will create uncertainty and additional administrative work for the union. It allows management to escape any liability for its own malfeasance or misfeasance regarding union dues. Numerous court decisions have documented management errors in withholding and forwarding employee dues in a timely manner and have held management responsible to make the union whole. DOD seeks to avoid this responsibility by simply declaring itself innocent.

5. Duty to Bargain

The entire concept of collective bargaining is changed in the outline. It is reduced only to an obligation to "consult." There is no requirement to make any effort to reach agreement. There is no impasse resolution process. Thus, wherever the terms "bargain"or "bargaining" appear in the outline, they should be understood only to mean "consult" and "consultation."

Consultation would be required over management-initiated changes in conditions of employment that have a "significant" impact on the unit. NSPS regulation will set what that means. The Department would still notify the union of any changes that are not "significant," though no consultation would be required.

Unions would be able to initiate consultation over any matters that "significantly" affect working conditions, and are not already covered by existing policies or national level consultation.

This outline makes a mockery of the term "collective bargaining." For more than 100 years collective bargaining has been understood as an obligation on the part of employers and unions to negotiate with the intent of reaching agreement. If the parties are unable to reach agreement on their own, they may use the assistance of mediators. After that if agreement still cannot be reached, in the private sector each side is free to try to force acquiescence with its demands through a strike or lockout. Since strikes are illegal in the Federal Sector, for more than 30 years binding resolution by a neutral independent body has served as a substitute. Here DOD evades Congress's requirement that its new personnel system provide for collective bargaining by simply making that term mean what it wants, not how it is understood everywhere else. The suggestion that this would satisfy the law's requirements is condescending and insulting. This blatant power grab would make Al Capone blush.

As weak as the requirement only to consult is, DOD would dilute it further by determining on its own those subjects over which consultation is required. Whenever the Department tired of discussing a particular issue with the union, it could just change the rules and take that issue off the table. The provision for union-initiated consultation similarly allows management to evade this responsibility by issuing a new policy.

There is no impasse resolution process in this proposal because there is not even a pretense that collective bargaining is supposed to culminate in a contract that the parties agree to follow. In fact, under DOD's definition of collective bargaining, there is no such thing as a contract.

6. Scope of Bargaining

Existing and new DOD-wide and Component-wide regulations, policies, and other similar issuances will supersede any conflicting provisions of collective bargaining agreements and past practices.

Management would retain all the rights contained in Section 7106 of Chapter 71. In addition, management would have the exclusive right to determine cash awards and incentives, determine performance ratings and payouts, set pay, determine pay and allowances and differentials, offer voluntary early retirement or buy-outs, and make Fair Labor Standards Act determinations. The exercise of any management rights is only subject to consultation.

As will be shown below, existing collective bargaining agreements may continue only until their expiration date, and cannot be extended or renegotiated. But, DOD would be able to void any contract provision or past practice that it did not like by simply issuing a new policy to the contrary. This would be contrary to hundreds of years of contract law in the United States.

The management rights clause in Chapter 71 is already among the strongest and most restrictive provisions in any labor relations scheme. DOD proposes to expand it further to retain for itself the power to make decisions in pay matters that are currently subject to negotiation. The current management rights clause requires management to negotiate over the procedures to be used in implementing those rights and over any adverse effects on employees from the exercise of those rights. DOD would eliminate such obligations, substituting only a call for consultation. Unions would be unable to try to mitigate the effects on employees and management would be able to run rampant on its workers.

7. Bargaining Process at the Level of Recognition

So-called bargaining would be accomplished through a form of consultation with exclusive representatives on any matter on which DOD management unilaterally decides there is a "duty to bargain," and over which the union has requested to bargain. It would require the parties to have a meaningful exchange of views in an attempt to reach agreement on the resulting policy document that would be issued.

In the event of an emergency or for national security reasons, management would be able to implement and consult afterwards.

In all cases the consultation process would last no more than 60 calendar days. If no agreement is reached after that, management may implement the proposed changes. A copy of the resulting policy would be given to the union, along with the reason for final action.

Unions would be able to seek review of procedural complaints with the DLRB. However, no *status quo ante* remedies may be granted.

In a gambit straight out of Alice in Wonderland, DOD proposes collective bargaining with neither bargaining nor collective bargaining agreements. The outline eliminates the ability to negotiate contracts that are binding and enforceable on both parties. Instead, the employer and the union would consult on what policies the employer would issue, but only if management wishes. The Agency would be free merely to go through the motions of consultation for 60 days and then do whatever it wanted with no recourse for the union.

AFGE is not opposed to delaying bargaining until after implementation when there is a real emergency. However, the DOD outline contains a hole big enough for an Abrams tank since it is free to consider any minor event to concern "national security."

The DLRB would be able to review union charges that the Agency failed to comply with even the limited obligations in the consultation process. However, the only action the Board could take if it determined a violation took place is to tell the Department not to do it again. The cynicism of this proposal is overwhelming.

8. Bargaining Process above the Level of Recognition (National Level Bargaining)

This would replace both the current national consultation process and local bargaining on an issue. National level consultation can occur at the DOD level concerning DOD policy changes or at the Component level on component level policy changes not covered at the DOD level. The process to be used is the same as that for local level consultation.

Here again, the Department or Component would be able to have superficial discussions with the union at the national level for 60 days before taking whatever action it wished. Local managers who would have to implement whatever policies are issued are removed completely from the process. While the union would be free to designate local-level representatives to participate, the process is an empty gesture since management retains the power to do whatever it wishes.

9. Union Rights

The current provisions of Chapter 71 regarding union representation during "formal discussions" with employees would be retained, with several modifications. Management must only invite the union to attend meetings with employees when it is known in advance that there will be a discussion of changes in general working conditions. Any matter concerning an employee complaint will not be considered a "formal discussion" which requires management to invite the union to attend. Employees may invite the union if they wish. Witness preparation or interviews will not be considered formal discussions. No portion of the EEO process will be considered a formal discussion.

The current provisions of Chapter 71 require that management invite the union to be represented in any formal discussion with bargaining unit employees. The provision recognizes the union's obligation to protect the institutional interests of the bargaining unit and to see that management neither takes advantage of an employee or group of employees, nor makes any "side deals" with them that are contrary to the working conditions that apply generally. The outline blatantly attempts to escape the current law and case decisions that found certain management actions violated employees' rights. In the past, management may have initiated a meeting for one purpose and it eventually became a formal discussion. Case decisions held that at that moment, management was required to invite the union to participate. The current law includes discussions of any employee complaint as a "formal discussion." So, when an employee would want to discuss a complaint, the union would be entitled to participate to look after the bargaining unit employees' mutual interests. Case decisions held that witness preparation and interviews and meetings held concerning EEO complaints were all "formal discussions." DOD would simply write its own regulations to eliminate these employee protections.

The right of employees to have union representation during investigatory interviews (the so-called *Weingarten* right) would continue with several modifications. Management would be able to limit the amount of time it would have to wait for a union to provide a representative. This determination would be based on such matters as the geographic location of the closest steward, security, health, safety, and the integrity of the interview process. Unions would not have the right to be present during investigations by the Department's various criminal and security investigative arms or its Inspector General.

Once more, DOD would severely debilitate an important employee protection. The Department would determine for itself who would be the union's representative by choosing the closest steward, regardless of that individual's skills or qualifications or the union's determination of who could best handle that case. The Department also seeks to overturn a decision by the United States Supreme Court that held that any component of the Agency that would interview an employee in an investigation that could result in that employee's being subject to discipline, including criminal investigative organizations or the Inspector General, must afford the employee the right to union representation. Again, DOD arrogantly seeks to rewrite any decision it does not like.

The Freedom of Information Act procedures will be used for union requests for information.

For 70 years it has been recognized that unions are entitled to information maintained by management when it is necessary to support collective bargaining. A large body of case law has developed in both the private sector and the federal sector regarding what information is required and the conditions for providing it. The outline would substitute the provisions of the Freedom of Information Act for these labor relations-specific provisions. The FOIA is intended to provide information to the general public about the actions of the government. Only that information that is in the public interest is required to be divulged. Information that is maintained by the Agency regarding employee discipline, or other working conditions in a particular workplace may not rise to that level of interest to the general public, but is of vital concern to the union seeking to represent employees. This proposal is a thinly-veiled attempt to curtail the information DOD would have to provide to the union.

The union would have the right not to represent any bargaining unit member who is not a member of the union, if that employe does not pay the required fee. If a fee is received, the union must fairly and competently represent the member.

As discussed above, this would apply only to individual cases and not to representing the unit as a whole. As discussed, below, the outline eliminates provisions for a negotiated grievance procedure, so employees would be free to use their own representatives in the DOD complaint process. As such, the outline is no different from the current situation in which unions are free to decline to represent nonmembers in statutory appeals. However, the outline would increase the standard of union representation that must be provided over what has existed for 70 years.

10. Official Time

Official time would be available only for specified uses and only when approved in advance by the appropriate supervisor. Official time could be used for consultation, preparation time for consultation, presentation of labor disputes, management-initiated meetings, and for any other situations as requested by the union and approved by management "at its sole and exclusive discretion."

For more than 40 years the Federal sector labor relations program has allowed union officials to perform representational duties on official time, or time paid for by the government, in recognition of the union's obligation to represent union members and nonmembers alike, and the inability to impose representational fees on nonmembers. The system provided that the parties would determine the uses of official time and the procedures for obtaining it through negotiations. The outline would reserve these decisions "solely and exclusively" to the employer. The result will be a weaker union, unable to properly represent the interests for the bargaining unit.

11. All Inclusive Complaints Review

The outline would consolidate all employee complaints currently filed under negotiated grievance procedures, administrative grievance procedures, and the statutory MSPB appeals process into a new NSPS appeals system. DOD would write the rules for how these appeals would be administered. As discussed above, the DLRB would adjudicate employee appeals.

DOD substitutes a management-dominated complaint review process for processes that had been negotiated by the parties. Instead of final decisions being issued by neutral, independent reviewers, the final decision will be issued by the management-controlled DLRB. The outline would recognize the imperial power of DOD over its employees.

Local union and management complaints that previously had been the subject of negotiated grievance procedures or unfair labor practice charges would be appealable only to the DLRB . Complaints would have to be filed within 15 days of the event or the date the charging party became aware of the event.

The outline does not explain how the complaint process would work. However, the proposal gives the union no rights that would need enforcement and any decisions would be rendered by the management-dominated DLRB. It provides only a pretense of fairness and due process.

Alleged violations of the local application of agency policy are reviewable by the appropriate management official as determined by the Component or by an appropriate union official in the case of a management initiated complaint. The complaint process lasts no more than 30 days, including time to file the complaint and make decisions. Decisions are final and binding unless mediation is invoked by either party. DLRB may do a limited substantive review of the original complaint decision.

Instead of final decisions by neutral parties such as arbitrators or FLRA administrative law judges, management will make interim decisions on union complaints and the union will make interim decisions on management complaints. This is akin to the interim responses to grievances prior to arbitration. They are not "decisions" as that term is understood. DOD proposes that if the union complains that management violated its own policies, management can simply respond, "No," and that will be the final word. The role of mediation and the "limited" review by DLRB are not made clear in the outline. However, the management-controlled DLRB is still not a credible adjudicator.

Currently unfair labor practice charges must be filed within 6 months of the date of the alleged violation. Here the entire complaint and adjudication process is limited to 30 days. The result will be rushed, arbitrary decisions that do not protect the interests of employees represented by the union.

National level union or management complaints alleging procedural violations of the labor relations system are appealable to the DLRB. Complaints would have to be filed within 15 days of the event or the date the charging party became aware of the event.

This severely limits the time to file such allegations from the current 6 months for filing ULP charges. However the outline provides such limited rights and protections to the union that the complaint process for enforcing those rights is practically irrelevant.

12. Miscellaneous Issues

Term collective bargaining agreements in effect at the time NSPS is implemented will remain in effect until they expire or their current rollover expires. However, in any conflict between existing or subsequently issued NSPS, DOD, or component regulations or other laws or government-wide regulations, the contract will be superseded. Once NSPS is implemented, no term collective bargaining agreements may be renewed, rolled-over or negotiated. Provisions in expired term collective bargaining agreements may continue until they are replaced by policy or regulation issued at any level subject to the consultation process.

For more than 100 years labor and management negotiated agreements to set working conditions that were binding and enforceable by the parties. The outline would eliminate that entirely. Existing contracts would have a date-certain on which they would expire and no longer govern the parties. Currently, a contract that is in effect takes precedence over Agency regulations that are issued during its term. The outline reverses this long-standing principle. All management needs to do to evade any provision of a contract during the time it is still in force is issue a new policy to the contrary at the DOD or component level.

The new NSPS labor relations system will not employ any provisions of 5 USC Chapter 71.

Congress allowed DOD to modify the provisions of Chapter 71 to meet its special national security needs. DOD chose to interpret that as a license to throw out the entire labor relations system, regardless of its effects on national security. There is not even a pretense that scrapping Chapter 71 is necessary. The outline proposes doing it just because DOD thinks it can.

It will be a violation of the NSPS labor relations regulations for employees or unions to call or participate in a strike, work stoppage or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with agency operations. It will be a violation for a union to condone any such activity by failing to take action to prevent or stop it.

This is the only provision of the current federal sector labor relations system that was continued intact in the outline. We are not surprised.

Appendix E

Letters from Congress

Congress of the United States
Washington, DC 20515

February 25, 2004

ATTN:
Ted Canelak
3 pp.

The Honorable Donald H. Rumsfeld
Secretary of Defense
U.S. Department of Defense
The Pentagon
Washington, DC 20301

Dear Mr. Secretary:

We are writing to express our serious concerns about a proposal for a new Department of Defense (DoD) labor relations system that was distributed to congressional staff on February 6, 2004.

The National Defense Authorization Act (NDAA), which was passed by Congress last November, provided that DoD could not waive Chapter 71 of Title 5 of the U.S. Code.[1] Chapter 71 sets forth the right of employees to join unions, the right of unions to bargain collectively, the duty of unions and management to bargain in good faith, the determination of appropriate bargaining units, and protections against unfair labor practices. However, the NDAA also allowed DoD to set up a new labor system for the next six years "to address the unique role that the Department's civilian workforce plays in supporting the Department's national security mission."[2] Through these two provisions of the NDAA, Congress intended that DoD protect the basic employee rights contained in Chapter 71, yet allowed DoD to modify the procedures for resolving labor-management disputes for the next six years. However, any such modifications would have to be consistent with Chapter 71 in furtherance of the Department's "national security mission."

Notwithstanding Congress' desire to balance employee rights and DoD's need for flexibility, we believe the recent DoD proposal abrogates the essential principles of Chapter 71 and goes well beyond what Congress intended in the NDAA. The DoD proposal effectively eliminates collective bargaining by providing only perfunctory "consultation" followed by unilateral implementation. This is not good-faith collective bargaining. It is noteworthy that the DoD proposal states that the new labor relations system "will not employ any provisions of 5 USC Chapter 71."

The details of the DoD proposal contain wholesale changes to the current federal employee labor relations system, including changes to internal union procedures, which have no relation to the Department's national security mission. These changes appear to be aimed solely at making it more difficult for employees to join unions. Such changes undermine the Civil Service Reform Act of 1978, which plainly stated that the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in

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[1] National Defense Authorization Act for Fiscal Year 2004 (P.L. 108-136), § 9902(d)(2).

[2] Id. at § 9902(m) (emphasis added).

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decisions which affect them safeguards the public interest and contributes to the effective conduct of public business.

Among the most significant changes sought by DoD are:

- DoD can unilaterally decide what personnel changes are "significant" enough to be subject to collective bargaining;
- DoD is required to engage only in "consultation" with unions over proposed personnel changes. If DoD and its unions cannot reach agreement, the Department can unilaterally implement the personnel changes and cut off all post-implementation negotiations;
- DoD can unilaterally issue regulations to supersede existing collective bargaining agreements negotiated by the Department and its unions;
- Large numbers of DoD employees — including some clerical employees, some professional employees, attorneys, and term-appointment employees — will be prohibited from joining unions;
- DoD can establish unrealistic requirements for the creation of a new bargaining unit;
- DoD is absolved of all liability should it mishandle union dues withheld from employee paychecks; and
- DoD can interfere in internal union procedures by requiring unions to provide a new fee-for-service arrangement for employees who do not wish to join unions but would like union representation on specific matters.

We believe the DoD proposal is also contrary to Congress' intent in other respects. The NDAA stated that the establishment of the new DoD personnel system must be "prescribed jointly with the Director" of the Office of Personnel Management (OPM). Based on our conversations with OPM officials, we understand that OPM has played only a minor role in the formulation of this proposal.

In addition, the NDAA states that any labor relations system developed by DoD must provide for "independent third party review of decisions."[3] Under the DoD proposal, this review would be provided by a newly created Defense Labor Relations Board (DLRB) that would be located within the Department and whose members would be selected solely by the Secretary. We do not see how such a system could possibly be "independent."

[3] Id. at § 9902(m)(6).

We understand that the proposal provided to congressional staff is only an initial proposal and may be modified after consultations with employee groups. However, we strongly urge the Department to withdraw this proposal immediately and submit a new proposal that is consistent with the intent of Congress.

Sincerely,

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform
U.S. House of Representatives

Joseph I. Lieberman
Ranking Minority Member
Committee on Governmental Affairs
U.S. Senate

Ike Skelton
Ranking Minority Member
Committee on Armed Services
U.S. House of Representatives

Carl Levin
Ranking Minority Member
Committee on Armed Services
U.S. Senate

Richard J. Durbin
Ranking Minority Member
Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia
Committee on Governmental Affairs
U.S. Senate

Daniel K. Akaka
Ranking Minority Member
Subcommittee on Financial Management, the Budget, and International Security
Committee on Governmental Affairs
U.S. Senate

Danny K. Davis
Ranking Minority Member
Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
U.S. House of Representatives

CHRIS VAN HOLLEN
8TH DISTRICT, MARYLAND

COMMITTEE ON
EDUCATION AND THE WORKFORCE

COMMITTEE ON GOVERNMENT REFORM

Congress of the United States
House of Representatives
Washington, DC 20515

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www.house.gov/vanhollen

March 29, 2004

The Honorable Donald H. Rumsfeld
Secretary
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Secretary Rumsfeld:

We are writing to express our serious concerns about the proposal for a new Department of Defense (DoD) labor relations system that has been distributed to congressional staff and employee groups.

In the National Defense Authorization Act (NDAA), which was enacted last November, the Department was authorized to modify the procedures for resolving labor-management disputes for the next six years. However, Congress stated that any new procedures would have to protect fundamental labor rights, such as the right of employees to join unions, the right of unions to bargain collectively, and the duty of unions and management to bargain in good faith. Congress also stated that the current labor relations system could be modified only in furtherance of the Department's "national security mission."[1]

In hearings that preceded the passage of the NDAA, DoD officials repeatedly stated that they were not trying to eliminate collective bargaining rights.[2] A majority of House members from both parties voted for the bill with the assurance that fundamental labor rights would be protected. Thus, we were very troubled to learn that DoD has submitted a proposal for a new labor relations system that abrogates these rights and goes well beyond what Congress intended in the NDAA.

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[1] National Defense Authorization Act (NDAA) for Fiscal Year 2004 (P.L. 108-136), § 9902(m)(1).

[2] Testimony of Deputy Secretary of Defense Paul Wolfowitz before the House Government Reform Committee (May 6, 2003) ("My understanding is that collective bargaining will still be an essential part of the process"); Testimony of Undersecretary of Defense David Chu before the House Subcommittee on Civil Service and Agency Organization (Apr. 29, 2003) ("And there's no proposal here to -- for anyone to lose his or her collective bargaining rights").

Under this proposal, good-faith collective bargaining would be virtually eliminated and replaced by "consultation" with unions over proposed personnel changes. DoD could unilaterally decide what personnel changes are "significant" enough to be subject to collective bargaining. If DoD and its unions could not reach agreement, the Department could unilaterally implement the personnel changes and cut off all post-implementation negotiations. Moreover, DoD could unilaterally issue regulations to supersede existing collective bargaining agreements negotiated by the Department and its unions.

To the extent that any collective bargaining is permitted under the new labor relations system, labor-management disputes would be resolved by a newly created Defense Labor Relations Board (DLRB). This board would be located within the Department, with its members selected by the Secretary. We do not believe such a system satisfies the NDAA requirement that any labor relations system developed by DoD must provide for "independent third party review of decisions."[3]

The DoD proposal also contains several provisions aimed solely at reducing union membership. Most notably, the proposal prohibits as many as 200,000 DoD employees – including some clerical employees, some professional employees, attorneys, and term-appointment employees – from joining unions.[4] DoD has provided no justification for how such changes further the Department's national security mission, as is required by the NDAA.

We strongly urge the Department to withdraw this proposal immediately and submit a new proposal that is consistent with the intent of Congress.

Sincerely,

CHRIS VAN HOLLEN
Member of Congress

FRANK WOLF
Member of Congress

[3] NDAA at § 9902(m)(6).

[4] *Union-Busting, DoD Style*, Federal Times (Feb. 16, 2004).

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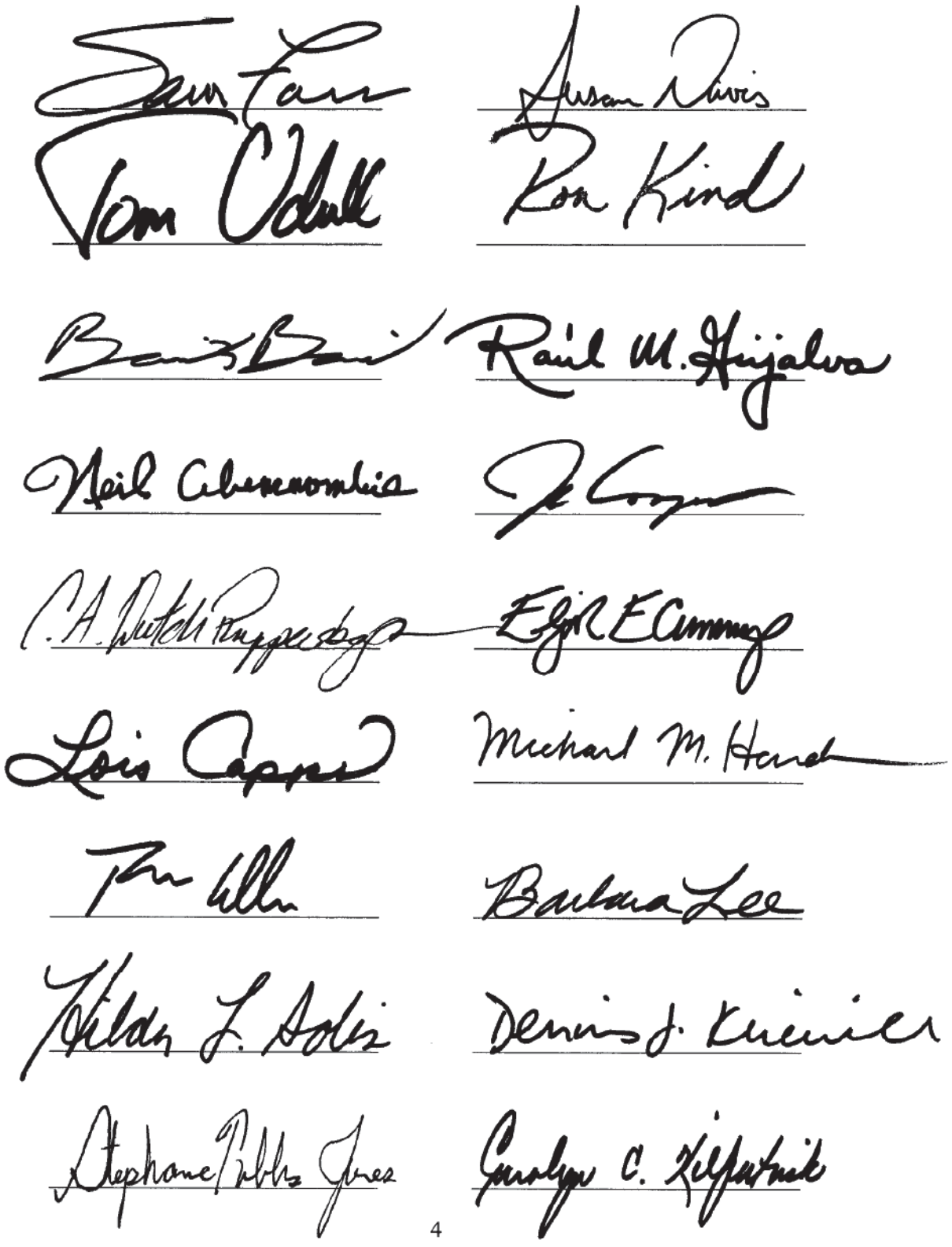

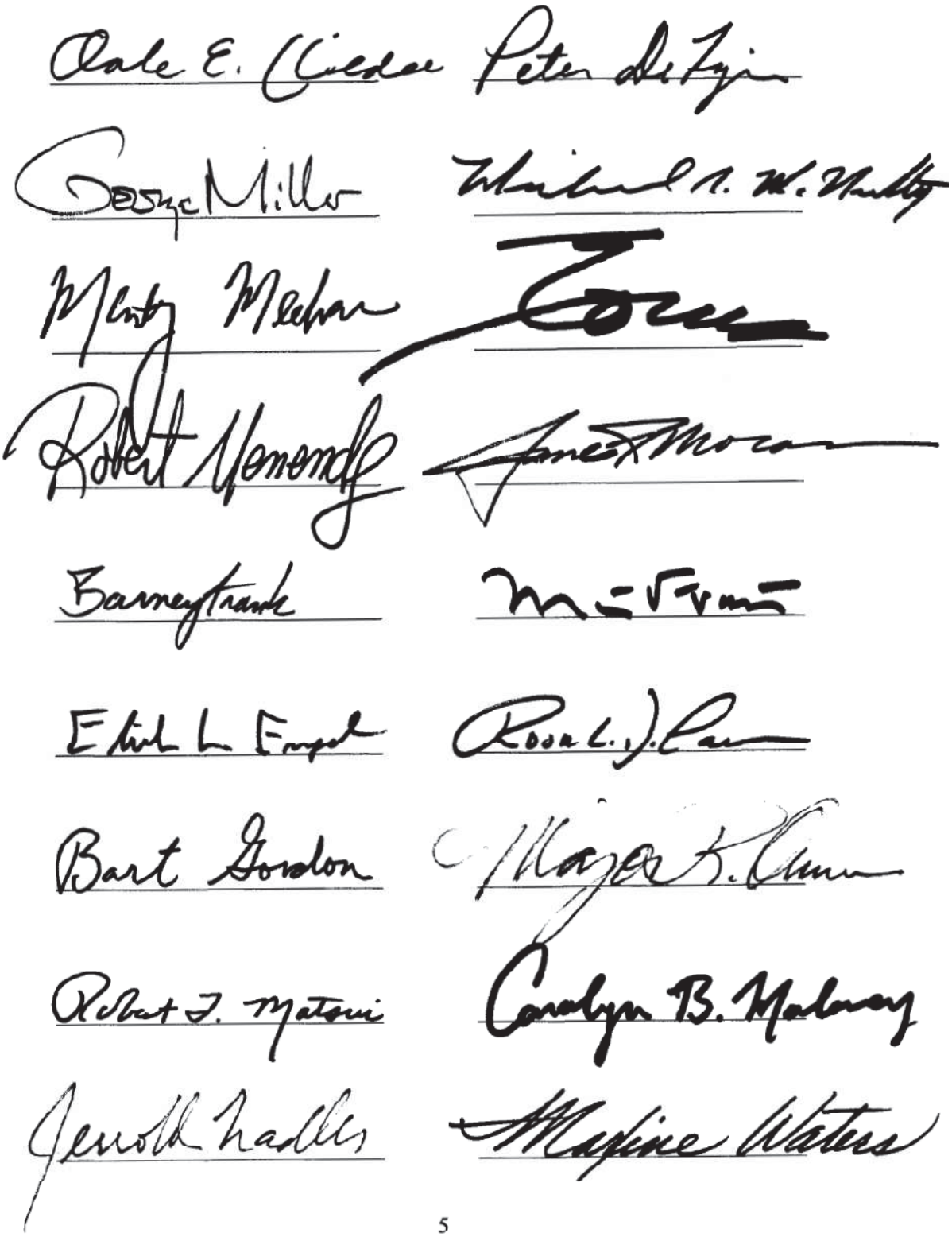

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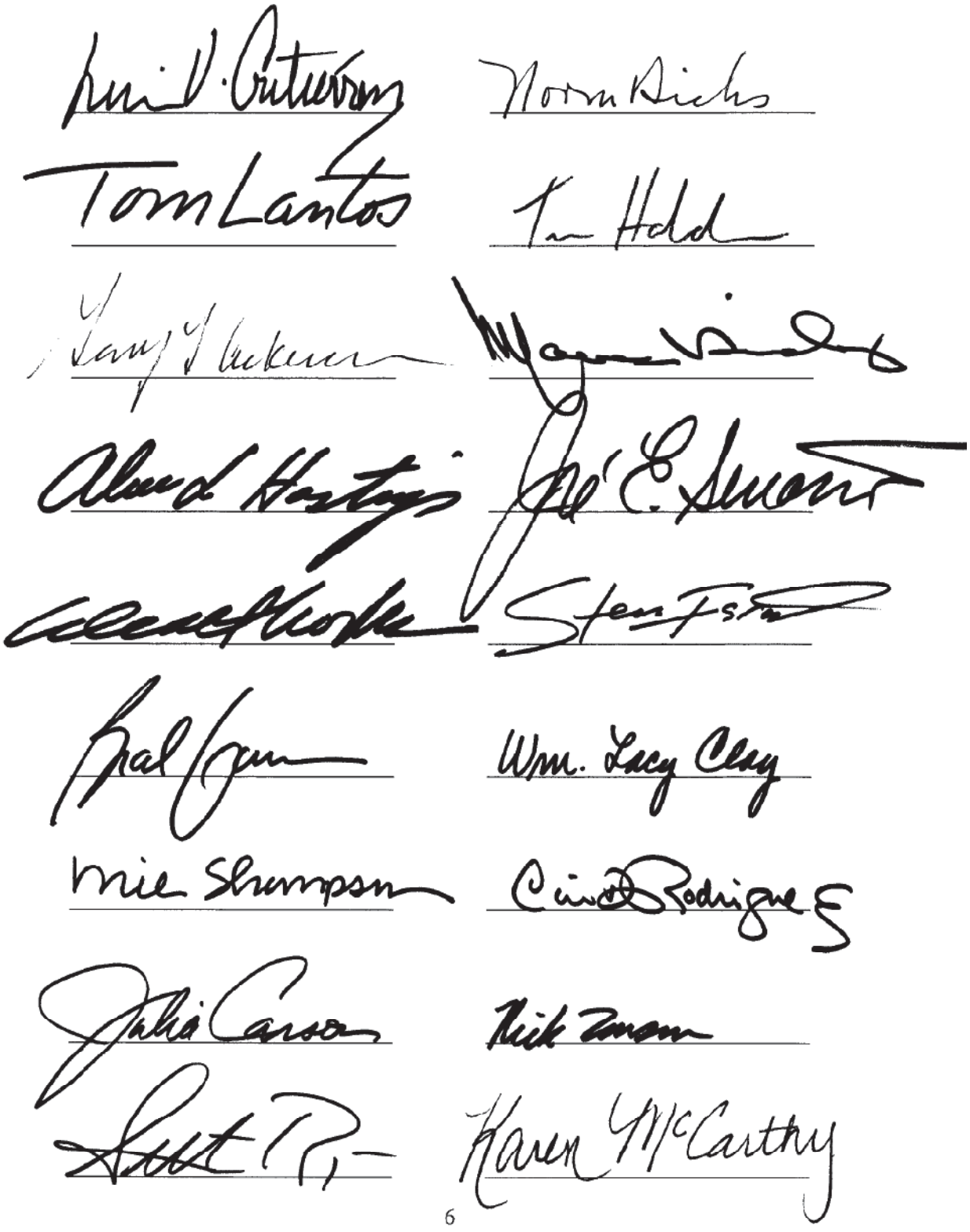

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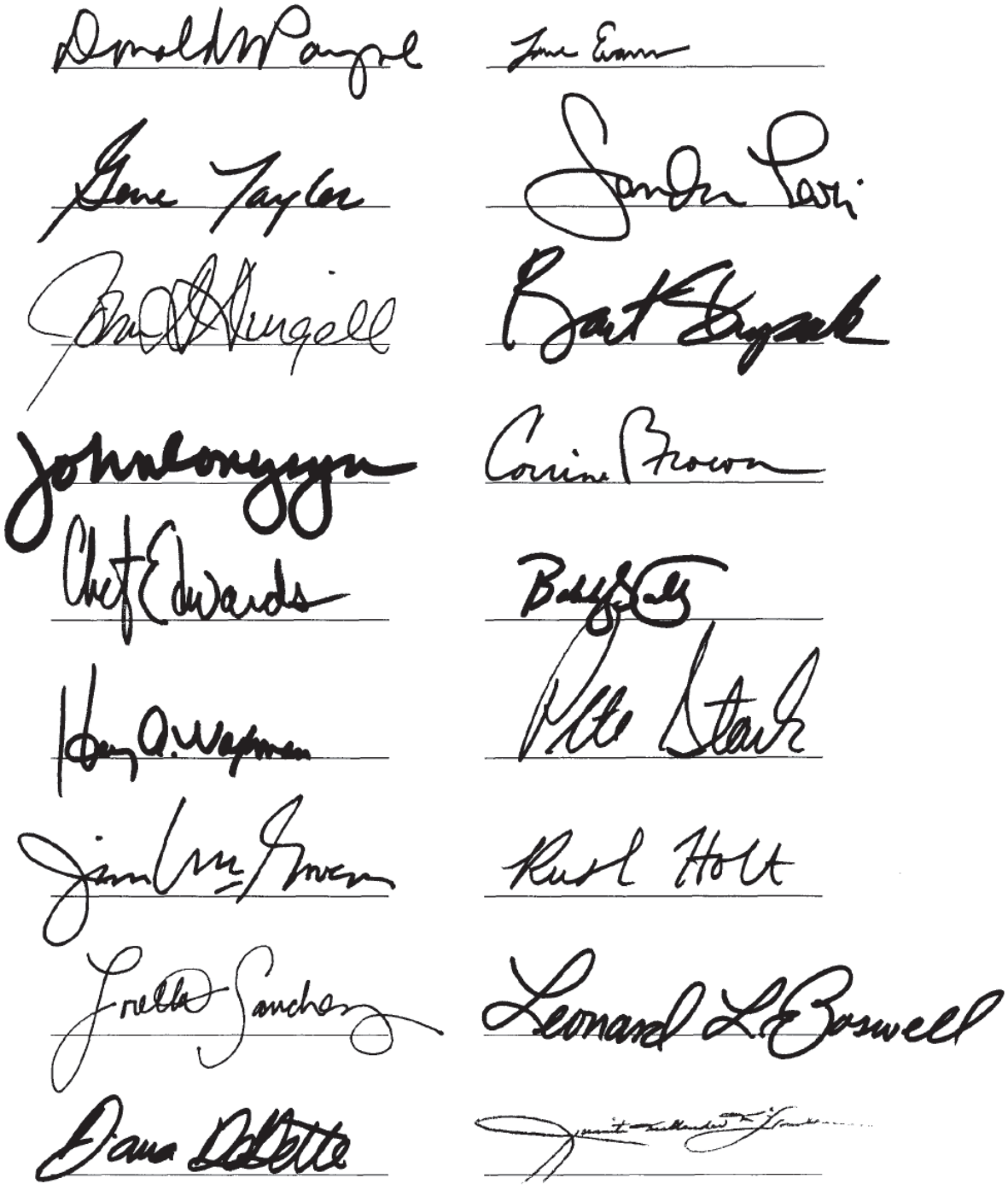

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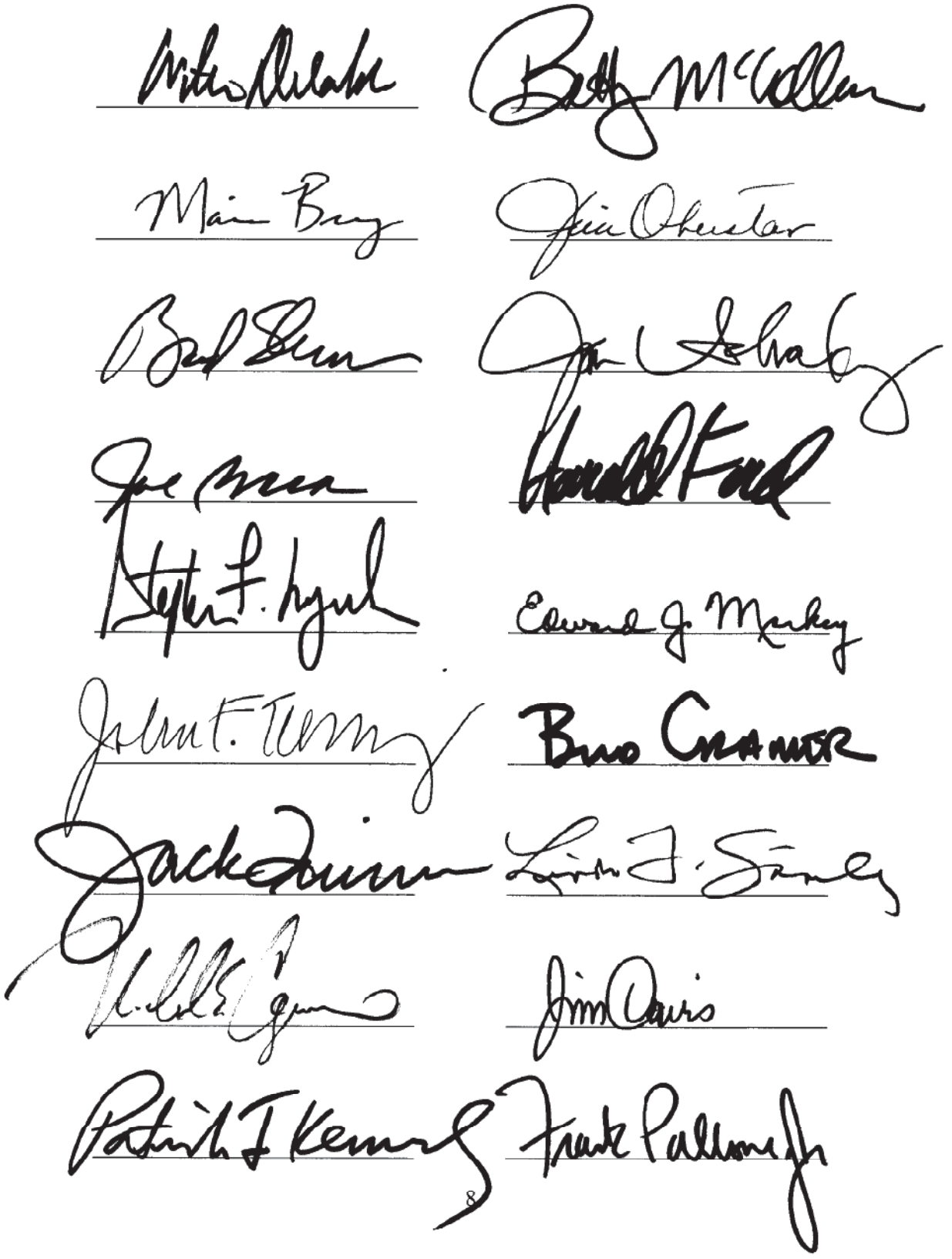

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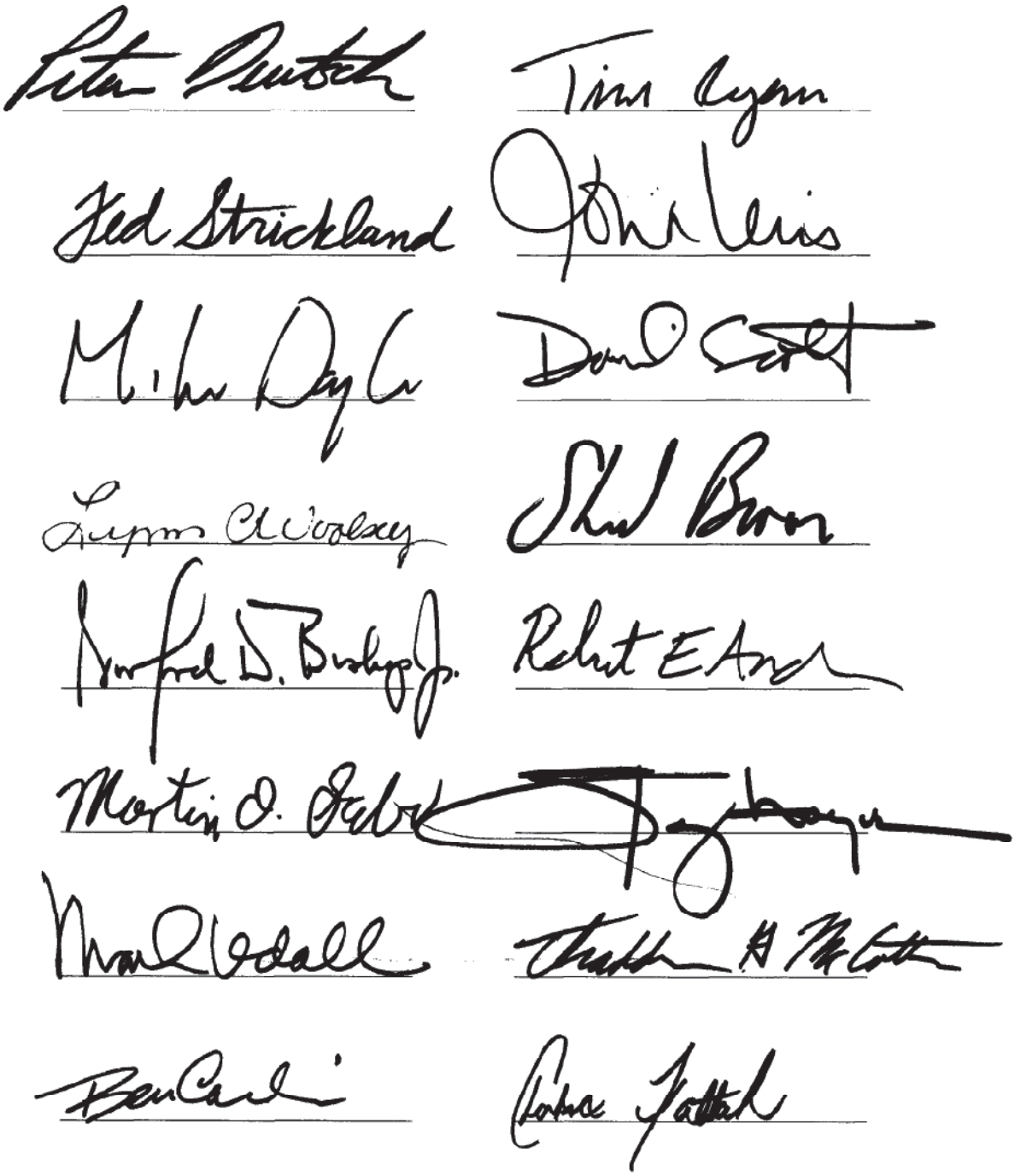

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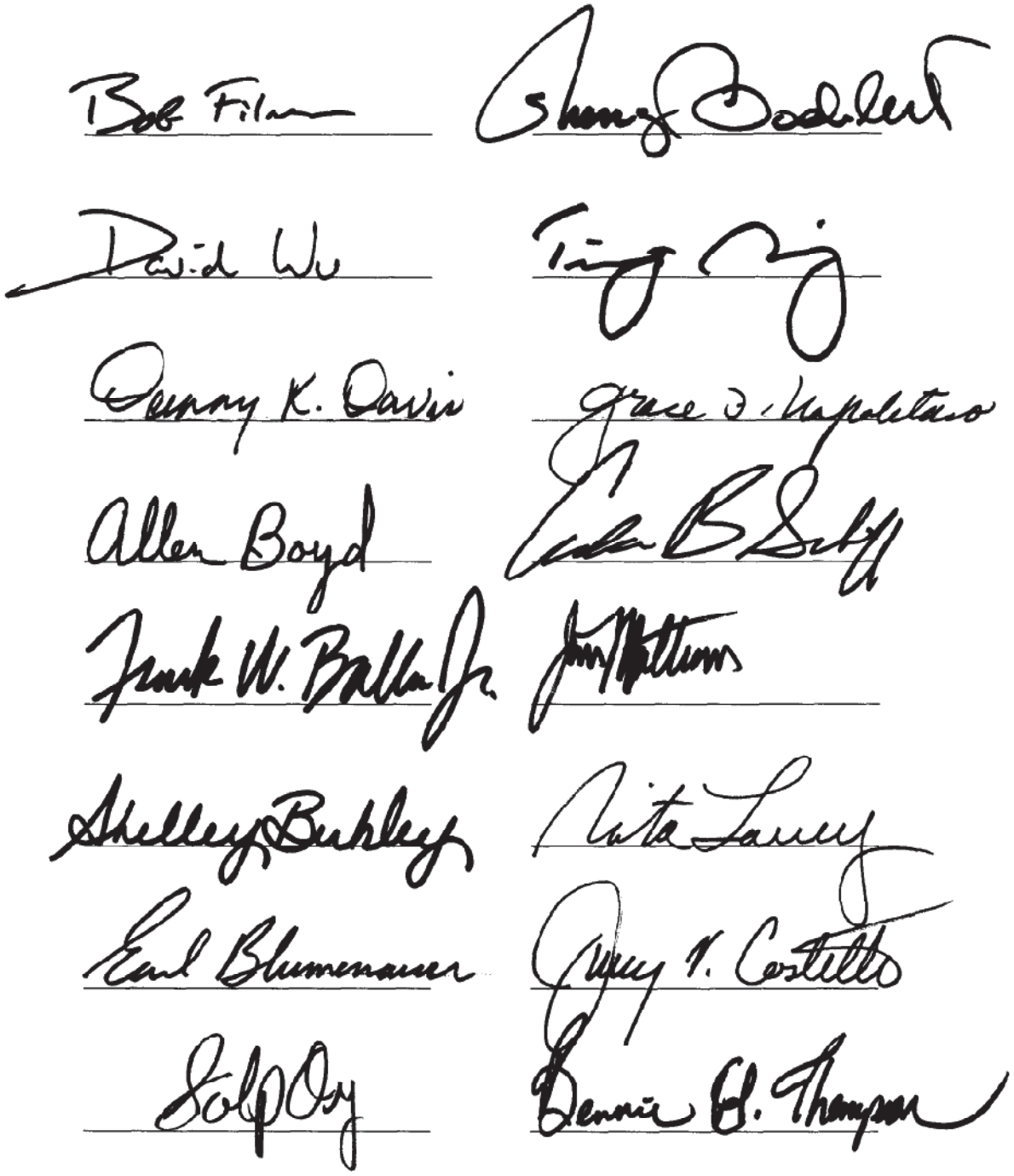

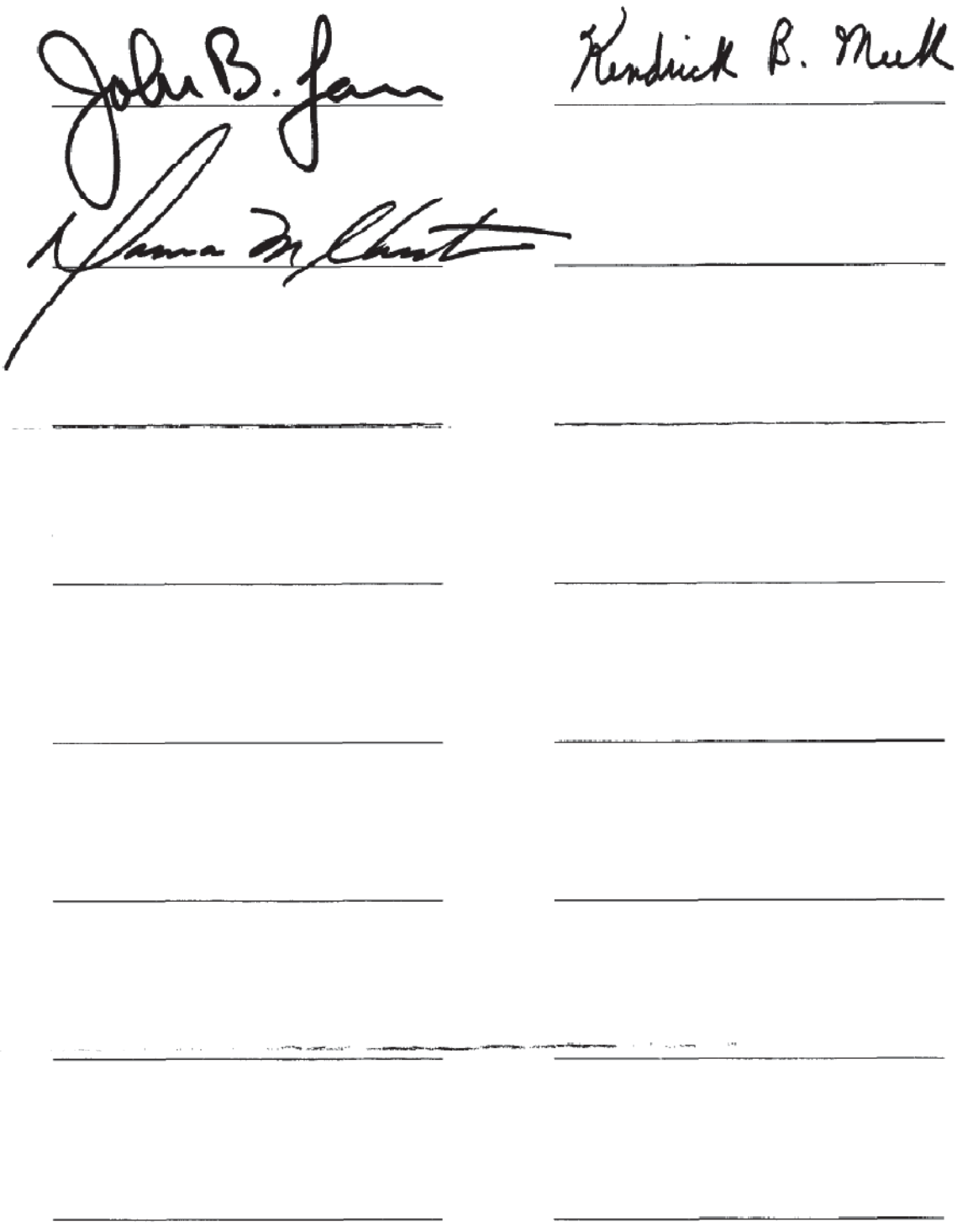

United States Senate

WASHINGTON, DC 20510

April 20, 2004

The Honorable Donald H. Rumsfeld
Secretary
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Secretary Rumsfeld:

We are writing to express our serious concerns about the proposal for a new Department of Defense (DoD) labor relations system that has been distributed to congressional staff and employee groups.

In the National Defense Authorization Act (NDAA), which was enacted last November, the Department was authorized to modify the procedures for resolving labor-management disputes for the next six years. Congress stated, however, that any new procedures would have to protect fundamental labor rights, such as the right of employees to join unions, the right of unions to bargain collectively, and the duty of unions and management to bargain in good faith. Congress also stated that the current labor relations system could be modified only in order to further the Department's "national security mission."[1]

In hearings that preceded the passage of the NDAA, DoD officials repeatedly stated that they were not trying to eliminate collective bargaining rights.[2] Ninety-five members of the U.S. Senate voted for this bill after being assured that fundamental labor rights would be protected. Thus, we were very troubled to learn that DoD has submitted a proposal for a new labor relations system that abrogates these rights and goes well beyond what Congress intended in the NDAA.

Under this proposal, good-faith collective bargaining would be virtually eliminated and replaced by "consultation" with unions over proposed personnel changes. DoD could unilaterally decide what personnel changes are "significant" enough to be subject to collective bargaining. If DoD and its unions could not reach agreement, the Department could unilaterally

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[1] National Defense Authorization Act (NDAA) for Fiscal Year 2004 (P.L. 108-136), § 9902(m)(1).

[2] Testimony of Deputy Secretary of Defense Paul Wolfowitz before the House Government Reform Committee (May 6, 2003) ("My understanding is that collective bargaining will still be an essential part of the process"); Testimony of Undersecretary of Defense David Chu before the House Subcommittee on Civil Service and Agency Organization (Apr. 29, 2003) ("And there's no proposal here to – for anyone to lose his or her collective bargaining rights").

implement the personnel changes and cut off all post-implementation negotiations. Moreover, DoD could unilaterally issue regulations to supersede existing collective bargaining agreements negotiated by the Department and its unions.

To the extent that any collective bargaining is permitted under the new labor relations system, labor-management disputes would be resolved by a newly created Defense Labor Relations Board (DLRB). This board would be located within the Department, with its members selected by the Secretary. We do not believe such a system satisfies the NDAA requirement that any labor relations system developed by DoD must provide for "independent third party review of decisions."[3]

The DoD proposal also contains several provisions aimed solely at reducing union membership. Most notably, the proposal prohibits as many as 200,000 DoD employees – including some clerical employees, some professional employees, attorneys, and term-appointment employees – from joining unions.[4] DoD has provided no justification for how such changes further the Department's national security mission, as is required by the NDAA.

We strongly urge the Department to withdraw this proposal immediately and submit a new proposal that is consistent with the intent of Congress.

Sincerely,

Senator Frank R. Lautenberg

Senator Joseph R. Biden

Senator Ron Wyden

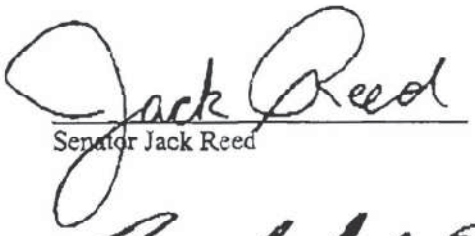
Senator Patty Murray

[3] NDAA at § 9902(m)(6).

[4] *Union-Busting, DoD Style*, Federal Times (Feb. 16, 2004).

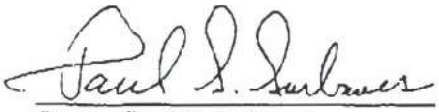
Appendix E

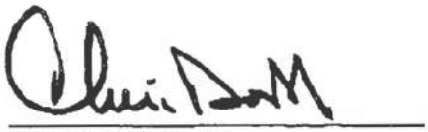

Senator Edward M. Kennedy

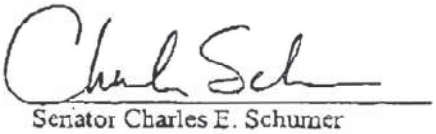

Senator Jack Reed


Senator Jon S. Corzine


Senator Mary L. Landrieu

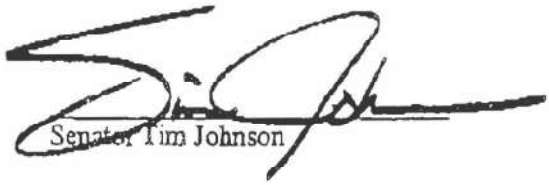

Senator Paul S. Sarbanes


Senator Chris Dodd


Senator Charles E. Schumer


Senator Tom Carper


Senator Barbara Mikulski


Senator Tim Johnson


Senator Maria Cantwell


Senator John Edwards


Senator Russ Feingold

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