INSTILLING AGILITY, FLEXIBILITY AND A CULTURE OF ACHIEVEMENT IN CRITICAL FEDERAL AGENCIES: A REVIEW OF H.R. 1836, THE CIVIL SERVICE AND NATIONAL SECURITY PERSONNEL IMPROVEMENT ACT OF 2003

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 1836

TO MAKE CHANGES TO CERTAIN AREAS OF THE FEDERAL CIVIL SERVICE IN ORDER TO IMPROVE THE FLEXIBILITY AND COMPETITIVENESS OF FEDERAL HUMAN RESOURCES MANAGEMENT

MAY 6, 2003

Serial No. 108–25

Printed for the use of the Committee on Government Reform

Available via the World Wide Web: http://www.gpo.gov/congress/house
http://www.house.gov/reform

U.S. GOVERNMENT PRINTING OFFICE

87–869 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON GOVERNMENT REFORM

TOM DAVIS, Virginia, *Chairman*

DAN BURTON, Indiana
CHRISTOPHER SHAYS, Connecticut
ILEANA ROS-LEHTINEN, Florida
JOHN M. MCHUGH, New York
JOHN L. MICA, Florida
MARK E. SOUDER, Indiana
STEVEN C. LATOURETTE, Ohio
DOUG OSE, California
RON LEWIS, Kentucky
JO ANN DAVIS, Virginia
TODD RUSSELL PLATTS, Pennsylvania
CHRIS CANNON, Utah
ADAM H. PUTNAM, Florida
EDWARD L. SCHROCK, Virginia
JOHN J. DUNCAN, JR., Tennessee
JOHN SULLIVAN, Oklahoma
NATHAN DEAL, Georgia
CANDICE S. MILLER, Michigan
TIM MURPHY, Pennsylvania
MICHAEL R. TURNER, Ohio
JOHN R. CARTER, Texas
WILLIAM J. JANKLOW, South Dakota
MARSHA BLACKBURN, Tennessee

HENRY A. WAXMAN, California
TOM LANTOS, California
MAJOR R. OWENS, New York
EDOLPHUS TOWNS, New York
PAUL E. KANJORSKI, Pennsylvania
CAROLYN B. MALONEY, New York
ELIJAH E. CUMMINGS, Maryland
DENNIS J. KUCINICH, Ohio
DANNY K. DAVIS, Illinois
JOHN F. TIERNEY, Massachusetts
WM. LACY CLAY, Missouri
DIANE E. WATSON, California
STEPHEN F. LYNCH, Massachusetts
CHRIS VAN HOLLEN, Maryland
LINDA T. SANCHEZ, California
C.A. "DUTCH" RUPPERSBERGER, Maryland
ELEANOR HOLMES NORTON, District of Columbia
JIM COOPER, Tennessee
CHRIS BELL, Texas

BERNARD SANDERS, Vermont (Independent)

PETER SIRH, *Staff Director*
MELISSA WOJCIAK, *Deputy Staff Director*
ROB BORDEN, *Parliamentarian*
TERESA AUSTIN, *Chief Clerk*
PHILIP M. SCHILIRO, *Minority Staff Director*

CONTENTS

	Page
Hearing held on May 6, 2003	1
Text of H.R. 1836	6
Statement of:	
Light, Paul, director, Center for Public Services, the Brookings Institution; Bobby Harnage, Sr., national president, American Federation of Government Employees; Colleen Kelley, president, National Treasury Employees Union; and Mildred L. Turner, member, U.S. Department of Agriculture Federal Managers Association	222
O'Keefe, Sean, Administrator, National Aeronautics and Space Administration; and William H. Donaldson, chairman, Securities and Exchange Commission	188
Wolfowitz, Paul, Deputy Secretary, Department of Defense; General Peter Pace, vice chairman of the Joint Chiefs of Staff, Department of Defense; David Chu, Undersecretary of Defense; Admiral Vern Clark, Chief of Naval Operations, USN; and Kay Coles James, Director, Office of Personnel Management	100
Letters, statements, etc., submitted for the record by:	
Davis, Chairman Tom, a Representative in Congress from the State of Virginia, prepared statement of	4
Davis, Hon. Danny K., a Representative in Congress from the State of Illinois, prepared statement of	183
Donaldson, William H., chairman, Securities and Exchange Commission, prepared statement of	208
Harnage, Bobby, Sr., national president, American Federation of Government Employees, prepared statement of	239
Hoyer, Hon. Steny, a Representative in Congress from the State of Maryland, prepared statement of	118
James, Kay Coles, Director, Office of Personnel Management, prepared statement of	111
Kelley, Colleen, president, National Treasury Employees Union, prepared statement of	264
Light, Paul, director, Center for Public Services, the Brookings Institution, prepared statement of	225
Maloney, Hon. Carolyn B., a Representative in Congress from the State of Maryland:	
Article dated May 6, 2003	162
Followup questions and responses	169
Prepared statement of	166
O'Keefe, Sean, Administrator, National Aeronautics and Space Administration, prepared statement of	191
Ruppersberger, Hon. C.A. Dutch, a Representative in Congress from the State of Maryland, prepared statement of	314
Turner, Mildred L., member, U.S. Department of Agriculture Federal Managers Association, prepared statement of	282
Waxman, Hon. Henry A., a Representative in Congress from the State of California, prepared statement of	95
Wolfowitz, Paul, Deputy Secretary, Department of Defense:	
Followup questions and responses	127, 134, 140, 149
Prepared statement of	104

INSTILLING AGILITY, FLEXIBILITY AND A CULTURE OF ACHIEVEMENT IN CRITICAL FEDERAL AGENCIES: A REVIEW OF H.R. 1836, THE CIVIL SERVICE AND NATIONAL SECURITY PERSONNEL IMPROVEMENT ACT OF 2003

TUESDAY, MAY 6, 2003

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Tom Davis (chairman of the committee) presiding.

Present: Representatives Tom Davis of Virginia, Jo Ann Davis of Virginia, Platts, Miller of Michigan, Murphy, Turner of Ohio, Janklow, Blackburn, Waxman, Kanjorski, Maloney, Kucinich, Davis of Illinois, Tierney, Clay, Watson, Van Hollen, Ruppersberger, Norton, and Cooper.

Also present: Representative Hoyer.

Staff present: Peter Sirh, staff director; Melissa Wojciak, deputy staff director; Keith Ausbrook, chief counsel; Ellen Brown, legislative director and senior policy counsel; Robert Borden, counsel/parliamentarian; David Marin, director of communications; Scott Kopple, deputy director of communications; Mason Alinger, Drew Crockett, and Edward Kidd, professional staff members; Teresa Austin, chief clerk; Joshua E. Gillespie, deputy clerk; Jason Chung, legislative assistant; Brien Beattie, staff assistant; Phil Barnett, minority chief counsel; Christopher Lu, minority deputy chief counsel; Tania Shand and Denise Wilson, minority professional staff members; Earley Green, minority chief clerk; Jean Gosa, minority assistant clerk; and Cecelia Morton, minority office manager.

Chairman TOM DAVIS. The committee will come to order. Good morning, and thank you for coming.

The purpose of today's hearing is to discuss H.R. 1836, the Civil Service and National Security Personnel Improvement Act, which includes civil service reform proposals that have been put forward by the Department of Defense, the National Aeronautics and Space Administration, and the Securities and Exchange Commission, several governmentwide civil service provisions and language authorizing the creation of a human capital performance fund.

Last month, Armed Services Committee Chairman Duncan Hunter and I introduced H.R. 1836, the Civil Service and National

Security Personnel Improvement Act, which pulls together these personnel flexibility proposals that have been circulating for some time into one comprehensive civil service reform package.

The purpose of today's discussion is to evaluate this legislation and identify possible areas of concern that we can address in moving forward with this legislation in committee.

As you know, the committee is scheduled to meet again tomorrow morning to consider this legislation, so it is particularly important that Members address their questions and concerns at this time.

One of the most significant elements of this legislation is the National Security Personnel System proposal for the Department of Defense. This proposal authorizes the Secretary of Defense, jointly with the Director of the Office of Personnel Management to establish a human resources management system that is flexible, contemporary, and in conformance with the public employment principles of merit and fitness set forth in Title 5 of the United States Code.

However, the legislation would provide the Secretary of Defense the flexibility to create a system that is not confined by some of the more prescriptive provisions of Federal personnel policy that have been built up over the years. Last year's debate on the creation of a Department of Homeland Security made it clear that the decades old system of hiring, firing, evaluating, promoting, paying and retiring employees was not appropriate for the new Department of 170,000 civilian personnel.

To name just a few examples, it takes an average of 5 months to hire a new Federal employee, 18 months to fire a Federal employee. Pay raises are based on longevity rather than performance, and the protracted collective bargaining process set up in Title 5 can delay crucial action for months, and in some cases years.

On top of all of that, the vast majority of Federal employees themselves recognize that dealing with poor performers is a serious problem in their agencies. If this decades old civil service system is inadequate for a department of 170,000 employees, whose mission is to protect the Nation against attacks, it hardly makes sense to confine a Department of over 600,000 civilian employees, whose mission is to protect the national security of this country, to a civil service system that was put in place in the 1950's.

To make matters worse, it appears that the Department of Defense has determined it's military and contract work forces are more agile, effective and reliable than its 600,000-strong civilian work force. In fact, as of a week ago, there were 8,700 contractor employees supporting Operation Iraqi Freedom, as opposed to 1,700 Federal civilian employees. In other words, contractors represented 83 percent of the work force in Iraq. To me, that is unacceptable.

The legislative proposal that was put forth by the administration to establish a new civil service system for the DOD is mirrored closely on the language that Congress provided to the Department of Homeland Security in establishing its human resources management system. I believe it is ambitious, it is a reasonable proposal for DOD, a Department that has decades worth of experience in personnel and work force policy, and has had a number of trial policies that they have put in place.

In addition to the almost year-long debate in Congress over the same human resources management system proposal during Homeland Security debate last year, this legislation has been the subject of hearings over the past 2 weeks, and Members have raised a number of important issues that we hope to address in today's hearing.

H.R. 1836 also includes several governmentwide civil service reforms, ranging from a modification of the student loan repayment authority to a change in the frequency of cabinet secretary pay periods. The most significant provision in this section, in my opinion, is language from the administration that would correct a longstanding issue regarding overtime pay for Federal employees.

In addition, the legislation includes language that the Financial Services Committee marked up earlier this year and would streamline the hiring process for accountants, economists, and examiners at the Commission.

Hiring has been a longstanding problem at the Commission. And with the growth of the SEC that is mandated by the Sarbanes-Oxley Act, the SEC is faced with hiring close to 1,000 new staffers in the coming years. Both the SEC and the National Treasury Employees Union support this provision. I have asked them both to come before us today to discuss this issue.

The bill also provides a number of personnel flexibilities for National Aeronautics and Space Administration, provided that OPM approves the work force plan developed by the NASA Administrator.

This language would provide the flexibility to NASA in recruiting and retaining a top-notch work force that will help shape the future of space exploration; coordinating with the private sector in advancing new technology and ideas, and in attracting the best and brightest in crafting its Federal work force.

Finally, the legislation includes an authorization of a "human capital performance fund," which is based on the proposal by the President in his fiscal year 2004 budget submission to Congress. The purpose of the funds is to offer Federal managers a tool to "incentivize" agencies' highest performing and most valuable employees. Coming up with new and innovative ways with which to motivate employees will forever be a challenge for a bureaucracy as large as the Federal Government, and I applaud the administration's efforts to attempt to address the issue.

I look forward to a meaningful and substantive debate on the civil service issue that is raised by the proposed legislation. We have assembled before us today an excellent panel of witnesses. I look forward to working with them and the Members of this committee, from both sides as we move forward with this legislation. I welcome all of the witnesses to today's hearing. I look forward to their testimony.

[The prepared statement of Chairman Tom Davis and the text of H.R. 1836 folows:]

TOM DAVIS, VIRGINIA,
CHAIRMAN

DAN BURTON, INDIANA
CHRISTOPHER SHAYS, CONNECTICUT
ILEANA ROS-LEHTINEN, FLORIDA
JOHN M. McHUGH, NEW YORK
JOHN L. MICA, FLORIDA
MARK E. SOUDER, INDIANA
STEVEN C. LaTOURETTE, OHIO
DOUG OSE, CALIFORNIA
RON LEWIS, KENTUCKY
JO ANN DAVIS, VIRGINIA
TODD RUSSELL PLATTS, PENNSYLVANIA
CHRIS CANNON, UTAH
ADAM H. PUTNAM, FLORIDA
EDWARD L. SCHROCK, VIRGINIA
JOHN J. DUNCAN, JR., TENNESSEE
JOHN SULLIVAN, OKLAHOMA
NATHAN DEAL, GEORGIA
CANDICE MILLER, MICHIGAN
TIM MURPHY, PENNSYLVANIA
MICHAEL R. TURNER, OHIO
JOHN R. CARTER, TEXAS
WILLIAM J. JANKLOW, SOUTH DAKOTA
MARSHA BLACKBURN, TENNESSEE

ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
FACSIMILE (202) 225–3974
MINORITY (202) 225–5051
TTY (202) 225–6852

www.house.gov/reform

HENRY A. WAXMAN, CALIFORNIA,
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA
MAJOR R. OWENS, NEW YORK
EDOLPHUS TOWNS, NEW YORK
PAUL E. KANJORSKI, PENNSYLVANIA
CAROLYN B. MALONEY, NEW YORK
ELIJAH E. CUMMINGS, MARYLAND
DENNIS J. KUCINICH, OHIO
DANNY K. DAVIS, ILLINOIS
JOHN F. TIERNEY, MASSACHUSETTS
WM. LACY CLAY, MISSOURI
DIANE E. WATSON, CALIFORNIA
STEPHEN F. LYNCH, MASSACHUSETTS
CHRIS VAN HOLLEN, MARYLAND
LINDA T. SANCHEZ, CALIFORNIA
C.A. DUTCH RUPPERSBERGER, MARYLAND
ELEANOR HOLMES NORTON, DISTRICT OF COLUMBIA
JIM COOPER, TENNESSEE
CHRIS BELL, TEXAS

BERNARD SANDERS, VERMONT,
INDEPENDENT

"Instilling Agility, Flexibility and a Culture of Achievement in Critical Federal Agencies: A Review of HR 1836, the Civil Service and National Security Personnel Improvement Act of 2003"

Opening Statement of Chairman Davis
Committee on Government Reform

May 6, 2003 at 10:00 a.m.
2154 Rayburn House Office Building

Good morning and thank you for coming. The purpose of today's hearing is to discuss H.R. 1836, the "Civil Service and National Security Personnel Improvement Act," which includes: (1) civil service reform proposals that have been put forward for the Department of Defense, the National Aeronautics and Space Administration and the Securities and Exchange Commission, (2) several government-wide civil service provisions, and (3) language authorizing the creation of a human capital performance fund.

Last month, Armed Services Committee Chairman Duncan Hunter and I introduced H.R. 1836, the "Civil Service and National Security Personnel Improvement Act," which pulls together these personnel flexibility proposals that have been circulating for some time into one comprehensive civil service reform package. The purpose of today's discussion is to evaluate this legislation and identify possible areas of concern that we can address in moving forward with this legislation in this Committee. As you know, the Committee is scheduled to meet again tomorrow morning to consider this legislation, so it is particularly important that Members address their questions and concerns at this time.

One of the most significant elements of this legislation is the National Security Personnel System proposal for the Department of Defense. This proposal would authorize the Secretary of Defense, jointly with the Director of the Office of Personnel Management, to establish a human resources management system that is flexible, contemporary and in conformance with the public employment principles of merit and fitness set forth in title 5 of the United States Code. However, the legislation would provide the Secretary of Defense the flexibility to create a system that is not confined by some of the more prescriptive provisions of federal personnel policy that have built up over the years.

Last year's debate on the creation of a Department of Homeland Security made it clear that the decades old system of hiring, firing, evaluating, promoting, paying, and retiring employees was not appropriate for the new Department of 170,000 civilian personnel. To name just a few examples: it takes an average of five months to hire a new federal employee, and 18 months to fire a federal employee; pay raises are based on longevity rather than performance; and the protracted collective bargaining process set up in title 5 can delay crucial action for months, if not years. On top of all that, the vast majority of federal employees themselves recognize that dealing with poor performers is a serious problem in their agencies.

If this decades old civil service system is inadequate for a Department of 170,000 employees whose mission is to protect the Nation against attacks, it hardly makes sense to confine a Department of over 600,000 civilian employees – whose mission is to protect the national security of the United States – to a civil service system that was put in place in the 1950s.

To make matters worse, it appears that the Department of Defense has determined that its military and contract workforces are more agile, effective and reliable than its 600,000-strong civilian workforce. In fact, as of a week ago, there were 8700 contractor employees supporting Operation Iraqi Freedom as opposed to 1700 federal civilian employees. In other words, contractors represented 83% of the workforce in Iraq. That, to me, is unacceptable.

The legislative proposal that was put forth by the administration to establish a new civil service system for the Defense Department is mirrored closely on the language that Congress provided to the Department of Homeland Security in establishing its human resources management system. I believe that this is an ambitious yet reasonable proposal for DOD, a Department that has decades worth of experience in personnel and workforce policy.

In addition to the almost year-long debate in Congress over the same human resources management system proposal during the Homeland Security debate last year, this legislation has been the subject of hearings over the past two weeks, and Members have raised a number of important issues that we hope to address in today's hearing.

H.R. 1836 also includes several government-wide civil service reforms, ranging from a modification of the student loan repayment authority to a change in the frequency of cabinet secretary pay periods. The most significant provision in this section, in my opinion, is language from the administration that would correct a long-standing issue regarding over-time pay for federal employees.

In addition, the legislation includes language that the Financial Services Committee marked up earlier this year that would streamline the hiring process for accountants, economists and examiners at the Commission. Hiring has been a longstanding problem at the Commission, and with the growth of the SEC that is mandated by the Sarbanes-Oxley Act, the SEC is faced with hiring close to 1000 new staff in the coming years. Both the SEC and the National Treasury Employees Union support this provision and I've asked them both to come before us today to discuss this issue.

The bill also provides a number of personnel flexibilities for the National Aeronautics and Space Administration, provided that OPM approves the workforce plan developed by the NASA Administrator. This language would provide flexibility to NASA in: recruiting and retaining a top-notch workforce that will help shape the future of space exploration; coordinating with the private sector in advancing new technologies and ideas; and attracting the best and the brightest in crafting its new federal workforce.

Finally, the legislation includes an authorization of a "human capital performance fund," which is based on the proposal by the President in his FY2004 budget submission to Congress. The purpose of the fund is to offer federal managers a tool to "incentivize" agencies' highest performing and most valuable employees. Coming up with new and innovative ways with which to motivate employees will forever be a challenge for a bureaucracy as large as the federal government, and I applaud the administration's efforts to try to address the issue.

I look forward to a meaningful and substantive debate on the civil service issues raised by this legislation. We have assembled before us today an excellent panel of witnesses, and I look forward to working with them and the Members of this Committee as we move forward with this legislation.

I welcome all of the witnesses to today's hearing and I look forward to their testimony.

I

108TH CONGRESS
1ST SESSION

H. R. 1836

To make changes to certain areas of the Federal civil service in order to improve the flexibility and competitiveness of Federal human resources management.

IN THE HOUSE OF REPRESENTATIVES

APRIL 29, 2003

Mr. TOM DAVIS of Virginia (for himself and Mr. HUNTER) introduced the following bill; which was referred to the Committee on Government Reform, and in addition to the Committees on Armed Services and Science, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

---

A BILL

To make changes to certain areas of the Federal civil service in order to improve the flexibility and competitiveness of Federal human resources management.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Civil Service and National Security Personnel Improvement Act".

1 (b) TABLE OF CONTENTS.—The table of contents for
2 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM

Sec. 101. Short title.
Sec. 102. Department of Defense national security personnel system.

TITLE II—DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL

Sec. 201. Modification of the overtime pay cap.
Sec. 202. Civil Service Retirement System computation for part-time service.
Sec. 203. Military leave for mobilized Federal civilian employees.
Sec. 204. Common occupational and health standards for differential payments as a consequence of exposure to asbestos.
Sec. 205. Increase in annual student loan repayment authority.
Sec. 206. Authorization for cabinet secretaries, secretaries of military departments, and heads of executive agencies to be paid on a biweekly basis.
Sec. 207. Additional classes of individuals eligible to participate in the Federal long-term care insurance program.

TITLE III—PROVISIONS RELATING TO THE SECURITIES AND EXCHANGE COMMISSION AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Subtitle A—Securities and Exchange Commission

Sec. 301. Securities and Exchange Commission.

Subtitle B—National Aeronautics and Space Administration

Sec. 311. Workforce authorities and personnel provisions.
Sec. 312. Effective date.

TITLE IV—HUMAN CAPITAL PERFORMANCE FUND

Sec. 401. Human Capital Performance Fund.

3 # TITLE I—DEPARTMENT OF DE-
4 # FENSE NATIONAL SECURITY
5 # PERSONNEL SYSTEM

6 **SEC. 101. SHORT TITLE.**

7 This title may be cited as the "National Security Per-
8 sonnel System Act".

1 **SEC. 102. DEPARTMENT OF DEFENSE NATIONAL SECURITY**
2 **PERSONNEL SYSTEM.**

3 (a) IN GENERAL.—(1) Subpart I of part III of title
4 5, United States Code, is amended by adding at the end
5 the following new chapter:

6 **"CHAPTER 99—DEPARTMENT OF DEFENSE**
7 **NATIONAL SECURITY PERSONNEL SYSTEM**

"Sec.
"9901. Definitions.
"9902. Establishment of human resources management system.
"9903. Attracting highly qualified experts.
"9904. Employment of older Americans.
"9905. Special pay and benefits for certain employees outside the United States.

8 **"§ 9901. Definitions**

9 "For purposes of this chapter—

10 "(1) the term 'Director' means the Director of
11 the Office of Personnel Management; and

12 "(2) the term 'Secretary' means the Secretary
13 of Defense.

14 **"§ 9902. Establishment of human resources manage-**
15 **ment system**

16 "(a) IN GENERAL.—(1) Notwithstanding any other
17 provision of this part or of part II of this title, the Sec-
18 retary may, in regulations prescribed jointly with the Di-
19 rector, establish, and from time to time adjust, a human
20 resources management system for some or all of the orga-
21 nizational or functional units of the Department of De-

1 fense. If the Secretary certifies that issuance or adjust-
2 ment of a regulation, or the inclusion, exclusion, or modi-
3 fication of a particular provision therein, is essential to
4 the national security, the Secretary may, subject to the
5 direction of the President, waive the requirement in the
6 preceding sentence that the regulation or adjustment be
7 issued jointly with the Director.

8 "(2) Any regulations established pursuant to this
9 chapter shall be established as internal rules of depart-
10 mental procedure, consistent with section 553 of this title.

11 "(b) SYSTEM REQUIREMENTS.—Any system estab-
12 lished under subsection (a) shall—

13 "(1) be flexible;

14 "(2) be contemporary;

15 "(3) not waive, modify, or otherwise affect—

16 "(A) the public employment principles of
17 merit and fitness set forth in section 2301, in-
18 cluding the principles of hiring based on merit,
19 fair treatment without regard to political affili-
20 ation or other nonmerit considerations, equal
21 pay for equal work, and protection of employees
22 against reprisal for whistleblowing;

23 "(B) any provision of section 2302, relat-
24 ing to prohibited personnel practices;

"(C)(i) any provision of law referred to in section 2302(b)(1), (8), and (9); or

"(ii) any provision of law implementing any provision of law referred to in section 2302(b)(1), (8), and (9) by—

"(I) providing for equal employment opportunity through affirmative action; or

"(II) providing any right or remedy available to any employee or applicant for employment in the public service;

"(D) any other provision of this part (as described in subsection (c)); or

"(E) any rule or regulation prescribed under any provision of law referred to in this paragraph;

"(4) ensure that employees may organize, bargain collectively as provided for in this chapter, and participate through labor organizations of their own choosing in decisions which affect them, subject to the provisions of this chapter and any exclusion from coverage or limitation on negotiability established pursuant to law; and

"(5) not be limited by any specific law or authority under this title that is waivable under this chapter or by any provision of this chapter or any

1 rule or regulation prescribed under this title that is
2 waivable under this chapter, except as specifically
3 provided for in this section.
4 "(c) OTHER NONWAIVABLE PROVISIONS.—The other
5 provisions of this part referred to in subsection (b)(3)(D)
6 are (to the extent not otherwise specified in this title)—
7 "(1) subparts A, E, G, and H of this part;
8 "(2) chapters 34, 45, 47, 57, 72, 73, and 79;
9 and
10 "(3) sections 3131, 3132(a), 3305(b), 3309,
11 3310, 3311, 3312, 3313, 3314, 3315, 3316,
12 3317(b), 3318, 3320, 3351, 3352, 3363, 3501,
13 3502(b), and 3504.
14 "(d) LIMITATIONS RELATING TO PAY.—(1) Nothing
15 in this section shall constitute authority to modify the pay
16 of any employee who serves in an Executive Schedule posi-
17 tion under subchapter II of chapter 53 of this title.
18 "(2) Except as provided for in paragraph (1), the
19 total amount in a calendar year of allowances, differen-
20 tials, bonuses, awards, or other similar cash payments
21 paid under this title to any employee who is paid under
22 section 5376 or 5383 of this title or under title 10 or
23 under other comparable pay authority established for pay-
24 ment of Department of Defense senior executive or equiva-
25 lent employees may not exceed the total annual compensa-

1 tion payable to the Vice President under section 104 of
2 title 3.
3 "(e) PROVISIONS TO ENSURE COLLABORATION WITH
4 EMPLOYEE REPRESENTATIVES.—(1) In order to ensure
5 that the authority of this section is exercised in collabora-
6 tion with, and in a manner that ensures the participation
7 of, employee representatives in the planning, development,
8 and implementation of any human resources management
9 system or adjustments to such system under this section,
10 the Secretary and the Director shall provide for the fol-
11 lowing:
12 "(A) The Secretary and the Director shall, with
13 respect to any proposed system or adjustment—
14 "(i) provide to the employee representa-
15 tives representing any employees who might be
16 affected a written description of the proposed
17 system or adjustment (including the reasons
18 why it is considered necessary);
19 "(ii) give such representatives at least 30
20 calendar days (unless extraordinary cir-
21 cumstances require earlier action) to review and
22 make recommendations with respect to the pro-
23 posal; and
24 "(iii) give any recommendations received
25 from such representatives under clause (ii) full

1 and fair consideration in deciding whether or
2 how to proceed with the proposal.
3 "(B) Following receipt of recommendations, if
4 any, from such employee representatives with re-
5 spect to a proposal described in subparagraph (A),
6 the Secretary and the Director shall accept such
7 modifications to the proposal in response to the rec-
8 ommendations as they determine advisable and shall,
9 with respect to any parts of the proposal as to which
10 they have not accepted the recommendations—
11 "(i) notify Congress of those parts of the
12 proposal, together with the recommendations of
13 the employee representatives;
14 "(ii) meet and confer for not less than 30
15 calendar days with the employee representa-
16 tives, in order to attempt to reach agreement on
17 whether or how to proceed with those parts of
18 the proposal; and
19 "(iii) at the Secretary's option, or if re-
20 quested by a majority of the employee rep-
21 resentatives participating, use the services of
22 the Federal Mediation and Conciliation Service
23 during such meet and confer period to facilitate
24 the process of attempting to reach agreement.

1 "(C)(i) Any part of the proposal as to which the
2 representatives do not make a recommendation, or
3 as to which the recommendations are accepted by
4 the Secretary and the Director, may be implemented
5 immediately.

6 "(ii) With respect to any parts of the proposal
7 as to which recommendations have been made but
8 not accepted by the Secretary and the Director, at
9 any time after 30 calendar days have elapsed since
10 the initiation of the congressional notification, con-
11 sultation, and mediation procedures set forth in sub-
12 paragraph (B), if the Secretary determines, in the
13 Secretary's sole and unreviewable discretion, that
14 further consultation and mediation is unlikely to
15 produce agreement, the Secretary may implement
16 any or all of such parts, including any modifications
17 made in response to the recommendations as the
18 Secretary determines advisable.

19 "(iii) The Secretary shall notify Congress
20 promptly of the implementation of any part of the
21 proposal and shall furnish with such notice an expla-
22 nation of the proposal, any changes made to the pro-
23 posal as a result of recommendations from the em-
24 ployee representatives, and of the reasons why im-

1 plementation is appropriate under this subpara-
2 graph.
3 "(D) If a proposal described in subparagraph
4 (A) is implemented, the Secretary and the Director
5 shall—
6 "(i) develop a method for the employee
7 representatives to participate in any further
8 planning or development which might become
9 necessary; and
10 "(ii) give the employee representatives ade-
11 quate access to information to make that par-
12 ticipation productive.
13 "(2) The Secretary may, at the Secretary's discre-
14 tion, engage in any and all collaboration activities de-
15 scribed in this subsection at an organizational level above
16 the level of exclusive recognition.
17 "(3) In the case of any employees who are not within
18 a unit with respect to which a labor organization is ac-
19 corded exclusive recognition, the Secretary and the Direc-
20 tor may develop procedures for representation by any ap-
21 propriate organization which represents a substantial per-
22 centage of those employees or, if none, in such other man-
23 ner as may be appropriate, consistent with the purposes
24 of this subsection.

1 "(4) Any procedures necessary to carry out this sub-
2 section shall be established as internal rules of department
3 procedure which shall not be subject to review.

4 "(f) PROVISIONS REGARDING NATIONAL LEVEL
5 BARGAINING.—(1) Any human resources management
6 system implemented or modified under this chapter may
7 include employees of the Department of Defense from any
8 bargaining unit with respect to which a labor organization
9 has been accorded exclusive recognition under chapter 71
10 of this title.

11 "(2) For any bargaining unit so included under para-
12 graph (1), the Secretary at his sole and exclusive discre-
13 tion may bargain at an organizational level above the level
14 of exclusive recognition. Any such bargaining shall—

15 "(A) be binding on all subordinate bargaining
16 units at the level of recognition and their exclusive
17 representatives, and the Department of Defense and
18 its subcomponents, without regard to levels of rec-
19 ognition;

20 "(B) supersede all other collective bargaining
21 agreements, including collective bargaining agree-
22 ments negotiated with an exclusive representative at
23 the level of recognition, except as otherwise deter-
24 mined by the Secretary;

1 "(C) not be subject to further negotiations for
2 any purpose, including bargaining at the level of rec-
3 ognition, except as provided for by the Secretary;
4 and
5 "(D) except as otherwise specified in this chap-
6 ter, not be subject to review or to statutory third-
7 party dispute resolution procedures outside the De-
8 partment of Defense.
9 "(3) The National Guard Bureau and the Army and
10 Air Force National Guard are excluded from coverage
11 under this subsection.
12 "(4) Any bargaining completed pursuant to this sub-
13 section with a labor organization not otherwise having na-
14 tional consultation rights with the Department of Defense
15 or its subcomponents shall not create any obligation on
16 the Department of Defense or its subcomponents to confer
17 national consultation rights on such a labor organization.
18 "(g) PROVISIONS RELATING TO APPELLATE PROCE-
19 DURES.—(1) It is the sense of Congress that—
20 "(A) employees of the Department of Defense
21 are entitled to fair treatment in any appeals that
22 they bring in decisions relating to their employment;
23 and
24 "(B) in prescribing regulations for any such ap-
25 peals procedures, the Secretary—

1 "(i) should ensure that employees of the
2 Department of Defense are afforded the protec-
3 tions of due process; and
4 "(ii) toward that end, should be required
5 to consult with the Merit Systems Protection
6 Board before issuing any such regulations.
7 "(2) Any regulations under this section that relate
8 to any matters within the purview of chapter 77 of this
9 title shall—
10 "(A) be issued only after consultation with the
11 Merit Systems Protection Board;
12 "(B) ensure the availability of procedures
13 that—
14 "(i) are consistent with requirements of
15 due process; and
16 "(ii) provide, to the maximum extent prac-
17 ticable, for the expeditious handling of any mat-
18 ters involving the Department of Defense; and
19 "(C) modify procedures under chapter 77 only
20 insofar as such modifications are designed to further
21 the fair, efficient, and expeditious resolution of mat-
22 ters involving the employees of the Department of
23 Defense.
24 "(h) PROVISIONS RELATED TO SEPARATION AND RE-
25 TIREMENT INCENTIVES.—(1) The Secretary may establish

1 a program within the Department of Defense under which
2 employees may be eligible for early retirement, offered sep-
3 aration incentive pay to separate from service voluntarily,
4 or both. This authority may be used to reduce the number
5 of personnel employed by the Department of Defense or
6 to restructure the workforce to meet mission objectives
7 without reducing the overall number of personnel. This au-
8 thority is in addition to, and notwithstanding, any other
9 authorities established by law or regulation for such pro-
10 grams.

11 "(2) For purposes of this section, the term 'employee'
12 means an employee of the Department of Defense, serving
13 under an appointment without time limitation, except that
14 such term does not include—

15 "(A) a reemployed annuitant under subchapter
16 III of chapter 83 or chapter 84 of this title, or an-
17 other retirement system for employees of the Fed-
18 eral Government;

19 "(B) an employee having a disability on the
20 basis of which such employee is or would be eligible
21 for disability retirement under any of the retirement
22 systems referred to in paragraph (1); or

23 "(C) for purposes of eligibility for separation
24 incentives under this section, an employee who is in

1 receipt of a decision notice of involuntary separation
2 for misconduct or unacceptable performance.
3 "(3) An employee who is at least 50 years of age and
4 has completed 20 years of service, or has at least 25 years
5 of service, may, pursuant to regulations promulgated
6 under this section, apply and be retired from the Depart-
7 ment of Defense and receive benefits in accordance with
8 chapter 83 or 84 if the employee has been employed con-
9 tinuously within the Department of Defense for more than
10 30 days before the date on which the determination to con-
11 duct a reduction or restructuring within 1 or more Depart-
12 ment of Defense Component is approved pursuant to the
13 program established under subsection (a).
14 "(4)(A) Separation pay shall be paid in a lump sum
15 or in installments and shall be equal to the lesser of—
16 "(i) an amount equal to the amount the em-
17 ployee would be entitled to receive under section
18 5595(c) of this title, if the employee were entitled to
19 payment under such section; or
20 "(ii) $25,000.
21 "(B) Separation pay shall not be a basis for payment,
22 and shall not be included in the computation, of any other
23 type of Government benefit. Separation pay shall not be
24 taken into account for the purpose of determining the
25 amount of any severance pay to which an individual may

1 be entitled under section 5595 of this title, based on any
2 other separation.

3 "(C) Separation pay, if paid in installments, shall
4 cease to be paid upon the recipient's acceptance of employ-
5 ment by the Federal Government, or commencement of
6 work under a personal services contract as described in
7 paragraph (6).

8 "(5)(A) An employee who receives separation pay
9 under such program may not be reemployed by the De-
10 partment of Defense for a 12-month period beginning on
11 the effective date of the employee's separation, unless this
12 prohibition is waived by the Secretary on a case-by-case
13 basis.

14 "(B) An employee who receives separation pay under
15 this section on the basis of a separation occurring on or
16 after the date of the enactment of the Federal Workforce
17 Restructuring Act of 1994 (Public Law 103–236; 108
18 Stat. 111) and accepts employment with the Government
19 of the United States, or who commences work through a
20 personal services contract with the United States within
21 5 years after the date of the separation on which payment
22 of the separation pay is based, shall be required to repay
23 the entire amount of the separation pay to the Depart-
24 ment of Defense. If the employment is with an Executive
25 agency (as defined by section 105 of this title) other than

1 the Department of Defense, the Director may, at the re-
2 quest of the head of that agency, waive the repayment if
3 the individual involved possesses unique abilities and is the
4 only qualified applicant available for the position. If the
5 employment is within the Department of Defense, the Sec-
6 retary may waive the repayment if the individual involved
7 is the only qualified applicant available for the position.
8 If the employment is with an entity in the legislative
9 branch, the head of the entity or the appointing official
10 may waive the repayment if the individual involved pos-
11 sesses unique abilities and is the only qualified applicant
12 available for the position. If the employment is with the
13 judicial branch, the Director of the Administrative Office
14 of the United States Courts may waive the repayment if
15 the individual involved possesses unique abilities and is the
16 only qualified applicant available for the position.

17 "(6) Under this program, early retirement and sepa-
18 ration pay may be offered only pursuant to regulations
19 established by the Secretary, subject to such limitations
20 or conditions as the Secretary may require.

21 "(i) PROVISIONS RELATING TO REEMPLOYMENT.—
22 If annuitant receiving an annuity from the Civil Service
23 Retirement and Disability Fund becomes employed in a
24 position within the Department of Defense, his annuity

1 shall continue. An annuitant so reemployed shall not be
2 considered an employee for purposes of chapter 83 or 84.
3 **"§ 9903. Attracting highly qualified experts**
4 "(a) IN GENERAL.—The Secretary may carry out a
5 program using the authority provided in subsection (b) in
6 order to attract highly qualified experts in needed occupa-
7 tions, as determined by the Secretary.
8 "(b) AUTHORITY.—Under the program, the Sec-
9 retary may—
10 "(1) appoint personnel from outside the civil
11 service and uniformed services (as such terms are
12 defined in section 2101 of this title) to positions in
13 the Department of Defense without regard to any
14 provision of this title governing the appointment of
15 employees to positions in the Department of De-
16 fense;
17 "(2) prescribe the rates of basic pay for posi-
18 tions to which employees are appointed under para-
19 graph (1) at rates not in excess of the maximum
20 rate of basic pay authorized for senior-level positions
21 under section 5376 of this title, as increased by lo-
22 cality-based comparability payments under section
23 5304 of this title, notwithstanding any provision of
24 this title governing the rates of pay or classification
25 of employees in the executive branch; and

1 "(3) pay any employee appointed under para-
2 graph (1) payments in addition to basic pay within
3 the limits applicable to the employee under sub-
4 section (d).

5 "(c) LIMITATION ON TERM OF APPOINTMENT.—(1)
6 Except as provided in paragraph (2), the service of an em-
7 ployee under an appointment made pursuant to this sec-
8 tion may not exceed 5 years.

9 "(2) The Secretary may, in the case of a particular
10 employee, extend the period to which service is limited
11 under paragraph (1) by up to 1 additional year if the Sec-
12 retary determines that such action is necessary to promote
13 the Department of Defense's national security missions.

14 "(d) LIMITATIONS ON ADDITIONAL PAYMENTS.—(1)
15 The total amount of the additional payments paid to an
16 employee under this section for any 12-month period may
17 not exceed the lesser of the following amounts:

18 "(A) $50,000 in fiscal year 2004, which may be
19 adjusted annually thereafter by the Secretary, with
20 a percentage increase equal to one-half of one per-
21 centage point less than the percentage by which the
22 Employment Cost Index, published quarterly by the
23 Bureau of Labor Statistics, for the base quarter of
24 the year before the preceding calendar year exceeds

1 the Employment Cost Index for the base quarter of
2 the second year before the preceding calendar year.
3 "(B) The amount equal to 50 percent of the
4 employee's annual rate of basic pay.
5 For purposes of this paragraph, the term 'base quarter'
6 has the meaning given such term by section 5302(3).
7 "(2) An employee appointed under this section is not
8 eligible for any bonus, monetary award, or other monetary
9 incentive for service except for payments authorized under
10 this section.
11 "(3) Notwithstanding any other provision of this sub-
12 section or of section 5307, no additional payments may
13 be paid to an employee under this section in any calendar
14 year if, or to the extent that, the employee's total annual
15 compensation will exceed the maximum amount of total
16 annual compensation payable at the salary set in accord-
17 ance with section 104 of title 3.
18 "(e) SAVINGS PROVISIONS.—In the event that the
19 Secretary terminates this program, in the case of an em-
20 ployee who, on the day before the termination of the pro-
21 gram, is serving in a position pursuant to an appointment
22 under this section—
23 "(1) the termination of the program does not
24 terminate the employee's employment in that posi-
25 tion before the expiration of the lesser of—

"(A) the period for which the employee was appointed; or

"(B) the period to which the employee's service is limited under subsection (c), including any extension made under this section before the termination of the program; and

"(2) the rate of basic pay prescribed for the position under this section may not be reduced as long as the employee continues to serve in the position without a break in service.

"§ 9904. Employment of older Americans

"(a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary may appoint older Americans into positions in the excepted service for a period not to exceed 2 years, provided that—

"(1) any such appointment shall not result in—

"(A) the displacement of individuals currently employed by the Department of Defense (including partial displacement through reduction of nonovertime hours, wages, or employment benefits); or

"(B) the employment of any individual when any other person is in a reduction-in-force status from the same or substantially equivalent job within the Department of Defense; and

1 "(2) the individual to be appointed is otherwise
2 qualified for the position, as determined by the Sec-
3 retary.
4 "(b) EFFECT ON EXISTING RETIREMENT BENE-
5 FITS.—Notwithstanding any other provision of law, an in-
6 dividual appointed pursuant to subsection (a) who other-
7 wise is receiving an annuity, pension, social security pay-
8 ment, retired pay, or other similar payment shall not have
9 the amount of said annuity, pension, social security, or
10 other similar payment reduced as a result of such employ-
11 ment.
12 "(c) EXTENSION OF APPOINTMENT.—Notwith-
13 standing subsection (a), the Secretary may extend an ap-
14 pointment made pursuant to this section for up to an addi-
15 tional 2 years if the individual employee possesses unique
16 knowledge or abilities that are not otherwise available to
17 the Department of Defense.
18 "(d) DEFINITION.—For purposes of this section, the
19 term 'older American' means any citizen of the United
20 States who is at least 55 years of age.

21 **"§ 9905. Special pay and benefits for certain employ-**
22 **ees outside the United States**

23 "The Secretary may provide to certain civilian em-
24 ployees of the Department of Defense assigned to activi-
25 ties outside the United States as determined by the Sec-

1 retary to be in support of Department of Defense activities
2 abroad hazardous to life or health or so specialized be-
3 cause of security requirements as to be clearly distinguish-
4 able from normal government employment—
5 "(1) allowances and benefits—
6 "(A) comparable to those provided by the
7 Secretary of State to members of the Foreign
8 Service under chapter 9 of title I of the Foreign
9 Service Act of 1980 (Public Law 96–465, 22
10 U.S.C. 4081 et seq.) or any other provision of
11 law; or
12 "(B) comparable to those provided by the
13 Director of Central Intelligence to personnel of
14 the Central Intelligence Agency; and
15 "(2) special retirement accrual benefits and dis-
16 ability in the same manner provided for by the Cen-
17 tral Intelligence Agency Retirement Act (50 U.S.C.
18 2001 et seq.) and in section 18 of the Central Intel-
19 ligence Agency Act of 1949 (50 U.S.C. 403r).".
20 (2) The table of chapters for part III of such title
21 is amended by adding at the end of subpart I the following
22 new item:

"99. Department of Defense National Security Personnel System ..... 9901.".

23 (b) IMPACT ON DEPARTMENT OF DEFENSE CIVILIAN
24 PERSONNEL.—(1) Any exercise of authority under chap-
25 ter 99 of such title (as added by subsection (a)), including

1 under any system established under such chapter, shall
2 be in conformance with the requirements of this sub-
3 section.

4 (2) No other provision of this Act or of any amend-
5 ment made by this Act may be construed or applied in
6 a manner so as to limit, supersede, or otherwise affect the
7 provisions of this section, except to the extent that it does
8 so by specific reference to this section.

9 (c) CONFORMING AMENDMENTS.—(1) Section 6 of
10 the Civil Service Miscellaneous Amendments Act of 1983
11 (Public Law 98–224; 98 Stat. 49), as amended, is re-
12 pealed.

13 (2) Section 342 of the National Defense Authoriza-
14 tion Act for Fiscal Year 1995 (Public Law 103–337; 108
15 Stat. 2721), as amended, is repealed.

16 (3) Section 1101 of the Strom Thurmond National
17 Defense Authorization Act for Fiscal Year 1999 (Public
18 Law 105–261; 112 Stat. 2139), as amended, is repealed.

19 (4) Section 4308 of the National Defense Authoriza-
20 tion Act for Fiscal Year 1996 (Public Law 104–106; 110
21 Stat. 669), as amended, is repealed.

TITLE II—DEPARTMENT OF DEFENSE CIVILIAN PERSONNEL

SEC. 201. MODIFICATION OF THE OVERTIME PAY CAP.

Section 5542(a)(2) of title 5, United States Code, is amended—

(1) by inserting "the greater of" before "one and one-half"; and

(2) by inserting "or the hourly rate of basic pay of the employee" after "law)" the second place it appears.

SEC. 202. CIVIL SERVICE RETIREMENT SYSTEM COMPUTATION FOR PART-TIME SERVICE.

Section 8339(p) of title 5, United States Code, is amended by adding at the end the following new paragraphs:

"(3) In the administration of paragraph (1)—

"(A) subparagraph (A) of such paragraph shall apply with respect to pay for service performed before, on, or after April 7, 1986; and

"(B) subparagraph (B) of such paragraph—

"(i) shall apply with respect to that portion of any annuity which is attributable to service performed on or after April 7, 1986; and

"(ii) shall not apply with respect to that portion of any annuity which is attributable to service performed before April 7, 1986.

"(4) Paragraph (3) shall be effective with respect to any annuity entitlement to which is based on a separation from service occurring on or after the date of the enactment of this paragraph.".

SEC. 203. MILITARY LEAVE FOR MOBILIZED FEDERAL CIVILIAN EMPLOYEES.

(a) IN GENERAL.—Subsection (b) of section 6323 of title 5, United States Code, is amended—

(1) in paragraph (2)—

(A) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and at the end of clause (ii), as so redesignated, by inserting "or"; and

(B) by inserting "(A)" after "(2)"; and

(2) by inserting the following before the text beginning with "is entitled":

"(B) performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10;".

1 (b) EFFECTIVE DATE.—The amendments made by
2 subsection (a) shall apply to military service performed on
3 or after the date of the enactment of this Act.

4 **SEC. 204. COMMON OCCUPATIONAL AND HEALTH STAND-**
5 **ARDS FOR DIFFERENTIAL PAYMENTS AS A**
6 **CONSEQUENCE OF EXPOSURE TO ASBESTOS.**

7 (a) PREVAILING RATE SYSTEMS.—Section
8 5343(c)(4) of title 5, United States Code, is amended by
9 inserting before the semicolon at the end the following:
10 ", and for any hardship or hazard related to asbestos, such
11 differentials shall be determined by applying occupational
12 safety and health standards consistent with the permis-
13 sible exposure limit promulgated by the Secretary of
14 Labor under the Occupational Safety and Health Act of
15 1970".

16 (b) GENERAL SCHEDULE PAY RATES.—Section
17 5545(d) of such title is amended by inserting before the
18 period at the end of the first sentence the following: ",
19 and for any hardship or hazard related to asbestos, such
20 differentials shall be determined by applying occupational
21 safety and health standards consistent with the permis-
22 sible exposure limit promulgated by the Secretary of
23 Labor under the Occupational Safety and Health Act of
24 1970".

(c) APPLICABILITY.—Subject to any vested constitutional property rights, any administrative or judicial determination after the date of enactment of this Act concerning backpay for a differential established under sections 5343(c)(4) or 5545(d) of such title shall be based on occupational safety and health standards described in the amendments made by subsections (a) and (b).

SEC. 205. INCREASE IN ANNUAL STUDENT LOAN REPAYMENT AUTHORITY.

Section 5379(b)(2)(A) of title 5, United States Code, is amended by striking "$6,000" and inserting "$10,000".

SEC. 206. AUTHORIZATION FOR CABINET SECRETARIES, SECRETARIES OF MILITARY DEPARTMENTS, AND HEADS OF EXECUTIVE AGENCIES TO BE PAID ON A BIWEEKLY BASIS.

(a) AUTHORIZATION.—Section 5504 of title 5, United States Code, is amended—

(1) by redesignating subsection (c) as subsection (d);

(2) by striking the last sentence of both subsection (a) and subsection (b); and

(3) by inserting after subsection (b) the following:

"(c) For the purposes of this section:

1 "(1) The term 'employee' means—
2 "(A) an employee in or under an Executive
3 agency;
4 "(B) an employee in or under the Office of
5 the Architect of the Capitol, the Botanic Gar-
6 den, and the Library of Congress, for whom a
7 basic administrative workweek is established
8 under section 6101(a)(5) of this title; and
9 "(C) an individual employed by the govern-
10 ment of the District of Columbia.
11 "(2) The term 'employee' does not include—
12 "(A) an employee on the Isthmus of Pan-
13 ama in the service of the Panama Canal Com-
14 mission; or
15 "(B) an employee or individual excluded
16 from the definition of employee in section
17 5541(2) of this title other than an employee or
18 individual excluded by clauses (ii), (iii), and
19 (xiv) through (xvii) of such section.
20 "(3) Notwithstanding paragraph (2), an indi-
21 vidual who otherwise would be excluded from the
22 definition of employee shall be deemed to be an em-
23 ployee for purposes of this section if the individual's
24 employing agency so elects, under guidelines in regu-

1 lations promulgated by the Office of Personnel Man-
2 agement under subsection (d)(2).".
3 (b) GUIDELINES.—Subsection (d) of section 5504 of
4 such title, as redesignated by subsection (a), is amended—
5 (1) by inserting "(1)" after "(d)"; and
6 (2) by adding at the end the following new
7 paragraph:
8 "(2) The Office of Personnel Management shall pro-
9 vide guidelines by regulation for exemptions to be made
10 by the heads of agencies under subsection (c)(3). Such
11 guidelines shall provide for such exemptions only under
12 exceptional circumstances.".

13 **SEC. 207. ADDITIONAL CLASSES OF INDIVIDUALS ELIGIBLE**
14 **TO PARTICIPATE IN THE FEDERAL LONG-**
15 **TERM CARE INSURANCE PROGRAM.**

16 (a) CERTAIN EMPLOYEES OF THE DISTRICT OF CO-
17 LUMBIA GOVERNMENT.—Section 9001(1) of title 5,
18 United States Code, is amended by striking "2105(c),"
19 and all that follows and inserting "2105(c).".
20 (b) FORMER FEDERAL EMPLOYEES WHO WOULD BE
21 ELIGIBLE TO BEGIN RECEIVING AN ANNUITY UPON AT-
22 TAINING THE REQUISITE MINIMUM AGE.—Section
23 9001(2) of title 5, United States Code, is amended—
24 (1) in subparagraph (A), by striking "and" at
25 the end;

(2) in subparagraph (B), by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(C) any former employee who, on the basis of his or her service, would meet all requirements for being considered an 'annuitant' within the meaning of subchapter III of chapter 83, chapter 84, or any other retirement system for employees of the Government, but for the fact that such former employee has not attained the minimum age for title to annuity.".

(c) RESERVISTS TRANSFERRED TO THE RETIRED RESERVE WHO ARE UNDER AGE 60.—Section 9001(4) of title 5, United States Code, is amended by striking "including" and all that follows through "who has" and inserting "and a member who has been transferred to the Retired Reserve and who would be entitled to retired pay under chapter 1223 of title 10 but for not having".

TITLE III—PROVISIONS RELATING TO THE SECURITIES AND EXCHANGE COMMISSION AND THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Subtitle A—Securities and Exchange Commission

SEC. 301. SECURITIES AND EXCHANGE COMMISSION.

Subchapter I of chapter 31 of title 5, United States Code, is amended by adding at the end the following:

"§ 3114. APPOINTMENT OF ACCOUNTANTS, ECONOMISTS, AND EXAMINERS BY THE SECURITIES AND EXCHANGE COMMISSION.

"(a) APPLICABILITY.—This section applies with respect to any position of accountant, economist, and securities compliance examiner at the Commission that is in the competitive service.

"(b) APPOINTMENT AUTHORITY.—

"(1) IN GENERAL.—The Commission may appoint candidates to any position described in subsection (a)—

1 "(A) in accordance with the statutes, rules,
2 and regulations governing appointments in the
3 excepted service; and
4 "(B) notwithstanding any statutes, rules,
5 and regulations governing appointments in the
6 competitive service.
7 "(2) RULE OF CONSTRUCTION.—The appoint-
8 ment of a candidate to a position under authority of
9 this subsection shall not be considered to cause such
10 position to be converted from the competitive service
11 to the excepted service.
12 "(c) REPORTS.—No later than 90 days after the end
13 of fiscal year 2003 (for fiscal year 2003) and 90 days after
14 the end of fiscal year 2005 (for fiscal years 2004 and
15 2005), the Commission shall submit a report with respect
16 to its exercise of the authority granted by subsection (b)
17 during such fiscal years to the Committee on Government
18 Reform and the Committee on Financial Services of the
19 House of Representatives and the Committee on Govern-
20 mental Affairs and the Committee on Banking, Housing,
21 and Urban Affairs of the Senate. Such reports shall de-
22 scribe the changes in the hiring process authorized by such
23 subsection, including relevant information related to—
24 "(1) the quality of candidates;

"(2) the procedures used by the Commission to select candidates through the streamlined hiring process;

"(3) the numbers, types, and grades of employees hired under the authority;

"(4) any benefits or shortcomings associated with the use of the authority;

"(5) the effect of the exercise of the authority on the hiring of veterans and other demographic groups; and

"(6) the way in which managers were trained in the administration of the streamlined hiring system.

"(c) COMMISSION DEFINED.—For purposes of this section, the term 'Commission' means the Security and Exchange Commission.".

Subtitle B—National Aeronautics and Space Administration

SEC. 311. WORKFORCE AUTHORITIES AND PERSONNEL PROVISIONS.

(a) IN GENERAL.—Subpart I of part III of title 5, United States Code, is amended by inserting after chapter 97, as added by section 841(a)(2) of the Homeland Security Act of 2002 (Public Law 107–296; 116 Stat. 2229), the following:

"CHAPTER 98—NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

"SUBCHAPTER I—WORKFORCE AUTHORITIES

"Sec.
"9801. Definitions.
"9802. Planning, notification, and reporting requirements.
"9803. Workforce authorities.
"9804. Recruitment, redesignation, and relocation bonuses.
"9805. Retention bonuses.
"9806. Term appointments.
"9807. Pay authority for critical positions.
"9808. Assignments of intergovernmental personnel.
"9809. Enhanced demonstration project authority.

"SUBCHAPTER II—PERSONNEL PROVISIONS

"9831. Definitions.
"9832. Administration and private sector exchange assignments.
"9833. Science and technology scholarship program.
"9834. Distinguished scholar appointment authority.
"9835. Travel and transportation expenses of certain new appointees.
"9836. Annual leave enhancements.
"9837. Limited appointments to Senior Executive Service positions.
"9838. Superior qualifications pay.

"SUBCHAPTER I—WORKFORCE AUTHORITIES

"§ 9801. Definitions

"For purposes of this subchapter—

"(1) the term 'Administration' means the National Aeronautics and Space Administration;

"(2) the term 'Administrator' means the Administrator of the National Aeronautics and Space Administration;

"(3) the term 'critical need' means a specific and important requirement of the Administration's mission that the Administration is unable to fulfill because the Administration lacks the appropriate employees because—

1 "(A) of the inability to fill positions; or
2 "(B) employees do not possess the req-
3 uisite skills;
4 "(4) the term 'employee' means an individual
5 employed in or under the Administration; and
6 "(5) the term 'workforce plan' means the plan
7 required under section 9802(a).
8 **"§ 9802. Planning, notification, and reporting require-**
9 **ments**
10 "(a) Before exercising any of the workforce authori-
11 ties under this subchapter, the Administrator shall submit
12 a written plan to the Office of Personnel Management for
13 approval. A plan under this subchapter may not be imple-
14 mented without the approval of the Office of Personnel
15 Management.
16 "(b) A workforce plan shall include a description of—
17 "(1) each critical need of the Administration
18 and the criteria used in the identification of that
19 need;
20 "(2)(A) the functions, approximate number,
21 and classes or other categories of positions or em-
22 ployees that—
23 "(i) address critical needs; and

1 "(ii) would be eligible for each authority
2 proposed to be exercised under section 9803;
3 and
4 "(B) how the exercise of those authorities with
5 respect to the eligible positions or employees involved
6 would address each critical need identified under
7 paragraph (1);
8 "(3)(A) any critical need identified under para-
9 graph (1) which would not be addressed by the au-
10 thorities made available under section 9803; and
11 "(B) the reasons why those needs would not be
12 so addressed;
13 "(4) the specific criteria to be used in deter-
14 mining which individuals may receive the benefits
15 described under sections 9804 and 9805 (including
16 the criteria for granting bonuses in the absence of
17 a critical need), and how the level of those benefits
18 will be determined;
19 "(5) the safeguards or other measures that will
20 be applied to ensure that this subchapter is carried
21 out in a manner consistent with merit system prin-
22 ciples;
23 "(6) the means by which employees will be af-
24 forded the notification required under subsections
25 (c) and (d)(1)(B);

1 "(7) the methods that will be used to determine
2 if the authorities exercised under section 9803 have
3 successfully addressed each critical need identified
4 under paragraph (1); and
5 "(8)(A) the recruitment methods used by the
6 Administration before the enactment of this chapter
7 to recruit highly qualified individuals; and
8 "(B) the changes the Administration will imple-
9 ment after the enactment of this chapter in order to
10 improve its recruitment of highly qualified individ-
11 uals, including how it intends to use—
12 "(i) nongovernmental recruitment or place-
13 ment agencies; and
14 "(ii) Internet technologies.
15 "(c) Not later than 60 days before first exercising
16 any of the workforce authorities made available under this
17 subchapter, the Administrator shall provide to all employ-
18 ees the workforce plan and any additional information
19 which the Administrator considers appropriate.
20 "(d)(1)(A) The Administrator may submit any modi-
21 fications to the workforce plan to the Office of Personnel
22 Management. Modifications to the workforce plan may not
23 be implemented without the approval of the Office of Per-
24 sonnel Management.

1 "(B) Not later than 60 days before implementing any
2 such modifications, the Administrator shall provide an ap-
3 propriately modified plan to all employees of the Adminis-
4 tration.

5 "(2) Any reference in this subchapter or any other
6 provision of law to the workforce plan shall be considered
7 to include any modification made in accordance with this
8 subsection.

9 "(e) None of the workforce authorities made available
10 under section 9803 may be exercised in a manner incon-
11 sistent with the workforce plan.

12 "(f) Whenever the Administration submits its per-
13 formance plan under section 1115 of title 31 to the Office
14 of Management and Budget for any year, the Administra-
15 tion shall at the same time submit a copy of such plan
16 to—

17 "(1) the Committee on Governmental Affairs
18 and the Committee on Appropriations of the Senate;
19 and

20 "(2) the Committee on Government Reform and
21 the Committee on Appropriations of the House of
22 Representatives.

23 **"§ 9803. Workforce authorities**

24 "(a) The workforce authorities under this subchapter
25 are the following:

1 "(1) The authority to pay recruitment, redesig-
2 nation, and relocation bonuses under section 9804.
3 "(2) The authority to pay retention bonuses
4 under section 9805.
5 "(3) The authority to make term appointments
6 and to take related personnel actions under section
7 9806.
8 "(4) The authority to fix rates of basic pay for
9 critical positions under section 9807.
10 "(5) The authority to extend intergovernmental
11 personnel act assignments under section 9808.
12 "(b) No authority under this subchapter may be exer-
13 cised with respect to any officer who is appointed by the
14 President, by and with the advice and consent of the Sen-
15 ate.
16 "(c) Unless specifically stated otherwise, all authori-
17 ties provided under this subchapter are subject to section
18 5307.

19 **"§ 9804. Recruitment, redesignation, and relocation**
20 **bonuses**

21 "(a) Notwithstanding section 5753, the Adminis-
22 trator may pay a bonus to an individual, in accordance
23 with the workforce plan and subject to the limitations in
24 this section, if—

1 "(1) the Administrator determines that the Ad-
2 ministration would be likely, in the absence of a
3 bonus, to encounter difficulty in filling a position;
4 and
5 "(2) the individual—
6 "(A) is newly appointed as an employee of
7 the Federal Government;
8 "(B) is currently employed by the Federal
9 Government and is newly appointed to another
10 position in the same geographic area; or
11 "(C) is currently employed by the Federal
12 Government and is required to relocate to a dif-
13 ferent geographic area to accept a position with
14 the Administration.
15 "(b) If the position is described as addressing a crit-
16 ical need in the workforce plan under section
17 9802(b)(2)(A), the amount of a bonus may not exceed—
18 "(1) 50 percent of the employee's annual rate
19 of basic pay (including comparability payments
20 under sections 5304 and 5304a) as of the beginning
21 of the service period multiplied by the service period
22 specified under subsection (d)(1)(B)(i); or
23 "(2) 100 percent of the employee's annual rate
24 of basic pay (including comparability payments

1 under sections 5304 and 5304a) as of the beginning
2 of the service period.
3 "(c) If the position is not described as addressing a
4 critical need in the workforce plan under section
5 9802(b)(2)(A), the amount of a bonus may not exceed—
6 "(1) 25 percent of the employee's annual rate
7 of basic pay (including comparability payments
8 under sections 5304 and 5304a) as of the beginning
9 of the service period multiplied by the service period
10 specified under subsection (d)(1)(B)(i); or
11 "(2) 100 percent of the employee's annual rate
12 of basic pay (including comparability payments
13 under sections 5304 and 5304a) as of the beginning
14 of the service period.
15 "(d)(1)(A) Payment of a bonus under this section
16 shall be contingent upon the individual entering into a
17 service agreement with the Administration.
18 "(B) At a minimum, the service agreement shall in-
19 clude—
20 "(i) the required service period;
21 "(ii) the method of payment, including a pay-
22 ment schedule, which may include a lump-sum pay-
23 ment, installment payments, or a combination there-
24 of;

1 "(iii) the amount of the bonus and the basis for
2 calculating that amount; and
3 "(iv) the conditions under which the agreement
4 may be terminated before the agreed-upon service
5 period has been completed, and the effect of the ter-
6 mination.
7 "(2) For purposes of determinations under sub-
8 sections (b)(1) and (c)(1), the employee's service period
9 shall be expressed as the number equal to the full years
10 and twelfth parts thereof, rounding the fractional part of
11 a month to the nearest twelfth part of a year. The service
12 period may not be less than 6 months and may not exceed
13 4 years.
14 "(3) A bonus under this section may not be consid-
15 ered to be part of the basic pay of an employee.
16 "(e) Before paying a bonus under this section, the
17 Administration shall establish a plan for paying recruit-
18 ment, redesignation, and relocation bonuses, subject to ap-
19 proval by the Office of Personnel Management.
20 **"§ 9805. Retention bonuses**
21 "(a) Notwithstanding section 5754, the Adminis-
22 trator may pay a bonus to an employee, in accordance with
23 the workforce plan and subject to the limitations in this
24 section, if the Administrator determines that—

1 "(1) the unusually high or unique qualifications
2 of the employee or a special need of the Administra-
3 tion for the employee's services makes it essential to
4 retain the employee; and
5 "(2) the employee would be likely to leave in
6 the absence of a retention bonus.
7 "(b) If the position is described as addressing a crit-
8 ical need in the workforce plan under section
9 9802(b)(2)(A), the amount of a bonus may not exceed 50
10 percent of the employee's annual rate of basic pay (includ-
11 ing comparability payments under sections 5304 and
12 5304a).
13 "(c) If the position is not described as addressing a
14 critical need in the workforce plan under section
15 9802(b)(2)(A), the amount of a bonus may not exceed 25
16 percent of the employee's annual rate of basic pay (includ-
17 ing comparability payments under sections 5304 and
18 5304a).
19 "(d)(1)(A) Payment of a bonus under this section
20 shall be contingent upon the employee entering into a serv-
21 ice agreement with the Administration.
22 "(B) At a minimum, the service agreement shall in-
23 clude—
24 "(i) the required service period;

1 "(ii) the method of payment, including a pay-
2 ment schedule, which may include a lump-sum pay-
3 ment, installment payments, or a combination there-
4 of;
5 "(iii) the amount of the bonus and the basis for
6 calculating the amount; and
7 "(iv) the conditions under which the agreement
8 may be terminated before the agreed-upon service
9 period has been completed, and the effect of the ter-
10 mination.
11 "(2) The employee's service period shall be expressed
12 as the number equal to the full years and twelfth parts
13 thereof, rounding the fractional part of a month to the
14 nearest twelfth part of a year. The service period may not
15 be less than 6 months and may not exceed 4 years.
16 "(3) Notwithstanding paragraph (1), a service agree-
17 ment is not required if the Administration pays a bonus
18 in biweekly installments and sets the installment payment
19 at the full bonus percentage rate established for the em-
20 ployee, with no portion of the bonus deferred. In this case,
21 the Administration shall inform the employee in writing
22 of any decision to change the retention bonus payments.
23 The employee shall continue to accrue entitlement to the
24 retention bonus through the end of the pay period in which
25 such written notice is provided.

1 "(e) A bonus under this section may not be consid-
2 ered to be part of the basic pay of an employee.
3 "(f) An employee is not entitled to a retention bonus
4 under this section during a service period previously estab-
5 lished for that employee under section 5753 or under sec-
6 tion 9804.

7 **"§ 9806. Term appointments**

8 "(a) The Administrator may authorize term appoint-
9 ments within the Administration under subchapter I of
10 chapter 33, for a period of not less than 1 year and not
11 more than 6 years.
12 "(b) Notwithstanding chapter 33 or any other provi-
13 sion of law relating to the examination, certification, and
14 appointment of individuals in the competitive service, the
15 Administrator may convert an employee serving under a
16 term appointment to a permanent appointment in the
17 competitive service within the Administration without fur-
18 ther competition if—
19 "(1) such individual was appointed under open,
20 competitive examination under subchapter I of chap-
21 ter 33 to the term position;
22 "(2) the announcement for the term appoint-
23 ment from which the conversion is made stated that
24 there was potential for subsequent conversion to a
25 career-conditional or career appointment;

1 "(3) the employee has completed at least 2
2 years of current continuous service under a term ap-
3 pointment in the competitive service;
4 "(4) the employee's performance under such
5 term appointment was at least fully successful or
6 equivalent; and
7 "(5) the position to which such employee is
8 being converted under this section is in the same oc-
9 cupational series, is in the same geographic location,
10 and provides no greater promotion potential than
11 the term position for which the competitive examina-
12 tion was conducted.
13 "(c) Notwithstanding chapter 33 or any other provi-
14 sion of law relating to the examination, certification, and
15 appointment of individuals in the competitive service, the
16 Administrator may convert an employee serving under a
17 term appointment to a permanent appointment in the
18 competitive service within the Administration through in-
19 ternal competitive promotion procedures if the conditions
20 under paragraphs (1) through (4) of subsection (b) are
21 met.
22 "(d) An employee converted under this section be-
23 comes a career-conditional employee, unless the employee
24 has otherwise completed the service requirements for ca-
25 reer tenure.

1 "(e) An employee converted to career or career-condi-
2 tional employment under this section acquires competitive
3 status upon conversion.

4 **"§ 9807. Pay authority for critical positions**

5 "(a) In this section, the term 'position' means—
6 "(1) a position to which chapter 51 applies, in-
7 cluding a position in the Senior Executive Service;
8 "(2) a position under the Executive Schedule
9 under sections 5312 through 5317;
10 "(3) a position established under section 3104;
11 or
12 "(4) a senior-level position to which section
13 5376(a)(1) applies.
14 "(b) Authority under this section—
15 "(1) may be exercised only with respect to a po-
16 sition that–
17 "(A) is described as addressing a critical
18 need in the workforce plan under section
19 9802(b)(2)(A); and
20 "(B) requires expertise of an extremely
21 high level in a scientific, technical, professional,
22 or administrative field;
23 "(2) may be exercised only to the extent nec-
24 essary to recruit or retain an individual exceptionally
25 well qualified for the position; and

1 "(3) may be exercised only in retaining employ-
2 ees of the Administration or in appointing individ-
3 uals who were not employees of another Federal
4 agency as defined under section 5102(a)(1).
5 "(c)(1) Notwithstanding section 5377, the Adminis-
6 trator may fix the rate of basic pay for a position in the
7 Administration in accordance with this section. The Ad-
8 ministrator may not delegate this authority.
9 "(2) The number of positions with pay fixed under
10 this section may not exceed 10 at any time.
11 "(d)(1) The rate of basic pay fixed under this section
12 may not be less than the rate of basic pay (including any
13 comparability payments) which would otherwise be pay-
14 able for the position involved if this section had never been
15 enacted.
16 "(2) The annual rate of basic pay fixed under this
17 section may not exceed the per annum rate of salary pay-
18 able under section 104 of title 3.
19 "(3) Notwithstanding any provision of section 5307,
20 in the case of an employee who, during any calendar year,
21 is receiving pay at a rate fixed under this section, no allow-
22 ance, differential, bonus, award, or similar cash payment
23 may be paid to such employee if, or to the extent that,
24 when added to basic pay paid or payable to such employee
25 (for service performed in such calendar year as an em-

1 ployee in the executive branch or as an employee outside
2 the executive branch to whom chapter 51 applies), such
3 payment would cause the total to exceed the per annum
4 rate of salary which, as of the end of such calendar year,
5 is payable under section 104 of title 3.

6 **"§ 9808. Assignments of intergovernmental personnel**

7 "For purposes of applying the third sentence of sec-
8 tion 3372(a) (relating to the authority of the head of a
9 Federal agency to extend the period of an employee's as-
10 signment to or from a State or local government, institu-
11 tion of higher education, or other organization), the Ad-
12 ministrator may, with the concurrence of the employee and
13 the government or organization concerned, take any action
14 which would be allowable if such sentence had been
15 amended by striking 'two' and inserting 'four'.

16 **"§ 9809. Enhanced demonstration project authority**

17 "When conducting a demonstration project at the Ad-
18 ministration, section 4703(d)(1)(A) may be applied by
19 substituting 'such numbers of individuals as determined
20 by the Administrator' for 'not more than 5,000 individ-
21 uals'.

22 "SUBCHAPTER II—PERSONNEL PROVISIONS

23 **"§ 9831. Definitions**

24 "For purposes of this subchapter–

"(1) the term 'Administration' means the National Aeronautics and Space Administration; and

"(2) the term 'Administrator' means the Administrator of the National Aeronautics and Space Administration.

"§ 9832. Administration and private sector exchange assignments

"(a) For purposes of this section—

"(1) the term 'private sector employee' means an employee of a private sector entity; and

"(2) the term 'private sector entity' means an organization, company, corporation, or other business concern, or a foreign government or agency of a foreign government, that is not a State, local government, Federal agency, or other organization as defined under section 3371 (1), (2), (3), and (4), respectively.

"(b)(1) On request from or with the concurrence of a private sector entity, and with the consent of the employee concerned, the Administrator may arrange for the assignment of—

"(A) an employee of the Administration serving under a career or career-conditional appointment, a career appointee in the Senior Executive Service, or an individual under an appointment of equivalent

1 tenure in an excepted service position, but excluding
2 employees in positions which have been excepted
3 from the competitive service by reasons of their con-
4 fidential, policy-determining, policymaking, or policy-
5 advocating character, to a private sector entity; and
6 "(B) an employee of a private sector entity to
7 the Administration,
8 for work of mutual concern to the Administration and the
9 private sector entity that the Administrator determines
10 will be beneficial to both.
11 "(2) The period of an assignment under this section
12 may not exceed 2 years. However, the Administrator may
13 extend the period of assignment for not more than 2 addi-
14 tional years.
15 "(3) An employee of the Administration may be as-
16 signed under this section only if the employee agrees, as
17 a condition of accepting an assignment, to serve in the
18 Administration upon the completion of the assignment for
19 a period equal to the length of the assignment. The Ad-
20 ministrator may waive the requirement under this para-
21 graph, with the approval of the Office of Management and
22 Budget, with respect to any employee if the Administrator
23 determines it to be in the best interests of the United
24 States to do so.

1 "(4) Each agreement required under paragraph (3)
2 shall provide that if the employee fails to carry out the
3 agreement (except in the case of a waiver made under
4 paragraph (3)), the employee shall be liable to the United
5 States for payment of all expenses (excluding salary) of
6 the assignment. The amount due shall be treated as a debt
7 due the United States.

8 "(c)(1) An Administration employee assigned to a
9 private sector entity under this section is deemed, during
10 the assignment, to be on detail to a work assignment (as
11 a detailee to the entity).

12 "(2) An Administration employee assigned under this
13 section on detail remains an employee of the Administra-
14 tion. Chapter 171 of title 28 and any other Federal tort
15 liability statute apply to the Administration employee so
16 assigned, and all defenses available to the United States
17 under these laws or applicable provisions of State law shall
18 remain in effect. The supervision of the duties of an Ad-
19 ministration employee assigned to the private sector entity
20 through detail may be governed by agreement between the
21 Administration and the private sector entity concerned.

22 "(3) The assignment of an Administration employee
23 on detail to a private sector entity under this section may
24 be made with or without reimbursement by the private sec-
25 tor entity for the travel and transportation expenses to

1 or from the place of assignment, for the pay, or supple-
2 mental pay, or a part thereof, of the employee, or for the
3 contribution of the Administration to the employee's ben-
4 efit systems during the assignment. Any reimbursements
5 shall be credited to the appropriation of the Administra-
6 tion used for paying the travel and transportation ex-
7 penses, pay, or benefits, and not paid to the employee.
8 "(d)(1) An employee of a private sector entity who
9 is assigned to the Administration under an arrangement
10 under this section shall be deemed on detail to the Admin-
11 istration.
12 "(2) During the period of assignment, a private sec-
13 tor employee on detail to the Administration—
14 "(A) is not entitled to pay from the Administra-
15 tion, except to the extent that the pay received from
16 the private sector entity is less than the appropriate
17 rate of pay which the duties would warrant under
18 the pay provisions of this title or other applicable
19 authority;
20 "(B) is deemed an employee of the Administra-
21 tion for the purpose of chapter 73 of this title, the
22 Ethics in Government Act of 1978, section 27 of the
23 Office of Federal Procurement Policy Act, sections
24 201, 203, 205, 207, 208, 209, 602, 603, 606, 607,
25 610, 643, 654, 1905, and 1913 of title 18, sections

1343, 1344, and 1349(b) of title 31, chapter 171 of title 28, and any other Federal tort liability statute, and any other provision of Federal criminal law, unless otherwise specifically exempted;

"(C) notwithstanding subparagraph (B), is also deemed to be an employee of his or her private sector employer for purposes of section 208 of title 18; and

"(D) is subject to such regulations as the Administrator may prescribe.

"(3) The supervision of the duties of an employee assigned under this subsection may be governed by agreement between the Administration and the private sector entity.

"(4) A detail of a private sector employee to the Administration may be made with or without reimbursement by the Administration for the pay, or a part thereof, of the employee during the period of assignment, or for the contribution of the private sector entity, or a part thereof, to employee benefit systems.

"(5)(A) A private sector employee on detail to the Administration under this section who suffers disability or dies as a result of personal injury sustained while in the performance of duties during the assignment shall be treated, for the purpose of subchapter I of chapter 81,

1 as an employee as defined under section 8101 who had
2 sustained the injury in the performance of duties.
3 "(B) When an employee (or the employee's depend-
4 ents in case of death) entitled by reason of injury or death
5 to benefits under subchapter I of chapter 81 is also enti-
6 tled to benefits from the employee's private sector em-
7 ployer for the same injury or death, the employee (or the
8 employee's dependents in case of death) shall elect which
9 benefits the employee will receive. The election shall be
10 made within 1 year after the injury or death, or such fur-
11 ther time as the Secretary of Labor may allow for reason-
12 able cause shown. When made, the election is irrevocable.
13 "(C) Except as provided in subparagraphs (A) and
14 (B), and notwithstanding any other law, the United
15 States, any instrumentality of the United States, or an
16 employee, agent, or assign of the United States shall not
17 be liable to—
18 "(i) a private sector employee assigned to the
19 Administration under this section;
20 "(ii) such employee's legal representative,
21 spouse, dependents, survivors, or next of kin; or
22 "(iii) any other person, including any third
23 party as to whom such employee, or that employee's
24 legal representative, spouse, dependents, survivors,
25 or next of kin, has a cause of action arising out of

1 an injury or death sustained in the performance of
2 duty pursuant to an assignment under this section,
3 otherwise entitled to recover damages from the
4 United States, any instrumentality of the United
5 States, or any employee, agency, or assign of the
6 United States,
7 with respect to any injury or death suffered by a private
8 sector employee sustained in the performance of duties
9 pursuant to an assignment under this section.
10 "(e)(1) Appropriations of the Administration are
11 available to pay, or reimburse, an Administration or pri-
12 vate sector employee in accordance with—
13 "(A) subchapter I of chapter 57 for the ex-
14 penses of—
15 "(i) travel, including a per diem allowance,
16 to and from the assignment location;
17 "(ii) a per diem allowance at the assign-
18 ment location during the period of the assign-
19 ment; and
20 "(iii) travel, including a per diem allow-
21 ance, while traveling on official business away
22 from the employee's designated post of duty
23 during the assignment when the Administrator
24 considers the travel to be in the interest of the
25 United States;

1 "(B) section 5724 for the expenses of transpor-
2 tation of the employee's immediate family, household
3 goods, and personal effects to and from the assign-
4 ment location;
5 "(C) section 5724a(a) for the expenses of per
6 diem allowances for the immediate family of the em-
7 ployee to and from the assignment location;
8 "(D) section 5724a(c) for subsistence expenses
9 of the employee and immediate family while occu-
10 pying temporary quarters at the assignment location
11 and on return to the employee's former post of duty;
12 "(E) section 5724a(g) to be used by the em-
13 ployee for miscellaneous expenses related to change
14 of station where movement or storage of household
15 goods is involved; and
16 "(F) section 5726(c) for the expenses of non-
17 temporary storage of household goods and personal
18 effects in connection with assignment at an isolated
19 location.
20 "(2) Expenses specified in paragraph (1), other than
21 those in paragraph (1)(A)(iii), may not be allowed in con-
22 nection with the assignment of an Administration or pri-
23 vate sector employee under this section, unless and until
24 the employee agrees in writing to complete the entire pe-
25 riod of his assignment or 1 year, whichever is shorter, un-

1 less separated or reassigned for reasons beyond his control
2 that are acceptable to the Administrator. If the employee
3 violates the agreement, the money spent by the United
4 States for these expenses is recoverable from the employee
5 as a debt due the United States. The Administrator may
6 waive in whole or in part a right of recovery under this
7 paragraph with respect to a private sector employee on
8 assignment with the Administration or an Administration
9 employee on assignment with a private sector entity.
10 "(3) Appropriations of the Administration are avail-
11 able to pay expenses under section 5742 with respect to
12 an Administration or private sector employee assigned
13 under this authority.
14 "(f) A private sector entity may not charge the Fed-
15 eral Government, as direct or indirect costs under a Fed-
16 eral contract, the costs of pay or benefits paid by the enti-
17 ty to an employee assigned to the Administration under
18 this section for the period of the assignment.
19 **"§ 9833. Science and technology scholarship program**
20 "(a)(1) The Administrator may carry out a program
21 of entering into contractual agreements with individuals
22 described under paragraph (2) under which—
23 "(A) the Administrator agrees to provide to the
24 individuals scholarships for pursuing, at accredited
25 institutions of higher education, academic programs

1 appropriate for careers in professions needed by the
2 Administration; and
3 "(B) the individuals agree to serve as employees
4 of the Administration, for the period described under
5 subsection (b), in positions needed by the Adminis-
6 tration and for which the individuals are qualified.
7 "(2) The individuals referred to under paragraph (1)
8 are individuals who—
9 "(A) are enrolled or accepted for enrollment as
10 full-time students at accredited institutions of higher
11 education in an academic field or discipline pre-
12 scribed by the Administration;
13 "(B) are United States citizens; and
14 "(C) at the time of the initial scholarship
15 award, are not Federal employees as defined under
16 section 2105.
17 "(b)(1) For purposes of subsection (a)(1)(B), the pe-
18 riod of service for which an individual is obligated to serve
19 as an employee of the Administration is, subject to sub-
20 paragraph (A) of paragraph (2), 12 months for each aca-
21 demic year for which the scholarship under such sub-
22 section is provided.
23 "(2)(A) Subject to subparagraph (B), the Adminis-
24 trator may provide a scholarship under this section if the
25 individual applying for the scholarship agrees that, not

1 later than 60 days after obtaining the educational degree
2 involved, the individual will begin serving full-time as an
3 employee in satisfaction of the period of service that the
4 individual is obligated to provide.

5 "(B) The Administrator may defer the obligation of
6 an individual to provide a period of service under this sub-
7 section, if the Administrator determines that such a defer-
8 ral is appropriate.

9 "(c)(1) The Administrator may provide a scholarship
10 under subsection (a) for an academic year if—

11 "(A) the individual applying for the scholarship
12 has submitted to the Administrator a proposed aca-
13 demic program leading to a degree in an academic
14 field or discipline approved by the Administration; or

15 "(B) the individual agrees that the program will
16 not be altered without the approval of the Adminis-
17 trator.

18 "(2) The Administrator may provide a scholarship
19 under this section for an academic year if the individual
20 applying for the scholarship agrees to maintain a high
21 level of academic standing as defined by regulation.

22 "(3) The dollar amount of a scholarship for an aca-
23 demic year shall not exceed—

24 "(A) the limits established by regulation under
25 paragraph (4); or

1 "(B) the total costs incurred in attending the
2 institution involved.
3 "(4) A scholarship may be expended for tuition, fees,
4 and other authorized expenses as established by regula-
5 tion.
6 "(5) The Administrator may enter into a contractual
7 agreement with an institution of higher education under
8 which the amounts provided in the scholarship for tuition,
9 fees, and other authorized expenses are paid directly to
10 the institution with respect to which a scholarship is pro-
11 vided.
12 "(6) An individual may not receive a scholarship for
13 longer than 4 academic years, unless an extension is
14 granted by the Administrator.
15 "(d)(1)(A) Any scholarship recipient who fails to
16 maintain a high level of academic standing, who is dis-
17 missed from an educational institution for disciplinary
18 reasons, or who voluntarily terminates academic training
19 before graduation from the educational program for which
20 the scholarship was awarded, shall—
21 "(i) be in breach of the contractual agreement;
22 and
23 "(ii) in lieu of any service obligation arising
24 under such agreement, be liable to the United States
25 for repayment of all scholarship funds paid to that

1 recipient and to the educational institution on their
2 behalf under the agreement within 1 year after the
3 date of default.
4 "(B) The repayment period may be extended by the
5 Administrator when determined to be necessary, as estab-
6 lished by regulation. A penalty for failure to complete the
7 academic program for which the scholarship was awarded
8 may be assessed at the discretion of the Administrator,
9 in addition to the repayment with interest as provided
10 under paragraph (3).
11 "(2)(A) A scholarship recipient who, for any reason,
12 fails to begin or complete that recipient's service obligation
13 after completion of academic training, or fails to comply
14 with the terms and conditions of deferment established by
15 the Administrator, shall be in breach of the contractual
16 agreement.
17 "(B)(i) In this subparagraph—
18 "(I) the term 'A' means the amount the United
19 States is entitled to recover;
20 "(II) the term 'F' means the sum of the
21 amounts paid to or on behalf of the participant;
22 "(III) the term 't' means the total number of
23 months of the period of obligated service the partici-
24 pant is required to serve; and

1 "(IV) the term 's' means the number of months
2 of the period of obligated service served by the par-
3 ticipant.
4 "(ii) When a recipient breaches the agreement as pro-
5 vided under subparagraph (A), the United States shall be
6 entitled to recover damages equal to 3 times the scholar-
7 ship award, in accordance with the following formula:
8 "A=(3F)[(t-s)/t]
9 "(C) The damages that the United States is entitled
10 to recover shall be paid within 1 year after the date of
11 default.
12 "(3) Beginning 90 days after default, interest shall
13 accrue on the payments required to be made under this
14 subsection, at a rate to be determined by regulation estab-
15 lished by the Administrator.
16 "(e)(1) Any obligation of an individual incurred
17 under this section for service or payment of damages may
18 be canceled upon the death of the individual.
19 "(2) The Administrator shall by regulation provide
20 for the partial or total waiver or suspension of any obliga-
21 tion of service or payment incurred by an individual under
22 this section if—
23 "(A) the compliance by the individual is impos-
24 sible or would involve extreme hardship to the indi-
25 vidual; or

1 "(B) enforcement of such obligation with re-
2 spect to any individual would be contrary to the best
3 interests of the Government.
4 "(f) The Administrator may provide a scholarship
5 under this section if an application for the scholarship is
6 submitted to the Administrator and the application is in
7 such form, is made in such manner, and contains such
8 agreements, assurance, and information as the Adminis-
9 trator determines to be necessary to carry out this section.
10 "(g)(1) There are authorized to be appropriated to
11 the Administration to carry out this section $10,000,000
12 for fiscal year 2004 and $10,000,000 for each succeeding
13 fiscal year.
14 "(2) Amounts appropriated for a fiscal year for schol-
15 arships under this section shall remain available for 2 fis-
16 cal years.
17 **"§ 9834. Distinguished scholar appointment authority**
18 "(a) In this section—
19 "(1) the term 'professional position' means a
20 position that is classified to an occupational series
21 identified by the Office of Personnel Management as
22 a position that—
23 "(A) requires education and training in the
24 principles, concepts, and theories of the occupa-
25 tion that typically can be gained only through

1 completion of a specified curriculum at a recog-
2 nized college or university; and
3 "(B) is covered by the Group Coverage
4 Qualification Standard for Professional and Sci-
5 entific Positions; and
6 "(2) the term 'research position' means a posi-
7 tion in a professional series that primarily involves
8 scientific inquiry or investigation, or research-type
9 exploratory development of a creative or scientific
10 nature, where the knowledge required to perform the
11 work successfully is acquired typically and primarily
12 through graduate study.
13 "(b) The Administration may appoint, without regard
14 to the provisions of sections 3304(b) and 3309 through
15 3318, candidates directly to General Schedule professional
16 positions in the Administration for which public notice has
17 been given, if—
18 "(1) with respect to a position at the GS–7
19 level, the individual—
20 "(A) received, from an accredited institu-
21 tion authorized to grant baccalaureate degrees,
22 a baccalaureate degree in a field of study for
23 which possession of that degree in conjunction
24 with academic achievements meets the qualifica-
25 tion standards as prescribed by the Office of

1 Personnel Management for the position to
2 which the individual is being appointed; and
3 "(B) achieved a cumulative grade point av-
4 erage of 3.0 or higher on a 4.0 scale and a
5 grade point average of 3.5 or higher for courses
6 in the field of study required to qualify for the
7 position;
8 "(2) with respect to a position at the GS–9
9 level, the individual—
10 "(A) received, from an accredited institu-
11 tion authorized to grant graduate degrees, a
12 graduate degree in a field of study for which
13 possession of that degree meets the qualifica-
14 tion standards at this grade level as prescribed
15 by the Office of Personnel Management for the
16 position to which the individual is being ap-
17 pointed; and
18 "(B) achieved a cumulative grade point av-
19 erage of 3.5 or higher on a 4.0 scale in grad-
20 uate coursework in the field of study required
21 for the position;
22 "(3) with respect to a position at the GS–11
23 level, the individual—
24 "(A) received, from an accredited institu-
25 tion authorized to grant graduate degrees, a

1 graduate degree in a field of study for which
2 possession of that degree meets the qualifica-
3 tion standards at this grade level as prescribed
4 by the Office of Personnel Management for the
5 position to which the individual is being ap-
6 pointed; and
7 "(B) achieved a cumulative grade point av-
8 erage of 3.5 or higher on a 4.0 scale in grad-
9 uate coursework in the field of study required
10 for the position; or
11 "(4) with respect to a research position at the
12 GS–12 level, the individual—
13 "(A) received, from an accredited institu-
14 tion authorized to grant graduate degrees, a
15 graduate degree in a field of study for which
16 possession of that degree meets the qualifica-
17 tion standards at this grade level as prescribed
18 by the Office of Personnel Management for the
19 position to which the individual is being ap-
20 pointed; and
21 "(B) achieved a cumulative grade point av-
22 erage of 3.5 or higher on a 4.0 scale in grad-
23 uate coursework in the field of study required
24 for the position.

1 "(c) Veterans' preference procedures shall apply
2 when selecting candidates under this section. Preference
3 eligibles who meet the criteria for distinguished scholar
4 appointments shall be considered ahead of nonpreference
5 eligibles.

6 "(d) An appointment made under this authority shall
7 be a career-conditional appointment in the competitive
8 civil service.

9 **"§ 9835. Travel and transportation expenses of cer-**
10 **tain new appointees**

11 "(a) In this section, the term 'new appointee'
12 means—

13 "(1) a person newly appointed or reinstated to
14 Federal service to the Administration to—

15 "(A) a career or career-conditional ap-
16 pointment;

17 "(B) a term appointment;

18 "(C) an excepted service appointment that
19 provides for noncompetitive conversion to a ca-
20 reer or career-conditional appointment;

21 "(D) a career or limited term Senior Exec-
22 utive Service appointment;

23 "(E) an appointment made under section
24 203(c)(2)(A) of the National Aeronautics and
25 Space Act of 1958 (42 U.S.C. 2473(c)(2)(A));

"(F) an appointment to a position established under section 3104; or

"(G) an appointment to a position established under section 5108; or

"(2) a student trainee who, upon completion of academic work, is converted to an appointment in the Administration that is identified in paragraph (1) in accordance with an appropriate authority.

"(b) The Administrator may pay the travel, transportation, and relocation expenses of a new appointee to the same extent, in the same manner, and subject to the same conditions as the payment of such expenses under sections 5724, 5724a, 5724b, and 5724c to an employee transferred in the interests of the United States Government.

"§ 9836. Annual leave enhancements

"(a)(1) In this subsection—

"(A) the term 'newly appointed employee' means an individual who is first appointed—

"(i) regardless of tenure, as an employee of the Federal Government; or

"(ii) as an employee of the Federal Government following a break in service of at least 90 days after that individual's last period of Federal employment, other than—

1 "(I) employment under the Student
2 Educational Employment Program admin-
3 istered by the Office of Personnel Manage-
4 ment;
5 "(II) employment as a law clerk train-
6 ee;
7 "(III) employment under a short-term
8 temporary appointing authority while a
9 student during periods of vacation from
10 the educational institution at which the
11 student is enrolled;
12 "(IV) employment under a provisional
13 appointment if the new appointment is per-
14 manent and immediately follows the provi-
15 sional appointment; or
16 "(V) employment under a temporary
17 appointment that is neither full-time nor
18 the principal employment of the individual;
19 "(B) the term 'period of qualified non-Federal
20 service' means any period of service performed by an
21 individual that—
22 "(i) was performed in a position the duties
23 of which were directly related to the duties of
24 the position in the Administration to which that

individual will fill as a newly appointed employee; and

"(ii) except for this section would not otherwise be service performed by an employee for purposes of section 6303; and

"(C) the term 'directly related to the duties of the position' means duties and responsibilities in the same line of work which require similar qualifications.

"(2)(A) For purposes of section 6303, the Administrator may deem a period of qualified non-Federal service performed by a newly appointed employee to be a period of service of equal length performed as an employee.

"(B) A period deemed by the Administrator under subparagraph (A) shall continue to apply to the employee during—

"(i) the period of Federal service in which the deeming is made; and

"(ii) any subsequent period of Federal service.

"(3)(A) Notwithstanding section 6303(a), the annual leave accrual rate for an employee of the Administration in a position paid under section 5376 or 5383, or for an employee in an equivalent category whose rate of basic pay is greater than the rate payable at GS–15, step 10, shall be 1 day for each full biweekly pay period.

1 "(B) The accrual rate established under this para-
2 graph shall continue to apply to the employee during—
3 "(i) the period of Federal service in which such
4 accrual rate first applies; and
5 "(ii) any subsequent period of Federal service.
6 **"§ 9837. Limited appointments to Senior Executive**
7 **Service positions**
8 "(a) In this section—
9 "(1) the term 'career reserved position' means
10 a position in the Administration designated under
11 section 3132(b) which may be filled only by—
12 "(A) a career appointee; or
13 "(B) a limited emergency appointee or a
14 limited term appointee—
15 "(i) who, immediately before entering
16 the career reserved position, was serving
17 under a career or career-conditional ap-
18 pointment outside the Senior Executive
19 Service; or
20 "(ii) whose limited emergency or lim-
21 ited term appointment is approved in ad-
22 vance by the Office of Personnel Manage-
23 ment;
24 "(2) the term 'limited emergency appointee' has
25 the meaning given under section 3132; and

1 "(3) the term 'limited term appointee' means
2 an individual appointed to a Senior Executive Serv-
3 ice position in the Administration to meet a bona
4 fide temporary need, as determined by the Adminis-
5 trator.
6 "(b) The number of career reserved positions which
7 are filled by an appointee as described under subsection
8 (a)(1)(B) may not exceed 10 percent of the total number
9 of Senior Executive Service positions allocated to the Ad-
10 ministration.
11 "(c) Notwithstanding sections 3132 and 3394(b)—
12 "(1) the Administrator may appoint an indi-
13 vidual to any Senior Executive Service position in
14 the Administration as a limited term appointee
15 under this section for a period of—
16 "(A) 4 years or less to a position the du-
17 ties of which will expire at the end of such
18 term; or
19 "(B) 1 year or less to a position the duties
20 of which are continuing; and
21 "(2) in rare circumstances, the Administrator
22 may authorize an extension of a limited appointment
23 under—
24 "(A) paragraph (1)(A) for a period not to
25 exceed 2 years; and

1 "(B) paragraph (1)(B) for a period not to
2 exceed 1 year.
3 "(d) A limited term appointee who has been ap-
4 pointed in the Administration from a career or career-con-
5 ditional appointment outside the Senior Executive Service
6 shall have reemployment rights in the agency from which
7 appointed, or in another agency, under requirements and
8 conditions established by the Office of Personnel Manage-
9 ment. The Office shall have the authority to direct such
10 placement in any agency.
11 "(e) Notwithstanding section 3394(b) and section
12 3395—
13 "(1) a limited term appointee serving under a
14 term prescribed under this section may be reas-
15 signed to another Senior Executive Service position
16 in the Administration, the duties of which will expire
17 at the end of a term of 4 years or less; and
18 "(2) a limited term appointee serving under a
19 term prescribed under this section may be reas-
20 signed to another continuing Senior Executive Serv-
21 ice position in the Administration, except that the
22 appointee may not serve in 1 or more positions in
23 the Administration under such appointment in ex-
24 cess of 1 year, except that in rare circumstances, the

1 Administrator may approve an extension up to an
2 additional 1 year.
3 "(f) A limited term appointee may not serve more
4 than 7 consecutive years under any combination of limited
5 appointments.
6 "(g) Notwithstanding section 5384, the Adminis-
7 trator may authorize performance awards to limited term
8 appointees in the Administration in the same amounts and
9 in the same manner as career appointees.
10 **"§ 9838. Superior qualifications pay**
11 "(a) In this section the term 'employee' means an em-
12 ployee as defined under section 2105 who is employed by
13 the Administration.
14 "(b) Notwithstanding section 5334, the Adminis-
15 trator may set the pay of an employee paid under the Gen-
16 eral Schedule at any step within the pay range for the
17 grade of the position, based on the superior qualifications
18 of the employee, or the special need of the Administration.
19 "(c) If an exercise of the authority under this section
20 relates to a current employee selected for another position
21 within the Administration, a determination shall be made
22 that the employee's contribution in the new position will
23 exceed that in the former position, before setting pay
24 under this section.

1 "(d) Pay as set under this section is basic pay for
2 such purposes as pay set under section 5334.
3 "(e) If the employee serves for at least 1 year in the
4 position for which the pay determination under this sec-
5 tion was made, or a successor position, the pay earned
6 under such position may be used in succeeding actions to
7 set pay under chapter 53.
8 "(f) The Administrator may waive the restrictions in
9 subsection (e), based on criteria established in the plan
10 required under subsection (g).
11 "(g) Before setting any employee's pay under this
12 section, the Administrator shall submit a plan to the Of-
13 fice of Personnel Management, that includes—
14 "(1) criteria for approval of actions to set pay
15 under this section;
16 "(2) the level of approval required to set pay
17 under this section;
18 "(3) all types of actions and positions to be cov-
19 ered;
20 "(4) the relationship between the exercise of au-
21 thority under this section and the use of other pay
22 incentives; and
23 "(5) a process to evaluate the effectiveness of
24 this section.".
25 (b) TECHNICAL AND CONFORMING AMENDMENT.—

1 (1) TABLE OF CHAPTERS.—The table of chap-
2 ters for part III of title 5, United States Code, is
3 amended by adding at the end the following:

"98. National Aeronautics and Space Administration ..... 9801".

4 (2) COMPENSATION FOR CERTAIN EXCEPTED
5 PERSONNEL.—
6 (A) IN GENERAL.—Subparagraph (A) of
7 section 203(c)(2) of the National Aeronautics
8 and Space Act of 1958 (42 U.S.C.
9 2473(c)(2)(A)) is amended by striking "the
10 highest rate of grade 18 of the General Sched-
11 ule of the Classification Act of 1949, as amend-
12 ed," and inserting "the rate of basic pay pay-
13 able for level III of the Executive Schedule,".
14 (B) EFFECTIVE DATE.—Notwithstanding
15 section 313, the amendment made by this para-
16 graph shall take effect on the first day of the
17 first pay period beginning on or after the effec-
18 tive date of this Act.
19 (3) COMPENSATION CLARIFICATION.—Section
20 209 of title 18, United States Code, as amended by
21 section 209(g)(2) of the E-Government Act of 2002
22 (Public Law 107–347; 116 Stat. 2932), is amended
23 by adding at the end the following:

1 "(h)(1) In this subsection, the term 'private sector
2 entity' has the meaning given under section 9832(a) of
3 title 5.
4 "(2) This section does not prohibit an employee of
5 a private sector entity, while assigned to the National Aer-
6 onautics and Space Administration under section 9832 of
7 title 5, from continuing to receive pay and benefits from
8 that entity in accordance with section 9832 of that title.".
9 (4) OTHER AMENDMENTS.—Section 125(c)(1)
10 of Public Law 100–238 (5 U.S.C. 8432 note), as
11 amended by section 209(g)(3) of the E-Government
12 Act of 2002 (Public Law 107–347; 116 Stat. 2932),
13 is amended—
14 (A) in subparagraph (C), by striking "or"
15 at the end;
16 (B) in subparagraph (D), by striking
17 "and" at the end and inserting "or"; and
18 (C) by adding at the end the following:
19 "(E) an individual assigned from the Na-
20 tional Aeronautics and Space Administration to
21 a private sector organization under section
22 9832 of title 5, United States Code; and".
23 **SEC. 312. EFFECTIVE DATE.**
24 This subtitle shall take effect 180 days after the date
25 of enactment of this Act.

TITLE IV—HUMAN CAPITAL PERFORMANCE FUND

SEC. 401. HUMAN CAPITAL PERFORMANCE FUND.

(a) Subpart D of part III of title 5, United States Code, is amended by inserting after chapter 53 the following:

"CHAPTER 54—HUMAN CAPITAL PERFORMANCE FUND

"Sec.
"5401. Purpose.
"5402. Definitions.
"5403. Human Capital Performance Fund.
"5404. Human capital performance payments.
"5405. Regulations.
"5406. Agency plan.
"5407. Nature of payment.
"5408. Appropriations.

"§ 5401. Purpose

"The purpose of this chapter is to promote, through the creation of a Human Capital Performance Fund, greater performance in the Federal Government. Monies from the Fund will be used to reward agencies' highest performing and most valuable employees. This Fund will offer Federal managers a new tool to recognize employee performance that is critical to the achievement of agency missions.

"§ 5402. Definitions

"For the purpose of this chapter—

"(1) 'agency' means an Executive agency under section 105, but does not include the General Accounting Office;

1 "(2) 'employee' includes—

2 "(A) an individual paid under a statutory

3 pay system defined in section 5302(1);

4 "(B) a prevailing rate employee, as defined

5 in section 5342(a)(2); and

6 "(C) a category of employees included by

7 the Office of Personnel Management following

8 the review of an agency plan under section

9 5403(b)(1);

10 but does not include—

11 "(i) an individual paid at an annual rate of

12 basic pay for a level of the Executive Schedule,

13 under subchapter II of chapter 53, or at a rate

14 provided for one of those levels under another

15 provision of law;

16 "(ii) a member of the Senior Executive

17 Service paid under subchapter VIII of chapter

18 53, or an equivalent system;

19 "(iii) an administrative law judge paid

20 under section 5372;

21 "(iv) a contract appeals board member

22 paid under section 5372a;

23 "(v) an administrative appeals judge paid

24 under section 5372b; and

1 "(vi) an individual in a position which is
2 excepted from the competitive service because of
3 its confidential, policy-determining, policy-mak-
4 ing, or policy-advocating character; and
5 "(3) 'Office' means the Office of Personnel
6 Management.

7 **"§ 5403. Human Capital Performance Fund**

8 "(a) There is hereby established the Human Capital
9 Performance Fund, to be administered by the Office for
10 the purpose of this chapter.

11 "(b)(1)(A) An agency shall submit a plan as de-
12 scribed in section 5406 to be eligible for consideration by
13 the Office for an allocation under this section. An alloca-
14 tion shall be made only upon approval by the Office of
15 an agency's plan.

16 "(B)(i) After the reduction for training required
17 under section 5408, ninety percent of the remaining
18 amount appropriated to the Fund may be allocated by the
19 Office to the agencies. Of the amount to be allocated, an
20 agency's pro rata distribution may not exceed its pro rata
21 share of Executive branch payroll.

22 "(ii) If the Office does not allocate an agency's full
23 pro rata share, the undistributed amount remaining from
24 that share will become available for distribution to other
25 agencies, as provided in subparagraph (C).

1 "(C)(i) After the reduction for training under section
2 5408, ten percent of the remaining amount appropriated
3 to the Fund, as well as the amount of the pro rata share
4 not distributed because of an agency's failure to submit
5 a satisfactory plan, shall be allocated among agencies with
6 exceptionally high-quality plans.
7 "(ii) An agency with an exceptionally high-quality
8 plan is eligible to receive an additional distribution in addi-
9 tion to its full pro rata distribution.
10 "(2) Each agency is required to provide to the Office
11 such payroll information as the Office specifies necessary
12 to determine the Executive branch payroll.
13 **"§ 5404. Human capital performance payments**
14 "(a)(1) Notwithstanding any other provision of law,
15 the Office may authorize an agency to provide human cap-
16 ital performance payments to individual employees based
17 on exceptional performance contributing to the achieve-
18 ment of the agency mission.
19 "(2) The number of employees in an agency receiving
20 payments from the Fund, in any year, shall not be more
21 than the number equal to 15 percent of the agency's aver-
22 age total civilian full- and part-time permanent employ-
23 ment for the previous fiscal year.
24 "(b)(1) A human capital performance payment pro-
25 vided to an individual employee from the Fund, in any

1 year, shall not exceed 10 percent of the employee's rate
2 of basic pay.
3 "(2) The aggregate of an employee's rate of basic
4 pay, adjusted by any locality-based comparability pay-
5 ments, and human capital performance pay, as defined by
6 regulation, may not exceed the rate of basic pay for Execu-
7 tive Level IV in any year.
8 "(c) No monies from the Human Capital Perform-
9 ance Fund may be used to pay for a new position, for
10 other performance-related payments, or for recruitment or
11 retention incentives paid under sections 5753 and 5754.
12 "(d)(1) An agency may finance initial human capital
13 performance payments using monies from the Human
14 Capital Performance Fund, as available.
15 "(2) In subsequent years, continuation of previously
16 awarded human capital performance payments shall be fi-
17 nanced from other agency funds available for salaries and
18 expenses.
19 **"§ 5405. Regulations**
20 "The Office shall issue such regulations as it deter-
21 mines to be necessary for the administration of this chap-
22 ter, including the administration of the Fund. The Office's
23 regulations shall include criteria governing—
24 "(1) an agency plan under section 5406;

1 "(2) the allocation of monies from the Fund to
2 agencies;
3 "(3) the nature, extent, duration, and adjust-
4 ment of, and approval processes for, payments to in-
5 dividual employees under this chapter;
6 "(4) the relationship to this chapter of agency
7 performance management systems;
8 "(5) training of supervisors, managers, and
9 other individuals involved in the process of making
10 performance distinctions; and
11 "(6) the circumstances under which funds may
12 be allocated by the Office to an agency in amounts
13 below or in excess of the agency's pro rata share.
14 **"§ 5406. Agency plan**
15 "To be eligible for consideration by the Office for an
16 allocation under this section, an agency shall—
17 "(1) submit a plan, subject to review and ap-
18 proval by the Office;
19 "(2) demonstrate that its performance manage-
20 ment system supports agency strategic performance
21 goals and objectives, and is used to make meaningful
22 distinctions based on relative performance;
23 "(3) provide sufficient training to supervisors,
24 managers, and other individuals involved in the proc-
25 ess of making performance distinctions;

1 "(4) upon approval, receive an allocation of
2 funding from the Office;
3 "(5) make payments to individual employees in
4 accordance with the agency's approved plan; and
5 "(6) provide such information to the Office re-
6 garding payments made and use of funds received
7 under this section as the Office may specify.

8 **"§ 5407. Nature of payment**

9 "Any payment to an employee under this section shall
10 be part of the employee's basic pay for the purposes of
11 subchapter III of chapter 83, and chapters 84 and 87,
12 and for such other purposes (other than chapter 75) as
13 the Office shall determine by regulation.

14 **"§ 5408. Appropriations**

15 "There is authorized to be appropriated $500 million
16 for fiscal year 2004, and, for each subsequent fiscal year,
17 such sums as may be necessary to carry out the provisions
18 of this chapter. In the first year of implementation, up
19 to 10 percent of the amount appropriated to the Fund
20 shall be available to participating agencies to train super-
21 visors, managers, and other individuals involved in the ap-
22 praisal process on using performance management sys-
23 tems to make meaningful distinctions in employee per-
24 formance and on the use of the Fund.".

1 (b) The table of chapters for part III of title 5,
2 United States Code, is amended by inserting after the
3 item relating to chapter 53 the following:

"54. Human Capital Performance Fund ..... 5401".

○

Chairman TOM DAVIS. I would now recognize the distinguished ranking member, Mr. Waxman, for his opening statement.

Mr. WAXMAN. Thank you very much, Mr. Chairman. I would like to thank you for holding this hearing. And I too am looking forward to the testimony of our witnesses.

The Bush administration's proposal to rewrite the rules for civilian employees at the Department of Defense is breathtaking in its scope and implications.

We have delayed the markup of the proposal twice, and that has been helpful for Members, staff and outside groups to try to understand this proposal.

Nevertheless, we are working at a breakneck pace on a bill that will directly affect almost 700,000 civilian employees at the Defense Department.

Now, why, you might ask, are we doing this? No one seems to know. At a subcommittee hearing last week, I asked Undersecretary of Defense, David Chu, how the current personnel system had hindered DOD's war efforts in Iraq. He wasn't able to give me any examples.

When Dr. Chu was asked whether Secretary Rumsfeld would consider delaying consideration of the bill, Dr. Chu pointed to, "the 3 weeks it took our troops to get from the Kuwait border to Baghdad."

Dr. Chu added that the Secretary, "is not someone who is patient with a long indecisive process."

In other words, now that the Defense Department has marched through Iraq in 3 weeks, it intends to do the same with Congress.

I might understand this better if we at least knew what DOD was going to do with the enormous flexibilities that it is seeking, but we have virtually no idea.

Basically, the DOD proposal is nothing more than a blank check. DOD is asking to be exempted from 100 years of civil service law, laws enacted specifically to prevent a patronage system. Yet, the Department isn't telling us how it is going to replace these laws. That is not the right way to deal with one of the most sweeping civil service reforms in history.

When David Walker, the Comptroller General, testified last week, he said he had serious concerns about giving DOD this broad authority. He explained, "unfortunately based on GAO's past work, most existing Federal performance appraisal systems, including a vast majority of DOD's systems are not currently designed to support a meaningful perform-based based pay system." That hardly inspires confidence for what DOD might do if we give them this authority.

At the last hearing, I read a quote from Tom Freidman, a columnist with the New York Times. And Mr. Friedman said, "Our Federal bureaucrats are to capitalism what the New York Police and Fire Departments were to 9/11, the unsung guardians of America's civic religion, the religion that says if you work hard and play by the rules, you get rewarded and you won't get ripped off. . . So much of America's moral authority to lead the world derives from the decency of our government and its bureaucrats, and the example we set for others. . . They are things to be cherished, strengthened, and praised every single day."

Mr. Friedman is right. We should be praising Federal civil servants, not attacking them. But, from day 1, this administration has sought to characterize loyal Federal employees as inept and inefficient bureaucrats. Federal jobs have been given to private contractors. Attempts have been made to slash annual pay increases. Financial bonuses have been given to political appointees instead of career employees.

It is incredible that the group of employees who the administration has chosen to target this time, are Defense Department employees. These are the same employees who saw terrorists crash an airplane into their headquarters. These are the same employees who made enormous sacrifices to support the military effort in Iraq.

I am willing to work on a bipartisan basis to make changes to the civil service laws where there is a need for new authorities or new flexibility. But we shouldn't destroy 100 years of civil service laws with a sledge hammer.

I urge my colleagues to slow down this runaway legislative train.

[The prepared statement of Hon. Henry A. Waxman follows:]

Statement of Rep. Henry A. Waxman, Ranking Minority Member
Committee Government Reform
Hearing on Defense Department Personnel Bill
May 6, 2003

Mr. Chairman, I'd like to thank you for holding this hearing.

The Bush Administration's proposal to rewrite the rules for civilian employees at the Department of Defense is breathtaking in its scope and implications. We've delayed the markup of the proposal twice, and that's been helpful for members, staff, and outside groups to try to understand the proposal. Nevertheless, we're working at a breakneck pace on a bill that will directly affect almost 700,000 civilian employees at the Defense Department.

Why, you might ask, are we doing this? No one seems to know. At a subcommittee hearing last week, I asked Undersecretary of Defense David Chu how the current personnel system had hindered DoD's war efforts in Iraq. He wasn't able to give me any examples.

When Dr. Chu was asked whether Secretary Rumsfeld would consider delaying consideration of the bill, Dr. Chu pointed to [quote] "the three weeks it took our troops to get from the Kuwait border to Baghdad." [end of quote] Dr. Chu added that the Secretary [quote] "is not someone who is patient with a long, indecisive process." [end of quote]

In other words, now that the Defense Department has marched through Iraq in three weeks, it intends to do the same with Congress.

I might understand this better if we at least knew what DoD was going to do with the enormous flexibilities that it's seeking. But we have virtually no idea.

Basically, the DoD proposal is nothing more than a blank check. DoD is asking to be exempted from a hundred years of civil service laws enacted specifically to prevent a patronage system. Yet the Department isn't telling us how's its going to replace these laws. That's not the right way to deal with one of the most sweeping civil service reforms in history.

When David Walker, the Comptroller General, testified last week, he said he had "serious concerns" about giving DoD this broad authority. He explained: [quote] "Unfortunately, based on GAO's past work, most existing federal performance appraisal systems, including a vast majority of DoD's systems, are not currently designed to support a meaningful performance-based pay system." [end of quote] That hardly inspires confidence for what DoD might do if we give them this authority.

At the last hearing, I read a quote from Thomas Friedman, a columnist with the *New York Times*. Mr. Friedman wrote: [quote] "[O]ur federal bureaucrats are to capitalism what the New York Police and Fire Departments were to 9/11 – the unsung guardians of America's civic religion, the religion that says if you work hard and play by the rules, you'll get rewarded and you won't get ripped off. . . . [S]o much of America's moral authority to lead the world derives from the decency of our government and its bureaucrats, and the example we set for others. . . . They are things to be cherished, strengthened and praised every single day." [end of quote]

Mr. Friedman is right: we should be praising federal civil servants, not attacking them. But from day one, this Administration has sought to characterize loyal federal employees as inept and inefficient bureaucrats. Federal jobs have been given to private contractors. Attempts have been made to slash annual pay increases. Financial bonuses have been given to political appointees, instead of career employees.

It's incredible that the group of employees who the Administration has chosen to target this time are Defense Department employees. These are the same employees who saw terrorists crash an airplane into their headquarters. These are the same employees who made enormous sacrifices to support the military effort in Iraq.

I am willing to work on a bipartisan basis to make changes to the civil service laws where there's a need for new authorities or new flexibility. But we shouldn't destroy a hundred years of civil service laws with a sledgehammer. I urge my colleagues to slow down this runaway legislative train.

Chairman TOM DAVIS. Thank you very much. Mrs. Davis, do you have an opening statement? We have our Civil Service Subcommittee chairwoman and ranking member. All of their statements will be put in the record.

Mrs. Davis.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Chairman. I want to thank you for holding this hearing and continuing the discussion on this important piece of legislation.

And I thank our witnesses for being here today, particularly those representing the executive branch. It is a distinguished group, and their presence here today illustrates the administration's commitment to meaningful and significant civil service reform.

This legislation is before us because a growing number of agencies are seeking relief from the rigidity of the General Schedule. This is not surprising. The General Schedule, adopted decades ago, has evolved into a tool for rewarding longevity and finding ways to reward performance and encourage our most talented employees is clearly the direction the Federal Government is heading.

Many observers, most recently and most notably the Volker Commission, have recognized the General Schedule as out of date and in need of major overhaul. But that is a long-term issue. In the hearing now, we have some personnel problems that must be addressed.

The Defense Department, NASA and the Securities and Exchange Commission are seeking to work within the constraints of Title 5 of the U.S. Code, which covers civil service law, to gain some of these flexibilities. Collectively and individually, these agencies are responsible for some of the most important, and in some cases, dangerous work of the Federal Government.

The National Security Personnel System sought by the Defense Department has received the most attention. And it is by far the largest of the proposals, both in terms of size and scope. My Civil Service Subcommittee held a hearing last week on the legislation, as did the Armed Services Committee.

It is evident that the Defense Department needs a more agile civilian work force to work side by side with the men and women in uniform. There have been concerns about the legislation raised at both hearings. But, Mr. Chairman, I am confident that with working with you, Chairman Duncan Hunter of Armed Services, our friends on the minority side, and the White House, we will be able to produce a good bill, one that advances the meaningful personnel reforms sought by the Pentagon, while also maintaining the important safeguards and protections that are an integral part of the civil service employment.

Thank you again, Mr. Chairman, for holding this hearing.

Chairman TOM DAVIS. Thank you very much.

We will put all of the other statements in the record at this point. We have moved to our first panel. We have the Honorable Paul Wolfowitz, Deputy Secretary of the Department of Defense, accompanied by General Peter Pace, from USMC, vice chairman of the Joint Chiefs of Staff, and Admiral Vern Clark, Chief of Naval Operations, and the Honorable Kay Coles James, the Director of the Office of Personnel Management.

It is the policy of the committee that all witnesses be sworn before their testimony. If you would rise with me and raise your right hands.

[Witnesses sworn.]

Chairman TOM DAVIS. Your total statement will be put in the record. Admiral Clark, are you testifying or is just Secretary Wolfowitz going to testify, and are you here for questions and answers?

Mr. WOLFOWITZ. I have an opening statement. I think Admiral Clark has a brief additional statement. And I think he and General Pace will then answer questions. And Director James, I think, has an opening statement.

Chairman TOM DAVIS. We have a clock. We try to be fairly loose with the first panel. But, you have a green light. After 4 minutes, it turns yellow. At the end of 5, it is red. If you can move to try to sum up, your whole statement is in the record. I think we have questions based on the total statement. So just in the interests of time and making sure we can get questions.

Also, Mr. Hoyer is going to drop by. At that point, we will allow him to speak and leave. He has other business as well, but he has an interest in this. And Mr. Waxman and I have agreed to let him speak as well.

We will start with you, Mr. Secretary, and then go to Admiral Clark and General Pace and then to Ms. James.

STATEMENTS OF PAUL WOLFOWITZ, DEPUTY SECRETARY, DEPARTMENT OF DEFENSE; GENERAL PETER PACE, VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE; DAVID CHU, UNDERSECRETARY OF DEFENSE; ADMIRAL VERN CLARK, CHIEF OF NAVAL OPERATIONS, USN; AND KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Mr. WOLFOWITZ. Thank you, Mr. Chairman, and thank you for holding this hearing on what is an extremely important subject for our national security.

I will try to briefly go through since you have the prepared statement. I will put it all in the record.

We witnessed in Iraq another magnificent effort by our men and women in uniform. They can claim a great achievement on behalf of freedom for America, and for Iraqis who were victims of a vicious regime. They performed their missions with incredible courage and skill, and the whole country is enormously proud of them and grateful to them.

Along with those qualities, much of the success we witnessed came from some transformational changes that are the product of extraordinary work in recent years. Our unparalleled ability to conduct night operations has allowed us to virtually own the night. The close integration of our forces has resulted in an order of magnitude change in how precise we are in finding and hitting targets from just a decade ago, to name just two dramatic examples.

But, as we continue to wage the war against terrorism, it is imperative that we continue to take stock of how we can further transform the Department of Defense to deal with a world that changed so dramatically on September 11th. As we have seen so

vividly in recent days, lives depend not just on technology, but on a culture that fosters leadership, flexibility, agility and adaptability.

One of the key areas in which we need Congress's help is in transforming our system of personnel management so that we can gain more flexibility and agility in how we utilize the more than 700,000 civilians that provide the Department such vital support, or to deal efficiently with those few who don't.

And let me, if I might, depart from the prepared text. This is not an attack on our civil service employees. To the contrary, they are a critical and extremely valuable part of our defense establishment. I speak as someone who was a career civil servant at one point in my career, and someone who has worked with literally hundreds of career civil servants. We could not do what we do without them. We believe that the reforms we are proposing are actually going to make more opportunities for people to join that civil service work force, and for those who are in it to be rewarded for performance, which everyone I know wants to be able to do.

But, it is also a national security requirement, because it goes straight to how well we are able to defend our country in the years to come. This is not a new issue. It is not a partisan issue. No fewer than three administrations have tried to fix a system that is by almost all accounts seriously outmoded. In an age when terrorists move information at the speed of an e-mail, the Defense Department is still bogged down in bureaucratic processes of the industrial age.

The Defense Information Systems Agency, for example, finds it difficult to recruit candidates so critical to this information age. The telecommunications, IT and professional engineering and science candidates who are so attracted to industry are critical to our performance, but because of inflexible and time-consuming laws that govern recruiting, we are at a big competitive disadvantage. When industry can offer the best and brightest jobs on the spot at job fairs, we have to compete for these same individuals using a hiring process that can take months. If this system is slow in bringing promising talent on board, it is sometimes equally slow to separate people with proven problems. In one case at the Defense Logistics Agency, it took 9 months to fire an employee with previous suspensions and corrective actions who had repeatedly been found sleeping on the job. That kind of practice is demoralizing to the great majority of the work force who are getting the job done.

Our legislative proposal, the Defense Transformation Act for the 21st Century, would be a big step forward in addressing such obvious shortfalls in the current system. The bill before you will also give the Armed Forces the flexibility to more efficiently react to changing events by moving resources, shifting people and bringing new weapons systems on line.

We have proposed a process for moving a number of nonmilitary functions to more appropriate departments. We have proposed more flexible rules for the flow of money through the Department.

We have proposed elimination of onerous regulations that make it difficult or virtually impossible for many small businesses to do business with the Department of Defense.

And, we have proposed measures that would protect our military training ranges so that our men and woman will be able to continue to train as they fight while honoring our steadfast commitment to protecting the environment.

As you work through the details of this bill, you will inevitably find that almost every regulation had some plausible rationale behind it. But it is important to keep in mind what the sum total of these industrial age bureaucratic processes does to our ability to develop an information age military. The cumulative effect of the old processes impacts not just on small details, but on our ability to defend our Nation and to provide the brave men and women who perform that task with the absolutely best support they deserve.

First, the inability to put civilians in hundreds of thousands of jobs, by our estimate over 300,000, that do not need to be performed by men and women in uniform puts unnecessary strain on our most precious resource, our uniformed personnel. Today we have uniformed military personnel doing essentially nonmilitary jobs, and yet we are calling up Reserves to help deal with the global war on terror.

Second, the overall inefficiency of our management system means that taxpayers are not getting the value that they could get from their defense dollars. And perhaps more important, the men and women whose lives depend on the support that those dollars deliver are also being shortchanged. Despite 128 different acquisition reform studies, we still have a system in the Defense Department that, since 1975 has doubled the time that it takes to produce a new weapons system, in an era when technologies in the private sector arrive in years and months, not in decades.

Third, the encroachment on our ability to train adequately in an era when training increasingly represents the most qualitative edge that the U.S. military enjoys, threatens a collision that could endanger the lives of our servicemen and women.

Fourth, our limited flexibility to manage our civilian work force will make it increasingly difficult to compete with the private sector for the specialized skills that an information age military needs for its support, but that will be in increasingly high demand throughout our economy.

And finally, and perhaps most important, our slowness in moving new ideas through that cumbersome process to the battlefield means that our remarkable men and women are making use of systems and processes that are still a generation or two behind where they ought to be. As we have seen in both Afghanistan and Iraq, we want to have every bit of qualitative superiority that we can achieve because that saves lives and allows us to more rapidly and precisely defeat the people who threaten the security of the United States. Our objective is not merely to achieve victories, but to have the kind of decisive superiority that can help us to prevent wars in the first place, or, if they must be fought, that can enable us to win as quickly as possible with as little loss of life as possible.

Mr. Chairman, the Department has already engaged in substantial transformation. We have reduced management and headquarters staffs by 11 percent. We have streamlined the acquisition process by eliminating hundreds of pages of unnecessary rules and

self-imposed red tape. And we have implemented a new financial structure.

But these internal changes are not enough. DOD needs legislative relief to achieve authentic transformation. The bill before you represents many months, indeed years of work inside and outside the Department of Defense. Congress, over the years, has authorized us some flexibility in small experimental projects to implement the kinds of personnel reform that we would now like to introduce for the whole Department.

More than 30,000 DOD employees have participated in demonstration projects that other congressional committees helped to pioneer. It is a fact, in other U.S. Government agencies, major portions of the national work force have already been freed from archaic rules and regulations. We need similar relief.

Mr. Chairman and members of the committee, the Department of Defense must transform for the 21st century, not just the way we fight, but also the way we conduct our daily business. And we need to get this done right now.

The world changed dramatically on September 11th. The laws and regulations governing the Department of Defense must keep pace. Thank you very much.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Wolfowitz follows:]

Prepared Statement of Deputy Secretary Paul Wolfowitz
For the House Committee on Government Reform
May 6, 2003

Chairman Davis and Members of the Committee: When President Bush took office almost two and half years ago, he placed a priority on changing how America's military does business; he charged the Department of Defense to transform to meet the threats of 21st Century. When September 11th came, it only amplified the fact that, while the world had changed dramatically, certain laws and regulations governing the Department of Defense were vestiges of an earlier, much different, much less immediate era. The American people need and deserve a transformed Defense Department, one that is poised and prepared to defend our national security in this new era, possibly the most dangerous America has ever confronted. A critical part of this transformation is the Defense Transformation Act for the 21st Century. I appreciate the opportunity to discuss with this Committee, focused as it is on reform, the Defense Department's perspective on this Act.

We have witnessed in Iraq another magnificent effort by our men and women in uniform and their coalition partners; they can claim a great achievement on behalf of freedom—for America and for Iraqis who were victims of a vicious regime. They have freed us from an enormous threat and given an entire people reason to believe that representative government is within their grasp. They performed their missions with incredible courage and skill, and we are enormously proud of them.

Along with those qualities, much of the success we witnessed came from certain transformational changes. Our unparalleled ability to conduct night operations has allowed us to virtually own the night, and the close integration of our forces has resulted in an order of magnitude change in how precise we are in finding and hitting targets from just a decade ago, to name just two dramatic examples.

And as we continue to wage the war against terrorism, it is imperative that we continually take stock of how we can further transform the Department of Defense—because when the world changed so dramatically on September 11th, it was vital that the Department of Defense change dramatically as well. As we have seen so vividly in recent days, lives depend, not just on technology, but on a culture that fosters leadership, flexibility, agility and adaptability.

Why This Legislation

To foster these qualities and bring DoD into the 21st Century, we need legislative help. One of the key areas in which we need your help is in transforming our system of personnel management so that we can gain more flexibility and agility in how we handle the more than 700,000 civilians who provide the Department such vital support—or to deal efficiently with those who don't. The ability to do so is nothing less than a national security requirement because it goes straight to how well we will be able to defend our country in the years to come.

In truth, this is neither a new nor a partisan issue. No less than three administrations have

tried to fix a system that is, by most accounts, seriously broken. In an age when terrorists move information at the speed of an e-mail, money at the speed of a wire transfer and people at the speed of a commercial jet liner, the Defense Department is still bogged down, to a great extent, in the micro-management and bureaucratic processes of the industrial age, when the world has surged ahead into the information age.

The Defense Information Systems Agency, for example, finds it difficult to recruit candidates so critical to this information age—the telecommunications, IT and professional engineering and science candidates who are also so attractive to industry—because of inflexible and time-consuming laws that govern recruiting. When industry can offer the best and brightest jobs on the spot at job fairs, we must compete for these same individuals using a hiring process that can take months. If this system is slow in bringing promising talent on board, it can be equally slow to unload people with proven problems. In one case at the Defense Logistics Agency, it took nine months to fire an employee with previous suspensions and corrective actions who had repeatedly been found sleeping on the job.

Our legislative proposal, the Defense Transformation Act for the 21st Century, would be a big step forward in addressing such obvious shortfalls in the current system. The bill before you will also give the Armed Forces the flexibility to more efficiently react to changing events with the ability to more rapidly move resources, shift people and bring new weapons systems on line.

We have proposed a process for moving a number of non-military functions that have been pressed on DOD over the years to other, more appropriate departments. We have proposed more flexible rules for the flow of money through the Department to give us the ability to respond to urgent needs as they emerge.

We have proposed elimination of onerous regulations that make it difficult or virtually impossible for many small businesses to do business with the Department of Defense. We have proposed expanded authority for competitive outsourcing so that we can get military personnel out of non-military tasks and back into the field.

And we have proposed measures that would protect our military training ranges so that our men and women will be able to continue to train as they fight while honoring our steadfast commitment to protecting the environment.

This bill involves an enormous amount of detail. As you work through it, you will inevitably find that almost every regulation had some plausible rationale behind it, but it is important to keep in mind what the sum total of all these industrial age bureaucratic processes does to our ability to develop an information age military. The cumulative effect of the old processes that we are seeking to change with this proposed legislation impacts not just small details, but our ability to defend our nation and to provide the brave men and women who perform that task with the absolutely best support they deserve. Allow me to name a few of these old processes.

First, the inability to put civilians in hundreds of thousands of jobs that do not need to be performed by men and women in uniform puts unnecessary strain on our most precious

resource—our uniformed personnel. Today, we have some 320,000 uniformed personnel doing essentially non-military jobs, and yet we are calling up Reserves to help deal with the global war on terror.

Second, the overall inefficiency of our management system means that taxpayers are not getting the value they could get from their defense dollars. And, perhaps more important, the men and women whose lives depend on the support that the dollars deliver are also being short-changed. Despite 128 acquisition reform studies, we have a system in the Defense Department that, since 1975 has doubled the time it takes to produce a new weapons system in an era when technologies in the private sector are arriving in years and months—not in decades.

Third, the encroachment on our ability to train adequately in an era when training increasingly represents the most important qualitative edge that the US military enjoys, threatens a collision that will endanger the lives of our servicemen and women. That collision has not yet happened, fortunately, but it behooves us to take appropriate measures now to ensure that it does not.

Fourth, our limited flexibility to manage our civilian work force will make it increasingly difficult to compete with the private sector for the kinds of specialized skills that an information-age military needs for its support, but that will be in increasingly high demand throughout our economy.

And finally, and perhaps most important, our slowness in moving new ideas through that cumbersome process to the battlefield means that the equipment and processes that our remarkable men and women are making use of are still a generation or two behind where they ought to be. As we have seen in both Afghanistan and Iraq, we need every bit of qualitative superiority that we can achieve in order to save lives and to more rapidly and precisely defeat the people who threaten the security of the United States. Our objective is not merely to achieve victories, but to have the kind of decisive superiority that can help us to prevent wars in the first place, or if they must be fought, that can enable us to win as quickly as possible with as little loss of life as possible.

Mr. Chairman, the Department is already engaged in substantial transformation. We have reduced management and headquarters staffs by 11 percent. We have streamlined the acquisition process by eliminating hundreds of pages of unnecessary rules and self-imposed red tape. And we have implemented a new financial management structure.

But these internal changes are not enough. DOD needs legislative relief to achieve authentic transformation. And we need the Congress's help to transform how we manage people, how we buy weapons and how we manage our training range. We need Congress to enact the Defense Transformation Bill.

Why This Legislation—Now

We understand it would be ideal if there were more time for you to consider this bill. But, we also recognize the fact that if we were to delay and not get on this year's Defense

Authorization Bill, this legislation may not become law until late 2004 or even 2005. And given that our adversaries continue to look for vulnerabilities and opportunities, delay will only work against us. And we believe this bill offers a substantial step forward in improving the overall conditions of the Department's civilian workforce.

The bill before you is the product of many months, indeed years, of work inside and outside the Department of Defense. Much of the content of the civilian personnel package is the result of personnel demonstration projects that Congress authorized the Department to undertake decades ago.

More than 30,000 DOD employees have participated in the demonstration projects that other Congressional committees helped to pioneer. Without the Congress' leadership and this committee's leadership, this bill would not be something we could be considering today.

Over the past year, this bill has gone through an extensive interagency process and comes to you with the full support of the administration. And the Congress has played a vital role in the development of this initiative.

Although, as has been pointed out, in its final form the bill did not reach the Congress until April 10, in the months leading up to its formal delivery, we had over 100 meetings with members and staff on the various provisions. That helped to shape, in substantial measure, those things that we thought should be presented to the Congress and those things that should not be. The input that we have received from the Congress has been invaluable in the development of the bill that is before you.

It is a fact that, in other U.S. government agencies, major portions of the national workforce have already been freed from archaic rules and regulations. We need similar relief. Mr. Chairman and members of the committee, the Department of Defense must transform for the 21st century not just the way we deter and defend, but also the way we conduct our daily business. And we need to get this done right now. The world changed drastically on September 11, but the laws and regulations governing the Department of Defense have simply not kept pace.

We realize that achieving the goal of reforming the Defense Department's civil service system requires some bold moves to constitute real transformation. We are asking you now to help us take such a bold step. That we are fighting a difficult war on terrorism that promises to be of some duration only makes the need to do so to reform our personnel system even more pressing. We must fix this system now. We cannot afford to wait.

Chairman TOM DAVIS. Admiral Clark, thanks for being with us.

Admiral CLARK. Thank you.

Mr. Chairman, Mr. Waxman, Mrs. Davis, members of the committee. I appreciate the opportunity to appear before this committee.

I have been on the Hill frequently this spring talking about transformation. This year we introduced Sea Power 21, our vision for the future, about transforming our Navy and creating the Navy for the 21st century. I have said repeatedly on the Hill that transformation is more than just buying new and different ships and airplanes and submarines and weapons.

Transformation is also about transforming our organizational processes in a way that maintains our total and qualitative advantage. Another thing I talk about transformation is it starts with people. People are our asymmetric advantage. They are wonderful. They are doing a great job. It starts in the hearts and minds of our people.

Our people are doing a great job in OIF and OEF. As a Service Chief, it is clear to me that we have to be able to continue to attract the very best people that we can get to build the military of the 21st century. I have a sense of urgency about this, and I look forward to talking to you today about the specific challenges that I face in trying to create that future.

In my mind, what is required is an agile, flexible personnel and business process that can recruit and train and reward the kind of dedicated men and women, men and women who can speed innovation. And the 21st century capability that this Nation requires, men and women who can improve the way we manage resources for the Nation, and to ensure that the taxpayers of the United States of America are getting a fair shake.

If we do that, we will be able to attract and retain the right people with the right capabilities and the right management skills to the benefit of our Nation. Now, some people see this legislation in the light of negatives. I believe that there is great goodness in this bill. I believe that the goodness is about, and points out the importance of, our civilian work force. I want to be on record that we can't make it without them. They are a key part of our Navy team.

This bill will strengthen our human resource force, and I support wholly the principles that are embodied in this legislation.

Mr. Chairman, I look forward to your questions, thank you.

Chairman TOM DAVIS. Thank you very much.

General Pace.

General PACE. Mr. Chairman, Mr. Waxman, members of the committee, thank you very much for this opportunity. It is my distinct honor to be able to thank you on behalf of all of the men and women in the Armed Forces, Active, Reserve, Guard and civilian, for your sustained bipartisan support.

And I would say that the tremendous accomplishments of our forces in battle recently is directly attributable to the reforms that started with the enactment of Goldwater-Nichols Act back in 1986. Our forces now are able to adapt very quickly in battle, and we need that same adaptability and flexibility in our DOD civilian personnel system. We also need to be able to recruit effectively.

About one-third of our civilian force, and in my service we call them civilian Marines, because they are such an integral and important part. About one-third of our civilian military members are over the age of 50. That means over a short period of time, we are going to have to replace this enormously talented force. To sustain the current quality and to be able to replace in those kinds of numbers, we are going to need a recruiting system that is able to go out, market, be funded and find the quality folks that we need.

Second, we need to be able to hire them very quickly. We must be able to go to the same counter, to the same job fair, as civilian corporations, and be able to hire on the spot if necessary, rather than hand someone a form and say, "We will talk to you in about 3 months once we process it."

Last, we need to be able to pay our dedicated professionals based on merit. We should not make them wait some defined period of time before they become eligible to be considered for the kind of pay raises they deserve based on their own performance.

I am very enthusiastic about the opportunity that this proposed legislation has for expanding the number of available jobs to our civilian Armed Forces members. Each of us, Admiral Clark, myself and the rest of the Joint Chiefs have been deeply embedded in the discussions that have led to this proposed legislation. We all strongly support it. We believe it will help us successfully benefit to our civilian force, it will be a benefit to the Department, and, over time, we will be able to sustain the very superior civilian members of our Armed Forces that we have now.

Thank you, sir.

Chairman TOM DAVIS. Thank you very much.

Ms. James, thanks for being with us.

Ms. JAMES. Thank you, Mr. Chairman. Good morning. Chairman Davis, Congressman Waxman, I want to thank you for the opportunity to testify today on these very important pieces of legislation.

I will summarize my statement and ask that it would be entered into the record, and look forward to answering questions.

Chairman TOM DAVIS. Without objection.

Ms. JAMES. On October 15, 2001, President Bush spoke to members of the Senior Executive Service and said, "I hope you will never take the honor of public service for granted. Some of us will serve in government for a season, others will spend an entire career here. But all of us should dedicate ourselves to great goals. We are not here to mark time but to make progress, to achieve results, and to lead a record of excellence."

After that speech, I went back to my office and thought about what is it that we could do at the Office of Personnel Management to leave a record of excellence as this President had challenged us to do. I think it is important to note that our discussions today are happening against the backdrop of National Public Service Recognition Week, where public servants at the Federal, State and local level are all being recognized for their contribution to our country.

The American civil service comes out of a proud tradition of 120 years, coming out of the Pendleton Act, and then the Civil Service Commission, and now OPM.

That proud tradition embodies the Merit System Principles, the Prohibited Personal Practices, Whistle Blower Protections and Veterans Preference.

I think that while we look at the legislation that is before us today, that we need to understand and recognize that all of us, everyone who is here at this table and who will testify later today, recognizes the value and the importance of these particular principles and the extraordinary service that we have.

However, within that service, within the American civil service, our antiquated, outdated, overly bureaucratic systems have challenged and stifled managers and workers for years. I don't think by attacking some of the systems that are in place that managers have to work with, one needs to believe that we are here to attack Federal workers, be they managers or lineworkers. All of us recognize the value of the American civil service and the work that those important citizens do.

Having said that, we will hear from, as we have already and we will later today, some absolutely extraordinary leaders. Leaders that have been asked to raise to extraordinary crises and challenges.

And those leaders, working within the overly burdensome and bureaucratic systems that they have, have been challenged beyond all measure. I certainly recognize their impatience and the desire to correct a system that is woefully inadequate and wrong. And so I am delighted to be here today to offer support for the Department of Defense and the changes that they seek as they look to transform their institution.

The challenge for America is to attract the best and brightest to Federal service. Our challenge is to reward America's best and brightest once we hire them, so that they can be rewarded for the profound and the absolutely extraordinary work that they do.

We have, in working with the Department of Defense, been assured that those things that are very dear to the American civil service are and will be protected as we look at how we change the systems, the American civil servants deserve better systems within which to operate.

So with that, I would like to close and be available for any questions that you may have.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Ms. James follows:]

STATEMENT OF THE HONORABLE KAY COLES JAMES

DIRECTOR

OFFICE OF PERSONNEL MANAGEMENT

Before a hearing conducted by the

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

on

CIVIL SERVICE AND NATIONAL SECURITY PERSONNEL IMPROVEMENT ACT

May 6, 2003

Chairman Davis, Congressman Waxman, thank you for the opportunity to testify on these important pieces of legislation.

On October 15, 2001, President Bush spoke to members of the Senior Executive Service and said, "...I hope you'll never take the honor of public service for granted. Some of us will serve in government for a season; others will spend an entire career here. But all of us should dedicate ourselves to great goals: We are not here to mark time, but to make progress, to achieve results, and to leave a record of excellence."

Accepting that challenge at the Office of Personnel Management means taking on some of the government's most complex management issues. I was particularly intrigued by the volume of work and research that contributed to the discussions prior to my appointment and confirmation. Through the groundwork of former Senator Thompson, Senator Voinovich, and Senator Akaka on Governmental Affairs; and David Walker at GAO; and of course the President's elevation of the issue, upon entry into office, on the Executive Management Scorecard; human capital is indeed a central issue facing our government managers today.

We owe special thanks to you, Chairman Davis, for your bold leadership and special attention to these important issues throughout your public service and here in the House, especially since becoming the Chairman of this Committee. We are also grateful to Congresswoman Davis, our subcommittee chair, and the entire Committee for their commitment and attention to the strategic management of human capital.

The call for reform is becoming an ever-louder chorus as managers and leaders join us and others, including the Volcker Commission, in stating the need for reform and suggesting where best to start.

The single most frustrating thing for managers in government, whether Republican or Democrat, is the antiquated, outdated, and outmoded systems they must use to manage the Federal workforce in the government's departments and agencies.

Consider our compensation system, a system that was established at the end of the 1940s, a time when over 70 percent of Federal white-collar jobs consisted of paper-intense clerical work.

How are we going to ensure we have a cutting-edge and strategic Federal workforce when we are stuck using a compensation system that was developed sixty years ago?

The knowledge, tools and technology used by today's Federal worker would be considered science fiction by the worker of the 1940s. Our workforce has changed dramatically and is constantly evolving as the challenges and opportunities facing our nation change. The modern Federal worker is a "knowledge worker" with technical skills, specialized expertise, and the ability to harness innovation and creativity in taking on some of our greatest challenges and problems. The Federal worker has come a long way from being a file clerk.

In the post September 11th world in which we live, we need a nimble, flexible, and responsive Federal workforce with the best systems available to manage, recruit, and retain the best and brightest, as well as the ability to recognize and reward excellent performance. Our systems for hiring, firing, disciplining, promoting and rewarding performance are not what they could be. This is only compounded by burdensome and duplicative appeals processes that paralyze Federal managers into inaction when action is necessary.

The legislation you have before you provides the opportunity to reform the systems that create stumbling blocks for the workforce of the 21st century. We are confident that as the legislation is implemented the essential principles of fairness and equal opportunity that make our system a model for other countries around the world will be preserved.

The American civil service truly is the envy of countries around the globe. OPM is routinely asked to consult with countries like Russia, Mexico, Uganda, the Philippines, Spain, Portugal, and others, as many as thirty countries around the world, on how to create a fair and transparent civil service system. When we see the systems of foreign nations, we are reminded how unique our system, free of patronage and discrimination, remains.

Other countries marvel at the continuity of our government in times of crisis and during the transition of power after elections. We have come to take it for granted, but the reason our government functions the way it does is due in large part to a stable and dedicated civil service and the leadership and expertise of our highly skilled Senior Executive Service.

Earlier this year, on January 16th, we celebrated the 120th Anniversary of the Civil Service Act of 1883, also known as the Pendleton Act. This transforming legislation that ended the widespread

"spoils system" was passed after a disgruntled job seeker assassinated President Garfield when he did not get the job he thought he had bought. The preceding system of wholesale patronage was fraught with corruption and mismanagement. After a change in the Presidential Administration, job seekers would line up around the White House demanding a position in the new government. Thankfully, out of that experience the founders of the civil service gave us an excellent foundation upon which to build a modern Federal workforce.

The civil service has a rich history of sacrifice, dedication and service to America. The lessons and core values of the civil service are timeless, and we can never afford to ignore the heritage with which we have been entrusted. That heritage includes the Merit System Principles, Prohibited Personnel Practices, Equal Employment Opportunity and Veterans' Preference.

Properly implemented these principles are valuable, worthy and excellent business practices that would contribute to the success of any organization, be it public, private, or non-profit. For the Federal government these principles are the foundation of our worldwide distinction among nations.

So why do we believe there is a need for reform? The problem is not the hard-working, dedicated men and women who have devoted their time, energy, and talents to serving the American people. Neither is the problem the principles of fairness and equal opportunity that form the backbone of the civil service. The problem truly is the out-of-date systems and processes that are used to manage the Federal workforce.

In this important process our two greatest stakeholders are the Federal workers and the American people. As members of this committee you have been called upon to represent the American people. For many Federal workers, unions and employee associations have been called upon to represent them. These reforms are not intended to target the rights and privilege of employees to organize as they currently exist. As we move forward with reforms we will not lose sight of the role unions and associations play in the Federal workforce.

We want and we need the best systems available for recruitment, compensation, and performance management. When properly implemented, these reforms will wipe clean the obstacles that are so commonly spoken of by Federal employees, and will provide Federal workers an environment where they will be able to realize their potential like never before - an environment that by necessity wholeheartedly embraces the Merit System Principles, Equal Employment Opportunity, and Veterans' Preference while avoiding Prohibited Personal Practices.

Sweeping civil service reform is very difficult to initiate, but many of the necessary components are in place if this Congress moves forward with the legislation before this committee.

You will hear testimony today from three colleagues, each of whom is recognized for his creative and innovative leadership. They know well the challenges they have before them and each is essentially operating in a new world. Our challenge is to give them the tools and flexibility they need without diluting veterans' preference, without diminishing the Merit System

creating a work environment that creates appropriate incentives for performance. It is also a down payment on much needed reform and future modernization for our compensation system.

Many people inside and outside of government direct their ire and the anger at OPM, but OPM's role is to monitor, enforce, and report on the laws that prior Congresses have enacted. Therefore, legislation is necessary to enact reform and create systems that reflect a modern 21st century approach to human resources management.

I believe this Congress has the courage and wisdom to reform our system to give agencies the tools and flexibilities they need to effectively manage the Federal workforce and help Federal employees meet their full potential while preserving the principles that make the civil service the envy of the world.

I have had the privilege to meet and work with some of the most patriotic, hard-working, and dedicated Americans you could ever imagine as Director of the Office of Personnel Management. They are creative, knowledgeable, skilled and talented, and they proudly demonstrate their love of this country by working everyday for America. From the borders of our country, to the frontlines of Homeland Security, to the laboratories of the CDC, to NASA's mission control, to the rings of the Pentagon, civilian workers provide essential services to our citizens and this country.

Thank you for your consideration of my testimony. I will gladly answer any questions the Committee may have now or in the future.

Chairman TOM DAVIS. We also, I see our distinguished Minority Whip has come into the room. And I would invite Mr. Hoyer to come up at this point and testify at this point.

Steny, thank you very much for making yourself available, and welcome.

Mr. HOYER. Thank you very much, Mr. Chairman. Admiral, Clark and General Pace, Secretary Wolfowitz, Kay Coles James, I was not here to hear the testimony of the first three, or are you first?

Ms. JAMES. No, I am last.

Mr. HOYER. In my book, she is first. She covers most of the people that—a lot of the people that live in my district.

Mr. Chairman, I thank you for this opportunity to present to you my views on the Civil Service and National Security Personnel Improvement Act.

I appreciate your decision to schedule an additional hearing prior to marking up this measure. I am dismayed, however, by the manner in which a civil service reform of this magnitude is being rushed through the legislative process.

It is shameful, in my opinion, that we will give no more than cursory consideration to legislation that will strip from more than a third of our Federal civilian employees their most basic worker protections.

Mr. Chairman, as you know, when the Clinton administration pursued similar proposals, I opposed rushing to judgment on those. I was not convinced either by party or partisanship to move too quickly. I share Mrs. Davis' views on that expressed last week.

The last piece of legislation to affect this many Federal employees was the 1978 Civil Service Reform Act, and the process by which it was developed and considered could not be more different than that which is proposed today.

Months prior to submitting his proposal to the Congress, President Carter established a working group to study personnel policies. The group heard from more than 7,000 individuals, held 17 public hearings, and scores of meetings and issued a three-volume report.

Upon subsequent introduction of the legislation, House and Senate committees held 25 days of hearings, receiving testimony from 289 witnesses. And a written statement from more than 90 organizations.

When the House committee marked up the legislation, it took 10 days and 42 roll call votes to consider 77 amendments. This thorough, open, and fair process resulted in civil service reform legislation that garnered near unanimous bipartisan support from both Chambers.

The contrast to the current process could not be more clear. This measure was conceived, as I understand it, by a handful of the President's closest advisors in the Defense Department, and perhaps in the White House as well, without any public input. Without any public input.

Regrettably, not a single Federal employee group was consulted, not one. Since introduction of the legislation last week, the House has scheduled a couple of hearings. A handful of witnesses will provide testimony, and will likely be attached to the Defense Author-

ization Bill and approved by the full House prior to the Memorial Day recess. At least that is what I am told. I don't know it. But that is the schedule that I understand this legislation has been put on.

Why the urgency to enact such sweeping reforms in such haste? Just 5 days ago aboard the aircraft carrier USS Abraham Lincoln, President Bush said, correctly, "I have a special word for Secretary Rumsfeld, for General Franks, and for all of the men and women who wear the uniform of the United States. America is grateful for a job well done."

The President was right. The Admiral, the General, the Secretary, and all of us are extraordinarily proud of what they have done. The military campaign in Iraq was a tremendous achievement made possible not only by the planning of our military leaders and the bravery and skill of our soldiers, sailors, airmen and marines, but also by the active support, the critical involvement, the expertise, and the talent of the commitment of nearly 700,000 Department of Defense civilian employees.

How can it be? My colleagues, how can it be that just days after the completion of such an immensely successful endeavor, that the Pentagon's personnel system is so fundamentally flawed that it needs such immediate and drastic overhaul? How can it be?

To be sure there are problems in the Federal personnel system, including inadequate performance appraisal systems and inflexibilities in hiring. Director James and I have discussed these. We need to make reforms in this area. I agree with that. And I am sure those of us who advocate on behalf of Federal employees would also agree.

Paying and disciplining employees needs to be reviewed, but it seems clear that there is time for the administration, Congress, and the affected employees to review the current system and explore solutions to these and any other problems that exist in a fashion that gives all parties affected, including the American people, the opportunity to participate in this process.

Not only that, we have an opportunity to learn from the experience of the Secretary of Homeland Security and Gordon England, Deputy Secretary, an extraordinary administrator, our former Secretary of the Navy, my friend and an outstanding individual, he and Secretary Ridge are going to pursue adopting policies that work.

We have 170,000. This is not a small sample. This is not China Lake. This is 170,000 people. A third—excuse me, 10 percent of our Federal civilian work force are going to be affected. Wouldn't it make sense to see how they do it and what successes they have and what problems they confront? Wouldn't that be rationale to do, rather than to rush to judgment?

But this bill is even more objectionable for what it does than how it is being processed. This proposal will have the chilling effect of undoing decades of some of the most important worker protections enacted by Congress and signed by President. Among its most egregious provisions the legislation grants the Secretary of Defense the authority to strip Federal workers of their collective bargaining rights, deny employees their right to appeal unfair treatment, grants supervisors complete discretion in setting salaries and de-

termining raises, and abolishes rules that require that reductions in force be based on seniority and job performance.

Let me state as emphatically as I can, I believe in pay for performance, period. We ought not be giving raises to, and, in fact, we ought not to be paying employees who do not perform at acceptable levels for the American taxpayer, and for our government, period.

I think all of us agree on that. Let me close, Mr. Chairman, by saying that I believe that this proposal is the last example, frankly, of this administration's hostility toward the right of American workers to organize and bargain collectively.

It also sends a terrible message to the Federal employees who help protect our Nation every day, the protections adopted by Congress and the President over the years will be abandoned. I acknowledge the fact that this is a substantive proposal. It has meritorious suggestions contained in it. The people proposing it are good people. But if it is a substantive proposal, I suggest to them it is worthy of substantive consideration, not 10 days between introduction and inclusion in the Defense Authorization Bill that doesn't have jurisdiction over this subject, this committee does, which is why you are having your hearing.

Mr. Chairman, shock and awe, that was a successful stratagem adopted, one which I think we can all respect. We acted with great force and we acted quickly. We got the enemy off balance. As a result, they did not have their defenses in order, and we had a victory of very substantial proportion. What outstanding planning. Mr. Secretary, I congratulate you. Admiral Clark, I congratulate you. I congratulate Secretary Rumsfeld as well, and the President who endorsed the plan.

But, ladies and gentlemen of this committee, we ought not adopt a strategy of shock and awe dealing with the 700,000 civilian employees at the Pentagon. We ought not to act massively, we ought not to act massively in a very substantial bill and then move extraordinary quickly so that we keep them off balance and unable to effectively respond.

Mr. Chairman, I would hope that you would exercise your leadership, as an advocate of Federal employees, not to prevent reform, because we need reform. Not because this bill is bad, per se, although there are things in it which I will oppose, and there are things in it that I will support, but because they deserve, and America deserves an opportunity to thoughtfully and completely consider this very substantial significant change in existing law passed by Congress, signed by Presidents, protecting our employees and promoting their best interests and the best interests of the American taxpayer.

Thank you very much for this opportunity.

Chairman TOM DAVIS. Thank you, Steny.

[The prepared statement of Mr. Hoyer follows:]

Statement of Rep. Steny H. Hoyer
House Committee on Government Reform
Hearing on the Civil Service and National Security Personnel Act
May 6, 2003

Thank you Mr. Chairman, and members of the committee, for the opportunity to present to you my views on the Civil Service and National Security Personnel Improvement Act. While I appreciate your decision to schedule an additional hearing prior to marking up this measure, I am dismayed by the manner in which a civil service reform of this magnitude is being rushed through the legislative process.

It is shameful that we will give no more than cursory consideration to legislation that will strip from more than a third of our federal civilian employees their most basic worker protections.

The last piece of legislation to affect this many federal employees was the 1978 Civil Service Reform Act, and the process by which it was developed and considered could not be more different than what we see today.

Months prior to submitting his proposal to the Congress, President Carter established a working group to study personnel policies. The group heard from more than 7,000 individuals, held 17 public hearings and scores of meetings, and issued a three-volume report.

Upon subsequent introduction of the legislation, House and Senate Committees held 25 days of hearings, receiving testimony from 289 witnesses and written statements from more than 90 organizations. When the House committee marked up the legislation, it took 10 days and 42 roll call votes to consider 77 amendments.

This thorough, open and fair process resulted in civil service reform legislation that garnered near-unanimous bipartisan support in both chambers.

The contrast to the current process could not be more clear. This measure was conceived by a handful of the president's closest advisors without any public input; regrettably, not a single federal employee group was consulted.

Since introduction of the legislation last week, the House has scheduled a couple of hearings, a handful of witnesses will provide testimony, and it will likely be attached to the Defense Authorization bill and approved by the full House prior to the Memorial Day recess.

But why the urgency to enact such sweeping reforms?

Just five days ago, aboard the aircraft carrier USS Abraham Lincoln, President Bush said "I have a special word for Secretary Rumsfeld, for General Franks, and for all the men and women who wear the uniform of the United States: America is grateful for a job well done." And the president was right.

The military campaign in Iraq was a tremendous achievement, made possible not only by the planning of our military leaders and the bravery and skill of our soldiers, sailors, airmen and marines, but also by the active support and participation of nearly 700,000 Department of Defense civilian employees.

How can it be, just days after the completion of such an immensely successful endeavor, that the Pentagon's personnel system is so fundamentally flawed that it needs such immediate and drastic overhaul?

To be sure there are problems in the federal personnel system, including inadequate performance appraisal systems and inflexibilities in hiring, paying and disciplining employees, which must be addressed.

But it seems clear that there is time for the administration, Congress, and the affected employees to review the current system and explore solutions to these and any other problems that exist.

Not only that, we have an opportunity to learn from the experience of the Secretary of Homeland Security, as he attempts to implement the similarly broad authorities he was given over the rights of his department's 170,000 employees.

But this bill is even more objectionable for what it does than for how it came to be. This proposal will have the chilling effect of undoing decades of some of the most important worker protections enacted by Congress.

Among its most egregious provisions, the legislation grants the Secretary of Defense the authority to strip federal workers of their collective bargaining rights, deny employees their right to appeal unfair treatment, grant supervisors

complete discretion in setting salaries and determining raises, and abolish rules requiring that reductions in force be based on seniority and job performance.

Let me close by saying that I believe this proposal is the latest example of this Administration's contempt for the right of American workers to organize and collectively bargain. It also sends a terrible message to the federal employees who help to protect our nation every day – that the protections adopted by Congress and the president over the years will be abandoned.

I acknowledge the fact that this is a substantive proposal. Because it is, we ought to take the time to consider it in a substantive way, rather pursuing this rush to judgment.

Chairman TOM DAVIS. The Chair is not going to allow the audience to applaud or boo or hiss. I know this went on in the Civil Service Subcommittee. If you want to do that, you can go outside, and we welcome you going out into the hall and doing that, but we are trying to conduct a hearing today to allow Members to have an exchange, a substantive exchange on issues.

So if you would obey these rules, we would be happy to have you here as our guests today.

Ms. James.

Ms. WATSON. Can you yield a second for an inquiry?

Chairman TOM DAVIS. I would be happy to.

Ms. WATSON. Is the bill ready? Could we get a copy of the bill?

Chairman TOM DAVIS. The bill has been printed. And I would be happy to get you a copy of it.

This is, as you know, it is a draft bill. This bill is—there are going to be a number of amendments. And we will try to get you, in fact, some of what are now being considered as manager's amendments. There will be more.

Ms. WATSON. We would like to have it in front of us.

Chairman TOM DAVIS. We will see if we can get an original to everybody. Thank you.

Let me start the questioning, and then I will go to Mr. Waxman. We will try to do in 5-minute increments to get around.

Mr. Wolfowitz, let me just ask you, you just heard Mr. Hoyer talk about, this came in without any public input and the like. How would you react to that?

Mr. WOLFOWITZ. First of all, we have had, I think by our count, some hundred briefings with Members of Congress, both House and Senate and staff, in developing this proposal.

One of the reasons it came to you in April instead of in February, is because we, in fact, wanted the benefit of that consultation.

Chairman TOM DAVIS. How about with employees and managers in DOD?

Mr. WOLFOWITZ. With respect to the American Federation of Government Employees, AFGE was briefed on a number of occasions about our demonstration project best practices and our plan to use the result of those experiments in a new personnel system for the Department. Those briefings started in January. Eight out of the nine demonstration projects that are the basis of this proposal, have union participation. So the unions have helped to shape the personnel practices currently employed that were reviewed under the best practices study.

And, as in the Department of Homeland Security, the unions with national consultation rights will be asked to participate in the establishment of the policies that implement the new personnel system. We value our employees. We value the unions. We are working closely with the unions.

Chairman TOM DAVIS. Let me ask you, you noted in your comments that there were now 300,000 uniformed personnel that, in some cases, were not doing active-duty status, but were behind desks and like. I take it they are there because you have flexibilities over uniformed personnel you don't have with some civilian personnel. And what I noted is that the Department, in some cases, has gone to contractors who you have flexibility to move and deal

with, as opposed to employees who sometimes have limitations on what you can do with them?

If this legislation were to pass, roughly as written and as proposed, would you see an increase, do you think, in the number of civilian personnel that would be hired by Department of Defense as a result of that, by being able to move around and having greater flexibility?

Mr. WOLFOWITZ. I think so, Mr. Chairman. I think under any given system, this flexibility in hiring and management will allow us to have a larger relative percent of civilian personnel and to use the uniformed people for uniform tasks.

And as you said also, it will allow us to bring our civilian personnel into the regular civil service system, instead of all of the kinds of work-arounds that you rightly noted have been the product of all of the years of the inflexibility we have dealt with.

And so, rather than this being an attack on the civilian work force, I think it is basically an opportunity to increase it, to make it more competitive, to make conditions in the civilian work force more attractive to people in general.

So, I very much hope that this will not be presented as something that does not appreciate the enormous value we already get from our civilian work force. We would like to have the flexibility to expand it.

Chairman TOM DAVIS. One of the arguments against the proposal that the Defense Department has come forward with, is that you are going to be taking away collective bargaining rights of civilian employees through this legislation.

That, in point of fact, you will continue to meet with them, you will continue to confer with them, they will continue to be part of the solution, but if an impasse is reached between management and the bargaining unit, the resolution would be on the part of the employer. That is my understanding, and my reading on that, which is more a meet and confer than a collective bargaining type of approach to this.

Can you clarify the intent of your proposal for collective bargaining? How you would resolve these impasses, and how elected union officials and shops that have elected to go union would be involved in this process, and how impasses would be involved? Can you clarify this a little bit?

Mr. WOLFOWITZ. My understanding is that collective bargaining will still be an essential part of the process. We are trying to make it somewhat more efficient, and as you say ultimately, the managers have certain authority. The unions would not have a veto.

But, the unions are a crucial part of managing this. In fact, Director James, do you want to comment further on that?

Ms. JAMES. No.

Chairman TOM DAVIS. Let me ask you. Right now, if there is an impasse between—you have an arbitrator, you have a dispute resolution, which in any opinion, you know it, is a very lengthy, very bureaucratic and probably hinders the flow. If there were a way of getting a quicker decision out of this, I think I can feel a lot more comfortable. But to get a decision, I think, right now, the shift on the part of some of the unions, understandably, they are concerned, because they see a marked shift in terms of the bargaining author-

ity if management can sit there and listen, and at the end of the day not have to budge or give.

You understand what I am saying.

Ms. JAMES. Yes, sir. I think the bane of the existence of some managers in the Federal Government is so many duplicative appeals processes that are often times very lengthy and, go on, on dual tracks at many times. And it will sometimes even discourage a manager from disciplining an employee because they don't want to get involved in that process, and so they tolerate poor performance as a result of that.

And I think what you see in the Defense Department is a desire to build a system where you can take action, you can take action quickly, but without getting rid of due process. I am sure that there will be due processes in place, and I am sure that they have a plan for doing that. So I feel confident and——

Mr. WOLFOWITZ. The way I understand the collective bargaining provisions is that it would be done at a national level, that there would be 30 days on issues of consultations with unions. Where there are differences, those differences would be reported to Congress. There would then be 30 days to resolve the problems, and the Federal Mediation Service could be called in to do that.

And I guess ultimately the decision would be with the managers. But, that decision would be reported to Congress. So it seems to me it is a process that allows multiple points for the unions to have their voices heard, and for Congress for that matter to intervene. Someone has to make a decision at the end of day.

There is 20 years of inability to move in areas that almost everyone agrees we should be able to move.

Chairman TOM DAVIS. Well, my time is up. I see Mr. Hoyer chomping at the bit. If the committee would indulge me just a minute, Steny.

Mr. HOYER. Thank you, Mr. Chairman. And I don't want to—I have not read the bill. Let me make it clear that I have not had the time to read the bill.

But, my understanding of the legislation, and having read some of the comments of some of the members of this committee, that Secretary Wolfowitz is correct. In the final analysis, it is at the manager's discretion. So that while there may well be a noblesse oblige willingness to talk to people, which is very nice, there seems to be no requirement to do that, because ultimately management has total flexibility, as I understand the thrust of the bill.

Again, let me stress, and then I have to leave, Mr. Chairman, let me stress that I believe we ought to take action to facilitate a number of the things that the military is concerned about, that you and I have discussed, Mr. Chairman, that—and Ms. James, Director James and I have discussed, clearly we need to facilitate management's ability to run an effective, efficient shop, whether it is 10 people or 100,000 people.

But, my point is, that we need to do that in a considered way. And very frankly, I want to tell Secretary Wolfowitz, Mr. Secretary, I don't obviously know who you have talked to. I can say that as I think I am correct in saying, that I am perceived as one of the principal Federal employee advocates in the Congress of the United States. Nobody has talked to me about this legislation, except in

the most general terms when we met with Secretary Rumsfeld about Iraq, with the Speaker and the leadership in very general terms, no specifics, nor was the timing of this ever discussed with me.

So while—and obviously you don't have to discuss it with me, but I will tell you that in my discussions, Mr. Chairman, with Federal employee unions and representatives, they do not believe that they were consulted on this piece of legislation. I think the Secretary is accurate in saying that there were discussions, preliminary in terms of some of the samples of practices that you referred to.

However, there certainly was not the consultation that I referenced that occurred in 1978 when we passed, by very heavy margins in both parties, substantial civil service reforms.

Thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you. I'm sure we can arrange that briefing for you.

Mr. WOLFOWITZ. I will be delighted to go through it. I think you will find it is quite reassuring in important respects that concern you.

Mr. HOYER. I will look forward to that. It would be my understanding that it is approximately 36 hours before it would be included in the bill.

Chairman TOM DAVIS. Steny, you are a quick thinker. You are good on your feet.

Mr. HOYER. I appreciate that analysis.

Chairman TOM DAVIS. Thank you for being with us, Mr. Hoyer.

Mr. Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman. I just want to point out, Mr. Wolfowitz, that you said that the hundreds of meetings with Members of Congress and their staffs—on the Democratic side of the aisle of this committee, which has primary jurisdiction over the civil service issues, we never had any consultation with anyone until the proposal was laid out before us and certainly no input into the development of the proposal.

We also heard last week from the unions that they were not consulted about it, either. The Comptroller General, David Walker, testified that DOD does not have a good track record in reaching out to key stakeholders. So I just put out there as a contrary view.

But I do want to get into some of the specifics. Because, from my point of view, I think we ought to be as constructive and bipartisan as we can be and give you the tools that you will need but not do it at the expense of over 100 years of civil service protections.

Now, our civil service laws as I see it in this bill are thrown out the windows. You pointed out that you don't think you are eliminating collective bargaining rights, but Chapter 71 of Title 5 provides that DOD could waive the right of Federal employees to join unions, protection against discrimination in hiring and promotion due to union membership, the protection from agency retaliation for filing complaints. These are such basic rights that I have a hard time understanding why anyone would want to revoke them.

When Undersecretary Chu testified last week before the subcommittee, he said the Department was only seeking flexibility to conduct collective bargaining at the national level instead of the local level. He said that, because of the large number of local

unions involved, national level bargaining is viewed by DOD as more efficient. You just made reference to that fact as well.

But the provision in the legislation goes well beyond fixing that narrow problem. Instead, it completely strips Federal employees of their collective bargaining rights. If DOD is simply interested in national level bargaining, why wouldn't Congress just permit this type of bargaining without waiving all of Chapter 71?

Mr. WOLFOWITZ. My understanding, Congressman Waxman, is that the powers we are seeking in that regard are basically the same as those that have already been granted to the Department of Homeland Security and I think in fact less extensive than I believe have been granted to the Transportation Security Agency. So we are not talking about stripping all of those basic protections of civil service. In fact, we are very much keeping the basic prohibitions on prohibitive personnel practices. We are keeping appeals processes in place. We are simply making it easier to hire people that ought to be hired, easier to reward people that ought to be rewarded.

Mr. WAXMAN. I want us to do that, Mr. Wolfowitz, but I am concerned about this broad, sledgehammer approach. The Department of Homeland Security had some provisions that we wanted to try out on an experimental basis. Now you are coming in and saying, whatever they have, we want the same. I think every other agency of government is going to want the same thing, as well.

Dr. Chu testified that, and I am quoting from page 55 of the hearing transcript, "There is no proposal here for anyone to lose his or her collective bargaining rights. The proposal is designed to facilitate bargaining at the national level. That is the proposal."

If that is the proposal, and I assume you believe collective bargaining is an important right for Federal employees, the problem I have with your bill is it does away with these important rights. It specifically states that if the Secretary disagrees with any suggestion made by any union, the Secretary may do whatever he wants in the Secretary's sole and unreviewable discretion.

If you give the Secretary sole and unreviewable discretion, that is not collective bargaining, it is a formulation that gives all power to the Secretary. If what you are trying to do is have collective bargaining at the national level, why don't we spell that out and still keep all the protections that are in the existing law that have been in the law for 100 years or so in place, so you can do what you feel you need to do without going beyond that?

Mr. WOLFOWITZ. I believe those recommendations of the Secretary will end up being reviewable by the Congress, ultimately.

Mr. WAXMAN. Everything is reviewable by Congress, but if the Secretary has power to make all the decisions, that is not collective bargaining. Congress cannot step in in every situation.

We find under existing law where there is collective bargaining or an individual employee has a grievance they can take it to a third party, for example, somebody accused of making an accusation of sexual harassment or racial discrimination. The Secretary does not decide these things. It goes to an impartial panel to review it. Those are all now out.

Mr. WOLFOWITZ. But I believe, Congressman, that the reference to "the Secretary's sole discretion" was just sole discretion with respect to administrative procedures, not with respect to the collective bargaining. It is a different part of the act that you are reading from. I would check that on the record, but I believe that is it.

[The information referred to follows:]

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Waxman
Witness: Mr. Wolfowitz
IFR: Page 54, line 1163

Mr. Waxman: Everything is reviewable by Congress, but if the Secretary has power to make all the decisions, that is not collective bargaining. Congress cannot step in in every situation. We find under existing law where there is collective bargaining or an individual employee has a grievance they can take it to a third party, for example, somebody accused of making an accusation of sexual harassment or racial discrimination. The Secretary does not decide these things. It goes to an impartial panel to review it. Those are all now out.

Mr. Wolfowitz: But I believe, Congressman, that the reference to "the Secretary's sole discretion" was just sole discretion with respect to administrative procedures, not with respect to the collective bargaining. It is a different part of the act that you are reading from. I would check that on the record, but I believe that is it.

Response There are two references in the Administration's proposed legislation concerning the Secretary's authority and collective bargaining. 9902(e)((1)(C) provides "sole and exclusive discretion" to the Secretary to implement policy where agreement cannot be reached with labor after joint development of regulations with the Office of Personnel Management, consultation with labor representatives, mediation by a third party, and congressional notification. The other reference, 9902(e)(2), provides that "the Secretary may, at the Secretary's discretion, engage in any and all collaboration activities at an organizational level above the level of exclusive recognition." Those two references do not negate or permit negation of collective bargaining, but are intended to facilitate it.

Note: This proposed language has since been dropped from the legislation and is not present in H.R. 1588.

Mr. WAXMAN. Then you agree with what we are trying to accomplish, then. If I am wrong, I apologize, but I read it differently, and maybe we should restore it to what we think it ought to provide. The law says, "If the Secretary determines that in the Secretary's sole and unreviewable discretion that further consultation and mediation is unlikely to produce agreement, the Secretary may implement any or all of such parts, including any modifications made in response to the recommendations, as the Secretary determines advisable."

If I had to negotiate and bargaining with someone who had the power to say no and mean it, that is not collective bargaining. Perhaps we could work on the language to make sure we don't have such broad discretion.

Mr. WOLFOWITZ. OK. I appreciate the opportunity to do that. But, if I might say, we are talking about personnel reforms that are not, for us, something that we are going to try out. We have been around longer than the Department of Homeland Security. Congress has given us an opportunity to experiment with some of these procedures.

I might note, for example, that the results we are getting back from the experiment that was done at Redstone Arsenal had a union leader saying, "By far the majority of the employees have indicated to me, both privately and in called meetings at Redstone Arsenal, that they wanted the experiment renewed. I am talking about 98 percent of them did. Only 1 out of 50 opposed it."

So we are dealing with a process, with procedures that are not completely new, procedures that we have tested in some important experiments and where I think the reaction of the workers has been a very positive one. That is the spirit in which we are approaching this.

Mr. WAXMAN. We disagree about what your bill in fact says.

Chairman TOM DAVIS. Thank you. The gentleman's time has expired.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Chairman. I would like to thank our distinguished witnesses for being here today.

Admiral, let me just say that you stated that you agreed with the principles embodied in the legislation, and I would like to make it very clear that I agree with the principles. It is the details that I am concerned with.

Mr. Secretary, I think it was you that said that you have roughly about 300,000 military personnel doing jobs now that you would like to put nonmilitary personnel in. Do you feel you need all the flexibility that is embodied in this legislation in order to fill those jobs with civilian personnel, or wouldn't what we gave the Department of Homeland Security do the trick?

Mr. WOLFOWITZ. Well, some of what we are asking for is not that different from what you did give the Department of Homeland Security. But, basically, what we are seeking with respect to the issue you just raised is the ability to hire people more flexibly and not to be in a position where we are competing for skilled workers with private industry that can offer them jobs on the spot and all we can say to them is, give us an application, we will get back to you in 90 days. You don't hire people that way. You don't compete that way.

Our procedures are from a different era when hiring practices were different, private industry was slower, and we were still competitive. There is a real danger now that we are not going to be competitive in precisely those areas that are most important for keeping up with a very rapidly changing world that we live in.

Mrs. DAVIS OF VIRGINIA. Director James, if we gave the Department of Defense the same flexibility we gave the Department of Homeland Security, would they be able to do what the Secretary wants to do?

Ms. JAMES. They certainly would.

I just want to say for the record that, given what we have seen from the military side of the Department of Defense, we want the civilian side to have the tools so they can be flexible and nimble. There is nothing more that I want than for the Secretary to go to a college campus, find a bright, aspiring civil servant and have the opportunity to offer them a job on the spot. We want them to have the direct hire authority and the flexibility. Our government needs to attract those kinds of individuals, so we are very supportive of the Department of Defense having that kind of authority to do the job they have been asked to do.

Mrs. DAVIS OF VIRGINIA. Thank you.

Mr. Secretary, I sit on the Committee on Armed Services as well, and there is nothing that I have been more of an advocate for than our defense and our men and women in uniform. I want to be able to give the Department of Defense what they need, but we need to do it in a way that we do not harm our civilian work force.

I know you all have brought it out very clearly, that our civilian work force is very important to you. I know you feel that way. I just don't want us to rush into something, because I think every other agency in the Federal Government will be lining up at our door for us to give them whatever we give the Department of Defense to do.

A couple of quick questions about reemployment of retirees. The current law allows you to reemploy retirees and, if justified, in special cases to get approval from OPM to waive the usual requirement that their salary be reduced by the amount of their annuity.

First, does the Department need the ability to employ retirees and to pay them their full salary along with their full annuity without seeking prior OPM approval because getting OPM's approval takes too long or because OPM is overly strict or what?

Second, don't you think we should have some sort of limitation that would show NASA, for example—and I have NASA Langley in my district—and other agencies that DOD would not use its special authority to attract the best and brightest people who are eligible for retirement and working in those other agencies?

If you would prefer to defer to Director James, that is OK with me.

Mr. WOLFOWITZ. I would certainly like to hear what she says.

Let me say that it seems to me—I cannot comment on the situation in NASA or other agencies, but I can comment on DOD as part of the Federal Government, that we are losing people to the private sector because they get their full retirement and probably a better salary working in the private sector. A lot of them are public-spirited and would be happy to continue working for the Federal Gov-

ernment if it did not cost them so much. We are trying to address that for DOD, and I certainly could not object to addressing it for other agencies, but that is outside my purview.

Chairman TOM DAVIS. Excuse me, Mr. Secretary. What you are trying to do in the legislation is bypass OPM, if I read it correctly, in bringing back these retirees. My question is, are you doing it because you think OPM takes too long in responding, or what?

Mr. WOLFOWITZ. I am not aware of trying to bypass OPM. What I am aware of is trying to be able to give people their full retirement instead of having them basically work for 25 cents on the dollar if they choose to stay working for the Federal Government now.

Chairman TOM DAVIS. I think you have the right to do that now with OPM's approval. That is what I am asking. You are trying to waive getting OPM's approval, is that not correct?

Mr. WOLFOWITZ. Since September 11th, we have had a provision, an emergency provision, that allows us to bring back civil service people to do specific tasks without sacrificing their retirement pay. What we are seeking is a continuation of that provision.

I don't know what OPM's role is, to be honest, in the emergency provision. I know that we have found that provision very useful and want to continue it.

Ms. JAMES. We did grant that authority to the Department of Defense; and I feel confident that, given that authority on a permanent basis, that they would oversee that program in a responsible manner and would use it to attract employees that may have retired to come back and work for the Department.

I feel confident that they would, in implementing that, put appropriate safeguards in place so that it would be a useful tool in their tool belt for the strategic management of human capital.

Chairman TOM DAVIS. The gentlewoman's time has expired.

Let me just follow quickly. You have a lot of people retiring now, getting their full retirement and coming back as contractors and really cleaning up. This could actually save money if you could keep them on as Federal employees.

Mr. WOLFOWITZ. That is absolutely right.

Chairman TOM DAVIS. Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I want to thank all the witnesses for being here, and their testimony. A number of you, including Dr. Chu when he testified before the subcommittee last night, made a point in saying that our civilian employees of the Department of Defense worked as one, as a team with the military, and that support that our civilians provided was absolutely critical to our success in Iraq, a success of which we are all very proud of our military, including the civilian support they were given.

I do, as Mr. Hoyer and Mr. Waxman say, find it extraordinary that just a short time after that great success we take an action which really will deprive many civil servants within the Department of Defense of some of their very basic rights and protections.

We talk about the importance of flexibility and agility. Those are great buzzwords and we all want it, but we could get rid of the ethics code in the Congress. It would make it all more flexible around here. It would not be a good thing. A lot of the provisions that have been built into law over time were to provide basic protections. We could get rid of restrictions on sex or racial discrimination. Those

are all things that restrain the exercise of power and management under certain circumstances. That would make it more flexible, but I think we would all agree that does not make it better.

You, Mr. Secretary, have raised a number of good points about changes we need to make that would allow us to hire people more quickly, maybe to retain and make more permanent some authority to bring back people. But we don't need to make these sweeping changes in order to address those very concrete things that you have raised today.

We had before the subcommittee last week the head of the GAO, David Walker, who said, and I want to say, "There is very serious concerns about this problem." He said that the DOD system, like many in the government today, is currently not designed to support a meaningful performance-based system at this time.

You have raised some of the small programs where you have experimented with this at DOD, but my question is, and this seemed to be the sense we got from Mr. Walker, why not take the time within DOD—there is nothing in the current law that prohibits DOD right now from developing a good performance-based system, put it into practice, look at the standards now, before we move and take away the merit pay system we have in effect.

So my first question is, why not just wait until you get it right, until the GAO and other independent groups that have looked at these things say that you get it right before we move ahead with this particular proposal?

Mr. WOLFOWITZ. I'm sorry, I don't believe the current law does allow us to make or do pay banding of the kind that we are talking about here or of the kind we have successfully implemented in some of our experiments. And we are not talking about stripping people of fundamental protections or removing the basic provisions of civil service, but there is something wrong, I think, with a grievance procedure that—excuse me, a separation procedure that requires that you have three strikes on exactly the same item before you can terminate someone, like that employee I mentioned who was found sleeping on the job not once but finally three times. It is demoralizing to the other employees.

I believe, and the experiments we have had at China Lake and Redstone Arsenal and other places bear it out, that these changes will be positive for the great, great majority of our civilian work force. It will make them better motivated, better compensated, and they will not have to deal with that 1 percent of poor performers that should not be so difficult to separate.

So we are not talking about removing the basic rights. There are grievance procedures throughout.

Mr. VAN HOLLEN. I think what Mr. Walker was saying with respect to the pay for performance was that you don't have in place now the kind of standards upon which you could base a fair pay for performance. He didn't say you don't have the authority, but he said the DOD has not laid the groundwork in terms of its personnel evaluation system that would allow us to do it in a meaningful way.

And this is true of Republican and Democratic administrations. There is always the danger of political favoritism within the system. I think we all know that is a real danger; and it is important,

again, regardless of the party in power, that we have those protections.

One thing I think we should all look at is whether it doesn't make sense to wait until we have a good performance evaluation system in place across the board before we move quickly with that.

Just to followup on the point you raised with respect to retaining the basic protections of rights, as part as this proposal DOD is seeking a waiver from Chapter 77, which ensures that there is an objective third party, like the Merit Systems Protection Board or the Equal Employment Opportunity Commission, to review agency disciplinary actions. Those I think are especially important, to have an independent evaluation in the case of racial discrimination actions or sexual harassment actions.

My question is, why do you want to waive Chapter 77 with respect to those protections?

Mr. WOLFOWITZ. My understanding is that all those basic things that you mentioned—that certainly we are not trying to eliminate any prohibitions on racial discrimination. I think it has to do with the fact that some of those provisions appear at multiple places in the statute.

If I can go back to pay for performance, we have a best practices model. It has been implemented in these experiments. In fact, it was published in the April 2nd Federal Register. I think it is a couple of hundred pages in length. That is the system we would like to institute more broadly. It has been tried; it works; it is reviewable. It is not something that leaves everything arbitrarily to the kind of manipulation that you are rightly concerned about. We would be concerned about it ourselves.

I think if we look at what happened at China Lake, at what happened at Redstone, we have been able to get some of the best people in this country working for the Federal Government in conditions where they might very well have gone off to the private sector if we didn't have that flexibility.

Mr. VAN HOLLEN. One last followup.

Chairman TOM DAVIS. The gentleman's time has expired. I'll give you a quick followup.

Mr. VAN HOLLEN. Thank you.

Just on the issue of having the pay-for-performance evaluation system in place, we also asked the Deputy Director of OPM a short time ago in a hearing to name some of the Federal agencies that had a basis for that kind of system in place, and DOD was not among them.

The last point I would like to make is that, with respect to—I am trying to understand your response with respect to the rights of employees. Are you saying you would not oppose having an agency outside of DOD like the Merit System Review Board or the Equal Employment Opportunity Commission review decisions, claims that are based on racial discrimination or sexual discrimination?

Mr. WOLFOWITZ. Certainly I don't think so. I would like to confirm that for the record. Those are fundamental protections. We are certainly not trying to change anything in the way that people are protected against that kind of discrimination. If we are doing so,

we would fix that. But I believe all the basic provisions of EEO review remain in place. I would be unhappy if they did not. I will try to confirm that for the record. I agree with you emphatically on that.

[The information referred to follows:]

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Van Hollen
Witness: Mr. Wolfowitz
IFR: Page 66, line 1466

Mr. Van Hollen: ...Are you saying you would not oppose having an agency outside of DOD like the Merit System Review Board or the Equal Employment Opportunity Commission review decisions, claims that are based on racial discrimination or sexual discrimination?

Mr. Wolfowitz: Certainly, I don't think so. I would like to confirm that for the record. We are certainly not trying to change anything in the way people are protected against that kind of discrimination. If we are doing so, we would fix that. But I believe all the basic provisions of EEO review remain in place. I would be unhappy if they did not. I will try to confirm that for the record...

Response: The proposal for a National Security Personnel System leaves untouched an employee's opportunity to appeal to the Equal Employment Commission on complaints of discrimination.

Chairman TOM DAVIS. I thank the gentleman for the question. I tried to raise it in a little different angle at the same time. I think it is something we need to ensure is protected as we move through this.

One other thing before I recognize Mr. Murphy.

A lot has been said about we just won this war under the current system, but the fact is that about 80 percent of your people on the ground were contractors, not employees, in Iraq?

Mr. WOLFOWITZ. I think that is about the right number.

Chairman TOM DAVIS. There is something wrong with that.

Mr. WOLFOWITZ. We didn't sort of come up with the idea—the notion is that somehow we won the war and now we are sweeping in with this. I think it was more correctly observed by Congressman Hoyer earlier that some of these provisions have been proposed for years.

I wish he had said yes to some of the things the Clinton administration had proposed in this area. They are long overdue, and the fact that we did so well in Iraq should not be a reason for saying, therefore, we are perfect.

Chairman TOM DAVIS. I think you said earlier that there are more opportunities for Federal employees for this, because a lot of the things that are being outsourced now and done by uniformed personnel could be done by Federal civilian employees. You have said that under oath and on the record, and that needs to be reiterated. That is one of the purposes of doing this.

Mr. WOLFOWITZ. It is one of the main purposes of doing this.

Chairman TOM DAVIS. Mr. Murphy.

Mr. MURPHY. I thank the chairman, and I thank the distinguished panel.

I'm thinking when one reviews the biographies of Theodore Roosevelt—I believe at one time he was head of the Civil Service Commission and spoke about the headaches he had and the problems he saw with what proceeded him with regard to hiring of people based upon political rather than personal merits, and relatives.

Certainly the issues you are bringing up here are ones the government has tried to deal with for a long time. Some are quite commendable. Any mayor in any town has recognized they could put a lot more police uniforms on the street by taking them out from behind desks, just as you said with the military. I think everyone here is in favor of that.

There are a couple of things that I go back to and some concerns that have to do with some of the due process procedures and who has ultimate authority here.

Let me read here from a page of the bill. The printed version I have is on page 11. It talks about, for any bargaining unit, "the Secretary at his sole and exclusive discretion may bargain at an organizational level above the level of exclusive recognition. It is binding on all subordinate bargaining units. It supercedes all other collective bargaining agreements, including collective bargaining agreements negotiated with an exclusive representative. It is not subject to further negotiations for any purpose, including bargaining at the level of recognition except as provided by the Secretary; and any bargaining completed pursuant to this subsection with labor organizations not otherwise having national consultation

rights shall not create any obligation on the Department of Defense or subcomponents to confer," and it goes on and on.

It sounds to me like it is putting a lot of power in the Secretary of Defense that would supercede other negotiations and discussions. Am I reading that correctly?

Mr. WOLFOWITZ. I believe what it is designed to do is to consolidate what could otherwise be an enormous and cumbersome proliferation of individual, inconsistent bargaining procedures with bargaining at the national level. I think that is the intent of it. I think that ultimate discretion, according to the Secretary, I think is the same discretion that is accorded to the Secretary of the Department of Homeland Security.

But the intent of that provision, and I think it is particularly important in a department as large as ours, is to enable us to come to consistent decisions across the Department and do so with some degree of expedition.

Mr. MURPHY. Again, that makes sense, that you don't want to be negotiating on hundreds of little agreements if you can expedite that and deal with it on a higher level. I just wonder, does that mean that the Secretary has the authority to strike out a lot of things that had been negotiated that may be good procedures as well?

Let me jump to another point here. There is another section preceding that in the bill which talks about provisions to collaboration with employee representatives. I am reading here from page 9. Essentially a number of recommendations are made from this group.

It says, "Any part of the proposal as to which the representatives do not make a recommendation or as to which the recommendations are accepted by the Secretary and the Director may be implemented immediately." So in other words, if they recommend it and you like it, the Secretary can go along with it. If nobody says anything, he or she can still come up with some guidelines or binding issues.

Does that seem to also perhaps bypass a lot of the negotiations which we have been hearing about that would be taking place with some of the labor?

Mr. WOLFOWITZ. I didn't read it that way. I read it as, again, making it possible to move more quickly on something where a consensus has been reached.

Mr. MURPHY. We will go back over that.

I want to just say something here, too. This is some testimony which will come later, but I thought that you won't have an opportunity to respond to it otherwise, so I thought I would quote from this. This is from Bobby Harnage, Sr., national president of the American Federation of Government Employees, in a document they passed on to us.

It says that "One of the most shocking authorities DOD is seeking for the Defense Secretary is the power to waive Chapters 31 and 33 of Title 5. This effectively grants the authority to hire relatives."

Is that true?

Mr. WOLFOWITZ. My understanding is that all the prohibitions on nepotism that are in current civil service law remain in this bill.

It may be that it is not repeated as many times as it was in the original chapter, but it is there.

Believe me, this is a proposal to have a more effective civilian work force, not to open it to that kind of destructive practice at all.

Mr. MURPHY. Thank you. I'll just close by commending you not only for the job all of you have done with the situation in Iraq and Afghanistan but your continued work and incredible dedication to make sure that not only our fighting force but our civilian force remains the best in the world.

Mr. WOLFOWITZ. Thank you, and I thank other Members of Congress for the great support you have given our Armed Forces. It is magnificent.

Chairman TOM DAVIS. Thank you. Mr. Ruppersberger.

Mr. RUPPERSBERGER. I, too, want to congratulate the Department of Defense. You have made us all proud and I think also not only with respect to the wars that we have been involved with but also working very closely with the other agencies in the war against terrorism.

Sitting here listening to the questions and the answers, it seems to me that the issue here before us is, No. 1, the speed in which this bill is moving forward through Congress.

I think Congressman Hoyer made the comment that we are in favor of accountability. We are in favor of giving flexibility to do the right thing. We are in favor of managing and being able to set the goals and hold the work force accountable for performance. But when you are dealing with a large government, as we have, there needs to be a rule, a guideline for employees. The reason unions were created years ago was because management was abusive. It seems to me we have to keep seeking that balance between management and unions.

I want to ask this question. Rather than asking Congress to approve the details of a new civilian personnel system, you are asking for sweeping authority, in my opinion, at least, to waive existing laws and create a new system by the administration. I think right now that the work force does not have the confidence at this point, based on a long-established system, that this is anything more than a move to be extremely arbitrary and controlling as it relates to their issues of security within their job employment.

Mr. WOLFOWITZ. I think maybe part of what is involved, then, is a lack of understanding of how much work has gone on over the course of actually a couple of decades with experiments like the China Lake experiment and, more recently, Redstone Arsenal to develop more flexible practices that are better for the Department as a whole and better for the work force and that we are not talking about stripping away everything that has ever been done. In fact, we are basing it on that experience, as I think I mentioned earlier.

I think the new regulations that have been published in the Federal Register for expanding that authority to the 170,000 positions that Congress has given us the opportunity to do constitutes some 200-plus pages.

So it is not a good thing if people are trying to—I don't mean trying to, but I think people should be careful not to start scaring people that suddenly this means that all jobs are arbitrarily at the dis-

cretion of unchecked management. The basic practices we talked about on prohibitions of discrimination of various kinds have not changed at all. The due process people would have if their jobs were in question are not changed fundamentally.

I think the most important provisions are provisions that will allow us to hire more people in the civilian work force. As Chairman Davis has said and I have said now a couple of times, I think it is an opportunity to expand the Federal work force over what it would otherwise be. It is definitely something we are proposing out of a sense of how important that work force is to us.

Mr. RUPPERSBERGER. I think it is a matter of how we get there. I don't think anyone disagrees that we need to do better. A lot of individuals are concerned about change. But as I read the bill, and this is the concern, Chapter 71 seeks a complete waiver of collective bargaining. Do you read it that way?

Mr. WOLFOWITZ. I don't read it that way. I read it as consolidating collective bargaining at the national level. Collective bargaining will still be very much a part of the process. I believe it has been a part of China Lake. It has definitely been part of the experiments we are referring to, including, as I say, China Lake.

Let me say a word. China Lake is this amazing research and development facility the Navy operates out in the desert in California. It has produced some of the most spectacular weapons systems we have. It was recognized some years ago that if we were going to retain that kind of a work force in those conditions that you had to be able to institute a different kind of management practice. It has been operated over many years. It includes collective bargaining. It includes basic protections.

As I said, when some of those same experimental procedures were instituted at Redstone, I was quoting earlier the union leader at Redstone was saying that 98 percent of the work force wanted it continued.

Mr. RUPPERSBERGER. It is with the protections in place. The issue that I see here today is that we are pushing through this bill in a rapid manner, and I think there is a lot of agreement that we could all come together and maybe get the same goal.

The perception of this bill is that—because it is being pushed through quickly, the perception is that, because we are at war, because of the fact that right now the Department of Defense needs the resources—and, believe me, in my opinion you are getting the resources—that the timing is not correct.

China Lake is a good experiment. There is a need for you to be able to hire and compete with the private sector. There is no question. But we still have a lot of employees that have a basic system that they rely on. You are only as good as the people that work with you. You have said that here today, and you know that is the case.

I just think we could probably pull this together and get what both sides want if in fact we could have the time to do it. Because from our perspective on this side we have not received much information or had the ability to really sit down and negotiate some of these issues.

Mr. WOLFOWITZ. If I might, for the record, Mr. Chairman, submit what I believe is a very substantial body of protections that the

Federal work force, the DOD work force would continue to enjoy under this bill, maybe in part we are dealing with a lack of understanding.

Chairman TOM DAVIS. Without objection, that will be put in the record.

[The information referred to follows:]

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Davis
Witness: Mr. Wolfowitz
IFR: Page 76, line 1703

Chairman Davis: ...But we still have a lot of employees that have a basic system that they rely on. You are only as good as the people that work with you. You have said that here today, and you know that is the case.

I just think we could probably pull this together and get what both sides want if in face we could have the time to do it. Because from our perspective o this side we have not received much information or had the ability to really sit down and negotiate on these issues.

Mr. Wolfowitz: If I might, for the record, Mr. Chairman, submit what I believe is a very substantial body of protections that the Federal workforce, the DOD workforce would continue to enjoy under this bill, maybe in part we are dealing with a lack of understanding.

Response: To address concerns regarding employee protections found in the proposed National Security Personnel System (NSPS), the applicable parts of the NSPS proposal and section 2302, title 5, United States Code are provided below. The information cites the pertinent provisions of NSPS, references the legal authorities retained and describes the protection afforded against abuses related to whistleblower protection, discrimination complaint processing and nepotism in hiring decisions. These protections are in title 5 today and remain in place through the enactment of NSPS. The Department envisions a contemporary human resources system that extends and continues these personal employee protections; careful examination of NSPS features will belie unfounded criticisms related to the loss of such protections through the NSPS proposal.

Whistleblowing

This protection is clearly delineated in NSPS section 9902(b)(3)(A) and is clarified by sections 9902(b)(3)(B) and (C). These provisions cite the authorities contained in sections 2302(b)(1), (8) and (9) and identify whistleblower reprisal as a prohibited personnel practice. Likewise, the ability to file a complaint with the Office of Special Counsel is addressed as an employee right. DoD employees will receive equal protection under NSPS when exercising their right to identify gross mismanagement or malfeasance.

The process for filing a whistleblower complaint is very specific regarding the steps that are taken. NSPS does not change the process.

Equal Employment Opportunity (EEO) Complaint Process

Nothing in section 9902 affects the rights of any employee or applicant under current Civil Rights laws. Any employee or applicant who believes that he or she has been discriminated against retains the rights to file a complaint of discrimination under current EEO procedures contained in 29CFR1614.

In addition, 9902(b)(3)(B) specifically prohibits waiver, modification, or otherwise affecting any provision of 5 U.S.C. § 2302 related to prohibited personal practices. The prohibited personnel practices that would apply to the DoD system would include prohibitions (in 5 U.S.C. § 2302(b)(1)) against any employee who has authority to take, recommend or approve any personnel action discriminating for or against any employee or applicant for employment:

- on the basis of race, color, religion, sex, or national origin as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
- on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a); or
- on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)).

Employees who believe that they have been the subject of a prohibited personnel practice or the violation of a merit system principle may file a complaint with the Office of Special Counsel, whose jurisdiction would not be affected by NSPS. Employees would also continue to have the right to file a complaint of discrimination under EEO regulations established by the Equal Employment Opportunity Commission (EEOC). This process remains unchanged with the implementation of NSPS.

In addition 5 U.S.C. § 2302(d) would continue to apply. This section reiterates that nothing in section 2302 may be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under:

- section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;
- sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;
- section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;
- section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or
- the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

Employees who believed that they were aggrieved by violations of these provisions could file a discrimination complaint under the EEOC's complaint procedures, which would

remain unaffected by NSPS; and, in the case of alleged prohibited personnel practice (also noted above), file a complaint with the Office of Special Counsel.

Employment of Relatives

Section 9902 requires that the system established under this authority must not modify, waive, or otherwise affect any provision of 5 U.S.C. § 2302. One of these provisions, section 2302(b)(7), prohibits appointing, employing, promoting, advancing, or advocating for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister) of such employee if such position is in the agency in which such employee is serving as a public official or over which such employee exercises jurisdiction or control as such an official. The prohibition against hiring of relatives specified in the NSPS proposal is exactly the same as that currently delineated in relevant title 5 provisions.

The process for filing a complaint regarding nepotism (a prohibited personnel practice) is very specific regarding the steps that are taken. NSPS does not change the process.

Chairman TOM DAVIS. Mr. Secretary, I understand you need to be out of here at 10 after 12. I want to move through and give everyone their 5 minutes.

Mrs. Blackburn.

Mrs. BLACKBURN. Thank you very much, and I thank the committee and those of you here to testify to us also for being here and providing an explanation. I certainly feel like I have a better understanding of what is before us. Thank you for your time and explanations today. I did not realize until today that basically you all have been working toward this for 20 years. I think that is noteworthy.

Ms. James, if you will address for the record the number of people that are in the pilot project that has been at DOD?

Ms. JAMES. Are you referring to the pilot projects within the Department of Defense?

Mrs. BLACKBURN. Yes.

Ms. JAMES. I think about 30,000.

Mrs. BLACKBURN. The total work force is 700,000, am I correct on that?

Ms. JAMES. That's correct.

Mrs. BLACKBURN. If you run pilot projects in other parts of the Federal Government, what percentage of the work force is generally in that project?

Ms. JAMES. It can vary, but that is fairly typical, what you see in the Department of Defense.

Mrs. BLACKBURN. That is a pretty typical sampling of the ones that are there.

In the pilot project, Mr. Wolfowitz, and this may come to you, what kind of buy-in have you had from the employees that have been in those pilot projects and what type of buy-in would you anticipate from the work force in general?

Mr. WOLFOWITZ. I would like to ask Admiral Clark to address China Lake, because he has dealt with that for many years.

I would just go back again and quote what the president of the AFGE local at Redstone said after that experiment had been under way, "by far, the majority of employees have indicated to me, both privately and in called meetings at Redstone Arsenal, that they had wanted it renewed. I am talking about 98 percent of them did. Only 1 out of 50 opposed it."

A majority of the AFGE employees at Local 1904 voted last month to be involved with the civilian personnel demonstration project at Fort Monmouth, NJ. I would say that the record is one of strong satisfaction, but I would like Admiral Clark, who knows the China Lake project much better than I do, to address it.

Admiral CLARK. Thank you, Mr. Secretary.

The China Lake program has—and one of the reasons, Mrs. Blackburn, I talked about the principles of this—the China Lake program has brought out the principles that we have seen best motivate and stimulate our work force. They greatly appreciate being rewarded for their performance.

I was in Panama City, FL, yesterday. They went to this program in 1999, exactly the same response. I met with a number of the employees yesterday and talked about how this works for them. So

the response we are getting from our people has been overwhelmingly supportive.

To be sure, when you step out in something new, people have some uncertainty about how it is going to work. The China Lake process is our best example of why we believe so strongly that these principles are correct.

Mrs. BLACKBURN. So the employees like being rewarded on their performance, and they have moved toward requesting that from you.

Admiral CLARK. Let me just say there is a tendency to paint this kind of discussion in terms of a government employee who may perhaps not be measuring up and the effect of that. They also greatly appreciate the fact that the system is dealing in an accountable way with regard to remuneration. So it cuts both ways.

Mrs. BLACKBURN. OK.

Mr. Wolfowitz, quickly, a couple of questions. Speaking to the process, how long do you anticipate this change to take place where you would completely change your program in the Department of Defense?

Mr. WOLFOWITZ. Our estimate is it would take about 2 years to fully implement what we are talking about, which is another reason—I understand it always sounds good to take more time to study something, but this has been studied for a long time. It is going to take a long time even if we get it at the end of this year to implement it.

Admiral Clark, do you want to speak to this issue of urgency? You have been around this block longer than I have.

Mrs. BLACKBURN. If I may add one more thing to that, during this process of 2 years, what is going to be your process for employee input during that? Admiral Clark, if you would address that in with your response.

Admiral CLARK. This gets back to the whole issue of the bargaining process and what things are going to be national and what things are going to be local and the development of the processes and procedures for review. That has been done in a very collaborative way in the China Lake model and also in what I saw yesterday in Panama City. That is the way it is done. It is done in a collaborative way.

Here is the part—several people have said, why now? We have not gotten to this part of the discussion. I very much, if I could, I would like to, Mr. Chairman, speak to this point for a moment.

In my view, I am the guy that by Title 10 I am given the responsibility to recommend up the chain to the Secretary the proposals to organize and train and equip this force. We have just completed a fantastic operation. No doubt about it. I want to tell you, we are not resting on our laurels. We are working 5, 8, 10 years out how it is going to be even better.

But from the position of the civilian personnel structure, I am in a sense of extremis. When I go to the field, here is what I'm getting. When I go to the non-China Lakes and with this business of over half of the employees are going to be retirement-eligible in 5 years—and, as Ms. James said, the issue about the bureaucracy that has grown over time in government, the layers of bureaucracy—one of you mentioned Gordon England. He was my boss

when he went to homeland defense. Our task was to figure out how to improve the effectiveness and efficiency of this organization so we can redirect dollars—I am spending 60 percent of my budget paying salaries—so that I have the resources to transform the military.

The point is this: in effect, we have a set of laws that precludes me from being efficient and creating efficiencies inside my structure and replacing these employees that are going to retire.

If I go in someplace and seek to create new hires while I am trying to create efficiencies under the current set of rules, the people I have to let go are the ones that we just hired. I am in a position that the law—the way it really works in real practice is: Vern, you can't make the Navy more efficient. Vern, you can't hire more people in these places where you have all kinds of people retirement-eligible in the next few years.

I want the committee to understand that I have a set of circumstances here that are keeping me from doing my job. I have a sense of urgency about this because this civilian work force is vital to equipping and enabling the young men and women of my Navy that are going to have to go out and do the next one and the next one and the next one.

Chairman TOM DAVIS. Admiral Clark, let me ask quickly, what about the employee who has worked there doing, at least in their mind, a great job, is a couple of years from retirement, there is a RIF——

Admiral CLARK. Thank you for that. Mr. Waxman used a quote, and I couldn't agree with him more, Tom Freedman's quote: The guardians that work hard, those people who are productive and effective, efficient, they are not going to be in question. That is not what anybody is talking about.

Chairman TOM DAVIS. But if someone is close to retirement, shouldn't their years of service be given some consideration if you are doing a RIF? You don't want to get someone 2 years short and, all of a sudden, everything they have worked hard for, their retirement—maybe they have given up other jobs—shouldn't that be a factor?

Admiral CLARK. There is a process that includes all of the variables that should be in a performance system; and it should not be slanted the way it is now, which is almost predominantly the other way.

Mr. WOLFOWITZ. But it would be a factor. I think it is the third in order.

Chairman TOM DAVIS. Thank you.

Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman.

I think we all appreciate the terrific leadership of the Pentagon in Iraq and Afghanistan. I think we want to work on a bipartisan basis to make these reforms work. But I am deeply worried, and I have been to all the hearings, that we are talking past each other.

For example, it was my understanding from Dr. Chu's prior testimony that the Pentagon has current legal authority to have demonstration programs or other flexibility for up to about 120,000 of its current employees. But we just heard a few moments ago that

the Pentagon is unclear on that, at least from some of the other witnesses.

I would like to know for the record whether the Pentagon has that current authority to experiment with up to 120,000 employees. Because that was prior testimony.

Second, even though this is the third of the hearings, we have asked written questions from the Pentagon and at least as of 10 a.m. no one has received answers to those questions, not even folks far more important than I am, folks like your chairman and ranking members of the committees. This is a problem we need to overcome, especially if the markup is tomorrow.

Chairman TOM DAVIS. Excuse me. I'd just like to ask the gentleman, were these questions at the Hask hearing? They weren't to us, right?

Mr. COOPER. At the Hask hearing, I know they weren't answered. But I know these go back to the first Civil Service Subcommittee hearing.

When we are asked to repeal broad sections of law, such as the law that currently requires DOD to bargain in good faith, that causes us some concern. I think while many of us trust the current leadership of the Pentagon, we are also being asked to repeal this requirement for all future Secretaries of Defense and all future Undersecretaries and Deputy Secretaries. So that should be of great concern.

To avoid this continuing problem of us talking past each other, would it be possible for us to agree today to go ahead and amend the Pentagon proposal in a way satisfactory to both sides of the aisle here, to preserve the obligation to bargain in good faith, to preserve the obligation to endorse collective bargaining rights, to preserve the obligation to prevent discrimination or harassment of employees, things that I think people of good will should be able to agree on easily?

But those, as currently drafted—and maybe your lawyers got the best of you—those safeguards are not part of the Pentagon's proposal. That is a concern, because, while we might trust current management, this law could apply forever.

Could we have agreement from the witnesses that those safeguards should be preserved?

Mr. WOLFOWITZ. Certainly the safeguards against harassing—harassment—against discrimination, against mistreatment of whistleblowers I am assured are in there. If they are not in there, we would be happy to look at the explanation of where what is there is inadequate.

On the issue of collective bargaining, I think we are asking for changes; we are not asking for dismantling the whole system. Most importantly, what I do understand is we are asking to do things at a national level so we can move more quickly. When there is an agreement, that we can move that agreement forward more quickly.

I would be hesitant to say right away that—we think that what we have come up with, which is in fact the product of a lot of consultation, is a pretty good outcome. If there is a different proposal, obviously, we would look at it. It is an important issue. But it is

a little different from these very basic protections, about which there can be no doubt whatsoever.

Mr. COOPER. There has even been massive disagreement on the subject of consultation. I don't want to belabor this too much, but Dr. Chu testified that earlier organized labor was not part of the design phase of these regulations.

I want to give the Pentagon the benefit of the doubt, but, according to the study which summarizes your eight or nine demonstration programs today, they say that a key part of the success of pay for performance at China Lake, at Redstone, all these other facilities you have been bragging about, is involvement of organized labor early on in the process.

So how can you have consultation if the other side doesn't even know they were consulted? There is some disconnect here that the committee after three hearings has not been able to overcome—a couple of hearings by this committee, Government Reform, and by the Committee on Armed Forces.

So we are not improving our information here. Questions have not been answered by the Pentagon that were posed in writing. We have to get to a common agreement on the facts before we can possibly mark up a bill intelligently. Otherwise, we are just giving you a blank check. Maybe some folks want to do that, but our job as a Congress is to try and do our job in a responsible and fair fashion that is strong on national defense and also preserves basic rights for our citizens.

Mr. WOLFOWITZ. I appreciate that spirit very much. I will do everything that I can to make sure that we answer the questions fast.

I am told that the questions for the record that we got from the House Committee on Armed Services were sent over to that committee this morning; and I am told, Chairman Davis, that the ones for the Subcommittee on Civil Service and Agency Reorganization are on the way. Now, "on the way" is a magic three words in government.

Chairman TOM DAVIS. Thank you.

Mr. Waxman.

Mr. WAXMAN. I want to point out, Mr. Secretary, if you feel you need flexibility in a certain area, we are happy to look at it. We want to accommodate you.

On these other areas where you think you have protections, we read it; and our lawyers say the protections aren't there.

It shouldn't be that we submit to you why it's not there and you look at it. We're the committee of Congress. Give us what you want us to look at and let us collaboratively work on this problem. We feel that this bill, maybe inadvertently, repeals huge sections of the law and protections for workers. Maybe it was not intended, but it is nevertheless the law, if we pass your proposal.

So please consider this an invitation not just for us to give you our ideas but for you to give us what you need. We will try to accommodate what you need without going beyond that.

Over and over again, you have said, well, you want what the homeland security agency has. What they have is an experiment. We ought to see how that works before we start applying it all across the government. I don't think we are prepared to do that.

I hope not, because we went pretty far in that with a lot of theories that have not been tested, based on the idea we are going to test those theories.

I just make this not as a question but a statement that I hope we will collaborate and find out from you what recommendations you really feel you need, not just this bill modeled on Homeland Security but what you really need. For that we ought to accommodate you.

Chairman TOM DAVIS. Thank you.

Mr. WOLFOWITZ. Thank you. I will be very happy—it is not a question. I will submit for the record a very clear statement of where we feel that basic protections that people on both sides of the table agree are essential are covered. Some of them may be in redundant provisions in the bill so it may look as though you are taking something out, but it remains somewhere else.

[The information referred to follows:]

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Cooper
Witness: Mr. Wolfowitz
IFR: Page 88, line 2008

Rep. Cooper: ...I just make this not as a question but a statement that I hope we will collaborate and find out from you what recommendations you really feel you need, not just this bill modeled on homeland Security but what you really need. For that we ought to accommodate you.

Mr. Wolfowitz: ...I will submit for the record a very clear statement of where we feel that basic protections that people on both sides of the table agree are essential are covered. Some of them may be in redundant provisions in the bill so it may look as though you are taking something out, but it remains somewhere else.

Response:

Civilian Personnel Protections found in NSPS

Title 5, United States Code, Chapter 23 contains specific protections for employees. This chapter of title 5 remains in full force and effect under NSPS.

Whistleblowing

- This protection is clearly delineated in NSPS section 9902(b)(3)(A) and is clarified by sections 9902(b)(3)(B) and (C). These provisions cite the authorities contained in title 5 United States Code, Sections 2302(b)(1), (8) and (9) and identify whistleblower reprisal as a prohibited personnel practice.
- Likewise, the ability to file a complaint with the Office of Special Counsel is addressed as an employee right. DoD employees will receive equal protection under NSPS when exercising their right to identify gross mismanagement or malfeasance.

Equal Employment Opportunity (EEO) Complaint Process

- Section 9902(b)(3)(C) specifically prohibits NSPS from waiving, modifying, or otherwise affecting any provision in law referred to in title 5 United States Code, Section 2302(b)(1), (8), and (9) by providing for equal employment opportunity through affirmative action.
- Any employee or applicant who believes that he or she has been discriminated against retains the rights to file a complaint of discrimination under current EEO procedures contained in title 29 Code of Federal Regulations 1614.

Employment of Relatives

- Section 9902(b)(3)(B) requires that the system established under NSPS must not modify, waive, or otherwise affect any provision of title 5 United States Code, section 2302 relating to prohibited personnel practices.
- One of these provisions, Section 2302(b)(7) specifically prohibits the employment of a relative.

Veterans' Preference

- Section 9902(b)(3)(B) requires that the system established under NSPS must not modify, waive, or otherwise affect any provision of title 5 United States Code, section 2302 relating to prohibited personnel practices. Therefore, any action involving veterans' preference that results in a prohibited personnel practices cannot be taken under NSPS.
- Title 5 United States Code, section 2302 (b)(11)(A) and (B) makes it a prohibited personnel practice to "Knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement or knowingly fail to take, recommend, or approve any personnel action if failure to take such action would violate a veterans' preference requirement."

Mr. WAXMAN. If we think they are not covered, you wouldn't mind our making sure they're covered?

Mr. WOLFOWITZ. Right, with the important provision that we have some disagreement about the extent of the collective bargaining.

Chairman TOM DAVIS. Clearly, there are some issues. You want more flexibility. Right now, there are too many things bargained that are really minutiae that you think don't belong under the formal procedures you have today that ought to be resolved in a faster, more efficient way.

Mr. WOLFOWITZ. Absolutely.

Chairman TOM DAVIS. We understand that. But there are some basic rights that, Mr. Waxman, you feel should be protected, and I take it that on those issues there ought to be some protections, and the question is, where do we draw the line? We may have some philosophical disagreement on that.

I am trying to narrow the issues. We will work with them this afternoon and this morning to see if we can resolve it.

Mr. WOLFOWITZ. Thank you, sir.

Chairman TOM DAVIS. Mr. Platts.

Mr. PLATTS. Thank you, Mr. Chairman. I appreciate all of the witnesses here today. My apologies for being late.

General Pace, you will be glad to know I am coming from Parris Island. I was up at 5:30 a.m. at the Crucible seeing your recruits get great training.

I wanted to touch on two issues here, if I can, in my time. One is that the concern from some of my union Federal employees back home and here in the Washington area that this legislation is going to result in more outsourcing of defense work, so a smaller civilian work force.

Dr. Chu, I think, has referenced in previous testimony before us that a significant number of uniformed jobs that are currently done by uniformed personnel could be civilian, which I would think would mean we would need more employees.

The chairman referenced in his opening statement the difficulty of dealing with the complex labor-management regulations we have now which often causes more outsourcing instead of using civilian employees.

So I guess what I am looking for, Mr. Secretary, is your best assessment of where you see the Federal civilian work force in numbers, if this so happens. Is it greater because you don't have to outsource more? Is it going to result in more outsourcing than we already are seeing?

Mr. WOLFOWITZ. That is a fair question. This bill does not address the issue of outsourcing. It is a major concern. There is obviously—in separate actions in legislation we are seeking authority to outsource those things that are not appropriate for Federal employees, either uniformed or nonmilitary.

I have learned over the past years it is an incredibly complicated issue. I think there are efficiencies that can be achieved for the government, for the taxpayer by outsourcing. There are clearly important functions that have to be done by people who are permanent employees of the Federal Government. I think the flexibility this bill will give us is the ability to put much more of that into

regular members of the civilian work force, instead of either going to contractors, which is a work-around we engage in too often because we don't have the flexibility, or in having uniformed military perform those functions, when in fact we have an enormous stress on our manpower as it is today.

Admiral, do you want to add to that?

Admiral CLARK. We are across every front. I look at my whole human resource, the whole force structure as the active duty military, the Reserves. I have 381,000 in the first group and 85,000 in the second group, 200,000 civilians in the GS area, and a couple hundred thousand contractors.

Across this whole front, the challenge that we are laying on our whole Navy, every aspect of it, is, help us be more effective. Help us be more efficient. That is for every element of this structure.

It is my conviction—and having observed the way we have to work around—that one of the things we need to do is reclaim work for government civilians that we have now out in the contractor world.

We have living proof that we are unable to do that with the inflexibility of the system. The inflexibility gets to the time factor, first and foremost. While this is being discussed, I have people calling me: Hey, boss, if you get a chance to testify there, tell them it took me a year and a half to get my person hired. These are real-world cases. They are not mythology. That is the issue.

With the number that has been used about how many people we have that are wearing uniforms that are doing things that are fundamentally nonmilitary in terms of having to—they are associated to defense, it is very clear to us that we need to move part of the work force into another segment, our four-element segment of our whole human resource pool. I am convinced that this legislation will allow us to do that in a much more effective way.

At the end of the day, no bones about it, what I am looking for, I want to send proposals up through the Secretary of Defense and to the President to come to the Congress to allow me to transform the military.

Yes, we won big. We want, in every fight with a potential enemy in the future—we are not looking for fair fights. We want to apply the technology. We want the blinding speed that we saw in the last one. We want them to see it again.

We want our kids to have the tools. To do that, we have to have the very best people we can bring to bear to provide for the national defense.

General PACE. Sir, if I may—I realize we are over time, Mr. Chairman—there is nothing more important than the obligation that I and each of the Joint Chiefs has than taking care of those in the Armed Forces. That is our sacred trust, to ensure we do the right thing by our people as we accomplish our mission.

My personal background is one where my father came to this country as a young man. He grew up in New York City. He joined the International Brotherhood of Electrical Workers, Local No. 3 in New York City. Everything my family has, and my mom's current quality of life, has to do with things that my family got through collective bargaining.

When I looked at the proposals that were coming over here, one of the main things I looked at was to ensure that we were doing right by our civilian force while we were doing right by our mission.

The specific words may be wordsmithed to make sure that we have not inadvertently done damage to someone that we did not mean to. But, clearly, the intent of this legislation is to take a superb civilian work force and to ensure that we can recruit it, that we can hire it, and that we can pay for it properly in the future so that they are treated properly as essential members of the team, just like everybody else in the Department of Defense. Thank you, sir.

Chairman TOM DAVIS. The gentleman's time has expired.

Thank you very much.

Ms. Norton. Thanks for bearing with us.

Ms. NORTON. Thank you very much, Mr. Chairman. I appreciate that you have afforded us at least one further hearing on the most complicated proposal, I think, that has ever been presented to this committee with respect to the civil service system.

Before I ask my question, I would like to say to all of you at the table, I am a former chair of the Equal Employment Opportunity Commission. I could not be more outraged at the kind of discrimination that could arise from this proposal. You have high-profile sexual harassment in the Air Force Academy as I speak. Racial discrimination is the ugly scar still present in our country, and you have a proposal here that would deprive Federal employees who already don't have the same equal employment rights that civilian employees have already—you would deprive them of any third-party review, which would mean they would be reviewed by their own agency for discrimination by their own agency. You would even eliminate or make waivable the right to file a complaint of discrimination before the Equal Employment Opportunity Commission.

Sir and Lady, the Equal Employment Opportunity Commission is the only expert agency on discrimination in the Federal Government. The notion that a third of the work force can't even file anymore at the instance of the agency head is disgraceful.

Now, let me go on to ask another question, having put that on the table and others having raised it. I appreciate that the witnesses have come forward. I want to congratulate the Department on the way in which it is carrying out its military mission.

I want to say to you that you are carrying out that mission from the way you have done the bombing to the compassionate way in which you are now carrying out the renewal in a way that makes me proud. But employees have approached us such that one would think that you were trying to imitate aspects of the regime you have just defeated in the way this proposal reads.

And I just want to tell you why that is the impression that you have given. OPM has been neutered, just as well bowed out, genuflected, not in it, pay for performance. But, according to GAO, no performance appraisal system is in place, so employees don't know what in the world is going to happen.

Imagine yourself one of the one-third of the work force that is reading what is proposed to happen to them. Imagine how you

would feel: no consultation with representatives of the employees who, by the way, have to make this system work if human capital means anything in your department; abolition or waivers of almost the entire civil service system.

And, finally, the part that outrages me most, to the general public we say to you, no notice and comment. All of this can be internal to us. That is why I think my comments about imitating aspects of the regime you have just eliminated were appropriate.

Now, I am concerned that if you are going to do this, there ought to be some real emergency that makes us rush to the table, to discard all that we have done as wrong and perceived quickly without scrutiny or the kind of review we give even lesser proposals.

As I understand it, Secretary Rumsfeld wants to transform the entire Defense Department. I commend him for that. It needed to be done before September 11th. Since September 11th it is imperative and indispensable. But if that is to be done, as I recognize the Department, there are three parts of it that are major.

There is the military part, and I thought the whole point was to match the civilian and the contractors to the military part so that it all runs smoothly. But as I read what the GAO said, there is a criticism that goes to the heart of what is proposed here, because according to the GAO, in order to improve human capital strategic planning for the DOD civilian work force, GAO recommended that the Secretary of Defense direct the Under Secretary of Defense, Personnel and Readiness, to assign a high priority to and set a target date for developing a department-wide human capital strategic plan that integrates both military and civilian work forces and takes into account contractor roles and sourcing initiatives.

We are given no plan for integrating anything. In fact, the Department's response was simply not to concur that kind of integration was necessary. So how are we to know that we are putting the cart before the horse? How are we to know that whatever you do to the civilian side is really going to match up with the military side and the contractor side?

Chairman TOM DAVIS. Thank you.

Mr. WOLFOWITZ. Mr. Chairman, I have said I would like to submit something for the record. But I think it is important to state clearly that this legislation leaves completely intact, as I understand it, merit system protections, it leaves completely intact prohibitions on prohibited personnel practices, it leaves intact equal employment opportunity provisions, it leaves intact veterans' preferences.

Ms. NORTON. Excuse me. I want to read to you what in fact the bill says.

Relating to the sense of the Congress, the sense—what you downgrade, you downgrade the rights of these employees because you make it a sense of the Congress that employees are entitled to fair treatment in any appeals.

You do not in fact make it enforceable as it now is, but in fact it is waivable.

Chairman TOM DAVIS. The gentlelady's time has expired.

Ms. Watson.

Mr. WOLFOWITZ. If I might respond, we have worked closely with Kay Coles James and her people in OPM to try to make sure that

in fact those protections are included in the bill. I think we achieved it.

I would like to ask Director James if that is her view.

Ms. JAMES. That is, in fact, my view. I would also like to say for the record that OPM does not feel neutered through this process. As a matter of fact, the legislation states clearly that the Secretary, working in conjunction with the Director, will implement the new systems within the Department. And we know, in close consultation with the Department of Defense, that it is not their intention in any way to water down those civil service protections.

Chairman TOM DAVIS. Thank you.

Ms. Watson.

Ms. WATSON. I want to thank the Chair and the witnesses. We appreciate your bringing those issues to us.

Can I get a yes or no answer, Mr. Wolfowitz, to these questions?

As I understand the bill in front of us—and I asked for it so I can read the wording. I am not used to working in the dark; I am used to looking at each word of a legislative document, because that then will become the law.

Yes or no, are you eliminating employees' collective bargaining rights which are set forth in Chapter 71 of Title 5, yes or no?

Mr. WOLFOWITZ. My understanding is, we are amending those, we are not eliminating them.

Ms. WATSON. Amending or eliminating. I will ask staff to check the language to see if you amend or you eliminate.

As I understand, this bill completely strips Federal employees of their collective bargaining rights. Yes or no?

Mr. WOLFOWITZ. I believe that is wrong. It changes the way in which it is done. It consolidates collective bargaining at the national level. I do not believe it is correct to describe it as stripping them of their collective bargaining rights.

Ms. WATSON. Does the bill waive Chapters 75 and 77? Does it waive?

Mr. WOLFOWITZ. It gives the Secretary authority to waive those chapters.

Ms. WATSON. All right. The Secretary is part of the executive branch?

Mr. WOLFOWITZ. Yes.

Ms. WATSON. The Congress is the legislative branch. So do we have a constitutional issue here? If the Secretary then makes those decisions, we make policy. So if I understand, Chapters 75 and 77 are waived by the Secretary if he or she chooses; therefore the policy will be made with the Secretary and not with the Congress?

Mr. WOLFOWITZ. Obviously that waiver would require legislation. But I think, more importantly, if the Secretary would waive some of those provisions, that would be something that is reviewable by the Congress. And if——

Ms. WATSON. After the fact, as I understand from the bill; is that correct? I am reading the words of the bill itself. So we can prepare pertinent and relevant amendments. But from the way I read the bill, the decision would be in the hands of the Secretary to change policy.

Mr. WOLFOWITZ. Mr. Chairman, could I ask Mr. Chu to address that?

Chairman TOM DAVIS. You may.

[Witness sworn.]

Mr. CHU. The proposal, which parallels what was given to Homeland Security, does put the power to waive in the Secretary's hands.

I think you need to look, in my judgment, at the relationship between the Department of Defense and the Congress on matters of this sort. It is a close and collaborative relationship. The Congress gives extensive direction, both in statute and its report language, as to how it expects the Department to carry out provisions of the law.

Ms. WATSON. But am I correct that by reading the legislation—you see, you should not let us see the legislation if you are going to give those kinds of answers.

But am I correct that the Secretary can make the policy and then inform the Congress after it is made, confer with the Congress?

Mr. CHU. I think that is typical of the grants of authority Congress has given to the Secretary of Defense.

Ms. WATSON. No, no, no. I am talking about the legal language in the bill. Would you agree?

Mr. CHU. The proposed bill does give the Secretary power to waive those chapters in order to reach the results Dr. Wolfowitz described.

Ms. WATSON. Thank you.

I understand that when national security is involved, already currently law specifically allows the Department to fire someone immediately. I have listened intently to the witnesses. And I agree you need to have the flexibility, particularly in hiring. Particularly in hiring we need experts. We need people with the information, we need people who are trained for the 21st century. I couldn't agree with you more.

What I am having problems with is the way we are going to get rid of a lot of people who have been working within government under some protections. So I understand that in terms of the Department, DOD, there are already provisions within the law to let that person who has been sleeping on the job three different times go immediately. Is that correct?

Mr. WOLFOWITZ. No. My understanding in that specific case, because you had to wait until it was three different times, you couldn't just do it once. Even though that particular employee already had been counseled on other aspects of misbehavior, it took a year to get rid of that particular employee. So my understanding is, you do not have that kind of flexibility.

The goal here is not to have large-scale RIFs of Federal employees. As Admiral Clark has said, we face a problem that large, very large numbers of our work force are going to be eligible for retirement in the next few years, and we need the ability to hire the right people in the right places to replace them. If we don't have that, we are going to end up with more of these contractor workarounds and more people who are not in the regular civil service when they should be, and more people who are not in unions when they should be, a less motivated work force and a less protected work force.

Chairman TOM DAVIS. The gentlelady's time has expired. If you have additional questions, if you can get them——

Ms. WATSON. I will put them in writing.

Thank you, Mr. Wolfowitz.

Chairman TOM DAVIS. Mr. Wolfowitz, I will try to get Mr. Kucinich very quickly. I know that he has a question. Then I will dismiss the panel.

Mr. KUCINICH. I want to thank the Chair, and thank Mr. Wolfowitz for remaining for this.

Every fair analysis indicates that this legislation would have very serious negative effects on whistleblowers. The transformation plan would eliminate the statutes that established due process and appeal rights for disciplinary actions; 75 and 77 of Title 5, which would provide that an employee against whom a disciplinary action is proposed is entitled to advance written notice of the disciplinary action, reasonable time to respond, to be represented by an attorney, and a written decision by the agency listing the specific reasons for the disciplinary action.

The transformation plan really doesn't offer a replacement for Chapters 75 and 77. It basically allows DOD to rewrite those chapters to the satisfaction of management.

Let me tell you why this becomes very significant. We have a case that on or about April 28, 2003, investigators from the Office of Inspector General disclosed the identity of a key civilian informant to his superiors at the Defense Finance Administration in Cleveland.

Mr. Dan Drost, who is a financial systems specialist in the Active Duty Navy pay division of DFAS, has been a key informant in the Department of Defense's Inspector General's investigation, into the causes of an erroneous privatization that resulted in the waste of $31 million in taxpayers' money. And as you may know, the Department of Defense Inspector General has reported that the privatization of military retired and annuitant pay functions were erroneously awarded to a private contractor, whose bid exceeded the in-house bid.

The Department of Defense Inspector General's investigation was significantly aided by the information given by this whistleblower. Over the past 2 years, when the IG's investigators desired face-to-face discussions with the whistleblower, they made arrangements directly with him. They met outside of the office. Their contact with him was confidential.

For some reason this time, the IG investigators approached upper management to schedule an interview with the whistleblower at the recent visit. Upper management informed Mr. Drost that they had scheduled a meeting with him to be interviewed by the IG at the IG's request. Indeed, the IG investigator went so far as to ask the whistleblower if he would allow a representative from the DFAS headquarters to be present at the interview.

The IG identified this whistleblower to his upper management. The same whistleblower has been in contact with my office in my capacity as the ranking Democrat on the oversight subcommittee that has jurisdiction over the Department of Defense. He has been in contact with my office for over 2 years about this erroneous privatization of the military retired and annuitant pay functions. He

brought this case of abuse of taxpayers' funds to my attention, was very helpful in providing our office with materials that I used to press the Inspector General for the above-mentioned investigation.

So, Mr. Secretary, this Mr. Drost provided information that led to the identification of $31 million in abuse and waste of taxpayers' funds. Now, because of the malfeasance of the IG's office, this whistleblower has been exposed, and I am asking you to give your assurance to this committee, notwithstanding this matter of Chapter 75 and 77, that Mr. Drost will face no retaliation, direct or indirect, that there will be no reprisals, that you will be watching to see what happens and there will be harsh consequences for anyone who tries to retaliate against him, and that he should be thanked for serving his nation.

Mr. WOLFOWITZ. Congressman, I agree that he should be thanked. Whistleblower protections are not to protect the whistleblower, but also the taxpayer so that we can get that kind of information.

I am going to try to find out whether we have the wrong regulations or the regulations that we have weren't followed properly. But we have contacted the whistleblower in question. We have given him both office and cell phone numbers of two senior managers within the DOD-IG.

I will hold those people responsible to make sure that there is no retaliation against him, and we owe you an answer to your letter, which I think we got yesterday.

This is an important case, but as I have said over and over again, there is nothing in this bill that is intended to reduce protection for whistleblowers. I think it is an important part of functioning effectively.

Mr. KUCINICH. I appreciate the Secretary's responsiveness. But there are provisions in this bill that would make whistleblowers much weaker. And this case in Cleveland is a graphic example of what happens, Mr. Chairman, if Federal employees who are conscientiously doing their job to protect the taxpayers are put at risk and are exposed. So I am asking this case to be in the consideration of your Department when you are looking at what happens to whistleblowers, because the whistleblowers are the ones that save the taxpayers money.

We must protect them. And, frankly, Mr. Secretary, this rewrite of these chapters does not accomplish that.

And I appreciate the Secretary's, Mr. Chairman, going on record and stating that Mr. Drost will not only be appreciated, but will be protected from any kind of reprisals by his superiors.

Chairman TOM DAVIS. The gentleman's time has expired.

The whistleblower protections are not waived under this act, to my knowledge. If the gentleman can cite me a section, I will be happy to look at it and correct it. But we have checked; I don't think they are not waived, but I appreciate the gentleman bringing this up to our attention.

Mr. KUCINICH. I thank the Chair.

I just want to respond that this transformation plan doesn't offer replacement for Chapters 75 and 77. It would allow DOD to rewrite those chapters to the satisfaction of management. That is really going to be little comfort to whistleblowers, because their right to

protect the public and blow the whistle might be protected, but their due process and appeal rights, which are necessary to defend whistleblowers against retaliatory actions will be eliminated in favor of whatever replacement process that they want to come up with.

So that is the point I am making. I appreciate the kindness of the Chair in making sure I had the chance to make that point. Thank you.

Chairman TOM DAVIS. Thank you very much. I think I can assuage the gentleman's concerns.

Secretary Wolfowitz, thank you very much. I think what I would like to do is—I know other Members have questions of the panel. I know you have to leave. I don't know if the Admiral and General have to leave as well. But if we have Dr. Chu up here, he can answer some additional questions on this panel, if that is all right with you, Mr. Secretary?

Mr. WOLFOWITZ. Yes, it is. And if I might just, before leaving, first of all, thank you, Mr. Chairman and the members of this committee for helping us to look at this very important legislation in an expeditious manner.

I would also like to affirm that we have worked closely with Kay James and OPM, will continue to do so to ensure that the protections that this committee and the Department of Defense hold dear are fully protected and preserved.

I want to thank Director James for her partnership in that. And I will make sure myself that these issues that have been raised here with respect to whistleblower protection and EEO protection are properly taken care of in this bill. I have been assured that they are. I will make doubly sure.

Chairman TOM DAVIS. Thank you very much.

Dr. Chu, you have been sworn so you can get up here and—we are going to move with Mr. Janklow for questions. Then I have Mrs. Maloney next, Mr. Clay after that, and then Mr. Davis.

Mr. JANKLOW. Thank you very much, Mr. Chairman.

If I could, and I would like to ask you, Ms. James, if I could—first of all, just a comment. Many of us in America have felt that the Department of Defense's primary function is to defend this country and, when necessary, deal with offensive actions on behalf of this country and, when necessary, deal with defensive actions on behalf of this country. And the best team to put together to do that isn't always known in advance all of the time.

If I could ask you—and, first, let me ask you, General, if I could—in the Armed Forces, when you decide to make a change in somebody running an operation on the military side, how long does it take you to do it?

General PACE. Usually a commander takes his time to make the proper leadership decision. Once he has decided on a course of action, he directs it immediately, sir.

Mr. JANKLOW. When the defense—sometimes maybe even the survival of this country or some of its people are at stake, you can move very quickly, because you have to move very quickly.

What is the difference between the civilian side and the military side, if there is one, when it comes to the real defense of this coun-

try? I realize some rare—they carry weapons and, you know, engage in combat operations.

But why should the civilian side—you don't have any reason why the civilian side should be any different in the Defense Department?

General PACE. Sir, from my perspective, the civilian side is very much an embedded part of the Defense Department, and is very much a part of our team. They provided invaluable support to our Armed Forces during recent combat operations. We should have the same rights for all members of the Armed Forces, whether they are wearing uniforms or not.

Mr. JANKLOW. Ms. James, if I could ask you, ma'am, one of the statements made, if somebody were to sleep three times on the job, then they could be fired. I don't know what the rules are in the Defense Department right now. Can you sleep three times before you get fired?

Ms. JAMES. Well, there may be managers out there who would hesitate to take action because of the burdensome processes that are in place. But those processes are there to protect employees from what may be overly zealous managers or for retaliation or those sorts of things.

Our desire is to improve and shorten the appeals processes, not to strip them away. So we are not implying that person should have no rights or no rights of appeal or process. But certainly the ones that are in place are overly burdensome and cumbersome.

Mr. JANKLOW. I realize this has grown up over a long period of time. We start out everything, like we do in America, small; and then we never subtract, we just keep adding all of the time. So things become cumulative.

But recognizing that they become cumulative—and I also recognize that there would be very significant changes in the Department of Defense—one, could you give me an example of any administration, be it my party or the other party, that would not want the best possible people at the moment being employed in the Department of Defense at any level, in any capacity?

Ms. JAMES. I can't give you an example of anyone in any administration, this or previous, that does not feel the same level of frustration with the outdated and antiquated systems in which they have to operate.

I have often said that if you take America's most creative and innovative CEO, that is known as a "turnaround artist," that can go in and make a company turn a profit and produce results, hire that person and put them in a Federal agency and say, you must operate within the confines of these systems, they would be very frustrated in a very short period of time.

And so our challenge is to try to figure out how to save the best of the American civil service, all of those protections that we talked about, but at the same time reform the systems that are in place under that service.

There has been a huge cry in this country for civil service reform for a very long time.

Mr. JANKLOW. Ma'am, before this committee we had Paul Volcker, Mr. Carlucci and Ms. Shalala testify on behalf of a com-

mission that they are all members of, all expressing the frustration that they have had in trying to administer the Federal agencies.

Using the Department of Defense, the Securities and Exchange Commission and NASA as really a pilot project, really three crucial agencies, all three of which have had unique trauma over the last 3 years—clearly within NASA, clearly within the SEC in terms of protecting shareholder and investors in America, and the Department of Defense upon which this country's absolute survival, within which it rests—this is just a comment, Mr. Chairman, but I can't imagine any place that is more ripe for pilot project restructuring than these particular agencies.

Thank you.

Mrs. DAVIS OF VIRGINIA [presiding]. Thank you, Mr. Janklow.

Mrs. Maloney.

Mrs. MALONEY. Thank you very much.

And thank you all for your service. Mr. Wolfowitz in his opening comments said that one of the reasons that we need this massive change is September 11th; and as one who represents New York City—I lost 300 constituents on that fatal day—September 11th changed many things.

But, certainly, the professional employees on the city, State and Federal levels, by all accounts, were heros and heroines, many of whom gave their lives volunteering, they weren't even supposed to be in the office, rushing in to be part of the bucket brigade in the effort to save others.

And I would say the military's success that we have seen in Iraq is again testimony of the flexible, responsive, hard-working civilian forces that were there supporting them.

So my question is, where is the problem? And when you talk to the head of the General Accounting Office, Comptroller Walker in his testimony, he urges against these massive, sweeping changes, and urges us to go forward statutorily with the changes that we need. And I would like to put in the record an article that was in the Washington Post today, entitled, "Hill Should Heed GAO's Chief's Cautions on Civil Service Changes at the Pentagon."

[The information referred to follows:]

05/06/03 Submitted for the record by Congresswoman Carolyn Maloney, NY

washingtonpost.com

Hill Should Heed GAO Chief's Cautions on Civil Service Changes at the Pentagon

By Stephen Barr

Tuesday, May 6, 2003; Page B02

O n the big issues, Congress usually pays attention to Comptroller General David M. Walker.

He heads the General Accounting Office, which throws up red flags on waste, fraud and mismanagement in the government. He looks to the bottom line -- whether Social Security, tax cuts or other big-ticket items. He also constantly reminds federal agencies that people are their most important asset.

But when it comes to overhauling the civil service at the Department of Defense, it appears that Walker's words of caution may be lost in the rush to give the Pentagon far-reaching authority to change the way it manages and pays DOD civilians.

In testimony last week before House committees, Walker warned against rushing Defense civilians out of the General Schedule, with its guaranteed annual salary increases, and into a pay-for-performance system.

Walker pointed out that the "vast majority" of Defense Department management systems are not designed to support meaningful evaluations of employees and decisions to raise or lower employee pay. He stressed that the Pentagon's proposal needs to be weighed carefully because it could hold implications for federal employees at other agencies.

Members of Congress are under pressure from the Bush administration to give the Pentagon what it wants. Defense Secretary Donald H. Rumsfeld met with Vice President Cheney and White House Chief of Staff Andrew H. Card Jr. to obtain their support, and White House aides have met with congressional staffers to answer questions.

It's unclear, however, what Congress will do. Thomas M. Davis III (R-Va.), chairman of the House Government Reform Committee, has scheduled a hearing for today. Sens. Susan M. Collins (R-Maine) and George V. Voinovich (R-Ohio) plan to work up their own proposal for the Senate to debate.

Walker has urged lawmakers to hold off on the Pentagon proposal and instead create "statutory safeguards" that would apply to all federal agencies, not just Defense.

The safeguards, Walker said in a recent letter to Rep. Danny K. Davis (D-Ill.), should be designed with the help of employees and union representatives, in part because they know best what skills are needed to accomplish an agency's mission.

In designing the system, Walker said, steps should be taken to ensure that it operates with equity and minimizes the chances for political abuse. Independent reviews should take place to check on the system's integrity and credibility, and agency boards that handle pay decisions should be made up predominately of career officials, he said; and employees should be given an internal grievance process to handle their complaints.

The system also should provide "reasonable transparency," Walker said. That could include publishing the results of pay decisions, while protecting the privacy rights of employees, and making public the results of employee surveys.

The principles for such government-wide safeguards could be written into law, with rules issued by the Office of Personnel Management, he said.

Let's hope Congress takes Walker's advice into account. Congress last year granted wide management leeway to the Department of Homeland Security, but the design of that new personnel system will not be finished until later this year. Although the Pentagon has done some testing of pay-for-performance, those experiments have covered less than 10 percent of the Defense workforce, and some of the projects are still evolving.

It's important to note that Walker is not opposed to an overhaul of the federal pay system. "There is a growing agreement on the need to better link individual pay to performance," he wrote Rep. Danny Davis. "Establishing such linkages is essential if we expect to maximize the performance and assure the accountability of the federal government for the benefit of the American people."

But Walker thinks Congress should be careful in changing the pay policy for 746,000 Defense civilians. "Moving too quickly or prematurely can significantly raise the risk of doing it wrong," Walker said.

Diary Live

Please join me at noon tomorrow for an online discussion of federal employee and retiree issues on Federal Diary Live at www.washingtonpost.com.

Stephen Barr's e-mail address is

barrs@washpost.com.

© 2003 The Washington Post Company

Mrs. MALONEY. Likewise, the GAO, the independent body, came out with a list of violations, challenges, questions, whatever you want to call it, questioning DOD's strategic plan. So before we go in and throw out a system that worked tremendously well on September 11th, tremendously well in the current challenge that we just went through, to put in what?

And we don't even know what we are going to put in, because you haven't come out with it; and I find that tremendously troubling. If there is a problem, let's fix it. I don't think anyone thinks that someone should have a Federal job and sleep on it. If that is the problem, fire the person or create a system where you can fire the person. But don't go in with a sweeping change that we don't even know what it means.

And GAO serves a purpose. One of the arguments that was made is that the elected officials come and go, the appointed officials come and go—the appointed officials are here roughly 18 months—but that it serves a purpose to have a professional work force that is there through many administrations, who knows how to get things done, and whose sole purpose is to serve the citizens of this country and not necessarily a particular party. They are supposed to be independent and serving whoever is there.

Now, GAO came out with a recent history of DOD. And in it, the Comptroller General gave the Department a D-plus, as being poorly managed. And they then cited that DOD had over $1 trillion worth of transactions that were unaccounted for last year.

So before we turn over sweeping changes that we seem to disagree on what they are, I would like to know what happened to that $1 trillion? I think that is a good first start to find what happened to $1 trillion the DOD says is missing. And they further say that DOD is responsible for 9 of the 25 highest risk areas in Federal Government, including decades-old financial problems.

Now, why should we change this? Many of my colleagues have pointed out questions, and you—the panel seem to disagree. They say that certain protections are not there, and they cite from the law that they are not there. You say that they are there.

I think at the very least, before we move forward in 10 days, which is what is planned to pass this, we agree on what is in it. And if it is such a good bill, then why are you rushing so quickly to push it through before we have a clear understanding of what is in there?

My colleague raised sexual harassment, that in the law that you are changing, that you then appeal to your supervisor. To the contrary, you have to have an independent person supervise, look at this. It could be the supervisor that is causing that problem; and if it is, if you say you are going to manage it so well indeed. DOD is saying that you are not, that there is $1 trillion missing, you have no plan in place—you are changing everything. And my question is, why—if it is such a great plan, why can't we work through what is exactly in this bill and understand it in a bipartisan way?

One of my colleagues said we are talking past each other; people are reading lines of the bill, and you are saying it is not true. And I go back also to the comment of Comptroller General Walker. If there is a problem, we all want to correct it. Let's correct it statutorily.

But to take everything that has been put in basically to protect taxpayers' dollars, to protect a work force that is not political cronyism, but is hired on merit to perform work through whatever party is in power, that all of these safeguards shouldn't be removed.

So my question is, if it is such a great bill, why are we moving so quickly before we decide together what is in it? The testimony has really, quoting line by line, been refuted back and forth today.

And second, why not follow what the Comptroller suggested. If there is something wrong, then let's statutorily correct it, but not give sweeping control of a massive area of government to an agency, by professional accounts, in its financial management—I would consider losing $1 trillion a serious situation.

I would consider getting a D-plus on your management serious. I would consider having a—GAO called it nine of the highest risk areas in the whole Federal Government for mismanagement are in DOD. Why in the world should we then turn around and give you sweeping powers to totally change everything when you haven't run it well to begin with, according to DOD and management—excuse me, according to GAO.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

STATEMENT OF CONGRESSWOMAN CAROLYN B. MALONEY

Committee on Government Reform
Full Committee Hearing

"Civil Service and National Security Personnel Improvement Act"

May 6, 2003

Thank you Mr. Chairman and Ranking Member Waxman. I'd like to extend a warm welcome to each of our witnesses today, and particularly to you, Mr. Donaldson. Congratulations for your successful work on the Global Settlement issue last week. I truly hope this will usher in a new era on Wall Street. Thank you all for taking your time to share your perspectives on this critical legislation before us today.

To place our deliberations in context, I remind my colleagues on the Government Reform Committee and our esteemed witnesses that democracy is not a streamlined, efficient process, nor, according to our nation's founders, should it be. Debate by the various factions of interest takes time, and I urge that we slow down the legislative process for this bill.

Substantive changes to the Civil Service are at stake. We must assure that safeguards against corruption, abuse and arbitrary job losses are in place. Proven human resource management techniques are must be included.

With 2/3 of a million employee jobs at stake, the rush to move DoD personnel out from under OPM human resource practices appears to be an attempt at empire building - a power grab separating DoD civilian personnel from established, workable human resource management practices. What is of grave concern is that this bill throws 700,000 careers, work practices, and due process rights to the political wind.

Bureaucratic neutrality is a bedrock principle of the Civil Service established by the Pendleton Act of 1893. The Pendleton Act provided safeguards for civil service employees against firing as politicians came and went.

H.R. 1836 bill disregards that principle in major ways. Personnel performance measures tied to mission and goals are missing. Instead the bill opens the way for political favoritism - a tactic that dramatically affects the way policies are interpreted and implemented - in hiring, promotions, transfers and raises. Politicizing 700,000 DoD employees is not a good idea for the future of democracy or for bureaucratic neutrality in the Civil Service.

The bill makes sweeping changes to DoD personnel policies, but the employees have been left out of the process so far, altogether. In modern management, a touchstone is employee involvement. The GAO calls this involvement essential for success. Employees and their representative unions need to be involved in the process before the fact, not afterward.

The bill has other problems with proposed changes in SEC hiring practices and NASA demonstration projects, but others of my colleagues will address these issues, so I will conclude.

Basically, we need to slow down consideration of this bill, demand that due process and direct bargaining rights are preserved, and require the inclusion of proven personnel principles. The bill must ensure quality, performance, transparency, accountability and protection of employees from political turnover. Considering that many of the changes this bill proposes will open the way for abuses that the Pendleton Act of 1893 was enacted to eliminate, we should proceed deliberatively and with caution.

Chairman TOM DAVIS. The gentlelady's time has expired. I think that is why they are asking for changes so they can bring that D-plus up.

Dr. Chu, do you want to respond to that?

Mr. CHU. Absolutely. Let me try to respond very briefly to your question and to your concern with the sense of urgency here.

First of all, we, like you, greatly admire the performance of the civilian employees of the Federal Government. Especially those at the Department of Defense, and likewise at the Pentagon, September 11th, performed heroically. In many instances, I fear, it is our conclusion that they performed so well despite, not because of, the rules under which we must operate. It is those rules that we seek to modify.

Mrs. MALONEY. Excuse me, sir. What specific rules made it impossible for our civil servants, those that ran to—September 11th to save lives, those that worked so brilliantly to support our military, what specific rules made it impossible for them to perform their job?

Chairman TOM DAVIS. Mrs. Maloney, your time has expired. He is trying to answer the last question. But we have got to stop it, so we can move on.

Mrs. MALONEY. Mr. Chairman, I have a few written questions, and I would like to put them before the panel and have them answered before you move forward.

And I would like to know where that missing $1 trillion is.

[The information referred to follows:]

CONGRESSWOMAN CAROLYN B. MALONEY

Committee on Government Reform
Full Committee Hearing

"H.R. 1836 Civil Service and National Security Personnel Improvement Act"

May 6, 2003

QUESTIONS FOR DEPUTY SECRETARY PAUL WOLFOWITZ, DEPARTMENT OF DEFENSE

1. GAO has criticized DoD for its poor bookkeeping, noting that the Department lacks "fundamental controls and management oversight" in it handling of money, as well as in numerous other areas. In 2001 the Comptroller General gave the Department a D+ grade on economy and efficiency. DoD had over $1 trillion worth of transactions that were unaccounted for last year. ***Given these serious problems, why should Congress trust the DoD to be able to devise, implement and manage a completely new, untried, personnel system?***

2. According to the language of the bill, DoD seeks a waiver from Chapter 77, which currently ensures that an objective third party, such as the Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC) reviews agency disciplinary action. Particularly in cases alleging sexual harassment or racial discrimination, there's a need for the cases to be handled by outside entities that have no connection to the Department. How have these appeals rights in any way hindered DoD's ability to perform its mission? And why would DoD want to waive impartial third party involvement as a basic protection for employees?

3. It is troubling that DoD's proposal provides for the potential elimination of the basic right of employees to file discrimination cases with the EEOC. ***Instead of designing a completely new system, if the current one presents a problem to DoD, why shouldn't the current system be adjusted?***

4. This bill states, "the new [personnel] system would be based upon the Department's Civilian Human Resources Strategic Plan". However, in April 2003, GAO reported that the DoD's strategic plan "lacked key elements found in fully developed plans." ***How can DoD accomplish the development and successful implementation of a new system when the Department has been unable to accomplish the following critical elements of its present plan?***

> DoD's plan does not show mission alignment, i.e. the plan does not "clearly show how the civilian workforce contributes to accomplishing an organization's overarching mission" (p.15)
>
> DoD's plan does not reflect a "results-oriented approach to assessing progress toward mission achievement" (p. 16). ***Since it is the intent of to new bill is create a system based on performance and results, what is DoD' proposed strategy to shift from its inability to achieve even a plan to do this to the actual implementation of a new, results-oriented system?***

The GAO found documentation that the DoD plan does not contain sufficient data about its workforce availability nor what its workforce needs are (p. 15). ***How does DoD propose that new legislation will correct this problem?***

Since the DoD current plan contains no strategy to address how the civilian workforce would be integrated with military personnel and contractors to coordinate efforts efficiently and appropriately (p. 22), ***how would the proposed legislation correct this deficiency and contribute to the DoD's ability to accomplish development of a plan to do so?***

5. By the DoD's own response to the GAO report, the strategic planning processes are only "in the earliest stages of development." ***How does DoD propose to development and implement its strategic plan while creating an entire, new personnel system...and within the two years as you personally suggested today in your testimony that the DoD could do?***

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Maloney
Witness: Mr. Wolfowitz

1. GAO has criticized DoD for its poor bookkeeping, noting that the Department lacks "fundamental controls and management oversight" in its handling of money, as well as in numerous other areas. In 2001 the Comptroller General gave the Department a D+ grade on economy and efficiency. DoD had over $1 trillion worth of transactions that were unaccounted for last year. **Given these serious problems, why should Congress trust the DoD to be able to devise, implement and manage a completely new, untried, personnel system?**

Response: The Department has had longstanding, successful experience in testing civilian personnel management flexibilities. These pilot projects currently cover a diverse group of defense civilian employees numbering more than 30,000. The Office of Personnel Management has evaluated the personnel flexibilities that we currently use in the Demonstration Projects and has overwhelmingly approved their success. Additionally, we have extensive experience in the operation of the Department's military personnel system with over 1.4 million active duty and 866,000 selected reserve military members. These facts alone should support our ability to develop and operate a new civilian personnel system.

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Maloney
Witness: Mr. Wolfowitz

2. According to the language of the bill, DoD seeks a waiver from Chapter 77, which currently ensures that an objective third party, such as the Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission (EEOC) reviews agency disciplinary action. Particularly in cases alleging sexual harassment or racial discrimination, there's a need for the cases to be handled by outside entities that have no connection to the Department. **How have these appeals rights in anyway hindered DoD's ability to perform its mission? And why would DoD want to waive impartial third party involvement as a basic protection for employees?**

   Response: Nothing in the proposed legislation affects the ability of an employee to file a complaint of discrimination with the Equal Employment Opportunity Commission, which is not covered in Chapter 77. However, our legislative proposal would permit a change in a system of appeals that the General Accounting Office found to be "inefficient, expensive, and time-consuming" (GAO/T-GGD-96-110). The GAO further stated, "because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems."

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Maloney
Witness: Mr. Wolfowitz

3. It is troubling that DoD's proposal provides for the potential elimination of the basic right of employees to file discrimination cases with the EEOC. **Instead of designing a completely new system, if the current one presents a problem to DoD, why shouldn't the current system be adjusted?**

   Response: Again, nothing in the proposed legislation affects the ability of an employee to file a complaint of discrimination with the Equal Employment Opportunity Commission, as provided for in 5 United States Code, Chapter 23, Section 2302.

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Maloney
Witness: Mr. Wolfowitz

4. This bill states "the new [personnel] system would be based upon the Department's Civilian Human Resources Strategic Plan. " However, in April 2003, GAO reported that the DoD's strategic plan "lacked key elements found in fully developed plans." **How can DoD accomplish the development and successful implementation of a new system when the Department has been unable to accomplish the following critical elements of its present plan?**

Response: The GAO report does not question the ability of DoD to "accomplish the following critical elements of its present plan." On page 18, the GAO report states, "Many human capital officials we spoke with noted they have only recently begun to transition from their past role of functional experts – focused primarily on personnel transactions – to partners with top leadership in strategically planning for their civilian workforce. In their new role, they expect to make improvements in strategically managing civilian personnel, including identifying results-oriented performance measures in future iterations of their plans."

- GAO: DoD's plan does not show mission alignment, i.e. the plan does not "clearly show how the civilian workforce contributes to accomplishing an organization's overarching mission" (p.15)

  Response: DoD recognizes the importance of ensuring that a plan shows how the civilian workforce contributes to accomplishing an organization's overarching mission. On page 17, the GAO report states, "The (DoD) plan recognizes the need for aligning the civilian workforce with the overarching mission by proposing to develop a human resources management accountability system to guarantee the effective use of human resources in achieving DoD's overarching mission."

- GAO: DoD's plan does not reflect a "results-oriented approach to assessing progress toward mission achievement" (p.16). **Since it is the intent of the new bill to create a system based on performance and results, what is DoD' proposed strategy to shift from its inability to achieve even a plan to do this to the actual implementations of a new results-oriented system?**

  Response: The GAO statement referenced in the question is not quoted accurately. The GAO statement is more qualified. The GAO did not say that "the DoD plan does not reflect a "results-oriented approaching to

assessing progress toward mission accomplishment." The GAO statement, which occurs on page 15 rather than on page 16, reads, "Moreover, none of the plans *fully* reflect a results oriented approach to assessing progress toward mission accomplishment." (emphasis added)

The GAO report did not question DoD's ability to develop a strategic plan. We find nothing in the GAO report to support the assertion of "DoD's.... inability to achieve even a plan to (create a system based on performance results)...." GAO states on page 2 that "Until recently, top-level leadership at the department and the component levels has not been extensively involved in strategic planning for civilian personnel...." And on page 3, GAO states, "DoD's issuance of its departmentwide civilian human capital plan begins to lay a foundation for strategically addressing civilian human capital issues...."

GAO: The GAO found documentation that the DoD plan does not contain sufficient data about its workforce availability nor what its workforce needs are (p.15). **How does DoD propose that new legislation will correct this problem?**

Response: The Department nonconcurred with the GAO's conclusion in this area. This action (define the future civilian workforce, identify their characteristics, and determine workforce gaps that need to be addressed) is already being accomplished through the President's Management Agenda Scorecard information that is provided every quarter to the Office of Management and Budget and the Office of Personnel Management.

The Department also questions whether the use of competencies is the appropriate or useful tool for determining workforce needs. On page 21, the GAO states, "DoD has begun adopting the Army's Civilian Forecasting System and the Workforce Analysis Support System for departmentwide use, which will enable it to project the future workforce by occupational series and grade structure. However, the systems are not capable of determining the size and skill competencies of the civilian workforce needed in the future....DoD officials stated that its first step was to purchase the equipment and software, which was accomplished in 2002....As of December 2002, DoD officials were testing the systems...." Reference in the question to "workforce availability" is unclear since the term is not defined

GAO: Since the DoD current plan contains no strategy to address how the civilian workforce would be integrated with military personnel and contractors to coordinate efforts efficiently and appropriately (p. 22), **how**

would the proposed legislation correct this deficiency and contribute to DoD's ability to accomplish development of a plan to do so?

Response: The Department nonconcurred with this recommendation. While both personnel systems operate as part of a total force system of management. There remain significant differences in purpose and structure. The use of contractors is just another tool to accomplish the mission, not a separate workforce, with separate needs, to manage.

Hearing Date: May 6, 2003
Committee: House Government Reform
Member: Rep. Maloney
Witness: Mr. Wolfowitz

5. By the DoD's own response to the GAO report, the strategic planning processes are only "in the earliest stages of development." **How does DoD propose to develop and implement its strategic plan while creating an entire, new personnel system... and within the two years as you personally suggested today in your testimony that the DoD could do?**

Response: Strategic planning is a dynamic, and not a static, process. The DoD Human Resources Strategic Plan (2002-2008), published in April 2002, is a baseline plan, that is evaluated, validated, and refreshed each execution year by senior human resources leadership to ensure that the goals of the plan are met by accomplished actions. It is updated so that it remains relevant to current world events, mission changes, and executive and legislative changes. Annex A of the Plan articulates the accomplishments during FY 2002. Annex B articulates FY 2003 goals, objectives and performance indicators and provides the roadmap for HR efforts during FY 2003.

The development and submission of the National Security Personnel System (NSPS) legislation and Best Practices administrative proposals are objectives that were accomplished within the DoD HR Strategic Plan framework, to *"develop a responsive, flexible personnel system that permits management to maintain a mission ready workforce."* These actions are integral parts of the Strategic Plan. As a result, execution has been anticipated dependent on legislative and administrative outcomes. Because of the integrated nature of proposed NSPS legislation (new innovations enabled by streamlined administrative and negotiation processes), we are prepared to continue our strategic planning efforts while implementing these critical changes.

Mr. CHU. If I can just briefly address your concern with urgency.

Dr. Wolfowitz testified to our need to move post's from military to civil status. We also are in the process, as the military leadership would say, of resetting the force.

You have heard General Jones in Europe talk to a different position there, units coming out of Europe. We have announced that the operations are coming out of Saudi Arabia. We are moving our forces in Korea to a better position. A great deal is changing right here and now in the months immediately ahead of us.

We would like to be able, in many instances, to use civil servants for some of the new positions being created. That is the essence of the urgency in front of this department.

Mr. Janklow pointed to the long history of other experts who have likewise urged that we modernize these rules. We are seeking to do so in a way that is timely to the immediate needs of the Department of Defense in the future—the near future security—of the United States.

Mrs. MALONEY. Well, the GAO says you don't have a plan in place. They are calling for you to move statutorily and not to go forward until you have a plan in place. That is the independent GAO talking.

Chairman TOM DAVIS. The gentlelady's time has expired.

They also support the concept of doing this. They have asked for the same powers for their own agency.

Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

Well, first off, I want to congratulate our chairman on his leadership in addressing this issue. We have all known that this has for a long time been a significant issue for the Department of Defense, an issue that has impacted our military on the issue of flexibility.

It has also been an issue that has been a considerable amount of frustration for the employees that will be affected by this as they have seen others who are working with them that have not been able to—where management has not been able to have the flexibility that is needed in order to get a project done or to achieve team goals.

I have a couple of questions concerning the language that—as to what is before us, though. In looking on page 22 of the bill, we have the goal that is stated in subsection 9904 of the Employment of Older Americans; and this, of course, is intended to give you an ability to have the full market of potential employees available to you as you look to fill positions. A provision in that section talks about individuals who take these positions would not be penalized in current pensions, annuity, Social Security or other similar payments they receive as a result of prior employment in conjunction with this employment.

Can you talk a bit about the problem that is associated with this and how this language will help?

Mr. CHU. Yes, sir.

As Dr. Wolfowitz testified, we have in front of us a wave of retirements over the next 5 to 10 years. We are very eager to bring back some of those with expertise to serve as mentors, to help with the transition.

We recognize that to do so now they face a significant financial penalty. We would like to remove that penalty. I believe the specific provision you talked to would have a term limit on it of 2 years, with an option to renew for 2 years. So it is intended to help us move through the human capital replacement—some call it a crisis, I know that has been GAO's phrase—in a manner that allows us to benefit from the experience of, as you might put it, the "old hands."

Mr. TURNER. Many times when people implement these types of provisions where someone can retire and then return in another position, they have a waiting period to avoid people day 1 retiring, day 2, immediately being back on the payroll again, and causing therefore an incentive for increased costs, not a reduction in costs.

I notice that you don't appear to have a waiting period. Is that something that you considered? And, if so, why is it not included?

Mr. CHU. I think our approach to this, and I think you are specifically speaking to the provision affecting Federal annuitants, our approach in that regard is to recognize that many of those people are going to go out and work, alternatively, for the private sector. So it is not as if they are not going to collect their annuities.

The issue is, if they are the best person for us, and it may be someone who has retired from another agency, maybe someone who has retired from our own agency, should we have authority to take advantage of their talent? That is the import of this provision.

We are very sensitive. We monitor this issue, particularly with high-grade employees. I look at those numbers myself in terms of what we do. We want to be very careful not to go where I think you are warning we have to be cautious about. We don't want to give people the opportunity just to switch titles and take advantage of the system, but we want to be realistic. These people are going to retire anyway.

The issue is, can we continue in specific cases to advantage ourselves with their experience?

Mr. TURNER. The language, that many people on the committee have focused on, that is of concern—which is unusual language in a statute—is when the Secretary receives sole, absolute and unreviewable discretion. That language is certainly incredibly broad, and is one that is not commonly found in a statute that is empowering someone in the Federal Government.

My concern with the unreviewable discretion is that we have the issue of Congress providing that authority. And the fact that Congress, of course, would want to retain its oversight authority throughout this process.

Obviously, since we would be enacting this, we would want to monitor it to make certain that it is being implemented effectively and that if there are any changes that need to be made, that those changes be made. I have not seen anything that would ensure that there wouldn't subsequently be an argument made that Congress, by giving unreviewable discretion, was somehow pushing aside its oversight authority.

Mr. CHU. It is my understanding, sir, that this does not override the powers of Congress to review and conduct oversight, to come back and take whatever action it thinks in its best judgment is nec-

essary in the instant case. This does not affect the powers of the Congress.

Mr. TURNER. I think that is the part that is the most important, because this is an experiment. We are looking to see the benefits occur; and as we monitor it to determine whether or not those benefits are being realized, we can know if we are going in the right direction or if it needs to be modified.

Mr. CHU. Absolutely, sir.

Chairman TOM DAVIS. The gentleman's time has expired. Thank you very much.

Mr. Davis, the ranking member on the subcommittee, thanks for being with us.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman. I want to thank the witnesses for testifying and for their patience.

Dr. Chu, let me just ask you, from 1883 when the civil service system first began, it has been undergoing change; and, I think, the changes are designed basically to make the system more effective and to protect the rights of workers and to give them a voice in decisions.

And now we are proposing, in one action, to take away or seriously diminish, undercut, many of those provisions which it has taken us years to arrive at.

We have just gone through a rather successful military action; and we have had other activity in which the Department of Defense has been greatly involved without any serious impediment, to my knowledge, to its ability to do its job, to carry out its functions.

Can you tell me what is so threatening at the moment or what great need exists for us to move with so much haste and dispatch to put a new system in place—and I might add, a new system which takes away all of those years of struggle and progress that have resulted in a better work force and greater protection for our civilians? Could you share with me what this great need is?

Mr. CHU. Would be delighted to, sir, but first let me speak to this issue of protections.

I think some of the quotations this morning or this afternoon have been to the sections that could be waived. I think it is important to look at the provisions in the proposed legislation that list the nonwaivable sections. It is there, in particular, Section 2302, for example, 2302(b), where much of the employee protections that I believe are your sincere concern can be found.

As to the urgency, as Dr. Wolfowitz testified, we are about to undertake a major review of military slots where, in our judgment, the same positions could be filled equally well by civilians, perhaps as many as 320,000. We would like to have civil servants considered for those opportunities. It would be very difficult in many cases to do that under the present structure, and hence the urgency to seek new powers from the Congress.

Likewise, as I indicated, we are in the process of, as the military leadership would say, resetting this force, repositioning this force. It is affecting our forward-stationed forces around the globe. That is going to have an effect on the civilian positions we will need. Again, we would like civil servants to be considered as one option for some of the changes that are under way or soon to be undertaken.

Mr. DAVIS OF ILLINOIS. OK. So you are going to say that you are going to be able to shift some of the work from military to civilians, and that is one of the reasons. Then let me just move on, because my time is going to end up expiring.

Director James, let me ask you, I mean, you have made it a point during your tenure—I must add, with high marks of seriously reaching out and involving stakeholders, unions, professional societies, associations and other groups in proposed changes or decisions that have to be made—this legislation, unfortunately, shows no such action on the part of the Department of Defense. And so my question is, how do we reconcile your approach to that which has been taken by the Department of Defense with these proposed changes and with this legislation?

Ms. JAMES. I have spoken to Dr. Chu as well as to Secretary Wolfowitz. And as we look at this important legislation that DOD certainly needs and needs now, it is my understanding that as they move forward, it is absolutely their intention to be inclusive, to involve stakeholders, to have the appropriate people at the table as we move forward and develop the systems that will—are so necessary and so important for the civilian employees in the Department of Defense right now.

Mr. DAVIS OF ILLINOIS. So you would expect also to be involved, as the Director of OPM, in further development of the implementation of this activity?

Ms. JAMES. Absolutely.

Mr. DAVIS OF ILLINOIS. Mr. Chairman, if I may—Admiral, there has been some discussion about restrictive civil service laws and how they might prevent contracting out, or the ability to move that. Isn't it true that there is an administrative mandate, that 15 percent of the work of DOD has to be contracted out this year and 30 percent next year? And if there are any difficulties, could it not be coming from the administrative mandate rather than any civil service restrictions?

Mr. CHU. No. I believe what you are speaking to is a requirement that we review various areas in the Department to determine what is the best source of the work.

What we are going to do here is make it possible for civil servants to benefit from the shifts from military to civil positions, from the shifts coming out from our forces overseas. The alternative, in too many cases with the current rules of the game, which are the rules we are seeking to amend, the alternative is, it goes to a contractor because it is easier, it is more flexible, it is more responsive.

We would like to make the civil service competitive in that regard.

Mr. DAVIS OF ILLINOIS. But we have no mandates that we contract out at least 15 percent?

Mr. CHU. No. We have a mandate to review.

Chairman TOM DAVIS. It is a competitive sourcing. It is a 15 percent competitive sourcing mandate, one which myself and Mr. Davis and the House voted against, but survived the conference.

But competitive sourcing doesn't mean it goes out, it just means that work that is currently within government is then reviewed to see if it should go out. In more than half of the situations the government wins, as a matter of fact.

Mr. CHU. Yes, sir.

Chairman TOM DAVIS. The A–76 circular on which this is based is being revised. We are watching it very, very carefully, Mr. Davis. I look forward to working with you on that. But there is no quote on work that should be outsourced.

I think one of the purposes of this legislation, and we have heard Mr. Wolfowitz, Secretary Wolfowitz, today under oath say that there would be more Federal—civilian Federal employees as a result of this, because of the 300,000 personnel that are uniformed that are behind desks, and the contractors that are being used to get around some of the rules. So we have that on the record.

But I appreciate the thought.

Mr. DAVIS OF ILLINOIS. Thank you, Mr. Chairman. And I appreciate your position relative to this issue.

[The prepared statement of Hon. Danny K. Davis follows:]

STATEMENT OF CONGRESSMAN DANNY K. DAVIS AT THE

GOVERNMENT REFORM COMMITTEE

HEARING

ON H.R. 1836, "A Review of H.R. 1836, the Civil Service and National Security Personnel Improvement Act of 2003"

Tuesday, May 6, 2003

Chairman Davis and Ranking Member Waxman, last week at the Civil Service and Agency Organization Subcommittee hearing on the personnel provisions of the Department of Defense Transformation Act, I that said by the end of the week we would know if H.R. 1836 was headed down the track of good government or political expediency. Now we know which track we're on and it's not good government.

The track we're on can best be articulated from the testimony of David Chu. When asked by Chairwoman JoAnn Davis if Secretary Rumsfeld would be willing to pull the personnel provisions from the DOD authorization bill so we could better scrutinize it, he said that it took our troops three weeks to get from the border of Kuwait to Baghdad

and that Rumsfeld is not someone who is patient with a long indecisive process.

Congress is suppose to move forward with this legislation, despite two hurried hearings that produced no specifics from DOD on how their new personnel system would work, because Secretary Rumsfeld is "not someone who is patient with a long indecisive process."

The Congress is here to follow the will of the American people not the will of the Secretary of Defense. Yes, the war in Iraq was a successful military operation, but this is not Iraq and DOD civilian personnel are not Bathe party members.

This government is not at war with the 700,000 DOD civilian personnel who worked diligently to help DOD win the war in Iraq. Where is the justification for giving Secretary Rumsfeld and every DOD secretary after him unilateral authority to implement civilian personnel policy?

There is no justification. GAO's March report on DOD's human capital plan states that DOD lacks key elements to support additional

human capital flexibilities. When asked if DOD had the necessary systems in place to manage the hiring pay and pay flexibilities they are requesting, the Comptroller General, at last week's hearing stated, "**No**, I think they have the framework that they want to implement but it's not in place yet."

If that is not enough, a GAO report issued last week on DOD's Civilian Industrial Workforce states that "The services have not developed and implemented strategic workforce plans to position the civilian workforce in DOD industrial activities to meet future requirements...Furthermore, workforce planning is lacking in other areas that OPM guidance and high-performing organizations identify as key to successful workforce planning."

This hearing, however, is not only about DOD. The National Aeronautics and Space Administration (NASA) has also requested exemptions from Title 5.

NASA's request, though not as broad as DOD's, has not passed muster either. In responding to a request from the Science Committee on

NASA's human capital legislation, much like DOD, the Comptroller General wrote, "NASA has limited capability for personnel tracking and planning, particularly on an agencywide or programwide basis. Based on the numerous initiatives NASA will need to undertake, transforming the agency will likely require a multi-year implementation period."

More importantly, the Comptroller General went on to say, "If additional flexibilities are desired, agencies should develop sound business cases to justify the need for the additional authorities."

Neither a justification nor a business case has been made for either DOD or NASA to get the legislative authorities they are seeking. But when you are on the track of political expediency, none is needed.

It is ironic that this legislation is being pushed forward during Public Service Recognition Week – a week when we are suppose to be celebrating the work and dedication of the very public servants down whose throats we are ramming civil service reform. Not because its good government but because we won the war in Iraq.

GAO has said that the center of human capital management is its

people. "People are an agency's most important organizational asset. They define its culture, drive its performance, and embody it knowledge base."

It would behoove all of us to remember that.

Thank you.

Chairman TOM DAVIS. The gentleman's time has expired.

This panel has been great. You have drawn a lot of fire. We have our panel who has been waiting patiently in the back. I want to thank all of you for being here today. I think there is some supplemental work.

Dr. Chu, we are going to want to work with you. Today, I have talked to Mr. Waxman about getting us together and addressing some of the issues that we can answer and maybe write some amendments too. But we appreciate everybody—General Pace, Admiral Clark, Ms. James, thank you all very much for your patience. I call our next panel, give just a brief recess, because they are on a time schedule. They have been sitting waiting in the back.

We are just pleased to have the Honorable Sean O'Keefe, the Administrator of the National Aeronautics and Space Administration, and the Honorable William Donaldson, the chairman of the Securities and Exchange Commission.

The good news is, I think the first panel drew most of the fire. So maybe this panel will not be as lengthy and we can move quickly.

Gentlemen, if you would just raise your right hands, I can swear you in.

[Witnesses sworn.]

Chairman TOM DAVIS. I understand you are each under some time restrictions. So I will let you get comfortable.

Mr. O'Keefe, when you are ready, you can start. We have a red light in front. It will turn orange after 4 minutes, red after 5. You can sum up there.

The same with you, Mr. Donaldson. We will go to questions and try to get you out of here in a timely manner.

Thank you both. I apologize. Obviously, the proposal here has drawn a lot of support and concern among Members, a lot of clarifications; and I think the first panel answered most of that. Both of the proposals on your agency have been vetted, too, through their authorizing committees as well. And why don't we go ahead and testify when you are ready?

STATEMENTS OF SEAN O'KEEFE, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; AND WILLIAM H. DONALDSON, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

Mr. O'KEEFE. Thank you, Mr. Chairman. I appreciate your introductions and certainly your willingness to be patient to hear from us. I have just returned last night from Russia, where we witnessed the landing of the Soyez capsule with two American astronauts and one cosmonaut aboard. They were safely recovered after a considerable search-and-rescue operation that had us all rather tense.

But all of the folks who were associated with that, both in Moscow at the NASA facilities there, as well as at the Johnson Space Center in Houston, and across the agency who were engaged in that activity, are engineers and technical folks who fit the composite sketch that very much is agency-wide; that is, in all likelihood, of all of the people helping in that recovery operation, there were three times as many folks engaged in this activity who were over

60 as under 30. They were all with experience levels of 25 to 30 years in large measure.

They are, most of them—a good quarter of them are facing or are eligible to retire within the next 3 to 5 years, and at present, a good 20 percent of them are eligible immediately.

So, as a consequence, the efforts and the extraordinary diligence that was expressed and demonstrated over the course of that harrowing few days, and certainly a harrowing few hours, was exerted by a number of folks, who in all likelihood, will not be part of the agency in the next few years.

There is very little likelihood we are going to have a strong prospect of recruiting comparable competent professionals of their caliber unless the kind of authorities and the opportunities that we have requested as part of this particular package are made available.

The challenge that we face is again probably not substantially unlike what we see across most Federal agencies and departments. Nonetheless, there are some rather unique and peculiar circumstances that require our attention now before it becomes of crisis proportion.

There are 19 separate reports and studies over the course of the last 2 years alone that have reported to this committee, and others of oversight across the Congress, identifying this peculiar set of circumstances in which the better part of two-thirds of our work force are in the science and engineering communities and, as a consequence, are of higher rates of eligibility for retirement in the course of that time, to be capstoned, I guess, by the observation of the Comptroller General that this is the No. 1 challenge that we face in the strategic management of human capital.

This is not a crisis today, no question about that. We are not alerting this as a specific red flag at the moment. It will be, though, in fairly short order. It is right on the horizon.

The President's proposal was submitted just a year ago to the Congress, is largely embodied in the language that is part of your bill, Mr. Chairman. And we thank you again for the diligence that you, your colleague, Mr. Boehlert, on the Science Committee, and the colleague on the other side, Senator Voinovich, have demonstrated to initiate the action on this particular effort, following the legislative proposal that the President advanced just last June.

So the action and the movement on the part of both the House and the Senate at this particular time is not only welcome, we are most impressed and pleased to see that there is specific attention to this set of concerns that again shows a diligence and responsibility to get ahead of this particular challenge at this time, rather than waiting until it becomes a crisis circumstance.

Our problem, and I would suggest this simply in closing, is, again, in forecasting the likelihood of where we are in terms of overall work force composition in the years ahead is not only the age variable—and that, again, is attenuated by the fact that there are more folks eligible for retirement today, and growing, than what we have seen in the recent past.

So our challenge is not only recruitment for those now in order to make sure there is some experience base that will be trained and mentored by those folks during the course of their experience,

but also to retain as many of the really extraordinary, skilled folks that may be confronting or weighing the alternatives of retirement in the years ahead.

Moreover, we have a very limited pool of cohorts to choose from and to recruit from, given the fact that the number of science- and engineering-related kinds of graduate degrees has declined in the last decade by the better part of 20 to 25 percent in very selective fields. As a consequence, there are fewer folks who are eligible and interested in this range of activity. So we need to get ahead of that to recruit, retain, and to look at mid-level entry from a variety of different opportunities. And this bill covers all of those fronts.

We thank you again for your leadership in moving this forward, sir. Thank you.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. O'Keefe follows:]

Hold for Release
Until Presented by Witness
May 6, 2003

Statement of

Sean O'Keefe
Administrator
National Aeronautics and Space Administration

Before the

Committee on Government Reform
House of Representatives

I welcome the opportunity to appear before the Committee today to discuss NASA's Human Capital challenges. The Agency faces a number of strategic obstacles to our ability to manage our Human Capital effectively and efficiently. The President forwarded legislation to Congress last May to provide our managers the tools they need to reshape and reconstitute a capable world-class workforce. Since that time we have worked with the Congress to reinvigorate legislative solutions to address our workforce concerns. I appreciate the hard work of the House Science Committee, and I welcome the opportunity to work with this Committee in these endeavors.

When President Eisenhower and the Congress created NASA in 1958, they sought to establish a government agency that could undertake and overcome the Nation's technological challenges in aeronautics and space exploration. Without NASA, there would be no American presence to take up these challenges. During the Cold War, the very best minds of our Nation joined forces to transform the futuristic dreams of our parents' generation into the historic reality our children learn about in today's classrooms. The legacy of that work continues today. Across the Nation, NASA scientists, engineers, researchers, and technicians have made, and continue to make, remarkable discoveries and advancements that touch the lives of every American. We are an Agency committed to "pioneering the future" as only NASA can.

In the wake of the Columbia tragedy, much has been written and discussed in the public debate about the prospect of future expertise at NASA. One of the greatest challenges before the Agency today is having the people - the human capital - available to forge ahead and make the future breakthroughs tomorrow's everyday reality. NASA's history is celebrated worldwide for having accomplished the things that no one has ever done before. None of those achievements happened by chance. They were the result of management innovation, revolutionary technologies and solid science and research. These three pillars of NASA's achievement were built by the men and women of NASA and without them, the history of achievement that we celebrate in aeronautics and space exploration never would have been

possible. History is made everyday at NASA; but to maintain our leadership position, a new generation must be forged to carry our Nation's innovation and exploration forward.

The legislation the Committee is considering is similar to that which the President submitted last year, with the inclusion of additional provisions recently developed. It is intended to provide us the flexible management tools to make sure NASA can continue to attract and retain the best and brightest minds and to enable us to reconfigure and reconstitute that workforce to meet the changing demands of that future innovation and exploration.

NASA supports most provisions in Subchapter B of title III. In fact, the Administration supports making these authorities available to other agencies in the federal government. While we endorse your approach, we would like to work with you on some technical changes. For example, proposed section 9835 would authorize NASA to pay the same travel and relocation expenses to newly hired Federal employees as is authorized for current Federal Government employees. While the Administration supports this concept, it would prefer to address this point on a government-wide basis in a similar legislative proposal it intends to submit later this year. Section 9807 would authorize NASA to pay up to the level of the Vice President's salary for up to 10 positions per year for employees in critical positions. This provision should be amended to specify that the payments are limited to one year for each application of the authority. Section 9837 would provide expanded authority to make time-limited appointments to Senior Executive Service (SES) positions, with a limitation of serving more than 7 consecutive years in limited appointments. This provision should be amended to disallow a limited term appointee from serving more than seven years in a lifetime under any combination of limited appointments by striking the word "consecutive."

The list of additional tools that the bill would provide NASA includes:

TO RECRUIT NEW TALENT:

- Scholarship-for-Service Program
- Enhanced recruitment bonuses
  - Remove limitation to 25% of base pay for only one year & include locality pay
  - Allow more than one method of payment (lump sum). E.g., installments pegged to continued performance.
- Distinguished Scholar Appointment Authority
  - Allows a focus on academic achievement for research positions where scholarly excellence is a primary need

TO RETAIN EXISTING TALENT, ATTRACT SHORT-TERM MID-LEVEL TALENT:

- NASA-Industry Exchange Program
- Allow extension of IPA Assignments from 4 to 6 years
- Term Appointments
  - Allow extension of term appointments from 4 up to 6 years
  - Allow conversion to permanent without second round of competition if competitively selected for term appointment

    Many NASA projects run more than 4 years and would benefit for retention of these individuals for the duration of the project.

- Enhanced relocation and retention bonuses
  - Remove limitation to 25% of base pay for only one year & include locality pay
  - Allow more than one method of payment (lump sum). E.g., installments pegged to continued performance.
- Allow increase maximum annual pay for NASA excepted service appointments from $134,000 to $142,500
- Allow increased pay for critical positions to level of the Vice President.
- Annual leave enhancements
  - To bring in mid-level talent with leave commensurate with their years of employment
- Superior Qualifications Pay
  - To allow additional compensation for highly qualified employees
- Allow temporary appointments to career reserve (non-political) SES positions to fill temporarily vacant positions.

TO TRY OTHER NEW AND MORE EFFECTIVE TOOLS:

- Modify current law to allow NASA to request and implement a demonstration project, subject to OPM approval, without any limitation on the number of employees that would be covered by the project.

The use of undirected buyouts to reduce NASA's workforce during the 1990's has led to an imbalance of skills; too may in some areas not enough in emerging technologies (e.g., nanotechnology). In addition, NASA is confronted with convergence of three trends:

1. reduction in number of science and engineering graduates;
2. increased competition from traditional aerospace sector and non-aerospace sector for this reduced pool of scientists and engineers; and
3. increasing number of experienced NASA employees eligible for retirement.

NASA needs to have better tools to recruit new hires, retain existing mid-level workforce, and reconfigure the workforce to meet emerging needs.

Vision And Mission

When I assumed the leadership of NASA almost a year and a half ago, I wanted to ensure that this pathfinder Agency had the means and mission to support that pioneering spirit through the next several decades. NASA has a vital role to play in today's world. My testimony today will touch on the management challenges that NASA must overcome if we are to achieve our mission. NASA is intent on continuing the gains made over 45 years while pushing the edge of the envelope of what appears today to be impossible. We have developed a roadmap to continue our work in a more efficient, collaborative manner. NASA will fulfill its imperative not only for the sake of human knowledge – but also for our future and our security.

In that spirit, we developed a new strategic framework and vision for the Agency. It is a blueprint for the future of exploration and a roadmap for achievement that we hope will improve the lives of everyone in this country and everyone on this planet. Our new vision is to improve life here, to extend life to there, and to find life beyond. This vision frames all that we do and how we do it. NASA will do this by implementing our mission – to understand and protect our home planet; to explore the Universe and search for life; to inspire the next generation of explorers…as only NASA can.

To understand and protect our home planet, NASA will work to develop and employ the technologies that will make our Nation and society a better place. We will work to develop technology to help forecast the impact of storms on one continent upon the crop production on another; we will work to trace and predict the patterns of mosquito-borne diseases, and study climate, geography and the environment - all in an effort to understand the multiple systems of our planet and our impact upon it.

Our mission's second theme is to explore the universe and search for life. NASA will seek to develop the advanced technologies, robotics, and science that eventually will enable us to explore and seek firsthand the answers and the science behind our most fundamental inquiries. If we are to achieve such ambitious objectives, there is much we still must learn and many technical challenges that must be conquered.

For example, today's rockets that have been the engine of exploration since the inception of space travel are today at the limit of what they can deliver. Propulsion is only one of the challenges facing further exploration of space. The physical challenges incurred by our space explorers also must be better defined. We still do not know or understand the long-term effects of radiation and exposure to a microgravity environment upon the human body. The infant steps we have taken via the Space Shuttle and the International Space Station have given us many answers to explore, but they have yielded even more questions for us to consider.

Our third mission objective is to inspire the next generation of explorers. NASA works in partnership with the U.S. Department of Education, the National Science Foundation, other Federal agencies, and industry and educational partners, we will work to motivate our Nation's youth to embrace the study of mathematics, science and engineering disciplines. To emphasize the important role that education plays at NASA, last year we established a new Education Enterprise. The Education Enterprise will unify the educational programs in NASA's other five enterprises and at our 10 Field Centers under a One NASA Education vision. NASA's Education imperative will permeate and be embedded within all the Agency's initiatives. The dedicated people in this new Enterprise will work to inspire more students to pursue the study of science, technology, engineering, and mathematics, and ultimately to choose careers in aeronautics and space-related fields. Without the scholars to take the study of these disciplines to their next level, the missions we seek to lead remain bound to the launch pad. As the US Department of Labor has reported, the opportunities in the technology sector are expected to quadruple in this decade. Unfortunately, the pool of college students enrolled in mathematics, science and engineering courses continues to decline. NASA faces similar challenges with having the scientific and engineering workforce necessary to fulfill its missions.

Our mission statement concludes with the statement, "as only NASA can." Our Agency is one of the Nation's leading research and technology Federal agencies. We possess some of our Nation's most unique tools, capabilities and expertise. NASA represents a National asset and investment unparalleled in the world. Nonetheless, to achieve success in our mission, our activities must focus on those areas where NASA can make unique contributions. To make the best use of our workforce and other resources, we must also leverage the unique contributions of our partners in academia, industry, and other federal agencies.

Our commitment to the American taxpayer is to continue providing a direct and very tangible means of improving life on our planet. We will overcome challenges and push on in the name of science and in the pursuit of knowledge to benefit all people. Extending life beyond the reaches of our Earth is not a process driven by any particular destination. Rather it is driven by science that will contribute to the social, economic, and intellectual growth of our society and the people who make that science possible are our greatest asset.

Workforce Challenges

NASA's ability to fulfill its ambitious mission is dependent on the quality of its workforce. An Agency is only as strong as its people. They need to be world-class if they are to be expected to break new ground in science and technology, explore the universe, or pioneer exciting discoveries here on Earth and beyond. In many areas, being "good enough" will not suffice; NASA needs the best and the brightest to build a world-class workforce. This means that NASA requires not only a broad pool of scientists and engineers who form the core of our workforce, but also highly competent professionals who can support NASA's technical programs, and address the Agency's financial, human capital, acquisition, business management, and equal opportunity challenges.

Today, NASA faces an increasing management challenge in attracting, hiring, and retaining the talented men and women who, inspired by our amazing discoveries and innovations of the past 4 decades, will help mold the future of our Nation's aeronautics and space programs. As a Nation, we must ensure that the Agency continues to have the scientific and technical expertise necessary to preserve our role as the world's leader in aeronautics, space and Earth science, and emerging technology research. The President already has indicated his commitment to the strategic management of human capital in the Federal workforce, by making this imperative, first on his Management Agenda. In fact, the President's Management Agenda specifically references the human capital challenge that NASA faces and related skill imbalances. The President's recognition of the human capital challenges faced by NASA and other agencies is shared by the General Accounting Office, which has placed the management of human capital as one of the items on the government-wide "high-risk list." And over the past two years there have been 19 reports and studies issued on NASA which have noted concerns about impending workforce problems and made recommendations for taking steps now to ward off a future crisis.

At NASA, we are ready to do our part to make sure that we have the best people for the job at hand, and to do that we need to manage this resource efficiently and responsibly, as well as

compete favorably in a very competitive market place. We have developed a Strategic Human Capital Plan to establish a systematic, Agency-wide approach to human capital management, aligned with our vision and mission. The Plan assesses NASA's current state with respect to human capital management, then goes on to identify goals, barriers, improvement initiatives, and intended outcomes. The Plan is an integrated approach to address the concerns of the Administration as well as our internal human capital needs. We are making progress, as evidenced by our improved ratings on the President's Management Scorecard.

NASA's ability to implement our mission in science, technology, and exploration depends on our ability to reconfigure and reconstitute a world-class workforce – peopled with skilled workers who are representative of our Nation's strengths. The human capital flexibilities that we are requesting will help us shape the workforce necessary to implement our mission today and in the future.

Today, NASA's ability to maintain a world-class workforce with the talent it needs to perform cutting-edge work is threatened by several converging trends. Each trend in isolation is a concern; in concert, the indicators are alarming. We need to address these trends now by anticipating and mitigating their impact on NASA's workforce in the near-term and beyond. These indicators could lead to a severe workforce crisis if we do not take prompt action. The warning signs are here, and we are paying attention. Many of our planned actions to deal with threats to our human capital are possible without the aid of Congress; but some of the solutions require legislation. We are proposing a number of human capital provisions, which the Administration believes are crucial steps toward averting a workforce crisis.

The trends I'd like to discuss with you today fall into 2 broad categories. First, there are trends that affect the nationwide labor market, and the applicant pool from which we draw our workers. These indicators affect other employers, not just NASA, and point to worsening employee pipeline issues in the future. Secondly, I would like to address a number of NASA-specific demographics. Coupled with the nationwide issues we face, the NASA picture shows us that we need to take action and take it now.

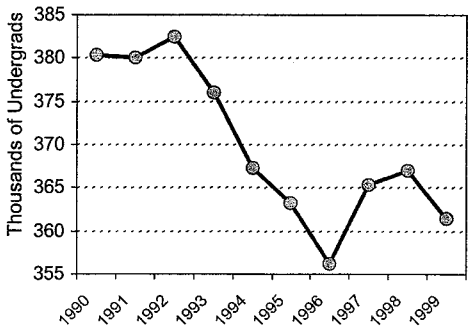
Nationwide Trends

➢ ***The Shrinking Scientist and Engineer (S&E) Pipeline***

There is growing evidence that the pipeline for tomorrow's scientists and engineers is shrinking. We are facing a critical shortage of students pursuing degrees in disciplines of critical importance to NASA-- science, mathematics, and engineering. Several recent National Science Foundation reports document a disturbing trend: the science and engineering (S&E) pipeline has been shrinking over the past decade. This trend begins at the undergraduate level and extends through the ranks of doctoral candidates. Here are some statistics that illustrate what currently is happening to the S&E pipeline:

- Undergraduate Engineering Enrollment -- The number of students enrolling in undergraduate engineering decreased by more than 20% between 1983 and 1999. *[National Science Board, Science and Engineering Indicators-2002, Arlington, VA: National Science Foundation, 2002 (NSB-02-01)]*

Undergraduate Engineering Enrollment Trend



- Graduate S&E Enrollment -- Engineering graduate enrollment also declined from a high in 1992 of 128,854 to 105,006 in 1999. Graduate enrollment in the physical sciences, earth sciences, and mathematics also showed a downturn between 1993 and 2000. *[National Science Foundation Data Brief, Growth Continued in 2000 in Graduate Enrollment in Science and Engineering Fields (NSF-02-306), December 21, 2001)]*

- Post-Graduate S&E Enrollment -- By the year 2000, the number of doctorates awarded annually in engineering had declined by 15% from its mid-decade peak; since 1994, the number of doctorates in physics declined by 22%. Even in mathematics and computer science – where job opportunities are on the rise – the number of doctorates awarded declined in 1999 and 2000. *[National Science Foundation Info Brief, Declines in U.S. Doctorate Awards in Physics and Engineering (NSF-02-316), April 2002]*

- Foreign S&E Enrollment -- 40% of the graduate students in America's engineering, mathematics, and computer science programs are foreign nationals. In the natural sciences, the number of non-citizens is nearly 1 in 4. When we concentrate on engineering graduate students who are U.S. citizens, the number of enrollees declined precipitously between 1993 and 1999: from more than 77,000 to just over 60,000, a 23% drop in under a decade. *[National Science Board, Science and Engineering Indicators-2002, Arlington, VA: National Science Foundation, 2002 (NSB-02-01)*

- Aerospace Enrollment -- Graduate enrollment in aerospace engineering has declined steadily in recent years - from 4,036 in 1992 to 3,407 in 2000, pointing to a diminishing interest in aerospace as a career. *[National Science Board, Science and Engineering Indicators-2002, Arlington, VA: National Science Foundation, 2002 (NSB-02-01) and National Science Foundation Data Brief, Growth Continued in 2000 in Graduate Enrolment in Science and Engineering Fields (NSF-02-306), December 21, 2001)]*

NASA is not alone in its search for enthusiastic, qualified employees representative of the best that our Nation has to offer. Throughout the Federal government, as well as the private sector, the challenge faced by a lack of scientists and engineers is real and is growing by the day. The situation is summarized in the Hart-Rudman Commission's Final Report issued last year: "The harsh fact is that the US need for the highest quality human capital in science, mathematics, and engineering is not being met."

The nationwide trends I have described have great significance to NASA since the Agency relies on a highly educated and broad science and engineering workforce: nearly 60% of the total NASA workforce is S&E, and fully half of those employees have Masters or Doctorate degrees.

➢ ***Increased Competition for Technical Skills***

At the same time that the national S&E pipeline is shrinking, ***the demand for the technical skills NASA needs is increasing.*** The job market in the S&E occupations is projected to increase dramatically over the next ten years. The need for technical expertise no longer is confined to the technical industries that have been traditional competitors. NASA will face competition from new arenas as graduates in the S&E fields now are sought after by the banking industry, entertainment industry, and elsewhere in career fields not traditionally considered as primary choices for technical graduates. In the academic sector, traditionally not a competitor, we find ourselves vying for the same high-level technical workers. America's top schools now offer very competitive salaries to academicians with world-class skills – the same skills NASA seeks. Specifically, here are some of the trends that the Nation is seeing in the job market:

- Increasing S&E Positions -- The Bureau of Labor Statistics projects that employment in the fields of science and engineering is expected to increase about 3 times faster than the rate for all occupations between 2000 and 2010, mostly in computer-related occupations. Increases in engineering and the physical sciences are projected at 20% and 15%, respectively. *[National Science Board, Science and Engineering Indicators-2002, Arlington, VA: National Science Foundation, 2002 (NSB-02-01)]*

- Increasing S&E Retirements -- This report also notes that, with current retirement patterns, the total number of retirements among S&E-degreed workers will increase dramatically over the next 20 years. More than half of S&E-degreed workers are age 40 or older, and the 40-44 age group is nearly 4 times as large as the 60-64 age group. As employers seek to fill vacancies created by these retirements, ***competition for quality S&E workers will intensify.***

- Low Interest in Government Employment -- According to an October 2001 Hart-Teeter poll, the lowest levels of interest in government employment were found among college-educated and professional workers. Only 16% of college-educated workers express significant interest in working for the Federal government, and a like number of professionals and managers would opt for a government job. In contrast, the poll also revealed that positive perceptions of private sector work increased dramatically among

those with formal education. This indicates that NASA will face a significant challenge in trying to attract experienced mid and senior level professionals to the Agency.

NASA Demographics and Trends

➢ ***Current Skills Imbalances, Gaps, and Lack of Depth Within the NASA Workforce***

The trends I have just outlined are not unique to NASA; we share them with other employers in the labor market today. Unfortunately, the difficulties they present to NASA's ability to manage our human capital are only exacerbated by several Agency-specific threats, warning us that we need to pay attention to these indicators before they result in a crisis. The challenge of acquiring and retaining the right workforce is not a problem of the future—it exists now.

The Agency is engaged in establishing a workforce planning and analysis capability, supported by a competency management system that will provide the capability to track, project, and analyze critical workforce competencies needed by NASA to execute its programs. The competency management system baseline should be completed by September 2003, which will enable identification of gaps in desired and existing competencies and facilitate gap reduction through hiring and retraining.

At this point, we know that we need people with competencies in:

Astronomy and Astrophysics
Space Physics
Remote Sensing Technologies
Program/Project Management
Human Factors Engineering
Nuclear Engineering
Information Technology

Analysis of data for the past five years (1998-2002) indicates that among the S&E workforce, the highest number of losses among those with under five years of Federal service were in the following categories, listed in order of frequency:

Aerospace Engineering
Electronics Engineering
Computer Engineer
Space Flight Operations Engineer
General Engineer – Management
Data Systems and Analysis Engineer
Facilities and Environmental Factors Engineer
Electrical Engineer

NASA has undergone significant downsizing over the past decade, reducing its workforce from approximately 25,000 civil servants in FY 1993 to approximately 19,000 today. NASA made every effort to retain key skills, but, in order to avoid involuntary separations in achieving those reductions, it was not always possible to control the nature of the attrition. Inevitably, we lost some individuals with skills we could not afford to lose, and now these skills need to be replaced. Through downsizing and the normal attrition process, we lost key areas of our institutional knowledge base.

The 2001 report of the Aerospace Safety Advisory Panel made specific references to NASA's skills deficiencies when they noted the following:

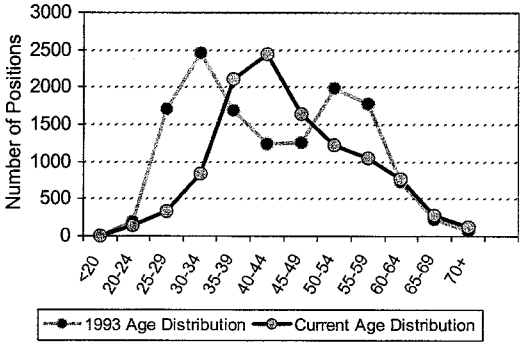
- NASA faces a critical skills challenge in the Shuttle and International Space Station programs despite resumption of active recruitment.
- The Agency must ensure the availability of critical skills, using appropriate incentives when necessary to recruit and retain employees.
- Recent downsizing and hiring limitations by the Agency may cause a future shortage of experienced leadership.
- The shortage of experienced, highly skilled workers has contributed to increases in workforce stress.

The 2002 report of the same Panel reiterates these concerns and calls for "aggressive action for the foreseeable future."

Unfortunately, NASA's need to reinvigorate the workforce with the right skills and abilities is occurring at the very time in which competition for workers with those skills is intense.

➢ ***Potential Significant Loss of Knowledge Due to Retirements within the S&E Workforce***

I have just discussed the skills imbalances that NASA faces today. The situation promises to worsen with time. New skills imbalances will occur over the next several years as the aging workforce reaches retirement eligibility. Approximately 15% of NASA's S&E employees are eligible to retire now. Within 5 years, almost 25% of the current workforce will be eligible to retire. Historical attrition patterns suggest that the percentage of those eligible for retirement should remain level at around 15-16% each year. In an Agency where the expertise is not as deep as we would like it to be, even a few retirements can be critical. Everywhere I go across the NASA Centers, I hear the same story: "We're only one-deep. We can't afford to lose that skill." Clearly the Agency must begin preparing for its projected workforce needs now since a quarter of its senior engineers and scientists will depart this decade and the job market is far more competitive than in the past.



Another way to look at the potential loss of knowledge is to examine NASA's current S&E profile. At this time, within the S&E workforce, NASA's over-60 population outnumbers its under-30 population by nearly 3 to 1. The age contrast is even more dramatic at some NASA Centers, at 5 to 1! By comparison, in 1993 the under-30 S&E workforce was nearly double the number of over-60 workers. This is an alarming trend that demands our immediate attention with decisive action if we are to preserve NASA's aeronautics and space capabilities.

➢ ***Increased Recruitment and Retention Problems***

The last NASA trend I want to discuss with you today involves the evidence of increased difficulty of recruiting and retaining employees. Historically, NASA has enjoyed unusually low attrition rates, due in part to the attraction of our unique mission and the fact that our employees simply love their work and stay on the job longer than the typical worker. However, one recent trend is of concern. We have noted a change in the attrition pattern among NASA's most recent hires. Compared to an overall attrition rate of just under 4% for all S&E's, the departure rate for S&E's hired since 1993 is nearly double - despite the fact that in the fall of 2000 the Agency completed downsizing.

Our challenge continues once we manage to hire personnel. Although our historical attrition rates are low, we notice an alarming development among our youngest S&E population. After factoring out the 55+-retirement eligibility group, attrition among the S&E workforce is highest in the 25-39 age group. This phenomenon has a multi-faceted impact on NASA. It represents a lost investment for the Agency; shrinks the potential pool of future leaders and managers; and skews the average age of S&E workforce toward retirement eligibility age.

Help is Needed

All of these trends provide immediate warning signals that significant measures must be taken to address workforce imperatives that ultimately impact mission capability. We cannot resolve

these new and emerging problems with past solutions; and current personnel flexibilities are not adequate.

To address the human capital challenges I have outlined for you today, NASA needs additional tools. We have used the ones we have and we have been innovative and imaginative but we need the Congress' assistance. Subchapter B of title III of H.R. 1836 provides these tools and NASA supports passage of that portion of the bill, with some suggested modifications as noted above.

Specifically, we need to:

- Encourage students to pursue careers in science and technology;
- Compete successfully with the private sector to attract and retain a world-class workforce;
- Reshape the workforce to address skills imbalances and gaps; and,
- Leverage outside expertise to address skills gaps and strengthen NASA's mission capability.

Each request in the legislative proposal has been carefully crafted to enhance NASA's ability to manage our human capital efficiently and effectively, in concert with the mandate of the President's Management Agenda – and plain old-fashioned good, sound management. Many of these provisions have been implemented by other agencies (such as the Department of Defense in their demonstration projects, and the Internal Revenue Service through their reform legislation). Without these legislative tools, NASA's challenges will soon become its crisis in human capital management.

Legislative Proposals

H.R. 1836 proposes several legislative provisions to address the threat to the S&E pipeline. The ***Scholarship for Service*** program would offer college scholarships to students pursuing undergraduate and graduate degrees in science, engineering, mathematics, or technology. In return, the students would fulfill a service requirement with NASA following their graduation, thus providing a return on our investment. Current statutes do not allow a service obligation for scholarship recipients.

Education is as valuable as experience. Yet, the traditional examining processes for new hires are heavily weighted toward experience, and are not aligned to the needs for such positions. As a result, an outstanding college graduate with impressive academic credentials may not be evaluated appropriately relative to another candidate with experience that is less applicable to the position. NASA needs a process that properly credits academic excellence for professional positions, and eliminates any barriers to speedy job offers to top candidates. The ***distinguished scholar authority*** would provide a streamlined appointment authority for professional and scientific positions, grades GS-7 through 12, which have a positive education requirement. Eligibility would be based on the applicant's academic performance, as indicated by the grade point average. Veterans' preference applies, and public notice is required.

The ***NASA Industry Exchange Program,*** modeled on the very successful Intergovernmental Personnel Act authority, introduces a means for NASA to engage in mutually beneficial, collaborate ventures with industry to infuse new ideas and perspectives into the Agency, develop new skills within the workforce, and strengthen mission capabilities. Without such an authority, talented individuals from industry remain an untapped resource for the Agency since the salaries and benefits of many Federal sector occupations are not competitive with the compensation packages offered to industry's most talented workers. Assignments would be limited to 2 years, with a 2-year extension, and would be subject to the full range of Federal criminal laws in title 18, including public corruption offenses, and adhere to current statutes covering government ethics, conflicts of interest, and procurement integrity. The Information Technology Exchange Program, established in the E-Government Act of 2002, which was passed by the House during the last Congress, represents a similar endeavor to establish an exchange program between the Federal Government and the private sector in order to promote the development of expertise in information technology management, and for other purposes.

Enhancing the ***Intergovernmental Personnel Act*** authority to permit assignments up to six years (rather than 4) is another tool that will facilitate knowledge transfer – an important goal of an Agency that must sustain its intellectual capital. This flexibility will allow individuals from academia or other institutions to continue working in support of long-term projects or programs when the need for continuity is critical.

Enhanced recruitment, relocation, and retention bonuses will help us with enhanced authority to offer financial incentives to individuals to come to work for us, to relocate to take on a new assignment, or to remain with the Agency instead of leaving to pursue a more lucrative job opportunity or retiring. Current bonus authority offers up to 25% of basic pay,

and has proved useful – to a point. Our proposal would base bonuses on the higher locality pay salaries, allow greater amounts when coupled with longer service agreements, and make more flexible payment options available (such as a choice between up front payments, installments, and payments at the conclusion of an assignment). These payment options could be tailored to the situation at hand, and tie payment of the incentive to actual performance.

The enhanced annual leave provisions are targeted particularly to mid-career hires, who likely would give up attractive vacation packages to become first-time Federal employees. This would provide mid-career hires from non-federal agencies with leave commensurate with their years of employment. This provision would also allow the members of Senior Executive Services and equivalents to accrue a full day of leave on a biweekly basis... These flexibilities help NASA to compete with the compensation packages available to private sector employers.

The ***term appointment authority*** is used extensively within the Agency to support many NASA programs and projects. It is useful for work of a time-limited duration, and it allows the Agency to terminate employment without adverse action when the need for the work/competencies wanes. The bill's provision to allow a limited number of term appointments to be extended up to six years, rather than four, will enhance its usefulness by accommodating the length of some NASA programs and projects. In addition, the bill provides that a term employee may be converted to a permanent position in the same line of work without further competition, provided the employee was initially hired under a competitive process and the public notice specified the potential for conversion. This provision does not alter any feature or principle of the competitive process, but eliminates the need for duplicative competition. Ultimately it may make the concept of term appointments more attractive to potential applicants and thereby provide a more robust labor pool for NASA management to consider. Conversions of term employees to permanent positions that differ from the position for which the employee initially competed would require internal competition.

In order to attract world-class talent into NASA's most essential positions, the bill proposes changes to the authority to pay employees in ***critical positions***. Proposed section 9807 would provide authority to grant critical pay for up to 10 positions per year, subject to approval by the NASA Administrator, with pay up to that of the Vice President (currently $198,600). This section should, however, be amended to specify that the payments are limited to one year for each application of the authority. The provisions raising the annual ***compensation cap for NASA excepted employees*** appointed under the Space Act from Level IV of the Executive Schedule to Level III will address this need as well. Based on the current pay scale, this would allow an increase from $134,000 to $142,500. These enhancements will help us compete in an enormously competitive job market.

Current authority to make ***limited term appointments into the SES*** may be used to fill SES general positions, but NOT career reserved positions – the majority of NASA's SES jobs. A further complication is that limited term appointments may be used ONLY for work of a project nature, not for continuing work. The lack of flexibility causes work-arounds to fill legitimate temporary needs that don't fall into the current framework, such as vacancies in key SES positions. Although limited-term SES employees may be called upon to perform executive level duties over an extended period, there is no authority to recognize them with the

monetary bonuses available to their permanent counterparts. NASA seeks *enhanced limited term appointment authority* for SES members to allow the use of SES limited term appointment authority to staff career reserved (not political) positions and allow the use of the authority for a variety of temporary needs, not limited to duties of a limited duration. In addition, we seek ability to pay bonuses to limited term appointees, similar to those available to executives on permanent appointments. These authorities doe NOT apply to political appointees.

Current statute permits setting pay for new Government employees under the General Schedule at any step of the pay range, based on superior qualifications or a special need of the Agency; there is no similar flexibility to adjust pay for employees after they join the Federal workforce. ***Superior qualifications pay*** authority would allow adjustments of base pay for NASA employees and those selected for NASA positions at any rate within the GS salary range for the position, based on the superior qualifications of the individual and/or the needs of the Agency.

Finally, the ***enhanced demonstration project authority*** provision provides the Agency with an effective and extensively tested mechanism for pursuing additional human resources innovations in response to changing workforce needs. A number of agencies, notably the Department of Defense and Department of Agriculture, have operated highly successful projects. Unfortunately current law limits "demo" projects to 5,000 employees, thus limiting the usefulness of this authority. Removal of this cap will allow NASA to make the use of so-called "best practices" of other agencies to a more effective portion of the NASA workforce. All of the existing requirements for demonstration projects—including merit system principles—continue to apply.

Mr. Chairman and Members of the Committee, each of these legislative provisions when taken individually will only help NASA deal with its human capital strategic threats to a limited degree. However, when taken together as an integrated package they form a strong nucleus in support of the Agency's Strategic Human Capital Plan and the President's Management Agenda, and will be invaluable as we deal with a diminishing pipeline, recruitment and retention of a world-class workforce, and skills imbalances. With these tools in hand, we will be able to avert a serious human capital crisis at NASA.

The missions we seek to lead and make possible are the visions that we all have for our future – new launch systems, innovations in high-performance computing, advances in biological research and exploration of our cosmos that extend our lives and way of life out there. Those things can only happen if we have the people that can make them happen. Technology and exploration will go nowhere without the human know-how and presence to make today's impossible into tomorrow's reality. After meeting and working with many of the men and women of NASA during the past year, I know we can do those things and I look forward to working with you and sharing the rewards of your investment and trust in us.

Chairman TOM DAVIS. Mr. Donaldson, thanks for being with us.

Mr. DONALDSON. Chairman Davis, Ranking Member Waxman, members of the committee, thank you very much for holding this very timely hearing on civil service issues facing several agencies. You have my written statement for the record, so I will briefly outline the very specific problem we are facing at the SEC and how the chairman's bill offers a solution to that problem.

You may be aware that dramatic changes have occurred in the Commission's personnel environment during the past year. Thanks in part to the efforts of this committee, the Commission has been granted the authority to pay higher salaries and provide additional benefits and has received increased appropriations to fill over 800 new positions this fiscal year.

However, while the new pay authority and increased appropriations have eased the Commission's crisis in hiring and retaining attorneys, substantial difficulties remain in our ability to hire accountants, economists and securities compliance examiners.

The reason for this distinction between attorney hiring and the hiring of other securities industry professionals is clear. Attorney hiring is excepted from civil service posting and competitive requirements, whereas the hiring of Commission accountants and economists and security compliance examiners is not.

When we are filling a vacancy under the competitive service, the process can take months to complete. Under excepted service authority, the hiring process can be completed in a few weeks. The procedures required for hiring under the competitive service system have proven unduly time-consuming and inefficient. Let me just elaborate a little on that.

A position is usually posted for 2 weeks, and then several days are allowed to elapse in order to be certain that all applications have arrived in our Office of Administrative and Personnel Management. After OAPM sifts out the obvious incomplete and unqualified applications, a rating panel comes in from the division or office that is seeking to hire and must first review and rate qualified applicants based solely on their written applications.

The rating panel in the division is made up of three or more professional staff who are at or above the grade level of the position being filled. These professional staff, often managers, must set aside the regular duties of their jobs and spend up to 2 days at a time rating applicants' resumes.

After the division's work in this phase, the file of the applicants goes back to the OAPM where, based on the ratings given by the division staff members, they check the work and then send the top three to five candidates back. Then yet another panel of selecting officials in the division or office may begin the process of setting up interviews of these candidates.

Beyond the cumbersomeness of the process, managers hiring for these positions have found that the rating process often favors not the best candidates, but those most familiar with how to fill out the relevant application with key words and phrases used by the various panels in rating the candidates against specific criteria.

Also, because the hiring panel only sees the three to five candidates identified by the rating panel, they may never see candidates who are otherwise highly qualified and perhaps better suit-

ed for the job, but who were not rated among the top candidates under the ground rules of the competitive service process.

This process, even when it works well, can take several months to complete. But, if none of the top-ranked candidates proves satisfactory, the position is often reposted and the selection process starts all over again. Given our task of implementing the Sarbanes-Oxley Act, our mission in overseeing the financial markets and our role in restoring investor confidence during these very difficult times, putting additional cops on the beat more quickly to accomplish our goals is absolutely vital.

Mr. Chairman, your bill, H.R. 1836, will do just that. The provisions of your bill are substantially similar to H.R. 658, which was introduced in February by Congressman Richard Baker of the Financial Services Committee. On March 26th, Congressman Baker's bill passed out of the Financial Services Committee with bipartisan support.

I would like to take a brief moment to thank Mr. Kanjorski, the ranking member of our authorizing subcommittee, for his work and support in that process. At the urging of both Mr. Baker and Mr. Kanjorski at their subcommittee hearing, we went back and worked diligently with our union, the National Treasury Employees Union, as well as with the Financial Services Committee staff from both sides of the aisle, until we reached a compromise that accomplishes the Commission's hiring objectives without loss of any civil service protection of the employees in the competitive service.

I want to stress my deep appreciation that the SEC provisions of your bill respect this compromise and keep intact those provisions we worked hard to craft in a way that all parties now support. The bottom line is that the Commission strongly supports the SEC provisions of your bill and hopes that they will be adopted at the soonest possible time and signed into law by the President.

Without expedited hiring authority, the Commission will not be able to hire these additional staff it desperately needs, and which Sarbanes-Oxley contemplates, in any responsive timeframe.

Thanks very much for your consideration of these issues and, again, for respecting the compromise we reached with our union and our authorizing committee members.

I, of course, would be happy to answer any questions you may have.

Chairman TOM DAVIS. Thank you.

[The prepared statement of Mr. Donaldson follows:]

TESTIMONY OF

WILLIAM H. DONALDSON, CHAIRMAN
U.S. SECURITIES AND EXCHANGE COMMISSION

CONCERNING
H.R. 1836, THE "CIVIL SERVICE AND NATIONAL SECURITY PERSONNEL IMPROVEMENT ACT"

BEFORE THE COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

MAY 6, 2003

U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Testimony Concerning H.R. 1836, the "Civil Service and National Security Personnel Improvement Act"

by William H. Donaldson
Chairman, U.S. Securities and Exchange Commission

Before the House Committee on Government Reform

May 6, 2003

Introduction and Summary

Chairman Davis, Ranking Member Waxman and Members of the Committee:

Thank you for inviting me to testify before you today, on behalf of the Securities and Exchange Commission, in support of Title III, Subtitle A of H.R. 1836, the "Civil Service and National Security Personnel Improvement Act." Although I have been at the Commission only since February 18th, I look forward to continuing and building on the strong and cooperative relationship that our Agency has developed with this Committee in the past as we work together on the SEC's resource needs to implement the Sarbanes-Oxley Act and fulfill all of our statutory duties. This is a critical time for the agency and the way we address the challenges before us will determine not only where we go tomorrow, but for years to come. Prominent among those challenges facing the Commission today is the threshold issue of the adequacy of its own staffing level. I thank you, Mr. Chairman, for your leadership in this vital area, leadership that would allow the Commission to move forward at full strength.

Given our task of implementing the Sarbanes-Oxley Act, our mission in overseeing our financial markets, and our role in restoring investor confidence during these difficult times, putting additional "cops on the beat" more quickly to accomplish our goals is absolutely vital.

Dramatic changes have occurred in the Commission's personnel environment during the past year. Thanks in large part to the efforts of this committee, the Commission has been granted the authority to pay its staff higher salaries, and to provide additional benefits. We have also received increases in our appropriations sufficient to fill over 800 new positions. While the new pay authority and higher appropriations funding have greatly eased the Commission's crisis in hiring and retaining attorneys, substantial difficulties still remain in our efforts to hire accountants, economists and securities compliance examiners.

In our experience, the reason for this distinction between attorney hiring and hiring of other Commission professionals is clear: while the hiring of Commission attorneys is excepted from civil service posting and competitive requirements, the hiring of Commission accountants, economists and securities compliance examiners is not. When we are filling a vacancy under competitive service requirements, the process can take months to complete. Under excepted service authority, the hiring process can be completed in a few weeks' time because hiring officials get to the interview step much more rapidly. Allowing the Commission to hire accountants, economists and securities compliance examiners in the same way we hire attorneys will give us the critical tools we need to fill these positions far more quickly, allowing the Commission to meet the challenges of our mission with the full resources that Congress intended.

The provisions of H.R. 1836 pertaining to the Securities and Exchange Commission would provide much needed authority to the Commission in its effort to expedite and simplify the hiring of accountants, economists and securities compliance examiners. Those provisions are substantially similar to those introduced by Michael Oxley and Richard Baker in H.R. 658, the "Accountant, Compliance, and Enforcement Staffing Act of 2003," which passed out of the House Financial Services Committee on March 26, in compromise form, with bi-partisan support. The compromise was reached after cooperative work with our union, the National Treasury Employees Union (NTEU), and the authorizing committee. It accomplishes the Commission's hiring objectives without loss of any of the civil service protections of employees in the competitive service. (See attached joint SEC/NTEU letter of support.) The Commission appreciates that H.R. 1836 respects this compromise, and keeps in tact those provisions we all worked hard to craft in a way that all parties can support.

Background

In January 2002, the Commission received its long sought "pay parity" authority as part of the Investor and Capital Markets Fee Relief Act.[1] This authority allowed us to implement a new pay scale in May 2002 that compensates all Commission employees with salaries commensurate with those paid by other federal financial regulators. This authority is helping to attract the highly qualified personnel we need and to stem the long-term drain of our most talented and experienced staff members. Additionally, after passage of the landmark Sarbanes-Oxley, in August 2002, as part of the Fiscal Year 2002 Supplemental Appropriations Act,[2] the Commission received a supplemental appropriation of $30.9 million, of which $25 million was earmarked for the purpose of filling 125 additional staff positions.

As expected, the combined effect of these two pieces of legislation has already had a profoundly positive influence on our ability to hire and retain attorneys. Nearly all

---

[1] Pub. L. No. 107-123, 115 Stat. 2390 (2002).

[2] Pub. L. No. 107-206, 116 Stat. 820 (2002).

of the attorney positions funded by last year's Supplemental Appropriations Act have been filled at this time. However, our experience in hiring accountants -- who comprise the bulk of the additional new slots from the supplemental funding -- has been far less successful. So far, despite our best efforts, only a few more than half of the new accountant positions funded with last year's Supplemental Appropriation have been filled. We are greatly concerned that without legislative assistance the struggle to fill positions will only intensify in the future. On February 20, 2003, the President signed into law the Consolidated Appropriations Resolution, providing the Commission with a Fiscal Year 2003 appropriation of $716.4 million, over $278 million more than our Fiscal Year 2002 appropriation. The Commission is expected to use these funds primarily to increase staff by another 700 positions this fiscal year, the majority of which will be accountants, economists and securities compliance examiners.

Specialized Experience Needed

The nature of the Commission's work requires that we seek highly skilled individuals who often are at a point in their careers where they have a number of employment options available to them. Our task is therefore hindered by the slow speed and inflexibility of the competitive service hiring process. We have, time and time again, seen the best applicants for accountant, economist and securities compliance examiner positions snapped up by competitors before the Commission has reached the point in the rigid competitive service hiring process where it can make them an offer. In marked contrast, this rarely happens with attorneys. Simply put, if we want an attorney, we can make them an offer almost as fast as any other employer can.

The Commission's efforts to hire accountants under our existing authority are particularly complicated by the special caliber of accountants that our mission demands. Most other federal agencies hire only a handful of accountants, for the limited purpose of keeping the agency's own books and records. However, in order to perform the complex task of ensuring the adequacy of disclosures by public companies, and to review the books and records of broker-dealers, investment advisers and mutual funds, the Commission must maintain a staff of hundreds of accountants, most of whom must have specialized experience in auditing or preparing the financial statements and reports of public companies. The Commission cannot maintain the high standard of professionalism that the investing public deserves by hiring accountants immediately out of school and expecting them to acquire their skills and experience "on-the-job" at the Commission. The learning curve is too steep, and our workload is too great.

Our difficulties in shepherding experienced, in-demand people in mid-career through the lengthy competitive service applications process are not limited to accountants. The complexity of the issues that Commission staff comes into contact with on a daily basis also mandates a similar level of skill and experience in our economists and securities compliance examiners. Often, the best candidates for securities compliance examiners are those with industry experience. Securities compliance examiners inspect broker-dealers, investment advisers, and mutual funds for compliance

with the federal securities laws. There is no substitute for having been on the other side of the fence when it comes to performing effective compliance examinations. As for economists, they analyze the impact of regulations to assist rulemakers in adopting the most cost-effective regulations, as well as assist with enforcement and other administrative tasks of the agency. The work of economists is highly specialized, and there is only a relatively small pool from which to hire in the first instance. Moreover, we must compete not just with the corporate world, but also with think tanks and academia for economists who qualify to do our work.

We believe the solution to these problems is to allow us to hire accountants, economists, and securities compliance examiners as we have successfully hired attorneys for years. We therefore support legislation to allow the Commission to hire accountants, economists, and securities compliance examiners using the excepted service process.

Hiring Process is Cumbersome and Time-Consuming

The procedures required for hiring under the competitive service system have proven unduly time-consuming and inefficient. A position is usually posted for two weeks, and then several days are allowed to elapse in order to be certain that all applications have arrived in our Office of Administrative and Personnel Management (OAPM). After OAPM sifts out the obviously incomplete and unqualified applications, a rating panel in the division or office that is seeking to hire must first review and rate qualified applicants, based solely on their written applications. The rating panel in the division is made up of three or more professional staff who are at or above the grade level of the job posted. These professional staff, often managers, must set aside the regular duties of their jobs and spend up to two days at a time rating the applicants' resumes. After the division's work in this phase, the file of applicants goes back to OAPM where, based on the ratings given by the division, staff members check the work of the division, and then send the top three to five candidates back to the division. Then, yet another panel of selecting officials in the division or office may begin the process of setting up interviews with these candidates to determine if one is suitable for hiring.

Beyond the cumbersomeness of the process, managers hiring for these positions have found that the rating process often favors not the best candidates, but those most familiar with how to fill out the relevant application with keywords and phrases used by the various panels in rating the candidates against specified criteria. Also, because the hiring panel only sees the three or five candidates identified by the rating panel, they may never see candidates who are otherwise highly qualified, and perhaps better suited for the job, but who were not rated among the top candidates under the ground rules of the rigid competitive service process. This process, even when it works well, can take several months to complete, but if none of the top ranked candidates proves satisfactory, the position is often reposted and the selection process starts all over again. In contrast, under the excepted service process, the hiring panel can simply review all the applications and interview all candidates whom they believed are highly qualified.

New Employees Would Retain Competitive Service Status

Although H.R. 1836 would allow the Commission to use the streamlined excepted service process to hire accountants, economists and securities compliance examiners, employees hired for these positions would be considered members of the competitive service for all other purposes, including full civil service rights and protections. These include veteran's preference, bargaining rights and union representation, health care options, EEO rights, and retirement and leave benefits. Their rights will also be the same as other competitive service employees with regard to appeals to the Merit System Protection Board, transfers between agencies, and the conduct of reductions in force. In short, the experience of employees hired under this new authority will be no different from their predecessors, except for a manifestly smoother hiring process.

Conclusion

The proposed legislation allowing the Commission to use the excepted service process in hiring for certain specialized positions is not unprecedented. Congress has already placed specialized employees of other agencies in the excepted service. For example, Congress has placed health care professionals (including doctors, dentists, and nurses) employed by the Department of Defense in the excepted service, along with Defense intelligence employees, employees in the Office of National Counterintelligence Executive, employees in the Department of Education's Performance-Based Organization for federal student financial assistance, and air traffic controllers hired through the FAA's College Training Initiative Program. Indeed, Congress placed all of the employees of the FBI in the excepted service.

In short, the Commission believes that its needs are significant and extraordinarily time-sensitive—we are trying to fill over 800 positions by the end of this fiscal year and to date have experienced serious difficulties in filling "mission-critical" positions for accountants, economists and securities compliance examiners. Thus, to be competitive in the hiring market, we believe we would greatly benefit from passage of H.R. 1836, granting excepted service hiring authority for those positions.

I appreciate the opportunity to share the agency's needs and concerns with you here today, and we look forward to working with you to solve this important problem.

United States Securities and Exchange Commission
National Treasury Employees Union

March 19, 2003

The Honorable Michael Oxley
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Barney Frank
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Richard Baker
Chairman, Subcommittee
On Capital Markets, Insurance
And GSEs
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Paul Kanjorski
Ranking Member, Subcommittee
On Capital Markets, Insurance
And GSEs
Committee on Financial Services
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Oxley, Ranking Member Frank, Chairman Baker and Ranking Member Kanjorski:

The SEC and the NTEU have worked together diligently—as the Capital Markets Subcommittee urged at its March 6 hearing on H.R. 658, the Accountant, Compliance and Enforcement Staffing Act of 2003—and have come to an agreement that fulfills the needs of the SEC while protecting the rights of its future employees. Based on this compromise, we both strongly support the manager's amendment to H.R. 658 and urge its adoption.

We are grateful that this legislation has been introduced in both the House and Senate to help the SEC expedite and streamline the hiring process so that it can bring on additional, mission-critical securities industry accountants, compliance examiners and economists as quickly as possible. Without this expedited hiring authority, the Commission will not be able to hire the additional staff it needs—and which the Sarbanes-Oxley Act of 2002 contemplates—in any responsive time frame to aid in the protection of America's investors and to help restore the integrity of our capital markets.

We hope that this legislation can be passed quickly in the House of Representatives and Senate and signed into law by the President at the earliest possible time. Please let us know if there is anything we can do to assist you as this legislation moves forward.

Sincerely,

William H. Donaldson
Chairman, SEC

Colleen M. Kelley
National President, NTEU

Chairman TOM DAVIS. Thank you both.

Mr. O'Keefe, thank you for flying all of the way back. You probably have some jet lag in coming back. I appreciate this. You were lumped in with DOD, simply because that was the vehicle.

In a perfect world, we would examine all of government and try to do this in a very systematic way. But sometimes the clock and other legislative vehicles get the better. That is why the clock—it is not driven by this committee; it is driven by others and leadership, and we are trying our best to take a deep breath and make sure that there is a level of understanding.

I think the fact that, Mr. Donaldson, in your case, you were able to go back with the NTEU and work those issues out—I think that gives us a higher level of confidence, even if it comes back before our committee.

SEC is a very attractive place for a young lawyer. You come in there. You hire people. The difficulty is retaining them, isn't it? After a while, they spend 2 or 3 years of experience, they are pretty hot commodities out there in the market. That is a pretty hot space for a young attorney to be working, at the SEC, and the difficulty is retaining some of the talent, isn't it?

Mr. DONALDSON. Well, we do have a lot of very talented people. We have a lot of demand out there in private industry for those people who have gained the experience of working at the SEC. So there is a turnover rate there.

Chairman TOM DAVIS. I mean, they go work for you for 2 or 3 years, they can go out in the private market and double, triple their salaries with what they have gotten.

Mr. DONALDSON. We have attended to that with the recent authorization in terms of pay parity and so forth.

Chairman TOM DAVIS. Never be parity; you won't be really close. But it is—and you found that you made additional concessions when you sat down with the NTEU?

Mr. DONALDSON. No, we basically have provided all of the guarantees under——

Chairman TOM DAVIS. But you were flexible when you sat down with them, and were able to satisfy each others' concerns?

Mr. DONALDSON. Right, we were, very much so.

Chairman TOM DAVIS. Why is hiring accountants and economists different from attorneys?

Mr. DONALDSON. Well, the role of an accountant at the SEC is considerably different from that at most other agencies. Most agencies hiring accountants are hiring them to operate within the agency in an accounting capacity, a managerial capacity, as opposed to our accountants who are investigative and analytical accountants out in corporate America.

Chairman TOM DAVIS. Mr. O'Keefe, let me ask you, in your testimony you note that NASA has not historically suffered from high attrition rates, but now retention is a much more relevant issue. Is that the aging work force to some extent?

Mr. O'KEEFE. Yes, sir, that is precisely it.

Chairman TOM DAVIS. NASA's legacy for space exploration and aeronautical innovation is unmatched. In recruiting, hiring and keeping top talent, it seems that NASA's name speaks for itself.

So why do you need additional changes in the way you hire and fire?

Mr. O'KEEFE. Sure. Well, it is a draw card to be sure. There is no doubt that the attractiveness to a range of engineering and scientific disciplines coming out of undergraduate and, principally, graduate and doctoral levels is very attractive to go to a place like NASA.

But there are two challenges that we are dealing with. The first one is that there are fewer and fewer folks who have the kind of skill qualification mix that we are seeking.

Various universities and colleges around the country in these disciplines have graduated about 20 percent fewer folks with these skills in the last decade than we have seen before. So, as a consequence, there is a smaller, diminishing cohort.

At the same time, we are seeing the same kind of phenomenon that the Commission on Aerospace, for example, that Mr. Walker chaired, is observing, that there is going to be a hiring surge. At the same time, we are experiencing a challenge in that direction.

The second problem is that the kinds of tools that we have available, that are extant today, while they are competitive for the purpose of bringing in graduate students, doctoral students, or those with some degree of experience from industry, it nonetheless turns sometimes on the very smaller intangibles, like the capacity to provide moving expenses, forgiveness of loans for graduate education programs that most companies would otherwise provide. Those are the kinds of things that we don't have or we have the capacity to get only after a long period of time, in which case they have made a decision to go somewhere else.

So we have got a very attractive high-end kind of first, initial response from many folks with the kind of skill mix that we are looking for. They eventually weary of the length of the process that it takes, or our inability to come even vaguely close to matching the kinds of opportunities they may see elsewhere.

Chairman TOM DAVIS. OK. Thank you.

Mr. Davis.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman. Let me thank you gentlemen for coming and for testifying and sharing with us.

Mr. O'Keefe, I understand that the Columbia space shuttle accident is currently being investigated by a panel headed by Retired Admiral Harold Gehman. One of the issues being investigated is whether work force issues at NASA may have contributed to the accident. It seems to me that it might be premature to give NASA additional flexibilities at the same time that an independent commission is studying the same issues.

Is there a reason why Congress shouldn't wait until after the Gehman Commission releases its report before we consider this proposal for additional flexibility?

Mr. O'KEEFE. I don't believe that your statement of the facts is exactly right. Admiral Gehman and the board are examining—among many, many aspects or factors that may have contributed to the accident, looking at the overall management process, the work force competencies, as well as our organizational procedures in terms of how this process goes.

And inasmuch as I think all of those issues will be covered as part of their final review here in the next couple of months, nonetheless, I don't think there will be a specific focus to this area that will be any more comprehensive than the 19 separate studies that have been released in the last 2 years alone. Pointing to what is an actuarial fact, we are going to see a higher rate of retirements in the years ahead; we are already seeing at least a growing attrition rate among the kind of skilled mixes that are most important for the purpose of launch services, space science kinds of activities.

I am not sure those findings are going to be materially different in this report than they have been in the last succession of repetitive observations made, that are exactly the same, by every other commission, by the General Accounting Office, by our inspector general, by external commissions. Everyone has noted the work force phenomenon that has been occurring very, very uniquely at NASA just by dint of the way the numbers have been running.

So I suspect that there will be a further reinforcement of that view, at least by Admiral Gehman's group, as well as, I suspect, at least an endorsement of looking at how to get ahead of that curve now in order to have an experience base that will be not just new entrants coming in at the same time that you have a very experienced cohort leaving. How do you find an opportunity for them to learn and to be mentored during the course of this time?

The second observation that I get, a sense from Admiral Gehman and his board members in their public statements, is that there will be and should be an opportunity for more attractiveness of mid-level entry from other comparable kinds of engineering experiences that would really add to the way that we view the nature of our challenge that we confront at NASA every day.

So my bet is, and it could be wrong, but my bet is, it is going to be a reaffirmation of what we have seen repetitively stated in the last couple of years.

Mr. DAVIS OF ILLINOIS. Is it possible that we might reach the point, though, where the critical need does not continue to exist? And if such, would the flexibilities continue to be required?

Mr. O'KEEFE. If anything, the bow wave we are about to see will begin in the next 3 years. we are looking at about a 15 percent eligibility for retirement right now. That will grow to 25 in the next 3 years. It becomes superannuated, really exacerbated, in certain career fields. In astronomy and astrophysics, in nuclear engineering, in space physics and remote sensing technologies it approaches as high as half.

Now, that is not going to get any better as time progresses along. And, if anything, it simply then shifts to other competencies that become more dramatically affected by the capacity of individuals who may decide they want to do something else with the rest of their lives after having dedicated 30 to 40 years of it having worked for NASA.

So, if anything, what we will see is—the scenery will shift, if you will, to different kinds of skill competencies, to different professional series over the course of the next 10 years. But the trend is irrefutable. Unless we find some way to arrest aging in the next couple of years, it is going to be an actuarial fact.

Mr. DAVIS OF ILLINOIS. Mr. Donaldson, I understand that the SEC is seeking flexibility in order to implement the Sarbanes-Oxley Act. Could it be then that those flexibilities might be required up to a point, but then after that point would not be required further?

Mr. DONALDSON. Well, I think that the job of hiring the 800 professionals within this fiscal year is going to be very difficult to accomplish; and I think that it will extend beyond this fiscal year even if we get the increased flexibility that we are seeking. So I see it as a multiyear problem here.

Beyond that, you know, only time will tell.

Mr. DAVIS OF ILLINOIS. Let me also then just compliment you on your ability to work, or the decision to work cooperatively with the National Treasury Employees Union. That seemed to be a model that worked for you in order to arrive at some good legislation.

Would you recommend it for other agencies?

Mr. DONALDSON. Well, I thank you for your nice words. I think that the credit goes to a number of people in our organization who have tried very hard to work positively with the union. The union has been terrifically cooperative. I think they recognize the problem that we have, and they have been very, very helpful.

Mr. DAVIS OF ILLINOIS. Thank you very much.

I thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you much.

Mrs. Davis.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Chairman, and thank you, gentlemen, both for being so patient in waiting.

And, Administrator, if you find a way to arrest aging, I want to be the first to try it out.

Administrator O'Keefe, NASA has come to Congress to bolster its scientific and engineering work force, yet some of the flexibilities that you are requesting could be extended to managerial and administrative personnel as well.

Suggestions have been made that the amount of money that NASA could use to pay or reward administrative employees should be capped so that the bulk of the funds could be spent on attracting high-quality scientists and engineers. Could NASA benefit from its new flexibilities if such a cap were put in place?

Mr. O'KEEFE. To be sure, the flexibilities would address the specific science and engineering challenges we have right now. Having said that, I think by trying to force a caste system, if you will, which is what such a proposal would do, that would really motivate folks who are very, very good engineers, who could manage lots of things and lots of programs, to think in terms of not being engaged in that activity and moving away from it, because it would mean administrative and management-level kind of activities would then become capped as a result of that and not attractive.

So we would create more and more of a stovepiping philosophy in which certain skills, or professional or technical skills, would be accented, emphasized, and valued greater than that of management.

And management is one of our challenges as well. We have the constant issue of wrestling with resources, costs, the extraordinary effort that has gone into developing a human resources strategic

plan, which our Assistant Administrator for Human Resources has done to the astonishment of OPM and OMB, to develop this kind of an approach.

Those are the kinds of fields that are going to be equally challenged in the years ahead. And if we were to do something like a cap on the science and engineering side at the expense of administration and management, we would eventually pay the price for that in time, in a very short time.

Mrs. DAVIS OF VIRGINIA. Administrator O'Keefe, I asked you earlier, and I wanted to ask you again to have it on record, having NASA Langley in my district and hearing from them how important it is to be able to attract workers, because they are struggling, as a lot of our Federal work force is, for attracting our really good, expert types.

In the civil service portion of this bill, it allows DOD to offer retirement-eligible staff an opportunity to retire with their full pension and come to work with DOD with full salary in addition to their pension.

Are you concerned that you may lose valuable employees under this bill?

Mr. O'KEEFE. I don't believe so. I think the challenge that both the Defense Department and we at NASA confront is more of a generational issue that is occurring right now. I think it is a more a phenomenon of this generation that has recently come out of graduate and undergraduate schools.

In the last 5 years, for example, we have seen folks leaving in much larger numbers in the fields of aerospace engineering, electronics engineering, electrical engineering, in all of those sectors, because mobility is a key factor among this age corps, more than anything else.

So, as a consequence, they are experiencing the same challenges that we are. If anything, there is a zero-sum kind of opportunity between the Defense Department activities that are very close to the centers that we operate and NASA in terms of exchanging ideas as well as different approaches to things. It is not any more or less of an attenuation in that regard.

Mrs. DAVIS OF VIRGINIA. You understand what I am asking? They can get their full retirement plus salary?

Mr. O'KEEFE. I just don't see that as being a real challenge.

Mrs. DAVIS OF VIRGINIA. Would you favor including a provision in the legislation that would give employees an opportunity to submit comments and suggestions on the work force plan before it is presented to OPM for approval?

Mr. O'KEEFE. Sure.

Mrs. DAVIS OF VIRGINIA. We have heard a lot here about how employees are not being brought into the particular bill for the civil service workers over in DOD.

Mr. O'KEEFE. I would be more than happy. It just confirms what it is we are already doing.

Our largest employee union is the International Federation of Professional and Technical Engineers. Greg Junemann, the president of that union, and I have met, as well as all of the individual center representatives of that union, with each center director of the 10 centers that we have.

Similarly, I have met with Bobby Harnage, my friend who is here today. He is part of the next panel. He and I have chatted and talked about this proposal as well. And all of his respective union leadership folks at each of the centers have been contacted by our center director, too. So the opportunity to have the employees comment on this and look at how we would implement various elements of this before OPM, as requested, is not an unreasonable proposition at all, and one we follow independent of the question of whether it is law or not.

Mrs. DAVIS OF VIRGINIA. Thank you, Administrator O'Keefe.

And thank you, Chairman Donaldson.

Chairman TOM DAVIS. Thank you.

Mr. Janklow.

Mr. JANKLOW. Thank you very much, Mr. Chairman.

If I could, Mr. McDonald, could you tell us—or excuse me, Mr. Donaldson, I apologize. Who do you know that is against this proposal with respect to your agency? Who is against it?

Mr. DONALDSON. I don't think that anybody is opposed to it.

Mr. JANKLOW. You haven't heard of anybody at this point in time?

Mr. DONALDSON. Not really.

Mr. JANKLOW. Mr. O'Keefe, who is against it, at least with respect to your agency?

Mr. O'KEEFE. None that I am aware of. There have been concerns voiced. I think at the earliest point when the President submitted last June's legislation, certainly the AFGE representatives testified as well, but again most of those concerns in the course of this past year have been worked on and discussed and so forth, the various bills that Mr. Davis has introduced, as well as Mr. Boehlert and Senator Voinovich.

Mr. JANKLOW. As far as you both know, we are not dealing with a bill that is very controversial, but terribly substantive for each of your agencies?

Mr. O'KEEFE. I don't think so. But I would certainly defer to those who might otherwise express a contrary view.

Mr. JANKLOW. Do you agree, Mr. Donaldson?

Mr. DONALDSON. Yes.

Mr. JANKLOW. Mr. O'Keefe, in your testimony earlier you said that—and also in your written testimony you talk about the fact that about 15 percent of your staff are eligible—your employees are eligible for retirement, that it grows to 25 percent. I believe you used the words "50 percent within 5 years." And then you said, it doesn't get any better after that.

How can you have an employee labor force that you know now is going to be 50 percent retire-eligible every year from now on after 5 years from now? That just doesn't make sense to me.

Mr. O'KEEFE. I apologize. I was inarticulate in using the term 50 percent. It was applied to very specific areas.

You may recall, I precursed with the statement that in astronomy and astrophysics, in space science, and nuclear engineering, in those particular fields, it grows as high as, if you just look at those particular professions——

Mr. JANKLOW. Up to 50. But then depending on how many retire and don't, that number changes.

Mr. O'KEEFE. Then that changes. So, as a consequence, then the scene shifts to other competency fields that get serious; and so, as a result, it is on average in that 15 to 20 percent range in the next few years. But in certain areas it is very, very serious, and then simply moves along into different venues over the course of that time.

Mr. JANKLOW. Mr. Donaldson, with respect to the SEC—and I am not talking about the top-level managerial folks; now I am talking about your line economists and accountants, especially those, and your lawyers—how often do you find that the people that have very successful, good positions in the private sector in the accounting field, in the economic field as an economist, or in the legal field are willing to quit those to come to work for the SEC with all of your rules, all of your regulations, all of your policies and your pay structure?

Mr. DONALDSON. Well, I think, to a degree this depends upon the opportunities that are available in the economy, and the general condition of the economy. Certainly, in the years of the 1990's when markets were booming and so forth, the opportunities in the private sector were considerable.

I think we are seeing——

Mr. JANKLOW. It didn't hurt the SEC at all, did it?

Mr. DONALDSON. No. But I think you are seeing a reverse of that now. I think you are seeing, in terms of the opportunities we now have, they are considerable. We have a lot of applicants. I think people are anxious to come to work for the SEC.

Mr. JANKLOW. And then when the economy gets better again, which it will at some point, then they will leave you again.

Mr. DONALDSON. Well, we are constantly working at keeping the environment in the SEC and, thanks to legislation, keeping our salaries and compensation as competitive as they can be. And, you know, we like to see lower turnover. And, in fact, with the pay comparability, early observations are that our turnover is slowing down. It's hard to differentiate whether that comes from a reduction in opportunities out in the private sector or better pay with us.

Mr. JANKLOW. Mr. Chairman, given the fact that there doesn't appear to be any opposition, I'm not going to waste any time with questions.

Chairman TOM DAVIS. That is fine with me. The good news is that you had to wait. But I notice Mr. Janklow did not ask Mr. Wolfowitz if anybody opposed his proposal. We would still be waiting for the list as it works its way through. But thank you both very much.

Mr. JANKLOW. I only had 5 minutes.

Chairman TOM DAVIS. Thank you both very much. I appreciate you working with the employees involved. We're going to hear from our next panel in terms of if they have any views on this as well, but we appreciate it.

I'm going to take about a 6- or 7-minute recess, come back at 1:30, where we will convene our next panel if that is OK with everybody. We will be in recess for about 7 minutes.

[Recess.]

Chairman TOM DAVIS. Thank you very much. We have saved the best for last here, just for the record. Thank you all very much for your patience through this. I think we had a lot of questions and a lot of concerns, and I think a lot of us still have some confusion as we go back and forth. But you heard the testimony, and hopefully it will help you be crisper, and we have some questions. We appreciate you being with us and staying to the end.

We have a very distinguished panel. Dr. Paul Light, the Director for the Center for Public Services at Brookings Institution; Bobby Harnage, Sr., the National Federation of Government Employees; Colleen Kelley, National Treasury Employees Union; and Mildred Turner, Federal Managers Association of the Department of Agriculture.

Thank you for your patience. It is our policy that we swear you in, if you would rise with me.

[Witnesses sworn.]

Chairman TOM DAVIS. We got the cameras going. We have to keep people here now as we go through. Focus in. Thank you again. Thanks for staying with us.

Dr. Light, we will start with you and move straight through.

STATEMENTS OF PAUL LIGHT, DIRECTOR, CENTER FOR PUBLIC SERVICES, THE BROOKINGS INSTITUTION; BOBBY HARNAGE, SR., NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; COLLEEN KELLEY, PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; AND MILDRED L. TURNER, MEMBER, U.S. DEPARTMENT OF AGRICULTURE FEDERAL MANAGERS ASSOCIATION

Mr. LIGHT. Great. Terrific. It is a pleasure to be here. I should say to Governor Janklow that I was a former resident, born and raised in South Dakota.

Mr. JANKLOW. A great place to be from, isn't it?

Mr. LIGHT. I'm afraid so, but I do get back from time to time.

I think my job in testifying here today is to look at the empirical evidence on behalf of reform. I've read the bill. I've tried to penetrate it. I'm not a lawyer, so I can't comment on the "notwithstandings" and "wherewithals," but I can comment on the desperate need for reform of the Civil Service as it currently exists, and I can speak to you from the perspective of people who want to serve their country, who want to be in Federal jobs, and who are in Federal jobs and find it extraordinarily frustrating to be waiting for jobs to be filled for 4 to 6 months, to be trapped in the system and unable to get the resources they need to do their jobs.

We survey all levels of the Federal work force, look at the conditions or the health of the Federal work force, and there isn't a single level of the Federal work force that is not currently in distress. At the entry level our surveys of college seniors show low interest, perceptions of significant delay. There is even a sense that the Federal Government is arrogant in its attitude toward potential employees; that it's up to you to wait for us to make a job offer, and if you can't wait for 4 to 6 months, then basically go someplace else.

At the middle level we see crowding, we see overlayering. We see extraordinary perceptions of distance between the top and the bot-

tom of government. I recommend in my testimony that the DOD bill, in terms of improving it, might well tackle the issue of the overlayering at the middle and higher levels of the defense bureaucracy. Between the period before September 11th and after September 11th, the number of DOD employees who perceived more layers in their agencies than necessary actually went up. The perception of layering, the perception of bureaucracy at DOD have increased post-September 11th because the pressure on the agency is so great and the embrace of mission is so great.

I don't need to review the problems of the Presidential appointee level. We've been through that.

There is legislation pending in the Senate that started 2 years ago that would be nice to have as part of any reform.

My particular concern here today is with the frontline. Looking at the frontline of the DOD work force, or look at the frontline of the Federal work force, what you see is that the frontline employees are the most dissatisfied with the current system. They are the most likely to report, for example, that there are too many layers between themselves and top management. That makes perfect sense. They are the most likely to complain that the hiring process is slow and confusing rather than fast and simple. They are also surprisingly likely to say that the hiring process is not fair as opposed to fair, although the vast majority of Federal employees think the current system is fair.

I think the reason why we find high pride and hard work on the frontlines is that Federal frontline employees are deeply committed to the mission of their agencies, and that's obviously the case at Defense. We asked Defense employees in the spring of 2002 whether there was a greater sense of mission in their agencies because of the events of September 11th. Sixty-five percent of DOD employees said there was more of a sense of mission in 2002 than there had been compared to just 35 percent of Federal employees in other agencies.

But what we also see on the frontlines of the Federal Government is the impact of vacancies, the impact of turnover, the impact of hiring delays. It is the worst thing we can do for a frontline employee to hold positions open for 4 to 6 months before you fill them. That just increases the burden on all employees.

It's also at the frontline where you see the most concerns about the problems in disciplining poor performers, because poor performance has its greatest impacts on the frontline. I talk in my testimony about DOD in specific.

I'd like to wrap up here about the issue of reform. The Civil Service Reform Act is about to celebrate its 25th anniversary, and embedded in that act were many of the calls for experimentation that we see now coming to fruition in this bill. I view this particular proposal as the logical consequence of the 1978 act, not as a conflict with the act, but as the outgrowth of many of the reforms that were put in place under the Carter-Mondale administration.

I look forward to your questions. I appreciate your interest in this issue. The opportunity for reform rolls around on its own timetable. My experience has been that we ought to take advantage of it when it appears. Thank you very much.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Light follows:]

THE CIVIL SERVICE AND NATIONAL SECURITY PERSONNEL IMPROVEMENT ACT

TESTIMONY BEFORE THE UNITED STATES HOUSE OR REPRESENTATIVES
GOVERNMENT REFORM COMMITTEE

PAUL C. LIGHT

WAGNER SCHOOL OF PUBLIC SERVICE
NEW YORK UNIVERSITY

CENTER FOR PUBLIC SERVICE
THE BROOKINGS INSTITUTION

MAY 6, 2003

Thank you for inviting me to testify before this Committee at this critical moment in civil service time. As some of you may know, it was twenty-five years ago that this Committee took up the Civil Service Reform Act of 1978. That statute reflected an effort to modernize a personnel system that had not been reformed since 1946, and addressed many of the issues embedded in the bill before this Committee today. Launched in a bipartisan spirit by the Carter-Mondale administration, the act was designed to create a new era in human resources management. It contained new procedures for pay for performance, accelerated hiring, and waivers for experimentation. It also created the Senior Executive Service, and sought to modernize the outmoded job classification system that governed the hiring and promotion of civil servants.

I can think of no better way to celebrate the twenty-fifth anniversary of the Civil Service Reform Act than to pass this bill and begin the next generation of reform. Civil service reform is not a Democratic issue or a Republican issue; it is a good government issue. It should be designed first and foremost to assure that talented Americans have the chance to serve their country. As President Carter argued in 1977, the public deserves a government as good as its people. I believe there is overwhelming empirical evidence that this proposal would advance that cause.

ENDORSEMENT OF THE PROPOSAL

Having served as senior adviser to both bipartisan National Commissions on the Public Service chaired by former Federal Reserve Board chairman Paul A. Volcker, I believe this reform package would receive the overwhelming endorsement of the 1989 and 2003 commissions. Indeed, the 2003 commission might logically ask Congress and the president "What took you so long?"

The 1989 commission believed that a "quiet crisis" had already begun, while the 2003 commission argued that the quiet crisis had reached a desperate moment. The 2003 commission did not equivocate in its endorsement for action. It urged Congress and the president to move quickly on a variety of fronts, including reorganization authority, presidential appointments reform, and creation of agile personnel systems that reward performance, not longevity. As the 2003 commission argued, for example, the pay proposals embedded in the Defense Department's proposal should be the *default* position for departments and agencies. If an agency can come up with something better than pay banding, let it try. But if not, pay banding should be the first option. The burden of proof should be on the current system to demonstrate its relevance to today's labor market.

I should hasten to add that the 2003 commission did not believe that further tinkering would suffice. The federal government has had twenty-five years of experience under the 1978 reforms with decisively with mixed results. On the one hand, its efforts to institute several variations of government-wide pay for performance under the 1978 act have produced unacceptable frustration and unacceptable over-grading.

On the other hand, the federal government has conducted a variety of successful experiments, including a half dozen at the Department of Defense that covered more than 30,000

employees, many of which have shown great promise. At some point, the experimentation must end and government must move forward with its best effort to improve the system. The experiments were not designed as ends in themselves, but as precursors to next-generation reform.

Let me also note that reform does not end with a single bill. To the extent this Committee and the General Accounting Office sees problems with implementation of this proposal, it can move quickly to perfect the legislation. I recognize the concerns about ambiguities in the various proposals, but also view the current bill as sufficiently detailed to allow the details to be easily resolved in the normal course of mark-up and implementation. Moreover, I am convinced by a close reading of the original Defense proposal that the system requirements under sec. 9902 are sufficient to allow legal relief should the department violate any of the public employment and merit principles embedded in the current system.

In this regard, my only recommendations for change in the current draft are three-fold. First, I believe employee representatives should be given more than 30 days to comment on proposed changes developed under the new framework—even better would be a formal requirement for consultation before a change is proposed. Second, I believe the bill should contain a requirement to reduce the number of middle- and upper-level management layers by a specific number to be determined through a methodology developed and presented to Congress and the General Accounting Office. Third, I believe that the bill should include the Senate's proposed streamlining of the financial disclosure requirements that political and career employees must fill out each year.

THE NEED FOR REFORM

Let me start by addressing the need for reform. Contrary to many, I do not believe the problem facing government is either a lack of applicants or the impending retirement wave. As my colleagues at *Government Executive* rightly point out in a story released last Friday, the retirement crisis may turn out to be far less of a crisis than most reformers believed—indeed, the turnover rate in government may actually be too low, especially at the middle- and upper-levels. Moreover, as they also point out, there are plenty of applicants for most jobs in government. It is true, for example, that 1.7 million American applied for the 70,000 baggage and passenger screening jobs at the Transportation Security Administration last year. It is also true that 47,000 Americans applied for 900 Federal Bureau of Investigation jobs, 35,000 applied for 465 Foreign Service slots, and 20,000 applied for 270 information technology jobs at Agriculture.

However, the challenge is not getting enough applicants, but getting the right applicants. Of the 1.7 million TSA applicants, more than a third were ineligible because they could not read or write; another third could not pass the initial screening test; and another quarter were ineligible because they were not U.S. citizens. It is also useful to note that TSA had the special hiring authorities embedded in the proposed statute. One cannot know how successful the agency would have been in hiring its workers without the on-the-spot hiring authority and expanded ranking system that Defense, NASA, OPM, and SEC seek here. TSA succeeded largely because it could move quickly to review candidates, and could make immediate offers for

those who qualified. To rephrase the old saying, many were called, but very few were actually qualified.

More importantly, the measure of an effective human resource system is not in the number of applicants. Any organization, public or private, can generate lots of applicants in a weak economy. The purpose is to aim for the top of the labor pool, generate the right applicants, hire them before other competitors do, and get them on the job quickly. It is also to reward them for a job well done, not time in the system, protect them from abuse and favoritism, advance them where appropriate to higher levels of responsibility, and do so on the basis of merit and performance. In short, the purpose of a human resource system is to create and manage a healthy, motivated, highly productive workforce, not merely generate long lists of job applicants.

Unfortunately, by almost any measure available, today's system does not measure up. It makes no sense, for example, to generate long lists of applicants only to make the chosen candidates wait four to six months for a job offer. Nor does it make any sense to lock those candidates into a reward system that emphasizes longevity over performance.

As for the statistics on quit rates, I caution this Committee to be very careful about using government-wide quit rates as a measure of anything. We know that quit rates vary greatly by level in the organization. Turnover is extremely low among middle- and upper-level managers, for example, but extraordinarily high among front-line workers. The federal government has between 150,000 and 250,000 separations a year, mostly at the front-line, which averages out to a quit rate of well over 10 percent. Indeed, one of the reasons hiring freezes have such a damaging effect on government is that they hit agencies where service matters most—among toll-free telephone operators, Veterans benefit officers, Social Security claims representatives, IRS auditors, and other critically important front-line staffs.

As the following table suggests, federal employees who quit government are pulling the trigger faster with each passing year, even during the 2001 recession. The quit rates are particularly troublesome at the General Schedule (GS) 7, 9, and 11 levels, where the federal government recruits many of its future leaders. In 1997, for example, 35 percent of the GS professional and technical (P&A) employees who quit had less than five years of service. By the first quarter of the 2002 fiscal year, the number had jumped to almost half.

PERCENT OF FEDERAL EMPLOYEES WHO QUIT
WITH UNDER FIVE YEARS OF SERVICE

Fiscal Year	Technical 5	Technical 7	GS P&A 7	GS P&A 9	GS P&A 11	GS P&A 13	GS P&A 15
1997	37%	15%	57%	35%	27%	7%	34%
1998	39	15	59	38	28	15	32
1999	46	18	62	39	29	15	34
2000	54	22	67	46	36	20	31
2001	65	28	71	47	33	24	34
2002[a]	63	30	70	47	42	27	41

[a] First quarter only
Source: Author's analysis of data from FEDSCOPE Dynamics Cube, Office of Personnel Management

Because the federal government relies on inside talent to fill so many of its entry- and middle-level jobs, it must have a steady stream of new talent entering the pipeline at the start of career. Unfortunately, even if the federal government becomes more effective at the entry-level pitch, it must recognize that today's labor force simply does not expect to stay in any one sector or job for very long.

THE EMPIRICAL INVENTORY

Senator Daniel Patrick Moynihan once said that everyone is entitled to their own opinion, but not to their own facts. I believe his words bear great validity here today, for the facts about the breakdown in the civil service system are both unrelenting and undeniable.

Indeed, there is no level of the current human resources system that does not need immediate reform. I am particularly concerned about problems on the front lines of government where non-supervisory personnel bear so much of the burden for the inefficiency. They are the ones who have to wait months for replacements to work their way through the process, and the ones who must deal with the layer-upon-layer of needless managerial oversight. It is my hope that this legislation will give them needed relief from the micro-management that marks so much of government work today, not to mention a long overdue reallocation of resources and personnel from the middle- and upper-levels of the hierarchy to the front lines. Under the Defense proposal, for example, we could witness the movement of 320,000 jobs from military slots back to civilian, which would increase the ability of front-line staffs to fulfill the critically important mission facing this nation today.

Notwithstanding the special problems on the front lines, one can find evidence of difficulty from bottom to top. Consider the following trends culled from recent research:

At the Early-Career Level

Our best available data suggest that it has not only become more difficult to recruit talented civil servants over time, it will become more so in the future. According to a May, 2002, survey of 1,015 college students by the Center for Public Service, only 13 percent of this year's liberal arts graduates said they had given very serious consideration to working for the federal government. Business came in first at 31 percent, state and local government second at 30 percent and the nonprofit sector third at 18 percent. Young Americans increasingly believe that the most rewarding public service work is not in the federal government, but in nonprofit agencies, state and local governments, and private firms that deliver goods and services on the federal government's behalf.

According to that same survey, top students do not believe the federal government provides the challenging, interesting work they desire. Although entry-level pay and benefits must meet minimum labor-market expectations, talented Americans put the emphasis on the nature of the work.

The federal government is increasingly unable to fill jobs from the outside. According to the National Academy of Public Administration's Center for Human Resources Management, 42

percent of the federal government's entry-level jobs during the 1990s were filled by someone already on the federal payroll. Parents and teachers remain a neglected focus in efforts to improve the image of federal careers. Asked which careers offered the greatest potential for their children in a June 2000 Harris Poll, just 11 percent of parents and 25 percent of teachers said that government was a promising career.

At least part of the problem resides in the hiring process itself. No private firm could long endure the kind of delays common to the current system. The hiring process has become slower and more confusing with each passing generation of employees. Today's federal employees describe the hiring process as slow, confusing, and not always fair. Asked which word best described the process, 57 percent of federal employees interviewed for the Center for Public Service 2001 "State of the Public Service" report said confusing, not simple, and 79 percent said slow, not fast. A companion sample of private-sector workers described their organization's hiring process as simple (75 percent), fast (53 percent), and fair (90 percent)

Vacancies at the bottom of government are likely to expand rapidly over the next ten years—age works its will on the demographic contours of government every day. By 2005, more than half the federal workforce will be eligible to retire. The potential gaps can be seen all across the government, from homeland security to Social Security. With normal attrition, SSA will have to replace three out every five employees by 2010. Already, one third of calls to the SSA toll-free telephone number resulted in a busy signal or a hang-up as callers exited in exasperation, waiting times at the agency's field offices are growing, and the quality of claims decisions appears to be declining as workload rises, thereby putting greater pressure on an already-overburdened appeals process.

Hiring freezes and attrition-based downsizing have left an indelible mark on the age structure of the federal workforce. The average federal employee is 45 years old today, 32 percent will be eligible for retirement by 2004, and another 21 percent will be eligible for early retirement. Regardless of whether they will actually retire, preliminary data suggest the presence of a growing gap between the average age of the federal government's entry-level workforce and its baby-boom middle- and upper-levels. The resulting "bathtub" or "valley" means that there are fewer potential leaders for future middle- and senior-level positions.

The hiring process is much faster among private contractors and in the military, which is why jobs are migrating toward both. Although the overall size of the contract workforce (product and services) is down since the end of the Cold War, the number of service contract workers appears to be rising as agencies put more and more jobs up for competition. The growth is particularly noticeable in hard-to-recruit areas such as information technology, where 80 percent of federal work is now done by contractors, and in management analysis/consulting. There has also been growth in what were once considered routine paper-processing positions such as Immigration and Naturalization Service visa notification mailings.

Jobs are being contracted out for good and bad reasons. On the one hand, many agencies believe that they can get faster, better service on information technology from private contractors than through the traditional hiring process. On the other, some contracting out is clearly being driven by poorly rationalized quotas. I would urge this Committee to demand far greater

accountability in the contracting process as part of this package. I cannot imagine a more unappealing hiring call that contains the caveat that new federal employees may be subject to contracting competition based on a shell-game designed to hide the true size of the federal workforce.

At the Middle-Career Level

The federal government continues to have great difficulty holding talented employees over the longer term. Only 30 percent of federal employees hired twenty years ago are still in government today, for example. It is not clear, however, that the right 30 percent stayed. Unlike the military, which uses an up-or-out system, retention is more a product of accident than intent. Only 45 percent of the federal employees and supervisors interviewed by the Merit Systems Protection Board in 2001 said their supervisors promote the most qualified person when jobs are open.

As a result, worries about career advancement remain high, as do concerns about the opportunity to accomplish something worthwhile. Nearly a third of the federal employees interviewed for the 2001 "State of the Public Service" report said they were not satisfied with their opportunities for advancement, while almost half said that their job performance was either a small factor or not a determining factor at all in whether they got a promotion. Other research suggests that exciting work, career growth, fair pay, pride in organization, and so forth are also key to retention of talented employees, all of which appear to be in short supply in non-Defense agencies.

Although challenging work, resources to do the job well, and so forth are key drivers of retention, competitive pay is also one of the top reasons people stay in the job. Even if the Federal Employees Pay Comparability Act were fully implemented, it is not clear that federal pay would be competitive in hard-to-retain/hard-to-recruit positions. Successful retention depends in part on adjusting pay to occupation and individual performance, letting the labor market work its will. Unfortunately, there is ample evidence that federal pay is not performance sensitive. Pay is used less to motivate higher performance, and more to reward experience and loyalty.

At the same time, there is little access to middle-level employment from outside of government. According to a study by the Partnership for Public Service, outside candidates were unable to apply for nearly half of vacant middle-level civil service jobs in 2001. Even when they did apply, the odds were against them. In 2000, for example, only 13 percent of mid-career hires were candidates who did not already hold federal jobs.

Federal careers are built around an implied compact that reserves promotional opportunities for those already inside government. The civil service system gives its employees guaranteed increases in employment step, but not grade, based on time in job. Although this compact is not as strict as the armed services single-entry-point career, it does close off many job openings to outsiders, and punishes managers who open jobs to competition.

At the Senior-Career Level

Job satisfaction, morale, sense of purpose, and perceived access to resources are all very high among the senior executives interviewed for the Center for Public Service "State of the Public Service" report. But these senior executives also expressed significant dissatisfaction with their salaries and their organization's access to enough training and employees to do their jobs well.

Pay compression at the top of the federal government is an increasingly significant source of dissatisfaction among senior employees. Eighty percent of senior executives now receive the same salary, meaning that the paychecks of supervisors and subordinates are often indistinguishable. Pay gaps are also increasing. Using data from the Hay Group, the Congressional Budget Office reported significant gaps in 1999 between the salaries and benefits of senior executives and private employees at large, medium, and small private firms, and rough parity with most officers at large nonprofits. Senior federal executives, career and political, made roughly one-tenth as much as chief financial officers at America's largest private firms in 1999, one-sixteenth as much as chief operating officers, and one-thirty-fifth as much as chief executive officers.

Equally trouble, the Senior Executive Service has not become the highly mobile, generalist workforce that its designers hoped to create. According to a 1992 survey, less than a quarter of SES members said they had served in an agency other than the one in which they were originally hired.

At the Presidential Appointee Level

Past appointees report a growing host of problems in the appointment process. Analyses of experiences in the Reagan, Bush (George H.W.), and Clinton administrations suggest that (1) delays in staffing new administrations are increasing, (2) confusion and embarrassment are rising, (3) all stages of the process are taking longer than necessary, (4) both branches are contributing to the problem, and (5) the process is increasingly favoring candidates with prior government experience who already live in Washington.

According to ongoing research by the Brookings Institution's Presidential Appointee Initiative, delays continue to rise at both ends of Pennsylvania Avenue. As of October 31, 2001, almost two months after the attacks on New York City and Washington, more than one out of five senior positions involved in the war on terrorism and homeland security were still vacant.

Indeed, as of December 31, 2002, and despite nearly heroic efforts at both ends of Pennsylvania Avenue, the Bush Administration had become the slowest in modern history to fill its top jobs. The average number of days from inauguration to confirmation for President Bush's first-year appointees was 181. This represents a dramatic increase from President Reagan's inaugural year average of 142 days and a slight increase over President Clinton's average of 174

days. Although the process itself demands significant streamlining, the number of appointees virtually assures that this record will be broken in the next administration. There is simply no justification for the number of appointees in the federal government, especially at a time when we all want greater accountability between the top and bottom of our agencies.

These problems have an impact on the willingness to serve. Although the desire to serve remains strong among America's civic leaders, fears of the process are a significant predictor of a declining unwillingness to actually take a position if offered. Most of 580 *Fortune 500* executives, university and college presidents, nonprofit executives, state and local government officials, think tank scholars, and top lobbyists interviewed for the Presidential Appointee Initiative viewed the current process as unfair, confusing, and embarrassing, and were more likely than those who had actually served as appointees in the past to see the process as an ordeal at both ends of Pennsylvania Avenue.

Pay compression has eroded interest in government service among potential presidential and judicial appointees, and has weakened retention. Federal district court judges barely make as much as junior associates at America's largest law firms, while the nation's corporate chief executives make 93 times as much on average as members of Congress, and presidential appointees trail in virtually every comparison. In addition, the federal government does not compete well against the private or nonprofit sectors in providing relocation benefits for presidential appointees who want to move to Washington.

THE STATE OF THE DEFENSE WORKFORCE

These problems are clearly visible in the Defense workforce, which remains one of the most highly motivated workforces in government. However, Defense employees themselves report significant problems in the human resource management of the department. If given a vote on reform, I have no doubt there would be a landslide in favor of action at all levels of the hierarchy.

Defense employees clearly feel an intense sense of mission today. When asked in the Center for Public Service's government-wide survey in the spring of 2002 whether the events of September 11 had created a greater sense of purpose, 63 percent of Defense employees said yes, compared to just 35 percent of non-Defense employees. Defense employees were also significantly more likely to describe their jobs as more difficult, more stressful, more challenging, yet more rewarding in the wake of September 11 than their non-Defense peers.

At the same time, Defense employees reported that the civil service system was not serving their department well. Consider the following findings from our Center for Public Service surveys of Defense employees in 2001, before the terrorist attacks, and in the spring of 2002:

- When asked to choose the words that best described the hiring process, 55 percent of DoD employees said confusing, not simple, another 75 percent said slow, not fast, and 18 percent actually said unfair, not fair.

- When asked how good a job their organization did in attracting top candidates *at their level in the organization*, 31 percent of DoD employees said not too good or not good at all, 47 percent said somewhat good, and only 19 percent said very good.

- When asked how good a job their organization did in retaining talented employees *at their level in the organization*, 35 percent said not too good or not good at all, 42 percent said somewhat good, and only 23 percent said very good.

- And when asked how good a job their organization did in disciplining poor performers *at their level in the organization*, 33 percent said not good at all, 35 percent said not good at all, 17 percent said somewhat good, and only 11 percent said very good.

I emphasized the phrase "at their level in the organization" because respondents were asked to describe what life is like at the bottom, middle, and top. The numbers could not be much worse, particularly when compared to the answers of private and nonprofit employees also interviewed by the Center for Public Service over the past two years. For whatever reason, the federal government in general, and DoD in specific, appears to believe that there is some advantage in confusing potential employees, making them wait for job offers, and providing few consequences for poor performance.

Let me hasten to add that I do not believe that DoD employees are performing poorly. Indeed, when asked to estimate the percentage of people they work with who were not performing their jobs well, DoD employees put the number at 22 percent on average, which compares well with the estimates from private and nonprofit employees But when asked what explains the poor performance they saw, 33 percent of DoD employees said their organization does not ask enough of the poor performers, 29 percent said the poor performers were not qualified for their jobs, and 21 percent said the poor performers did not have the training to do the job well.

Once again, I remind the Committee that these numbers are self-ratings of co-workers at each respondent's level of the organization. These are not managers talking about front-line employees, or senior executives talking about middle-level employees. These are the conclusions of co-workers rating co-workers.

These are not the only problems facing the Defense Department, unfortunately. Defense employees were also clearly dissatisfied with the pace of past reforms in making their jobs easier. Asked whether their organization had been reinvented over the past few years, 70 percent of DoD employees answered yes. But when asked whether the reinventing had made their jobs easier to do, only 9 percent answered "a lot easier," 35 percent said "somewhat easier," 30 percent said "somewhat more difficult," and 18 percent said "much more difficult." Asked about the layers of management between themselves and top management, 44 percent of DoD

employees said there were too many in 2002, just 2 percent said too few, and the rest, 54 percent said the right number. It should be obvious which employees were the most likely to say there were too many layers: the ones at or near the bottom.

Some of these numbers changed in the wake of September 11. The number of DoD employees who said there were too many layers actually went up between 2001 and 2002, largely, I think, because the layers were more obviously an impediment to doing their jobs. So did the number of DoD employees who complained that their organization did not provide enough access to the training needed to do its job well. In 2001, 34 percent of DoD employees said their organization always had access to the training; by 2002, the number had fallen to 26 percent. I suspect that access to training actually held steady during the period, but the perceived need for training increased with the job difficulty, stress, and challenge highlighted above. It is one thing to lack access to training during peacetime, even the kind of "boiling peace" of the late 1990s, and quite another to lack training during a new war on terrorism.

Let me add that the most serious shortage at DoD does not appear to be training. Rather, it is staffing. Asked about the issue in the spring of 2002, 45 percent of DoD employees said their organizations only sometimes or rarely had enough employees to do its job well, a stunning assessment. At least among civilian employees, the post-Cold War downsizing has gone much too far, making jobs tougher, and high-performance more uncertain.

None of these frustrations appear to have affected job satisfaction, however: 92 percent of DoD employees said they were very or somewhat satisfied with their salary in 2002; 98 percent were very or somewhat satisfied with their job security; 96 percent were very or somewhat satisfied with their benefits; and, not surprisingly, 92 percent were very or somewhat satisfied with their jobs overall.

Where the frustrations do appear to have an impact is on morale. The number of DoD employees who said morale was either somewhat low or very low was essentially unchanged between 2001 and 2002, rising from 37 percent to 38 percent. At the same time, the number who were satisfied with their opportunity to accomplish something worthwhile actually fell from 49 percent very satisfied to 40 percent. Again, this appears to be the result of increased demand in the post-September 11 period, coupled with the lack of adequate staffing.

One last finding deserves note as the Committee moves ahead, for its goes to the heart of whether DoD can be trusted with the authorities envisioned in the proposed reform. Simply put, DoD employees have much greater confidence in their department to do the right thing than non-Defense employees. Consider the following indicators from the 2002 survey:

- 74 percent of DoD employees said their organization could be trusted to do the right thing just about always or most of the time, compared to 68 percent of non-Defense employees.

- 56 percent of DoD employees said they felt very proud to tell friends and neighbors where they work, compared to 46 percent of non-Defense employees.

- 44 percent of DoD employees said their organization did a very good job running its programs, compared to 33 percent of non-Defense employees.

This does not mean, however, that these employees would feel comfortable giving the department a complete blank check on workforce decisions. Nor is that what the Defense proposal envisions. Employees would still have protections from prohibited personnel practices. What it does suggest is that DoD employees have at least some confidence that the department can be trusted to try, assuming, of course, that Congress plays its proper oversight role.

CONCLUSION

I believe that now is the time for the kind of comprehensive reform envisioned in the Chairman's proposal. There are risks in doing so, of course. But the risks of not acting now are far more consequential. We have now had twenty-five years to tinker, tweak, refine, adjust, and retarget the reforms embedded in the 1978 Civil Service Reform Act. At one point, many of us believed that enough authorities already existed to solve the problems I have highlighted above—indeed, one of those people is now serving as the Administrator of the National Aeronautics and Space Administration, who has asked for statutory help.

But at least some of us now believe that the 1978 act and Title 5 of the U.S. Code cannot work without comprehensive reform. Government is no longer in a buyer's labor market, nor is it the preferred destination it once was. If ever there was a time when it made sense to wait months to fill vacancies, if ever there was a time when it made sense to reward longevity over performance, and if ever there was a time to permit needless layers of management, that time is now passed. I urge this Committee to grant these agencies the freedom to succeed. The empirical case for action could not be clearer.

Chairman TOM DAVIS. Mr. Harnage, thanks for being with us.

Mr. HARNAGE. Thank you, Mr. Chairman and members of the committee, for the opportunity to testify today on DOD's sweeping legislative request. This bill rips out the heart of the Civil Service and virtually guarantees a Department of Defense that will be corrupted by politics and cronyism.

There is one phrase in DOD's legislation that appears over and over again. That phrase is "the Secretary determines in the Secretary's sole and unreviewable discretion." That's it. Each Secretary of Defense will have sole and unreviewable discretion to do whatever he wants, whether it is hiring and firing the civilian work force, listening to Congress, or recognizing the elected representatives of the employees.

AFG represents over 200,000 civilian DOD employees who have worked around the clock in a huge number of support and maintenance jobs to ready our uniform troops, their equipment, and their weapons, for combat in the Iraq war. They have barely come up for air, and they found out that the Pentagon has now declared war on them. We secured our military installations after September 11th, prepared to do battle with anyone that threatened our security and freedom, and we have gone to war with Iraq. The President just thanked all of our troops, military and civilians alike, for a very successful operation. What did not work? What is it that posed a problem that now suggests that we must throw all of these laws of employees's protection and merits out? What is so broken that requires you to abrogate your responsibilities? Have you been given one example; and if so, what did it have to do with national security?

When you consider this legislation, I urge you to please make note that it does not ask Congress to vote on a new personnel system for the Department. It does not ask Congress to vote on a new pay system, new RIF rules, new overtime rules, new hazard pay standards, whether unions can operate, or whether anyone can go to the MSPB. It asks you to hand over your authority for protecting and approving laws and regulations in all those areas and more to each and every Secretary of Defense.

The rhetoric is that this is some kind of modernization, but there is nothing modern about cronyism or patronage systems in government. When they ask for the authority to waiver the heart and soul of Title 5, what they are doing is waiving all the progress made in the 20th century. Whatever their intentions, they will be moving the Civil Service backward about 100 years; not forward, but back to the 19th century when to the victor went the spoils, and there were no rules to prevent government corruption.

DOD is not asking for authority so they won't have to contract out and privatize everything. Their privatization agenda and their agenda to dismantle the Federal service are two sides of the same coin. It is all about cronyism and moving money to political favorites, in some cases possibly their own pockets.

It is also not true that the pay system we have now has no link between pay and performance. High performers get their due, but at same time there are protections that keep the system honest so that corrupt officials cannot hide behind rhetoric about performance to get away with discrimination and political favoritism.

DOD's proposal allows every Secretary of Defense, without congressional input to impose a new flavor of the week pay and personnel system of his own design, and employees will have nothing whatsoever to say about it, and neither will you.

DOD's own survey of its workers, both in and out of pay-for-performance demonstrations, tells the story. They say they know what the employees want. If they do, they are ignoring it. They ask workers whether they thought their performance rating was an accurate picture of their actual performance. The news is that confidence in the accuracy of these evaluations has gone down fast for both whites and minorities who are in the demos, while at the same time it has gone up for those in the GS system. Less than one-half of the minorities thought their evaluation in the demo was fair, and less than 60 percent of the whites thought so. In the GS pay system, the confidence went up in both categories.

In a survey by OPM, more than 50 percent of the employees did not trust their supervisors, yet DOD says it is ready to impose its flawed system on everyone. Remember also that the new plan that this administration wants to impose has only been tried on about 4 percent of the DOD work force, and that 4 percent mostly is in scientific labs, hardly a cross-section of the DOD civilian work force.

Everyone, even the Secretary of Defense, needs to be held accountable and have his power in balance. No Secretary should be above the law. They shouldn't be allowed to decide which laws and which regulations they'd rather do without. I urge you in the strongest possible terms to think twice before you vote to hand over this power.

Government agencies operate under laws and regulations set by Congress to specifically make sure that taxpayers and government employees are guaranteed freedom from coercion and corruption. DOD's proposal takes away that freedom. Most of these issues are negotiable in the private sector, but in the Federal sector we have laws passed by Congress, so most of these issues are not negotiable. Take away the laws, abrogate your responsibilities, and leave these issues still not negotiable, and you put Federal employees in a category that no other employee in the Nation has experienced. You will truly create a two-class system where Federal employees, the ones just bragged about, are second-class citizens, less rights, less protections, less merit, less due process, second-class in every way. Please slow down and do this right.

This concludes my testimony.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Mr. Harnage follows:]

AFGE Congressional Testimony

STATEMENT BY

BOBBY L. HARNAGE, SR.
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE
HOUSE GOVERNMENT REFORM COMMITTEE

REGARDING

DOD'S PROPOSALS FOR ITS CIVILIAN WORKFORCE

ON

May 6, 2003

American Federation of Government Employees, AFL-CIO
80 F Street, NW, Washington, D.C. 20001 ★ (202) 737-8700 ★ www.afge.org

Mr. Chairman and Members of the Committee: My name is Bobby L. Harnage, Sr. and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 federal employees our union represents, including 200,000 civilian employees of the Department of Defense (DoD), I thank you for the opportunity to testify today on the legislative proposals submitted by DoD.

AFGE strongly opposes this legislation on the grounds that it erases decades of social progress in employment standards, punishes a workforce that has just made a crucial and extraordinary contribution to our victory in Operation Enduring Freedom, and takes away from Congress and affected employees the opportunity they now possess to have a voice in crafting and approving the personnel and other systems of the Department of Defense. Today, no one owns the Department of Defense – it is a public institution, supported by U.S. taxpayers and administered by a Secretary of Defense appointed by an elected President, and overseen and regulated by the U.S. Congress. If this legislation is enacted, each individual Secretary of Defense, in cooperation with each President, will effectively own the Department of Defense as if it were a private concern. The Congress will have relinquished its oversight and legislative role with regard to approximately 654,000 government personnel.

DoD's "shock and awe" strategy, designed to stun and confuse its opponents, has been wrongly applied to the legislative arena in this proposal. The yet-to-be introduced legislation, and the public pronouncements relative to its rationale from high-ranking Pentagon officials upon its unveiling, have made me wonder whether its authors were under the impression that Saddam had won, rather than the Coalition troops. I could not understand why the Defense Department was poor mouthing its own effectiveness at the same time that it had just won a resounding victory in Iraq. I still cannot.

Can today's Pentagon officials honestly believe that the Defense Department is mired in failure, and that granting sweeping new authorities to every Secretary of Defense is what is necessary for it to succeed? The civilian employees of DoD represented by AFGE have been working around the clock for months supporting and maintaining both troops and weapons, loading materials and combat forces onto ships, aircraft, and tanks; or in many cases serving on active duty. They are justly proud of their contribution, and are devastated to learn that Pentagon leaders intend to reward this effort with Operation Erode the Civil Service, to be followed by Operation Fait Accompli.

We are at a loss to identify a serious or true rationale for this legislation. Over the past 12 years, DoD has achieved BRAC, services realignment, the creation of several agencies, including:

- Defense Logistics Agency (DLA),
- Defense Finance and Administration Service (DFAS)
- Defense Commissary Agency (DeCA)

- Defense Printing Agency (DPA)
- Defense Contract Audit Agency (DCAA)
- Defense Contract Management Agency (DCMA)
- National Imagery and Mapping Agency (NIMA)
- Defense Information Systems Agency (DISA)

and the elimination and consolidation of several agencies, widespread privatization, and downsizing of more than 200,000 federal positions. DoD has been granted tremendous flexibility, and it has exercised its authorities to the maximum extent. They have engaged in numerous successful combat missions, including two wars in the Gulf and in Europe. They have done a tremendous job advancing and protecting our nation's security interests. What did they need to do to protect our nation's security that the laws and regulation they seek the authority to waive prevent? What is the problem they are trying to solve?

I am not here to tell you that everything is fine at DoD from the perspective of DoD's rank and file civilian workforce. They have been asked to do more with less throughout the past decades deficit reduction and simultaneous and repeated reorganizations, transformations and policy shifts. Thousands live under the constant threat that DoD will contract out their jobs without giving them an opportunity to compete in a fair public-private competition. Because the downsizing of the 1990's was undertaken without regard to mission or workload, DoD's acquisition workforce was cut in half at the same time that the number and dollar value of service contracts exploded, making the job of oversight and administration of contracts ever more difficult. The promise that federal salaries would rise gradually in order to become more comparable to private sector rates, as provided by the Federal Employees Pay Comparability Act of 1990 (FEPCA) has not been realized, and DoD's blue collar employees have likewise been denied the prevailing wage rates that their pay system promises to them.

But nothing in the proposal would begin to solve any of those problems; instead, it would take away from Congress not only the opportunity, but also the responsibility for addressing them, and likely result in making each of those problems worse. I believe that there are solutions to these problems on which AFGE and Pentagon leaders could agree. There is nothing to explain why our union's repeated overtures to the Administration have been spurned. I stand ready to work together with Pentagon leaders and Members of Congress on constructive solutions to any problems the current personnel system poses with regard to this nation's security. Unfortunately, the proposal being considered today was composed entirely without input or consultation with DoD's largest employee organization.

Description of DoD's Legislative Proposal

What does the proposal do to civilian defense employees? The Act would amend current subpart I of part III of title 5, by adding chapter 99 establishing a new Department of Defense National Security Personnel System. With some notable

exceptions, these provisions are consistent with the analogous provisions in the previously enacted Homeland Security Act.

Secretaries of Defense would be given authority to establish, by regulations prescribed jointly with the Office of Personnel Management (OPM), human resources management systems for some or all of the organizational units of DoD. In addition, they would be authorized to waive the requirement that regulatory changes be issued jointly, "subject to the direction of the President." It is not clear what "subject to the direction of" means, i.e., whether it implies that the authority may be exercised "subject to the approval of" or whether the Secretaries may undertake such unilateral action only when told to do so by the President.

The proposal specifies that any regulations established thereby are considered "internal rules of departmental procedure" consistent with 5 U.S.C. §553. That section comprises the Administrative Procedure Act ("APA") "notice and comment" requirements and expressly excludes from its scope "matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," or to "interpretive rules, general statements of policy or rules of agency organization, procedures or practice." Consequently, any rules promulgated pursuant to the proposed 5 U.S.C. §9902(a) are likely to be deemed excluded from the notice and comment requirements of §553 regardless of the explicit exclusion noted here.

The legislation gives to Secretaries of Defense powers that go far beyond the unprecedented authorities given to the Secretaries of the Department of Homeland Security. The following chapters are nonwaivable for DHS employees but would be waivable for DoD employees under the proposed legislation:

Ch. 41: Training
Ch. 55: Pay Administration (Including backpay, severance pay)
Ch. 59: Allowances (Uniform, Housing, Post differentials)

In addition, almost all of the following chapters of title 5 would be waivable:

Ch. 31: Authority for Employment
Ch. 33: Examination, Selection, and Placement, and
Ch. 35: Retention Preference, Restoration, and Reemployment

The proposal, like Homeland Security, authorizes Defense Secretaries to waive the following critical chapters:

Ch. 43: Performance appraisal system
Ch. 51: Position Classification
Ch. 53: Pay rates and systems (GS/WG/grade and pay retention)
Ch. 71: Collective Bargaining rights
Ch. 75: Due process
Ch. 77: Appeal rights/judicial review

With regard to collective bargaining, the DoD proposal is highly misleading and disingenuous. Although it ostensibly ensures the right of employees to organize and bargain collectively, while concomitantly making the exercise of that right explicitly subject to any limitations provided in the proposal as well as those exclusions from coverage and limitation on negotiability established pursuant to law. The restrictions contemplated by the proposal are substantial. For example, instead of bargaining, the proposal primarily talks in terms of "collaboration." Moreover, it stipulates that the Secretary may disregard levels of recognition and undertake, at his discretion, to engage in collaborative activities at any organizational level above the level of recognition. To the extent that the proposal does address "bargaining," it provides that the Secretary may undertake "at his sole and exclusive discretion" to bargain without regard to the level of exclusive recognition. Any agreement negotiated pursuant to this authority supersedes all other agreements "except as otherwise determined by the Secretary" and is not subject to further negotiation except as provided by the Secretary.

The remaining content of the proposal is directed at hiring contract personnel, with the exception of hiring "older Americans" which is plainly intended to permit reemployment of retired military without any diminution to pension currently imposed on so-called "double dippers."

It is worth elaborating what all this would mean in very practical terms. Allowing each new Secretary of Defense to waive chapters 53 and 51 of Title 5 means that each new Secretary of Defense would be free to create a wholly new pay and position classification system for the Department. It would mean that any Secretary of Defense could eliminate the General Schedule (GS) and the Federal Wage System (FWS) or their successors (whatever they might be) and replace them with new systems of his own design. Annual salary adjustments, nationwide and locality, passed by the Congress to help federal salaries keep pace with private sector wage increases would be gone. Periodic step increases for eligible workers who are performing satisfactorily would be gone. The current Secretary of Defense is said to prefer a pay banding system that allows supervisors to decide whether and by how much an individual employee's pay might be adjusted. Supervisors, not Congress, would decide whether DoD employees get a raise and what the size of that raise would be. No one knows how future Secretaries of Defense might exercise this power.

Chapter 51 describes the current classification system and requires that different pay levels for different jobs be based on the principle of "equal pay for substantially equal work." New systems designed by successive Secretaries of Defense would not have to adhere to that standard. Jobs which are graded similarly today on the basis of that principle might therefore be treated completely differently when various and successive new systems are put into place by each new Secretary of Defense. Granting these authorities to each new Secretary of

Defense with regard to classification raises serious concern, as the current standards go a long way toward preventing federal pay discrimination on the basis of race, gender, or ethnicity.

Allowing waiver of chapter 43 gives over to each Secretary of Defense the power to unilaterally decide a system for taking action against poor performers. In order to make sure that federal employees are not the targets of unwarranted or arbitrary discipline, current law provides employees with an opportunity to undertake a "performance improvement period" before they are disciplined for poor performance. In any new systems created by different administrations, current safeguards and the opportunity to improve or appeal may be eliminated.

Waiving chapters 75 and 77 will put in jeopardy DoD employees' due process and appellate rights. While non-union private sector workers have no legal right to appeal suspensions, demotions, or dismissals from their jobs, federal workers have these legal rights for very important reasons. In addition to being the right thing to do, because their employer is the U.S. government, the guarantor and enforcer of American citizens' due process rights, the bar is higher than for private firms whose obligations are different. Thus chapter 75 sets up a system for management to suspend, demote, or dismiss employees, but provides employees with the ability to appeal these actions to the Merit Systems Protection Board (MSPB) if there is evidence that the actions were motivated by factors other than performance, including racial or other prejudice, political views, or union status. Under this chapter, DoD employees are eligible for advance written notice of the disciplinary action, a reasonable time to respond, representation by an attorney, and a written decision by DoD listing the specific reasons for the disciplinary action. Any Secretary of Defense could eliminate these protections under the proposal.

Chapter 77 establishes the procedures for appealing to not only the MSPB, but also describes procedures for appealing decisions that are alleged to involve discrimination either to the MSPB or the Equal Employment Opportunity Commission (EEOC), and for accountability, establishes judicial review of MSPB decisions. Giving each Secretary of Defense the power to do away with the rights and procedures described in chapters 75 and 77 means that DoD workers could lose and regain these rights according to the political preferences of any Administration. One Secretary of Defense may decide that employees of DoD should have little or no right to information about why they are being disciplined, and little or no right to appeal decisions against them. Another Secretary of Defense may reinstate procedures for the period of his tenure, but they may disappear again after the next election.

Current law, as set forth in chapter 71 of title 5, allows DoD employees to organize into labor unions and pursue union representation through the process of collective bargaining with management over some conditions of employment. Giving each Secretary of Defense the authority to waive some or all of chapter 71

eliminates a very important part of the checks and balances that hold managers and political appointees accountable. Waiving chapter 71 would allow any Secretary of Defense to create new personnel systems without any formal give-and-take with the affected employees' elected representatives.

In addition, the proposal would allow any Secretary of Defense to direct the department to bypass local unions' bargaining rights. It eliminates the process by which disputes between employee representatives and management are resolved. Today, labor-management impasses are sent to the Federal Services Impasses Panel (FSIP), a seven-member board appointed by the President, which acts as a binding arbitrator on all disputes. The legislation would prohibit any bargaining or negotiability impasses, no matter how routine or unrelated to national security, from going to the FSIP, the Federal Labor Relations Authority, or any third party outside DoD. This is unprecedented and any Secretary of Defense who decides to exercise this authority would render the entire collective bargaining process a sham.

One of the most shocking authorities DoD is seeking for its Defense Secretaries is in the power to waive chapters 31 and 33 of title 5. This effectively grants the authority to hire relatives, while simultaneously eliminating requirements for merit-based testing for positions in the competitive service. Supervisors would be able to hire and promote their cronies, their relatives, and their political favorites if any Secretary of Defense decides to exercise this authority. Can it possibly be the case that Pentagon officials believe that prohibitions on hiring brothers-in-law and members of only certain political parties has prevented DoD from achieving its mission?

The DoD proposal would eliminate the requirement that reductions-in-force (RIF) be conducted according to procedures set out in chapter 35. These procedures assure that RIFs are conducted on the basis of employment status and length of service as well as efficiency or performance ratings. On what basis would supervisors select individuals for RIFS without the constraints described in chapter 35's procedures? No one knows and no one will know since each Secretary of Defense would have the authority to write and rewrite RIF rules if the proposal were enacted. Indeed, every time DoD conducted a RIF, the rules could change. The proposal would allow supervisors to decide who will be the victim of a RIF on the basis of favoritism rather than performance merit, seniority, and employment status.

Again it must be asked – beyond rhetorical homilies about flexibility--why is this authority being sought? DoD downsized by several hundred thousand civilians at the end of the Cold War without apparent loss of mission effectiveness or capacity, and the burden is on DoD to explain the need for this authority outside Congressional review.

Another shocking and dangerous waiver authority is sought in the legislation with regard to chapter 55, which covers pay Administration. This chapter addresses numerous issues ranging from overtime and compensatory time calculations, firefighter pay, Sunday and holiday pay, dual status pay for National Guard and Reserve technicians, jury duty pay, severance pay, and back pay due to personnel actions found to have been unjustified. Likewise, the proposal seeks to give Defense Secretaries the authority to waive chapter 59 which covers everything from uniform allowances to danger pay to duty at remote worksites. By waiving these two chapters, each new Secretary of Defense would have the power to turn back the clock on the last several decades of progressive legislation on matters crucial to the economic security of federal employees and their families.

What the Current Administration Might Do With the New Authorities

DoD reveals in the Section by Section Analysis attached to the proposal a preview of what *this* Defense Secretary might decide to do with his sweeping new powers. However, again it must be noted that the authorities granted to Secretaries of Defense could easily mean a thorough upheaval in personnel practices each time a new individual takes over at the Pentagon, all without the input or approval of either Congress or the affected employees. That is, if the current Secretary were to resign or be replaced as a result of a new election, everything he created under this proposal could be repealed and a whole new personnel system put in place. Nevertheless, neither this Secretary of Defense nor any subsequent one would need to gain Congressional approval for changing DoD's personnel system if the proposal is enacted.

Indeed, the proposal merely instructs current and future Secretaries of Defense to create personnel systems that are "flexible" and "contemporary." There is a curious paradox in the Section by Section analysis and the promotional remarks that have been made by high-ranking DoD officials who have tried to create a rationale for this legislation. In the Section by Section analysis, the current situation at DoD is described as a "fragmented" system governed by "multiple titles of the United States Code," and "nine demonstration projects covering 30,000 employees, 50 different pay systems, and several alternative personnel systems." When officials are explaining the need for vast and unchecked new authorities, however, they describe the current system as "rigid," "antiquated," and preventive of success. But how could a rigid system spawn so much fragmentation? How could a rigid system allow nine demonstration projects and 50 pay systems? How could a rigid system result in so many alternative personnel systems?

And, it is important to remember that all of this "fragmentation" has been accomplished at the request of DoD. What innovation or alternative or fragmentation does DoD hope to create that they cannot, and more important what problem do they hope to solve that they have not solved with these varied

and flexible alternatives? Pentagon officials must be asked to answer these questions substantively, with something more than bromides about flexibility.

A particularly chilling sentence in the Sectional analysis reads: "Consistent with the Secretary's broad authority to manage military personnel, the Secretary also would exercise broad authority to manage DoD civilian personnel, subject to the direction of the President, provided he certifies that such authority would be essential to the national security." It is difficult to interpret that sentence in a way that would quiet concerns that there might no longer be any distinction between the terms of civilian employment in DoD, and the terms of service for uniformed personnel.

The military "employment" system is in fact a relevant point to consider in the context of the authorities requested in this legislation. AFGE does not dispute the need for a personnel system to manage uniformed service members that grants enormous authority up the chain of command. The nation's defense necessitates a military personnel system that is capable of responding to the demands of an ever-changing national security and battlefield environment. However, to allow each Secretary of Defense the same broad authority to manage the civilian workforce as he has in managing military personnel would be a mistake.

Military personnel management, and the need for a broad authority to manage the uniformed services, is the result of a unique set of demographic, sociological, mission, operational, environmental and cultural imperatives. These unique factors in turn necessitate a unique personnel management system.

The military personnel system is driven by the needs of the battlefield. Recruitment, promotion, career development and assignment, training, disciplinary matters, skills, and retention policies and priorities reflect the needs and unique challenges associated with managing uniformed personnel whose sole purpose is to serve a battlefield mission. Consequently, the force resulting from this personnel system is different from that in the civilian workforce. The military force is younger than the general population. It is intentionally more transient than the general workforce. It operates under a unique legal code (the Uniform Code of Military Justice), and by design, the individuals working in this environment perform a greater number of jobs employing a greater variety of job skills than their civilian federal counterparts. Because of the unique hardships and dangers associated with a military career, the military personnel management system attempts to provide its own singular incentives in order to maintain morale and assist in retention.

The civilian defense workforce exists to support those who serve in direct military capacity for the nation's defense. Unlike their uniformed teammates, the civilian DoD workforce is shaped and governed by a complex, yet effective, infrastructure of federal statutes, laws, policies and regulations. The purpose of

this infrastructure is to ensure that a stable and qualified workforce is recruited, compensated and retained to support the service department's and separate defense agencies' missions. Under the infrastructure which governs the federal defense workforce there is no premium placed on "career broadening assignments or transfers." The federal workforce is stationary, in place, reliable and ready at a moment's notice to serve and perform such missions as they may be assigned. While the military system through its assignment and promotions policies such as "up or out" accepts transition and personnel turbulence as the routine cost of doing business. The civilian personnel management system on the other hand places a greater premium on personnel stability, continuity, developing and maintaining organizational knowledge and experience. In like manner, the military system through its training policies and career broadening tours, reflects the battlefield's need for redundancy and multi-skilled performance in a chaotic and confusing environment. The civilian system emphasizes the management of workers performing a single, unique mission essential skill in a stable work environment working in support and in tandem with their military counterparts.

In making the comparison between the two personnel systems I am not saying one system is superior to the other. What I am saying is quite the opposite. While these two management systems are dynamically different and result from dramatically different needs. They – under the current arrangement - are complementary and create a healthy symbiosis. Work has continued whether there was a war, Watergate, impeachment, or Congressional stalemate. There can be no military tyrants with our current system. The two different personnel management systems have created an armed force and workforce that has always been there to serve our nation well – and if allowed, will continue to be there for us in the future.

Individual Pay for Performance: A Perpetual War of All Against All

AFGE has testified recently on the question of whether individualized pay for performance is a wise choice for the federal pay system governing the entire Executive Branch. The critique and caution we offered in that context is equally relevant to the Department of Defense. Although the proposal specifically does not ask Congress to approve a new pay system or a new personnel system, but instead asks Congress to relinquish this authority to successive Secretaries of Defense, this Secretary has let it be known that something along the lines of the Navy's China Lake Demonstration Project Pay for Performance Plan might be used as a model for the pay system the current Administration intends to impose.

The question of whether the China Lake Plan is a worthy successor to the General Schedule for DoD or any other agency is one useful way to consider how the authorities in the legislation might be used or abused. It is always more productive to compare systems that are real, rather than compare fantasized perfect models of pay for performance with the easily-maligned real systems.

Thus, I will discuss briefly the General Schedule, since it too deserves an accurate description so that proposed alternatives are not considered or evaluated against an easily dismissed or derided "straw dog."

The version of the General Schedule I will discuss is the one that was established as a result of the enactment of the bipartisan Federal Employees Pay Comparability Act (FEPCA) in 1990. Despite the insistence of some who claim that it is an aged and inflexible historical relic, the fact is that the General Schedule has been modified numerous times, in some cases quite fundamentally. FEPCA's distinguishing feature, the locality pay system, has not even had a full decade of experience, since its implementation began only in 1994 after passage in 1992 of technical and conforming amendments to FEPCA that established both locality pay and Employment Cost Index (ECI)-based annual pay adjustments.

Flexibility in Times of Peace

FEPCA introduced a panoply of pay flexibilities into the allegedly rigid General Schedule of which DoD has made ample use:

- special pay rates for certain occupations
- critical pay authority
- recruitment and retention flexibilities that allow hiring above the minimum step of any grade
- paying recruitment or relocation bonuses
- paying retention bonuses of up to 25% of basic pay
- paying travel and transportation expenses for new job candidates and new hires
- allowing new hires up to two weeks advance pay as a recruitment incentive
- allowing time off incentive awards
- paying cash awards for performance
- paying supervisory differentials to GS supervisors whose salaries were less than certain subordinates covered by non-GS pay systems
- waiver of dual compensation restrictions
- changes to Law Enforcement pay
- special occupational pay systems
- pay flexibilities available to Title 5 health care positions, and more.

In addition, FEPCA retained agencies' authority for quality step increases, which allow managers to reward extraordinary performance with increases in base salary that continue to pay dividends throughout a career.

The basic structure of the General Schedule is a 15-grade matrix with ten steps per grade. Movement within a grade or between grades depends upon the satisfactory performance of job duties and assignments over time. That is, an employee becomes eligible for what is known as a "step" increase each year for

the first three years, and then every two or three years thereafter up to the tenth step. *Whether or not an employee is granted a step increase depends upon performance (specifically, they must be found to have achieved "an acceptable level of competence").* If performance is found to be especially good, managers have the authority to award "quality step increases" as an additional incentive. If performance is found to be below expectations, the step increase can be withheld, and proper steps can be taken either to discipline the employee, demote the employee, and give him an opportunity to improve.

The federal position classification system, which is separate and apart from the General Schedule and would have to either continue or be altered separately and in addition to any alteration in the General Schedule, determines the starting salary and salary potential of any federal job. As such, a job classification determines not only initial placement of an individual and his or her job within the General Schedule matrix, classification determines the standards against which individual worker's performance will be measured when opportunities for movement between steps or grades arise. **And most important, the classification system is based upon the concept of "equal pay for substantially equal work", which has done much to prevent federal pay discrimination on the basis of race, ethnicity, or gender.**

The introduction of numerous pay flexibilities into the General Schedule under FEPCA was only one part of the pay reform the legislation was supposed to effect. It was recognized by President George Bush, our 41st President, the Congress, and federal employee unions that federal salaries in general lagged behind those in the private sector by substantial amounts, although these amounts varied by metropolitan area. FEPCA instructed the BLS to collect data so that the size of the federal-non-federal pay gap could be measured, and closed gradually to within 90% of comparability over 10 years. To close the pay gap, federal salary adjustments would have two components: a nationwide, across-the-board adjustment based upon the Employment Cost Index (ECI) that would prevent the overall gap from growing, and a locality-by-locality component that would address the various gaps that prevailed in specific labor markets.

Unfortunately, neither the Clinton nor the George W. Bush administration has been willing to comply with FEPCA, and although some small progress has been made as a result of Congressional action, on average federal salaries continue to lag private sector salaries by about 22%. The Clinton administration cited, variously, budget difficulties and undisclosed "methodological" objections as its reasons for failing to provide the salary adjustments called for under FEPCA. The current administration ignores the system altogether, and for FY04 has proposed allocation of a fund with 0.5% of salaries to be allocated via managerial discretion. Meanwhile, the coming retirement wave, which was fully anticipated in 1990 and is particularly acute in DoD because of the downsizing of more than 200,000 jobs in that decade, has turned into a full-fledged human capital crisis, as the stubborn refusal to implement the locality pay system which was designed

to improve recruitment and retention of the next generation of federal employees continues.

One of the rationales that will be repeated endlessly as DoD officials push for unfettered authorities will be the importance of their being able to act decisively in emergencies involving national security risks or incidents. They may claim, wrongly, that today they lack the authority to abrogate collective bargaining agreements in such cases, or move and direct or terminate personnel easily and expeditiously because of obstacles set forth in title 5. In fact, no such obstacles exist either in law or in collective bargaining agreements.

Flexibility in Times of Emergency

The current federal sector labor law provides that "nothing shall affect the authority of any management official of any agency...to take whatever actions may be necessary to carry out the agency mission during emergencies."(5 U.S.C.§7601(a)(2)(D)). Thus it is already within the sole discretion of the Secretary of Defense in times of heightened alert to take any emergency action, even those that might be expressly and directly inconsistent with existing labor agreements. In our 70 years of experience, as the largest union representing civilian workers in Defense, we do not know of one instance, in times of heightened security, where there has been any labor dispute over the Secretary's emergency authority to reassign, transfer, or deploy any worker to any assignment for any security reason. *In other words, the current labor law gives the Secretary of Defense, in the context of personnel actions, all the flexibility he needs when he determines that he needs it.*

Barely one month ago, OPM Director Kay Coles James sent the heads of all Executive Departments and Agencies a memorandum (dated March 17) describing "Level Orange Emergency Human Resources Management (HRM) Authorities that had been put into use. There were two lists of flexibilities: one set required OPM approval prior to implementation, and the other did not. Among the "Existing Authorities" that agencies were invited to exercise without OPM approval were excepted service appointments of up to 60 days, emergency SES appointments, re-employment of annuitants, and competitive service appointments of up to 120 days without regard to CTAP, ICTAP, or RPL requirements. Further, biweekly caps could be lifted for premium pay up to annual limits.

Employees could be excused from work for needed emergency law enforcement, relief, or recovery efforts; telework arrangements can be approved. Employees could be furloughed without advance notice or any opportunity to respond, and more. With OPM approval, agencies have been authorized to make excepted service temporary appointments, waive dual compensation restrictions for re-employed annuitants, and waive buyout repayment requirements, among other authorities. These authorities are flexibility itself, and AFGE is glad that DoD has

access to them in emergency situations. No group is more concerned or more supportive of measures that truly advance our nation's security than DoD's civilian federal workforce.

China Lake

The Navy's China Lake plan started out as a demonstration project under title 6 of the Civil Service Reform Act. It was initiated in 1980, modified in 1987, expanded in 1990, extended indefinitely in 1994 (made into a "permanent" alternative personnel system), and expanded again in 1995. The employees covered by the China Lake plan are approximately 10,000 scientists, engineers, technicians, technical specialists, and administrative and clerical staff—a workforce that is not typical of any government agency, or even a minority of work units in any one agency.

Although the China Lake plan is often referred to as a model for pay for performance, the rationale given to OPM at its inception, and to Congress in its progress reports, was to improve the competitiveness of salaries for scientists and engineers. Nevertheless, the China Lake model is a performance-based pay system that differs from the General Schedule in terms of its classification of jobs into pay bands that are broader than the grades and steps in the GS matrix. Thus it is often called a broadbanding system.

OPM's evaluation of the China Lake plan was positive. They judged it a success in improving overall personnel management at the two demonstration laboratories studied. OPM cited the "simplified delegated job classification based on generic standards" as a key factor in the demo's success, as the time spent on classification actions was reduced, and the official report was that conflict between the affected workers and management declined. In the 10-year period of evaluation, average salaries rose by 3% after taking into account the effects of inflation. The China Lake plan made an explicit attempt to link pay increases within its "broad bands" to individual performance ratings. Starting salaries were also "flexible" within the bands.

It is important to note that the China Lake demo predated the passage of FEPCA by a decade. Indeed, China Lake's experience was invoked throughout the debate over reforming the federal pay system in the years leading up to FEPCA's passage in 1990, and many of FEPCA's flexibilities were based upon positive experiences accumulating in the China Lake demo.

It is worth describing at length the mechanics of the China Lake pay for performance system, apart from its equally elaborate classification system. I do this in part to show how China Lake's design may be appropriate to some scientists and engineers, but not to all federal employees since many are in occupations and workplaces that place extreme or even total limitations on creativity, individual initiative, or individualized performance. I also include this

description to show that administrative ease is not one of pay for performance's virtues if the pay for performance system attempts to build in safeguards that limit the role of bias, favoritism and prejudice, as has been attempted at China Lake.

Instead of the General Schedule's 15 grades, China Lake has five career paths grouped according to occupational field. The five occupational fields are Scientists/Engineers/Senior Staff, Technicians, Technical Specialists, Administrative Specialists, and General Personnel. Each career path has classification and pay levels under the broadband concept that are directly comparable to groupings of the General Schedule. Within each career path are included many types of jobs under an occupational heading. Each job has its own career ladder that ends at a specific and different point along the path. Each broad band encompasses at least two GS grades. The China Lake plan describes itself as being "anchored" to the General Schedule as a "reality check." For those keeping count, the China Lake broadband has at least as many salary possibilities as the General Schedule, and at most as many as 107,000, since salaries can really be anywhere between the General Schedule's minimum or maximum.

Movement along an individual career path is the key factor to consider, as the overall plan has been suggested as a pay for performance model. As such, it is important to note that although some individuals may have an opportunity to move up to the top of a career path, not all can. Each job has its predesignated "top out" level. The promotion potential for a particular position is established based on the highest level at which that position could be classified, but individuals' promotions will vary. Promotion potential for a given position doesn't grow just because movement is nominally based upon performance. The only way to change career paths is to win a promotion to another career path altogether, i.e. get a new job. One can move along a pay line, but one may not shift to a higher pay line.

The description of the China Lake system involves pages and pages of individualized personnel actions involving the classification and reclassification of workers, and the setting of salary and salary adjustments. It is certainly neither streamlined nor simple, and asks managers on a continuous basis to evaluate each individual worker on numerous bases. In terms of bureaucratic requirements, and a presumption that managers have the training, competence, available time, commitment, and incentive to be as thorough as this system expects them to be for every single employee under them, the China Lake plan seems unrealistic at best. Further, the plan lacks adequate opportunity for employees to appeal their performance appraisals and the attendant pay consequences.

Unlike some of the radical "at will" pay and classification systems advocated by those who believe that any rules or regulations or standards or systems constitute intolerable restrictions on management flexibility, the China Lake plan

retains a requirement to tie salary to job duties and responsibilities, not an individual worker's personal characteristics.

AFGE's Views on the General Schedule vs. "Individualized Pay for Performance"

The rationales offered by proponents of pay for performance in the federal government have generally fallen under one of four headings: improving productivity, improving recruitment prospects, improving retention, and punishing poor performers. Perhaps the most misleading rationale offered by advocates of pay for performance is that its use has been widespread in the private sector. Those who attempt to provide a more substantive argument say they support pay for performance because it provides both positive and negative incentives that will determine the amount of effort federal workers put forward. Advocates of pay for performance wisely demur on the question of whether pay for performance by itself is a strategy that solves the problem of the relative inferiority of federal salaries compared to large public and private sector employers. That is to say, when pay for performance is referred to as complying with the government's longstanding principle of private sector comparability, what they seem to mean is comparability in *system design*, and not comparability in salary levels.

Does a pay system that sets out to reward individual employees for contributions to productivity improvement and punishes individual employees for making either relatively small or negative contributions to productivity improvement work? The data suggest that they do not, although the measurement of productivity for service-producing jobs is notoriously difficult. Measuring productivity of government services that are not commodities bought and sold on the market is even more difficult. Nevertheless, there are data that attempt to gauge the success of pay for performance in producing productivity improvement. Most recently, DoD's own data from its "Best Practices" pay demos has shown that they have not led to improvements in productivity, accomplishment of mission, or cost control.

Although individualized merit pay gained prominence in the private sector over the course of the 1990's, there is good reason to discount the relevance of this experience for the federal government as an employer. Merit based contingent pay for private sector employees over the decade just past was largely in the form of stock options and profit-sharing, according to BLS data. The corporations that adopted these pay practices may have done so in hope of creating a sense among their employees that their own self interest was identical to the corporation's, at least with regard to movements in the firm's stock price and bottom line. However, we have learned more recently, sometimes painfully, that the contingent, merit-based individual pay that spread through the private

sector was also motivated by a desire on the part of the companies to engage in obfuscatory cost accounting practices.

These forms of "pay for performance" that proliferated in the private sector seem now to have been mostly about hiding expenses from the Securities and Exchange Commission (SEC), and exploiting the stock market bubble to lower actual labor costs. When corporations found a way to offer "performance" pay that effectively cost them nothing, it is not surprising that the practice became so popular. However, this popularity should not be used as a reason to impose an individualized "performance" pay system with genuine costs on the federal government.

Jeffrey Pfeffer, a professor in Stanford University's School of Business, has written extensively about the misguided use of individualized pay for performance schemes in the public and private sectors. He cautions against falling prey to "six dangerous myths about pay" that are widely believed by managers and business owners. Professor Pfeffer's research shows that belief in the six myths is what leads managers to impose individualized pay for performance systems that never achieve their desired results, yet "eat up enormous managerial resources and make everyone unhappy."

The six myths identified by Professor Pfeffer are:

(1) labor rates are the same as labor costs;

(2) you can lower your labor costs by lowering your labor rates;

(3) labor costs are a significant factor in total costs;

(4) low labor costs are an important factor in gaining a competitive edge;

(5) individual incentive pay improves performance; and finally,

(6) the belief that people work primarily for money, and other motivating factors are relatively insignificant.

The relevance of these myths in the context of the sudden, urgent desire to impose a pay for performance system on the federal government is telling. Professor Pfeffer's discussion of the first two myths makes one wish that his wisdom would have been considered before the creation of the federal "human capital crisis" through mindless downsizing and mandatory, across-the-board privatization quotas. Pfeffer's distinction argues that cutting salaries or hourly wages is counterproductive since doing so undermines quality, productivity, morale, and often raises the number of workers needed to do the job. Did the federal government save on labor costs when it "downsized" and eliminated 300,000 federal jobs at the same time that the federal workload increased?

Does the federal government save on labor costs when it privatizes federal jobs to contractors that pay front-line service providers less and managers and professionals much, much, much more?

Salaries for the 1.8 million federal employees cost the government about $67 billion per year (a little over a third of this goes to DoD employees), and no one knows what the taxpayer-financed payroll is for the 5 million or so employees working for federal contractors. But as a portion of the total annual expenditures, it is less than 3%, according to Congressional Budget Office (CBO) projections. Regarding the relevance of low labor costs as a competitive strategy, for the federal government it is largely the ability to compete in labor markets to recruit and retain employees with the requisite skills and commitment to carry out the missions of federal agencies and programs. Time and again, federal employees report that competitive salaries, pensions and health benefits; job security, and a chance to make a difference are what draw them to federal jobs. They are not drawn to the chance to become rich in response to financial incentives that require them to compete constantly against their co-workers for a raise or a bonus. DoD employees, in particular, are drawn to the agency's national security mission.

Professor Pfeffer blames the economic theory that is learned in business schools and transmitted to human resources professionals by executives and the media for the persistence of belief in pay myths. These economic theories are based on conceptions that human nature is uni-dimensional and unchanging. In economics, humans are assumed to be rational maximizers of their self-interest, and that means they are driven primarily, if not exclusively by a desire to maximize their incomes. The inference from this theory, according to Pfeffer, is that "people take jobs and decide how much effort to expend in those jobs based on their expected financial return. If pay is not contingent on performance, the theory goes, individuals will not devote sufficient attention and energy to their jobs."

Further elaboration of these economic theories suggest that rational, self-interested individuals have incentives to misrepresent information to their employers, divert resources to their own use, to shirk and "free ride", and to game any system to their advantage *unless* they are effectively thwarted in these strategies by a strict set of sanctions and rewards that give them an incentive to pursue their employer's goals. In addition there is the economic theory of adaptive behavior or self-fulfilling prophesy, which argues that if you treat people as if they are untrustworthy, conniving and lazy, they'll act accordingly.

Pfeffer also cites the compensation consulting industry, which, he argues, has a financial incentive to perpetuate the myths he describes. More important, the consultants' own economic viability depends upon their ability to convince clients and prospective clients that pay reform will improve their organization. Consultants also argue that pursuing pay reform is far easier than changing more

fundamental aspects of an organization's structure, culture, and operations in order to try to improve; further, they note that pay reform will prove a highly visible sign of willingness to embark on "progressive reform." Finally, Pfeffer notes that the consultants ensure work for themselves through the inevitable "predicaments" that any new pay system will cause, including solving problems and "tweaking" the system they design.

In the context of media hype, accounting rules that encourage particular forms of individual economic incentives, the seeming truth of economic theories' assumptions on human nature, and the coaxing of compensation consultants, it is not surprising that many succumb to the temptation of individualized pay for performance schemes. But do they work? Pfeffer answers with the following:

> Despite the evident popularity of this practice, the problems with individual merit pay are numerous and well documented. It has been shown to undermine teamwork, encourage employees to focus on the short term, and lead people to link compensation to political skills and ingratiating personalities rather than to performance. Indeed, those are among the reasons why W. Edwards Deming and other quality experts have argued strongly against using such schemes.
>
> Consider the results of several studies. One carefully designed study of a performance-contingent pay plan at 20 Social Security Administration (SSA) offices found that merit pay had no effect on office performance. Even though the merit pay plan was contingent on a number of objective indicators, such as the time taken to settle claims and the accuracy of claims processing, employees exhibited no difference in performance after the merit pay plan was introduced as part of a reform of civil service pay practices. Contrast that study with another that examined the elimination of a piece work system and its replacement by a more group-oriented compensation system at a manufacturer of exhaust system components. There, grievances decreased, product quality increased almost tenfold, and perceptions of teamwork and concern for performance all improved.[1]

Compensation consultants like the respected William M. Mercer Group report that just over half of employees working in firms with individual pay for performance schemes consider them "neither fair nor sensible" and believe that they add little value to the company. The Mercer report says that individual pay for performance plans "share two attributes: they absorb vast amounts of management time and resources, and they make everybody unhappy."

One further problem cited by both Pfeffer and other academic and professional observers of pay for performance is that since they are virtually always zero-sum propositions, they inflict exactly as much financial hardship as they do financial

[1] "Six Dangerous Myths about Pay", by Jeffrey Pfeffer, Harvard Business Review, May-June 1998 v. 76, no.3, page 109 (11).

benefit. In the federal government as in many private firms, a fixed percentage of the budget is allocated for salaries. Whenever the resources available to fund salaries are fixed, one employee's gain is another's loss. What incentives does this create? One strategy that makes sense in this context is to make others look bad, or at least relatively bad. Competition among workers in a particular work unit or an organization may also, rationally, lead to a refusal on the part of individuals to share best practices or teach a coworker how to do something better. Not only do these likely outcomes of a zero-sum approach obviously work against the stated reasons for imposing pay for performance, they actually lead to outcomes that are worse than before.

What message would the federal government be sending to its employees and prospective employees by imposing a pay for performance system? At a minimum, if performance-based contingent pay is on an individual-by-individual basis, the message is that the work of lone rangers is valued more than cooperation and teamwork. Further, it states at the outset that there will be designated losers – everyone cannot be a winner; someone must suffer. In addition, it creates a sense of secrecy and shame regarding pay. In contrast to the current pay system that is entirely public and consistent (pay levels determined by Congress and allocated by objective job design criteria), individual pay adjustments and pay-setting require a certain amount of secrecy, which strikes us as inappropriate for a public institution. An individual-by-individual pay for performance system whose winners and losers are determined behind closed doors sends a message that there is something to hide, that the decisions may be inequitable, and would not bear the scrutiny of the light of day.

Beyond compensation consultants, agency personnelists, and OPM, who wants to replace the General Schedule with a pay for performance system? The survey of federal employees published by OPM on March 25 may be trotted out by some as evidence that such a switch has employee support. But that would be a terrible misreading of the results of the poll. AFGE was given an opportunity to see a draft of some of the poll questions prior to its being implemented. We objected to numerous questions that seemed to be designed to encourage a response supportive of individualized pay for performance. We do not know whether these questions were included in the final poll. The questions we objected to were along the lines of: Would you prefer a pay system that rewarded you for your excellence, even if it meant smaller pay raises for colleagues who don't pull their weight? Do you feel that the federal pay system adequately rewards you for your excellence and hard work? Who wouldn't say yes to both of those questions? Who ever feels adequately appreciated, and who doesn't secretly harbor a wish to see those who *appear* to be relatively lazy punished? Such questions are dangerously misleading.

The only question which needs to be asked of DoD's civilian federal employees is the following: Are you willing to trade the annual pay adjustment passed by Congress, which also includes a locality adjustment, and any step or grade

increases for which you are eligible, for a unilateral decision by your supervisor every year on whether and by how much your salary will be adjusted?

It is crucial to remember that the OPM poll was taken during a specific historical period when federal employees are experiencing rather extreme attacks on their jobs, their performance, and their patriotism. The Administration is aggressively seeking to privatize 850,000 federal jobs and in many agencies, is doing so in far too many cases without giving incumbent federal employees the opportunity to compete in defense of their jobs. After September 11, the Administration began a campaign to strip groups of federal employees of their civil service rights and their right to seek union representation through the process of collective bargaining. The insulting rationale was "national security" and the explicit argument was that union membership and patriotism were incompatible. Some policy and lawmakers used the debate over the terms of the establishment of the Department of Homeland Security as an opportunity to defame and destroy the reputation, the work ethic, loyalty, skill and trustworthiness of federal employees. And out of all of this has come an urgent rush to replace a pay system based upon objective criteria of job duties, prerequisite skills, knowledge, and abilities, and labor market data collected by the BLS with a so-called pay for performance system based on managerial discretion.

In this historical context, federal employees responded to a survey saying that they were satisfied with their pay. In fact, 64% percent expressed satisfaction and 56% believed that their pay was comparable to private sector pay.

But as the representative of 600,000 federal employees, AFGE would suggest that they are satisfied with their pay system, not their actual paychecks. Since the alternatives with which they have been threatened seem horrendous by comparison, expression of satisfaction with the status quo in a survey sponsored by an agency determined to give managers discretion or "flexibility" over pay is no surprise.

Perhaps more important for the subject of pay for performance in the context of the survey is the fact that 80% report that their work unit cooperates to get the job done and 80% report that they are held accountable for achieving results. Only 43% hold "leaders" such as supervisors and higher level management in high regard; only 35% perceive a high level of motivation from their supervisors and managers, and only 45% say that managers let them know what is going on in the organization.

In this context, it seems reasonable to ask if the majority of employees are relatively satisfied with their pay, why the frantic rush to change? If federal supervisors and managers are held in such low regard, how will a system which grants them so much new authority, flexibility, unilateral power, and discretion be in the public interest? How will a pay system that relies on the fairness, competence, unprejudiced judgement, and rectitude of individual managers be

viewed as fair when employees clearly do not trust their managers? Given that less than a third of respondents say managers do a good job of motivating them, is pay for performance just a lazy manager's blunt instrument that will mask federal managers' other deficits?

We are also highly concerned about the introduction of managerial discretion over pay in the context of recent aggressive attempts on the part of this administration to disparage and dismantle important elements of the merit system and provisions of title 5 which protect federal employees from discrimination in hiring, firing, pay, classification, performance appraisal, and which provide for collective bargaining. The current system makes sure that winning a federal job is a matter of what you know, not whom you know. The current system makes sure that the salary and career development potential of that job are a function of objective, job description criteria, not a manager's opinion of an individual worker's "competency" or skin color, gender, religion, age, political affiliation, or union status. Deviations from these protections are not warranted. Our nation has prospered and our government programs have benefited from having a professional, apolitical civil service that is strongly protected from corruption and discrimination. Introducing individualized pay systems that grant enormous power to federal managers regarding pay represents a grave danger to this protection.

The advocates of pay for performance in DoD or elsewhere in the federal government have the burden of demonstrating exactly how and why the General Schedule prevents federal managers from managing for excellence and productivity improvement. They must demonstrate exactly how and why each of the merit system principles will be upheld in the context of political appointees' supervision of managers who will decide who will and will not receive a salary adjustment, who will receive a higher salary for a particular job and who will receive a lower salary for the same job.

They must demonstrate exactly how and why individualized pay for performance is superior to systems that provide financial reward for group and organizational excellence. They must demonstrate exactly how and why paying some people less so that they can pay others more will contribute to resolving the federal government's human capital crisis and attract the next generation of federal workers to public service. They must demonstrate exactly how and why agencies will invest in the training, oversight, and staffing necessary to administer elaborate, federal employee by federal employee pay for performance plans fairly and efficiently. And they must demonstrate that they will be able to secure adequate funding so that pay for performance does not degenerate into a false promise, where discretion is exercised to award higher salaries only to recruit and/or retain particular individuals rather than to reward actual performance.

Conclusion

Pentagon officials have argued their case as a plea for freedom – freedom *to* waive the laws and regulations that comprise the federal civil service – so that the nation's security can be assured. We ask Members of the Subcommittee to consider that our opposition is a plea for freedom as well – freedom *from* political influence, freedom from cronyism, freedom from the exercise of unchecked power. As the Defense Department is not a private corporation, the pressures of the competitive market will not hold it accountable for mismanagement or cronyism. That is why government agencies operate under a set of laws and regulations set by the Congress; that way, taxpayers and government employees are guaranteed freedom from coercion and corruption.

We have no reason to suspect that there is any intention to abuse the power DoD has sought for its Secretaries of Defense. Nevertheless, history has shown that a concentration of power in the hands of one individual does not necessarily translate into success on the battlefield. Our nation's tradition of checks and balances on power has been tremendously successful in allowing our military the freedom *to* pursue our nation's security interests at the same time that the public and the civilian workforce are allowed freedom *from* unfettered military authorities.

As I stated above, AFGE has always supported our nation's military mission, and we remain ready and willing to sit down with Pentagon leaders to work collaboratively to solve any real problems they have experienced with regard to accomplishing that mission that can be traced to the civil service infrastructure. The DoD proposal, however, would effectively eliminate any opportunity for collaboration between DoD management and its civilian workforce. I urge the Subcommittee in the strongest possible terms to reject this legislation and the processes that led to its presentation. Further, I urge you to recommend to the Pentagon a resumption of dialogue with its unionized workforce.

This concludes my testimony, and I would be happy to answer any questions Members of the Committee may have.

Chairman TOM DAVIS. Ms. Kelley, thanks for staying and being with us.

Ms. KELLEY. Thank you, Chairman Davis and Members. I very much appreciate the opportunity to appear before you on behalf of the more than 150,000 Federal employees who are represented by NTEU.

NTEU is very concerned by the scope of the legislation before the committee and as well as by its timing. We're at a loss as to exactly what the problem is in the Defense Department that they are attempting to fix.

The Department is coming off a stunning victory in the war with Iraq. The Secretary as well as both military and civilian Defense Department employees who engaged in that battle deserve nothing but praise for their quick and skilled response. Yet it seems the thanks that both the soldiers and the civilians are about to get is to have their jobs contracted out and their Civil Service rights and protections eliminated.

The pay-for-performance scheme this legislation would permit the Defense Secretary to implement would be based on a performance appraisal system which has come under intense criticism by employees as well as by independent experts like the GAO. NTEU questions where in the Federal Government or for that matter in the private sector pay for performance is working.

The proposed legislation also seeks authority for the Secretary of Defense to reclassify, discipline, suspend, demote or dismiss employees outside the tested and constitutionally sound procedures that are set up under current law. Defense employees would be stripped of their most important Civil Service rights and protections.

The legislation also limits the Department's obligations to collectively bargain with its unions. This unprecedented proposal goes far beyond even the flexibilities included in the recent Department of Homeland Security legislation.

It is particularly important to point out that the flexibilities the Secretary of Defense seeks would not be constant or set. Each new Secretary could change them. In the last decade our Nation has had five Secretaries of Defense. Does this committee think it is appropriate that every one of them should have been able to change the human capital management system for employees of the Department? Regardless of the reasons the current Defense Secretary may espouse for requiring this unprecedented level of flexibility, there is absolutely no justification for giving the current or future Defense Secretaries the ability to constantly change the rules under which their employees operate.

NTEU also has serious concerns with several provisions in the legislation that are aimed at privatizing thousands of Federal jobs. The bill seeks to privatize firefighting and security jobs at military facilities and to open up to contractors thousands of other civilian and military uniformed positions. And perhaps the most dangerous contracting out change in the bill is aimed at promoting the departmentwide use of an untested procurement process known as best value.

As a member of the commercial activities panel charged with developing recommendations for improving government procurement

policies, one of the issues that divided the panel was the best value contracting issue. Under best value, contracts are subjectively awarded based on arbitrary criteria. If the prohibition on the use of best value at the Department of Defense is repealed, billions of taxpayer dollars will be sent out the door to unaccountable contractors for gold-plated services that the government doesn't need.

Before privatizing more Federal jobs, Congress should act to clean up the waste, fraud and abuse in government contracting by requiring more accountability in oversight of contractors and requiring fair public-private competitions before government work is privatized.

NTEU has concerns about the inclusion in this legislation of the administration's proposal to create a $500 million human capital performance fund. It is hard not to view funding for this new gimmick coming at the expense of an appropriate 2004 pay raise. The administration would give managers broad discretion to give incentive pay to a fraction of the Federal work force. The only thing this is likely to accomplish is a further decline in employee morale.

As this committee knows, the Securities and Exchange Commission provisions included in the DOD legislation are the product of NTEU working with representatives of the SEC along with the appropriate congressional representatives to reach an agreement that no one finds objectionable. There is no reason why the DOD bill cannot be handled in the same manner, and I urge this committee to slow this train down and work with both DOD and the Federal employee unions to determine exactly what flexibilities the Department needs, why it requires those flexibilities, and how the agency, Congress, and the unions involved can best reach agreement on those changes.

I thank you again for the opportunity to testify and look forward to any questions you might have.

Chairman TOM DAVIS. Thank you very much.

[The prepared statement of Ms. Kelley follows:]

Chairman Davis, Ranking Member Waxman, Members of the Government Reform Committee:

Thank you very much for the opportunity to appear this morning and comment on The Defense Transformation for the 21st Century Act. I am Colleen Kelley, National President of the National Treasury Employees Union and I appear today on behalf of the more than 150,000 federal employees represented by NTEU.

NTEU is very concerned by the scope of the legislation before the Committee today as well as its timing. The provisions of this bill would permit the active duty military to be downsized and may ultimately lead to the contracting out of many of those positions. It has been estimated that hundreds of thousands of jobs currently done by the uniformed military could end up being done by contract employees. The legislation also seeks to abolish some of the most fundamental civil service rules and protections for civilian employees of the Department of Defense. Most importantly, it seeks to accomplish all of this with very little opportunity for Congressional review and insufficient input from the military and civilian Defense Department employees who will find themselves subject to these changes.

NTEU is at a loss as to exactly what the problem is that the Defense Department is attempting to fix. The Defense Department is coming off a stunning victory in the war

with Iraq. The Secretary as well as both the military and civilian Defense Department employees engaged in that battle deserve nothing but praise for their quick and agile response. Yet, it seems the thanks both the soldiers and the civilians are about to get is to have their jobs contracted out and their civil service rights and protections eliminated.

The legislation seeks to permit the Secretary of Defense to sidestep the Office of Personnel Management as well as most Congressional oversight and institute new, untested pay systems for Defense Department employees. The pay for performance scheme this legislation would permit the Defense Secretary to implement would be based on a performance appraisal system that has come under intense criticism for being unfair and biased. Performance appraisals in the federal government are routinely challenged as being subjective. Yet, rather than correct these underlying flaws in the system and take the time to develop a meritorious pay for performance system, this legislation is being rammed through Congress.

NTEU questions where in the federal government – or for that matter in the private sector – pay for performance is working. Serious questions have been raised about the pay for performance systems that have been tried. These systems have given rise to a sense of unfairness among employees and to the view that managers exercise too much favoritism under pay for performance schemes. Even the head of the General Accounting Office, David Walker, has expressed concerns about the DoD pay proposal. Like with most federal agencies, he has pointed out that the Department of Defense needs to improve its management systems and show that adequate safeguards are in place to

minimize the chances of abuse. He has also pointed out that the department should have consulted with its unions from the start.

The General Accounting Office (GAO) recently released its study of the Federal Aviation Administration's (FAA) 7 year overhaul of its pay and personnel systems. The FAA replaced its pay system, which had been based on the General Schedule grade and step system, with what it calls a market-based pay for performance system. When the GAO interviewed FAA employees concerning the new system, nearly two-thirds of the employees interviewed "disagreed, or strongly disagreed that the new pay system is fair to all employees." This sense of unfairness, and employees' view that they will not be treated equitably by their managers, has led a greater number of them to seek union representation – the percentage of the FAA workforce who are members of unions jumped from 63% to almost 80% following the implementation of the new pay system.

Concerns about federal supervisors and managers having more control in the pay setting process are by no means unique to the FAA. The group, FPMI Communications, undertook a poll of federal workers last October on the subject of pay for performance. Fully two-thirds of the respondents in that poll believed that giving managers more authority on pay would lead to too much favoritism.

A demonstration on pay banding at the Bureau of Alcohol, Tobacco and Firearms (BATF) is another good case in point. The BATF program began in early 2000, with the first round of salary reviews scheduled for October of that year. Performance standards

and critical job elements needed to be in place prior to implementation of the first salary reviews, however, insufficient thought was given to their development and haphazard standards resulted. As is far too frequently the case, managers received little or no training on how to write pay for performance evaluations for this new system. Although NTEU was given the opportunity to review and comment on the proposed standards, our suggestions largely went unused.

Under the BATF program, once performance appraisals were written by managers, they were forwarded to Performance Review Boards (PRBs) that further reviewed the evaluation and issued a final rating of employees. That rating was subsequently entered into a pay matrix that would determine whether or not the employee would be entitled to a performance based raise.

The PRB was given the authority to downgrade evaluations when compared to other employees in the same pay band and job series. And, in fact, evaluations were downgraded. Employees working for poorly trained managers who were, therefore, unable to write a clear, well-documented appraisal suffered under this system. No matter how stellar their performance, if the individual's supervisor was unable to document that performance in a well-written appraisal, the employee would not be eligible for a performance increase. In addition, the authority the PRB was given to downgrade performance evaluations led to the belief among many of our members that the Bureau was operating within a fixed pool of money. In other words, some employees had to have their evaluations downgraded in order for others to receive pay raises. There is no

question that this perception of manipulation of the process by management led to employee skepticism about the overall performance appraisal system.

Another feature of the BATF program was one that permitted employees to provide a self-evaluation as well as any external information regarding their individual performance that they thought would be helpful in their review. This could include customer letters or recognition by a professional association or other information the employee thought complimentary to his or her performance review. Although this part of the program was voluntary, most employees were given no training or guidance on developing these self-assessments, further leading to skepticism concerning the program.

While a fair and unbiased performance appraisal system must be an underlying principle in any pay for performance system, the same basic principles must be heeded when judging employees in other situations. In 1996, Congress strongly supported this principle during consideration of a proposal (H.R.3841) to give added weight to the use of performance evaluations during Reductions in Force (RIFs) of federal employees. Members of the House of Representatives raised serious questions during floor debate on this bill concerning the lack of formal guidance for performance appraisals and questioned their tendency to be subjective. In a September, 1996 speech on the House floor, Representative Cardiss Collins, the Ranking Member on the House Government Reform Committee, stated "...performance appraisals are routinely challenged as being subjective and unfair, over inflated and biased against minorities." The proposal was

soundly defeated. However, little has changed since 1996 concerning performance appraisals.

Evidence also points to pay for performance schemes in the private sector producing less than desired results, especially when implemented in large or complex organizations. In testifying before the House Civil Service Subcommittee, Under Secretary of Defense for Personnel and Readiness, David Chu, noted IBM's use of pay for performance as something that would be good for DoD. Ironically, approximately three years ago, the Ford Motor Company implemented a Performance Management Program and unwittingly created a culture of backstabbing as employees tried to outdo one another instead of working as a team. Instead of cooperation, the system fostered infighting and divisiveness.

Individual employees were rated against each other and instead of working toward a common goal, employees became primarily focused on individual performance. The previous culture of team problem solving and risk taking gave way to a situation where employees were unwilling to make suggestions or propose solutions that might result in their being rated lower than their fellow employees. The federal government, much like Ford Motor Company, relies on employees working together to deliver results. Ford was forced to dismantle key components of their Performance Management Program in the face of sinking employee morale. There are lessons here for the federal government as well.

Similarly, the Fairfax County, Virginia School District was forced to terminate its merit pay plan when it became clear that teachers were being pitted against each other and cooperation and teamwork were being discouraged. Moreover, the School District's commitment to its merit pay plan waned as soon as the program began costing the district money.

Merit pay awards in Fairfax County were scheduled to be 10% salary increases that would be included in base pay and counted toward retirement. When the time came to award these increases, the School Board, facing a budget crunch, reduced the merit raise amount from 10% to 9% and deemed it a bonus instead of a salary increase that would count toward retirement benefits. Still facing budget concerns, the Board subsequently abolished merit pay entirely.

The Texas legislature passed a merit pay law in 1984, but just like Virginia, they too, encountered fiscal problems and scaled back their program. When 100,000 teachers qualified for merit pay, the state changed the rules retroactively to reduce the number of qualified teachers by approximately one-third.

Pay for performance means something different to almost anyone you ask. What seems to be consistent across the board, however, are the problems in designing a quality pay for performance system. Employees must be encouraged to work together rather than compete against one another. A system that promotes individual achievement over group effort is bound to create additional problems. A pay for performance system

designed to be used only when budgets are flush will breed contempt for the system and will not work. Development of the performance evaluation system used to rate employees will fail absent employee feedback and commitment to the process. And, appropriate manager training in using the new system is key to ensuring that the system will be perceived as valid.

The Office of Personnel Management recently released the results of its ambitious survey of federal employees on a number of key issues. It was particularly disturbing to NTEU that 60 percent of federal employees do not believe that their leaders generate high levels of motivation and commitment. Moreover, less than half of the employees surveyed think positively about the integrity of their leaders and the fairness of their workplaces. Are these the leaders who employees are now supposed to trust to write unbiased performance evaluations?

Is this the track record that the Department of Defense seeks to follow? Is a new pay for performance system – implemented without thorough Congressional review and without heeding the lessons we have learned from other efforts to implement pay for performance really in the public interest?

The proposed legislation also seeks authority for the Secretary of Defense to reclassify, discipline, suspend, demote or dismiss employees outside the tested and constitutionally sound procedures set up under current law. And, while the Defense Department is stripping employees of their most important civil service rights and

protections, the legislation limits the Department's obligations to collectively bargain with its unions.

This unprecedented proposal goes far beyond even the flexibilities included in the recent Department of Homeland Security legislation. Many Members of Congress made clear during the homeland security debate that they would anxiously watch how the new flexibilities granted to the Homeland Security Department would be implemented The ink is barely dry on that proposal and in fact, the parties have only begun to work toward the goal of developing a new human capital management system for the agency. Nonetheless, the Defense Department has been adamant that it requires authority far beyond those flexibilities – authority that they have not been able to justify the need for.

And, it is particularly important to point out that the flexibilities the Secretary of Defense seeks would not be constant or set. Rather, each new Secretary of Defense could change them. Presumably, if the current Defense Secretary decided, following implementation of a particular change, that he wanted to change it again, he would have the power to do so. Giving unfettered authority to the Secretary of Defense to constantly – if he or she chose – alter personnel rules is ludicrous. It is nothing less than an abdication of Congressional responsibility and turns a blind eye to the possible effects such sweeping authority may have on employee morale. If the goal is to ultimately eliminate all federal employees and contract out the entire Defense Department, this is certainly a good step down that road. After all, what employees are going to be interested in accepting a job or staying in a job when the rules regarding pay, performance

evaluations, downsizing and collective bargaining rights are permanently subject to change on a moment's notice and at the whim of whoever currently occupies the position of Secretary of Defense?

In the last decade, our Nation has had five Secretaries of Defense. Does this Committee think it is appropriate that every one of them should have been able to change the human capital management system for employees of the department? Regardless of the reasons the current Defense Secretary may espouse for requiring this unprecedented level of flexibility, there is absolutely no justification for giving Defense Secretaries into the foreseeable future the ability to constantly change the rules under which their employees operate.

As you know, the Homeland Security legislation permits two political appointees, the Secretary of the Department and the Director of the Office of Personnel Management to change current law in six areas of Title 5:

Chapter 43 establishes the performance appraisal system for employees and contains the system under which management takes action against poor performers. Workers are given an opportunity to improve their performance and if that fails and they are terminated from their jobs, they are given the right to appeal the decision to the Merit Systems Protection Board (MSPB).

Chapter 51 sets up the classification system so that federal jobs can be assigned grades and have pay rates established. A classification system ensures that there is some equity between similar jobs in the federal government and serves the important purpose of preventing bidding wars between agencies for personnel.

Chapter 53 establishes the federal white-collar pay system, the senior executive pay system and the blue collar pay system. Waiving this chapter means that employees may or may not receive annual Congressionally approved federal pay raises.

Chapter 71 gives employees the right to form unions and engage in collective bargaining. The current President has already shown his willingness to use his authority to exempt employees from their bargaining units for national security reasons. NTEU remains concerned that the "need" for flexibility in this area is little more than a thinly veiled attempt to eliminate unions in the public sector. The effect of waiving Chapter 71 is to allow the Secretary to unilaterally determine employees' eligibility to vote in union elections, set negotiability rules and procedures for settling disputes, set internal union processes and determine the appropriateness of contract provisions. Giving the Secretary the ability to write and rewrite these rules has the effect of making them meaningless.

Chapter 75 sets up a system for disciplining employees for misconduct and a system for employees to appeal these actions. This is nothing more than basic due process and it is difficult to understand the need for flexibility in this area.

Chapter 77 establishes the procedure for appealing discrimination decisions either to the EEOC or MSPB and establishes judicial review of MSPB decisions. These procedures are necessary to protect against illegal and unethical action by agency managers in instances such as whistleblower retaliation, discrimination, corruption and favoritism. What is the need for flexibility in this area?

Yet, the flexibilities proposed for the Department of Defense go well beyond those already enacted for the Department of Homeland Security. Defense Secretaries would have the authority to waive Chapter 41 – training – an area where the federal government has already shown an inability to accomplish goals. Does this mean the Secretary would have the authority to abolish training its employees altogether? Chapter 55 – which sets out back pay and severance pay rules. Where is the need for flexibility here? The Secretary would also have the authority to waive Chapter 59 (allowances including uniform and housing allowances), as well as parts of Chapter 31 (authority for employment), Chapter 33 (examination, selection and placement) and Chapter 35 (retention preference, restoration and reemployment rules).

I also have serious concerns with several provisions in the legislation that are aimed at privatizing thousands of federal jobs. The bill seeks to privatize firefighting and security jobs at military facilities, and open up to contractors thousands more at military depots. And perhaps the most dangerous contracting change in the bill is aimed at promoting the widespread Department-wide use of an untested procurement process known as "best value".

I was a member of the Commercial Activities Panel, a group of experts charged with developing recommendations for improving government procurement policies. One of the issues that divided the Panel was "best value" contracting, in which contracts are subjectively awarded based on arbitrary criteria. If the prohibition on the use of "best value" at the Department of Defense is repealed, billions of taxpayer dollars will be sent out the door to unaccountable contractors for gold-plated services the government does not need.

Before privatizing more federal jobs, Congress should act to clean up the current waste, fraud and abuse in government contracting by requiring more accountability and oversight of contractors and by requiring fair public-private competitions before government work is privatized.

NTEU also has concerns about the inclusion in this legislation of the Administration's proposal to create a $500 million Human Capital Performance Fund. It is hard not to view funding for this new gimmick as coming at the expense of the 2004 federal pay raise. Rather than putting this $500 million toward a more appropriate federal pay raise, the Administration would give managers broad discretion to give incentive pay to a fraction of the federal workforce. The only thing this is likely to accomplish is a further decline in employee morale.

As the Chairman knows, DoD has also asked for a government-wide provision to be included in the DoD authorization bill to roll back the equal opportunity protections that federal workers currently enjoy. This provision is wrong and has no place in the legislation. The provision would change the law so that the right of a labor union representative to be present at a formal meeting with an employee would only apply to a grievance directly relating to a collective bargaining agreement but not a statutory EEO violation.

NTEU is absolutely committed to defending equal opportunity in the federal workplace. We do not hesitate to act when we believe management has acted against equal opportunity rights, without regard to whether they are granted contractually or statutorily. The DoD proposal is an obstruction to us in that mission. Excluding a union representative from these meetings can result in the abuse of a discriminated worker's rights or the rights of larger groups in the bargaining unit. For both these reasons, it is essential that current EEO rights are not reduced by this or any other legislation.

In summary, NTEU believes the changes this legislation proposes deserve to be fully reviewed and debated before sweeping legislation like this is approved. The inclusion of flexibilities for NASA in this bill also raises serious questions. It is my understanding that Congressman Boehlert has drafted a competing version of NASA flexibility legislation that, unlike the version included in H.R.1836, is at least the product of cooperation and agreement.

As the Chairman knows, the Securities and Exchange provisions included in the DoD legislation are the product of NTEU working with representatives of the Securities and Exchange Commission along with the appropriate Congressional representatives to reach an agreement that no one finds objectionable. There is no reason why the DoD bill cannot be handled in the same manner and I urge this Committee to slow this train down and work with both DoD and the federal employee unions to determine exactly what flexibilities the Department needs, why it requires those flexibilities and how the agency, Congress and the unions involved can best reach agreement on those changes.

Thank you very much for the opportunity to appear today. I would be happy to answer any questions.

Chairman TOM DAVIS. Ms. Turner.

Ms. TURNER. Chairman Davis and members of the committee, my name is Mildred Turner. On behalf of the 200,000 managers and supervisors in the Federal Government whose interests are represented by the Federal Managers Association, I would like to thank you for inviting us to present our views before the Committee on Government Reform regarding H.R. 1836.

I am currently a farm loan manager for USDA's Farm Service Agency. My statements, however, are my own in my capacity as a member of FMA and do not represent the official views of FSA or USDA.

As those who are responsible for the daily management and supervision of government programs and personnel, our members possess a wide breadth of experience and expertise that we hope will be helpful as we collectively seek to address the human capital crisis that Civil Service employees have been forced to endure with no future plan in place. We at FMA have grave concerns about the rushed nature in which these potentially precedent-setting changes to Civil Service statutes are being moved through what is supposed to be a fair and deliberative legislative process. While we appreciate the opportunity to offer our perspective here today, you should be informed, Mr. Chairman, that FMA has not been afforded the same opportunity by the Department of Defense before, during or since the drafting of its bill.

The new Department of Homeland Security was granted broad authority to develop an alternative personnel system, which is only in the preliminary stages of design. DHS was supposed to be used as a potential model for the rest of the Federal Government. Why, then, is DOD so anxious to do the same when we have not seen the effects of the DHS system?

We at FMA believe that we need to slow down this runaway train immediately and instead carefully consider major reform proposals that will impact the lives of one-third of the Federal work force—and eventually could affect all remaining civil servants.

Between 1994 and 2001, the nonpostal executive branch civilian work force was reduced by 452,000 positions. One of the side effects of this downsizing is that overtime is becoming increasingly common. Under current law, overtime pay for Federal managers, supervisors, and Fair Labor Standards Act-exempt employees is limited to that of a GS–10, step 1 employee. This means that employees paid at GS–12, step 6 and above earn less than their normal hourly rate of pay for overtime work. The overtime cap also causes managers and supervisors to earn substantially less for overtime than the employees they supervise.

The first grade-based overtime cap enacted in 1954 set the base at GS–9, step 1. Twelve years later in 1966, it was increased to GS–10, step 1. In the 37 years since that time, however, nothing has been done to keep pace with the changing work force realities.

Increasing overtime pay would represent an important step toward addressing overtime problems that increasingly serve as disincentives to hard-working civil servants contemplating accepting promotions into the ranks of management. In fact, some have turned down promotions and even taken downgrades to be eligible to receive real overtime pay.

Mr. Chairman, I have been personally affected by this overtime problem. My ordeal has to do with the current interpretation of rules outlined in section 5 CFR 551.208 with respect to FLSA-exempt Farm Service Agency personnel assigned to what the Agency refers to as consent decree action teams [CDAT]. Since June 1999, FSA has been assigning FLSA-exempt and nonexempt employees to CDAT and directing those employees, including myself, to work a large number of overtime hours. While working on CDAT, FLSA-exempt employees had the same duties, responsibilities, and authorities as did the FLSA-nonexempt employees. Exempt and nonexempt employees are working side by side and are performing identical tasks with the same amount of authority and responsibility. Many of these employees have been on 2-week rotations, including Saturdays, while working on CDAT. Overtime pay for FLSA-exempt employees is capped at GS–10, step 1, while nonexempt employees receive one and a half times their normal salary for overtime hours, which in some cases is twice the rate of FLSA-exempt employees.

To date there have been more than 300 exempt individuals, many of whom are FMA members, who have worked on the CDAT project without the benefit of being compensated equally for overtime earned while performing identical job responsibilities as FLSA-nonexempt employees.

There continues to be considerable confusion concerning the implementation of FLSA as related to the USDA FSA employees who have been detailed to CDAT. It is FMA's belief that the criteria set forth in 5 CFR 551.208 have been met. Specifically, we understand it to mean that individuals who worked for more than a total 30 days on the CDAT project will be properly designated as nonexempt during the time they spend on CDAT. This matter continues to affect many employees who perform a wide range of functions for FSA.

When we at FMA requested OPM's assistance concerning the classification of the CDAT project and employees' exempt and nonexempt statuses, the response was that if an employee is assigned to a series of three or more 2-week periods without an intervening break, it may be necessary to change the employee's FLSA status.

Unfortunately, this is not how we interpret the statute, as there is no specific reference to the 30 days being consecutive. As a result, to this day I, along with other affected members on CDAT, have not received equitable pay for mandatory overtime work.

While private sector employers are not required to pay overtime to FLSA-exempt employees, private sector managers and supervisors do not face the same type of pay compression prevalent in the Federal sector which makes leaving management to earn uncapped overtime so attractive.

At a bare minimum FMA would like to ensure that Federal managers, supervisors, and FLSA-exempt employees receive at least the regular rate of pay for overtime work as supported by OPM in the past and proposed in H.R. 1836. We would like to thank you, Mr. Chairman, for including this provision as part of the legislation we are discussing today. Although we would prefer to see the overtime cap raised to a fair but reasonable level, this provision pro-

vides a good first step in addressing overtime pay as we seek to remove obstacles to our government's ability to recruit and retain a highly motivated cadre of managers and supervisors. Thank you very much.

[The prepared statement of Ms. Turner follows:]

FMA

Federal Managers Association

Testimony
Before the Committee on Government Reform
United States House of Representatives

For Release on Delivery
Expected at
10:00 A.M. EST
Tuesday
May 6, 2003

A Review of H.R. 1836, the Civil Service and National Security Personnel Improvement Act of 2003

Statement of
Ms. Mildred L. Turner
Federal Managers Association

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

Chairman Davis, Ranking Member Waxman, and Members of the Committee:

My name is Mildred Turner. On behalf of the 200,000 managers and supervisors in the Federal government whose interests are represented by the Federal Managers Association (FMA), I would like to thank you for inviting us to present our views before the House Government Reform Committee regarding H.R. 1836, the "Civil Service and National Security Personnel Improvement Act of 2003."

I am currently a Farm Loan Manager for the Farm Service Agency (FSA), U.S. Department of Agriculture, at the Centre/Clinton county office located in Lamar, PA. In my position I am responsible for the management of a $25 million farm loan portfolio of direct and guaranteed loans, which represents a total of approximately 150 farm families. My statements, however, are my own in my capacity as a member of FMA and do not represent the official views of the Farm Service Agency or the Department of Agriculture.

Established in 1913, FMA is the largest and oldest Association of managers and supervisors in the Federal government. Our Association has representation in more than 25 Federal departments and agencies. We are a non-profit advocacy organization dedicated to promoting excellence in public service through effective management. As those who are responsible for the daily management and supervision of government programs and personnel, our members possess a wide breadth of experience and expertise that we hope will be helpful as we collectively seek to address the human capital crisis that our civil service has been saddled with.

This hearing is being held less than a month after the Department of Defense (DOD) submitted an expansive list of legislative reform proposals to Capitol Hill just as Congress was preparing to recess for the two-week Spring District Work Period. Among other things, these reforms would overhaul the current DOD civilian personnel system; yet Congress is being given,

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

in essence, less than two weeks to examine and review the proposals prior to significant portions of the legislation being marked-up both in this Committee and in the Armed Services Committee as part of the fiscal 2004 Defense Authorization bill.

We at FMA have grave concerns about the rushed nature in which these potentially precedent-setting changes to civil service statutes are being moved through what is supposed to be a fair and deliberative legislative process. While we appreciate the opportunity to offer our perspective here today, you should be informed, Mr. Chairman, that FMA has not been afforded the same opportunity by DOD, before, during or since the drafting of their bill.

In fact, the legislation itself provides no substantive justification for the magnitude of the proposed changes; there is a merely a brief section-by-section analysis that puts the text of the legislation in simplified terms. Toward this end, no argument is provided to demonstrate whether or not DOD even has the infrastructure in place to effectively manage all of the new authorities. Furthermore, the new Department of Homeland Security (DHS) was granted broad authority to develop an alternative personnel system, which is only in the preliminary stages of design. DHS was to be used as a potential model for the rest of the Federal government; why then is DOD so anxious to do the same when we have not even seen the effects of the DHS system?

In recent testimony, Comptroller General David Walker warned Congress that "moving too quickly or prematurely at DOD or elsewhere can significantly raise the risk of doing it wrong."[1] We at FMA firmly believe that we need to slow down this runaway train immediately and, instead, carefully consider major reform proposals that will impact the lives of one-third of the Federal workforce – and eventually could affect all remaining civil servants.

OVERTIME PAY FOR MANAGERS AND SUPERVISORS

On the issue of pay flexibility, we would like to express our concerns about the distinct retention problem that exists in the Federal government. The notion of the career civil servant is becoming obsolete because there are few incentives for advancement in the Federal government.

[1] U.S. General Accounting Office: "Defense Transformation – Preliminary Observations on DOD's Proposed Civilian Personnel Reform," GAO-03-717T, p. 6.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

When combined with better salary and benefits packages in the private sector, it is no wonder that many Federal employees are leaving the public sector after only a few years of service. In fact, there are often times disincentives for moving up the career ladder. A perfect illustration is the current statute which caps overtime pay for Federal managers and supervisors.

Between 1994 and 2001, the non-postal executive branch civilian workforce was reduced by more than 452,000 positions.[2] One of the side-effects of this downsizing is that overtime is becoming increasingly common. According to OPM, "the percentage of private sector supervisors and other FLSA-exempt employees who receive overtime pay is increasing."[3]

Federal managers, supervisors, and other Fair Labor Standards Act-exempt employees, however, face an outdated restriction placed on the payment of overtime that is encouraging some to leave the ranks of management and return to the bargaining unit or move to the private sector so they can earn a higher paycheck.

Under current law, 5 U.S.C. 5542(a)(2), overtime pay for Federal managers, supervisors and FLSA-exempt employees (one and a half times the normal rate for work in excess of 40 hours per week) is limited to that of a General Schedule level 10, step 1 employee. This means that employees paid at GS 12, step 6, and above earn less than their normal hourly rate for overtime work.

The first grade-based overtime cap, enacted in 1954, set the base at GS 9, step 1 (P.L. 83-763). Twelve years later in 1966, it was increased to GS 10, step 1 (P.L. 89-504). In the thirty-three years since that time, however, nothing has been done to keep pace with changing workforce realities. In 1966 the average GS grade was 7.3; in 2001 the average GS grade was 9.7,[4] nearly three full grade levels higher since the implementation of the current overtime cap.

Overtime pay is premium pay and therefore does not count toward increasing an employee's future retirement benefit. This means that increasing overtime pay does not affect mandatory spending. The overtime cap causes two problems for Federal managers and supervisors:

[2] U.S. Office of Personnel Management, "The Fact Book 2002 Edition: Federal Civilian Workforce Statistics," p. 8.
[3] April 28, 1999 letter from Office of Personnel Management Director Janice R. LaChance to House Speaker J. Dennis Hastert.
[4] U.S. Office of Personnel Management, "The Fact Book 2002 Edition: Federal Civilian Workforce Statistics," p. 26.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

1. First, managers and supervisors above GS 12, step 6 actually earn less on overtime than they do for work performed during the regular work week.

   Example: Sally Supervisor is a GS-13, step 9.
   Her regular rate of pay is **$41.91** per hour.
   For overtime, however, she is paid at a rate of **$31.70** per hour.
   If Sally worked on a Saturday she would be paid **$10.21** less per hour than for the work she performed on Friday.

2. Second, managers and supervisors may earn substantially less for overtime work than the employees they supervise.

   Example: Sally Supervisor is a GS-13, step 9.
   Her regular rate of pay is **$41.91** per hour.
   For overtime, however, she is paid at a rate of **$31.70** per hour.
   Ed Employee is a GS-12, step 7 and FLSA non-exempt. His overtime rate is **$50.09.**
   Sally earns **$18.39** less per hour than Ed for overtime work.

* Examples use hourly/overtime rates in the Washington-Baltimore locality pay area

Increasing overtime pay would represent an important step toward addressing overtime problems that increasingly serve as disincentives to hard-working civil servants contemplating accepting promotions into the ranks of management. In fact, some have turned down promotions and even taken downgrades to be eligible to receive "real" overtime pay[5]. As one manager from the Social Security Administration said, "It's not a money issue, it's a fairness issue. I work 50 or 60 hours per week and would prefer getting at least what my normal salary is." He went on to

[5] The Federal Times: "Supervisors Want Pay for Overtime – Downgrades More Lucrative for Social Security Managers," February 9, 1998, p. 4.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

state that the overtime policy has not dissuaded managers from working late or coming in on weekends. "There is too much work to do," he said[6].

Mr. Chairman, I have been personally affected by this overtime problem. My ordeal had to do with the current interpretation of rules outlined in section 551.208 of title 5, Code of Federal Regulations (CFR), with respect to FLSA-exempt Farm Service Agency personnel assigned to what the agency refers to as Consent Decree Action Teams.

Since June of 1999, Farm Service Agency has been assigning FLSA-exempt and nonexempt employees to Consent Decree Action Teams (CDAT) and directing those employees to work a large number of overtime hours. While performing on CDAT, FLSA-exempt employees have the same duties, responsibilities, and authority as do the FLSA-nonexempt employees. Exempt and nonexempt employees are working side-by-side and are performing identical tasks with the same amount of authority and responsibility. Many of these employees have been on two-week rotations for work on these Consent Decree Action Teams since June of 1999. Overtime pay for the FLSA-exempt employees is capped at GS-10 step 1 while nonexempt employees are receiving one and one half times their normal salary for the overtime hours.

To date, there have been more than 300 exempt individuals, many of whom many are FMA members, who have worked on the CDAT project without the benefit of being compensated equally for overtime earned while performing identical job responsibilities. As you are aware, an employee's exemption status is determined by the type of work he/she is performing. To this end, there continues to be considerable confusion concerning the implementation of the Fair Labor Standards Act as it relates to USDA-FSA employees who have been detailed to the Consent Decree Action Teams.

In accordance with 5 CFR 551.201, an agency may "designate an employee FLSA-exempt only when the agency correctly determines that the employee meets one or more of the exemption criteria" set forth by the 5 CFR and supplemental interpretations and instructions

[6] Ibid

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

issued by the Office of Personnel Management. Moreover, 5 CFR 551.208 discusses the effect of performing temporary work or duties on FLSA exemption status.

It is FMA's belief that the criteria set forth by the aforementioned regulation have been met. Specifically, we understand it to mean that individuals who have worked for more than a total of 30 days on the CDAT project would be properly designated as nonexempt during the time they spend on CDAT. This matter continues to affect many employees who perform a wide range of functions for FSA, including Management and Program Analysts, Farm Loan Managers, County Executive Directors, District Directors, Program Management Specialists, and Loan Specialists.

When we at FMA requested OPM's clarification concerning the CDAT project and employees' exempt and nonexempt statuses, their response was that "... if an employee is assigned to a series of three or more two-week periods, *without an intervening break* (italics added for emphasis), it may be necessary to change the employee's FLSA status. If the employee were to return to his or her position of record before completing 30 calendar days on the temporary assignment, no change in FLSA status would be appropriate under section 551.208." Unfortunately, this is not how we interpret the statute, and to this day I, along with other affected members on CDAT, have not received equitable pay for mandatory overtime work.

FMA also remains concerned about an issue that adversely affects many managers who are under the purview of Department of the Navy. In an effort to reorganize the shipyard management structure several years ago, the position of Zone Manager was created as a managerial oversight position in the Project Management arena. At the time this was done position was classified as FLSA-exempt or restricted from receiving true overtime for those hours worked beyond the normal tour of duty (40 hours per week). We feel that there are other positions which support our production workforce that are improperly classified as "exempt." Some of these positions affect our Production Training Department instructors and resource managers. This classification has placed a manager working in this position description in a situation where the workers assigned to him/her make more money than the manager for the overtime hours worked.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

In 1986, the Office of Personnel Management declared all Federal employees above the GS-11 salary level exempt regardless of their assigned duties. In July 2001, the International Federation of Professional and Technical Engineers (IFPTE) and the Department of the Navy (Naval Sea System Command-NAVSEA) reached a Supplemental Global Agreement to address Fair Labor Standards (FLSA) overtime claims of IFPTE's engineers, scientists and technicians employed at Portsmouth, Norfolk and Puget Sound Naval Shipyards. One key provision of the Supplemental Agreement was the identification of series and grade levels that are FLSA exempt/non-exempt. More specifically, the Navy Shipyards recognized that the law provides for FLSA overtime pay for employees working as GS-12 technicians and in related occupations.

Following the agreement made between NAVSEA and the IFPTE regarding the classification of employees in an "exempt status," we at FMA feel that positions such as the Zone Manager deserve to have their classification status changed also. The just decision made in changing the status of the members of the IFPTE needs to be extended to the managers, supervisors, instructors, and production support personnel presently classified as FLSA-exempt.

The ship repair environment is one in which emergency and voyage repair situations arise from time to time. We are not talking about the manager who works an occasional Saturday or a few hours late one evening. We have members in the shipyard community who are assigned to a project that requires in some cases working 12 to 16 hours a day for a month or more – and receive no overtime pay because of a lack of funding, much less capped overtime pay. The essential work of our employees and managers to ensure that ship schedule and deployments are met is an important component of our national security. We at FMA would like to see a thorough review of the referenced classifications. It is our position that the managers, supervisors, instructors, and production support personnel presently in an "exempt" status are entitled to receive fair overtime compensation for the critical work they perform on behalf of our Nation.

Inadequate overtime pay has led to severe morale problems. As a result of the de-layering of the Federal workforce – which reduces opportunities for further advancement – a growing number of experienced managers and supervisors are taking voluntary downgrades to positions of less responsibility because they see no reward for staying in the current jobs. With the

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

government's reliance on overtime for critical workloads, they can earn as much or more money in a lower-graded position.

OPM has proposed legislation in the past guaranteeing that employees always receive at least their regular hourly rate of pay, which would eliminate the reduced hourly rate for employees at GS 12, step 6, and above[7]. At the time, OPM justified the reform by stating that it would "bring greater consistency to Federal overtime pay practices generally, since the same change was enacted for Federal law enforcement officers as part of the Federal Law Enforcement Pay Reform Act of 1990 (See 5 U.S.C. 5542(a)(4)) and for Federal firefighters as part of the Federal firefighters Pay Reform Act of 1998 (See 5 U.S.C. 5542(f))... These changes would be consistent with our overall strategic objective of simplifying the Federal compensation system." The OPM Director at the time went on to say that, "The overtime pay proposal is a long overdue correction that would be consistent with the pay practices of many non-Federal employers."[8] It is also worth noting that on December 21, 2000, as part of P L. 106-558, an exception to the Federal Law Enforcement Pay Reform Act of 1990 was enacted authorizing an overtime hourly rate of pay equal to one and one-half times the hourly rate of basic pay for certain wildland firefighters who are employees of the Department of the Interior or the United States Forest Service of the Department of Agriculture. The authority also is applicable to wildland firefighters only while they are engaged in wildland fire suppression activities.

While private sector employers are not required to pay overtime to FLSA-exempt employees, private sector managers and supervisors do not face the same type of pay compression prevalent in the Federal sector that makes leaving management to earn uncapped overtime so attractive. At a bare minimum, FMA would like to ensure that Federal managers, supervisors, and FLSA-exempt employees receive at least their regular rate of pay for overtime work, as supported by OPM in the past and proposed in H.R. 1836. We would like to thank you, Mr. Chairman, for including this provision as part of the legislation we are discussing today. Although, we would prefer to see the overtime cap raised to a fair but reasonable level, this provision represents a good first step in addressing overtime pay as we seek to remove obstacles

[7] April 28, 1999 letter from Office of Personnel Management Director Janice R. LaChance to House Speaker J. Dennis Hastert.
[8] OPM Director Janice Lachance, OPM news release, May 18, 1999.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

to our government's ability to recruit and retain a highly motivated cadre of managers and supervisors.

Broader compensation reform is a critical piece to this puzzle. In April 2002, OPM released a white paper[9] intended to initiate a dialogue on reform of the current Federal pay structure. According to OPM, if the government is to recruit, manage, and retain the human capital it needs, its white-collar pay system should:

- Achieve the principle of providing equal pay for work of equal value;
- Provide agencies the means to offer competitive salary levels on a timely, rational basis;
- Recognize competencies and results, at both the individual and organizational level; and
- Orient employee efforts and pay expenditures toward mission accomplishment.

Similarly, the second National Commission on the Public Service, a.k.a, the Volcker Commission so named for Commission Chair Paul Volcker, has issued recommendations on pay reform as part of its final report released this past January. More specifically, the Volcker Commission believes that Congress should establish policies that permit agencies to set compensation related to current market comparisons. The Commission is also of the opinion that current personnel systems are: a) out of touch with market reality; and b) immune to performance because managers seek to "spread bonuses around as compensation supplements for large numbers of employees instead of incentives or rewards for top performers."[10] The Commission goes on to state that such a system "discourages potential employees, especially the most talented and promising, who are reluctant to enter a field where there are so few financial rewards for their hard work, where mediocrity and excellence yield the same paycheck."[11]

PAY COMPARABILITY BETWEEN PUBLIC AND PRIVATE SECTORS

Compounding the myriad of problems associated with the recruitment and retention of Federal employees is the significant pay gap between the public and private sectors. According

[9] U.S. Office of Personnel Management: "A Fresh Start for Federal Pay: The Case for Modernization," April 2002.
[10] Report of the National Commission on the Public Service: "Urgent Business for America: Revitalizing the Federal Government for the 21st Century," January 2003, pp. 9-10.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

to a survey of college graduates, Federal and non-Federal employees conducted by the Partnership for Public Service[12], the Federal government is not considered an employer of choice for the majority of graduating college seniors. In the survey, nearly 90 percent said that offering salaries more competitive with those paid by the private sector would be an "effective" way to improve Federal recruitment. Eighty-one percent of college graduates said higher pay would be "very effective" in getting people to seek Federal employment. When Federal employees were asked to rank the effectiveness of 20 proposals for attracting talented people to government, the second-most popular choice was offering more competitive salaries (92 percent). The public sector simply has not been able to compete with private companies to secure the talents of top-notch workers because of cash-strapped agency budgets and an unwillingness to address pay comparability issues.

The Federal Employee Pay Comparability Act (FEPCA) of 1990 was intended to close the gap between Federal employee salaries and those of their private-sector counterparts. However, FEPCA has never been implemented as it was originally intended. Since this bill was enacted, administrations led by both political parties have used a capping feature designed to reduce pay increases in times of economic distress. This executive authority has been utilized despite record budget surpluses. More than a decade since the enactment of FEPCA, the Bureau of Labor Statistics shows that the pay gap between Federal civilian employees and their private-sector counterparts has grown to 33 percent. If FEPCA is never to be adhered to, we must, at a minimum, re-examine FEPCA to determine how best to bring public-sector salaries more in line with those of their private-sector counterparts. Closing the pay gap between public and private-sector salaries is critical if we are to successfully recruit and retain the "best and brightest."

PAY PARITY BETWEEN CIVILIAN AND MILITARY PERSONNEL

For the time being, however, we must uphold the longstanding principle of linking annual pay increases between Federal civilian employees and military personnel. Since 1987 – and in 19 of the last 22 years – civilian and military personnel have received the same annual raises.

[11] Ibid

[12] Survey conducted by Hart-Teeter for the Partnership for Public Service and the Council for Excellence in Government, Oct. 23, 2001, p. 1-3.

Per the direction of Congress, President Bush recently signed into law a 4.1 percent average pay raise for civilian workers this year that matches the increase for the military – despite originally proposing only a 2.6 percent pay raise for Federal civilians. Nevertheless, the Administration has just proposed a 2 percent across-the-board average pay raise for Federal employees in 2004, while military personnel are slated to receive a 4.1 percent average pay raise next year – marking the third straight year that the White House has attempted to de-link civilian and military pay increases. The 2 percent recommended pay raise also rebuffs the 2.7 percent increase mandated by the formula in FEPCA used to determine annual civil service pay raises.

In light of the well-documented human capital concerns facing our Federal government, we must maintain the tradition of providing equitable pay increases to Federal civilian employees and members of the uniformed services – all of whom are on the frontlines ensuring our nation's security each day and make significant contributions to the general welfare of the United States.

RECRUITMENT AND RETENTION TOOLS

Compensation is an integral piece of the human capital crisis we are presently facing. Legislation has been introduced in the House by Rep. Jo Ann Davis (R-VA), H.R. 1601, and in the Senate by Sen. George Voinovich (R-OH), S. 129, that would allow managers to use a variety of compensation tools such as recruitment, relocation, and retention bonuses, and give agencies streamlined critical pay authority to fill key positions. In your legislation, Mr. Chairman, you have proposed offering similar authorities for the National Aeronautics and Space Administration (NASA). These are sensible reforms that would begin to address the workforce problems that will only worsen with the forthcoming retirement wave.

Retention bonuses do not always have to take the form of financial incentives. In exit interviews of Federal workers, other issues have been raised such as a lack of recognition and the absence of a long-term sense of purpose. It is also a widespread belief of those leaving government that insufficient opportunities exist for growth in the public sector, which brings us to the problem of proper succession planning. In a recent poll conducted by the Partnership for Public Service, when Federal employees were asked to rank the effectiveness of 20 proposals for

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

attracting talented people to government, the most popular choice was providing more opportunities for career advancement.

Student loan repayment has long been identified as a recruitment and retention bonus that would help attract and retain high-performing employees. Federal agencies have had the authority to repay student loans since 1990, but authorizing language for implementation purposes was not published until 2001. Currently, agencies can pay up to $6,000 a year in student loan payments for each employee, but the total amount per employee cannot exceed $40,000. Also, employees who participate in the program must remain with the agency for at least three years and must pay the money back if they leave before the three years are up. Mr. Chairman, you have proposed in your legislation to increase the $6,000 threshold to $10,000, and we at FMA applaud your recommendation.

Under 5 U.S.C. 5379, agencies are authorized to establish a program under which they may agree to repay certain types of Federally-insured student loans as a recruitment or retention incentive for highly qualified personnel. Currently, however, fewer than half of the 53 agencies that report to OPM on the student loan repayment program had a plan in place, or expected to have a plan in place in the near future[13]. Three in four respondents to a recent Hart/Teeter survey considered a loan forgiveness program for college graduates who take Federal jobs an effective recruitment tool[14].

FMA would like to see this benefit extended to those seeking graduate degrees as an additional recruitment and retention tool. According to a recent survey of third-year law school students by the Partnership for Public Service, Equal Justice Works, and the National Association for Law Placement (NALP), law school debt prevented 66 percent of student respondents from considering a public interest or government job[15].

Often times, however, agencies do not have adequate funding for these incentives, even existing ones. Annual appropriations should include additional line items for recruitment and training. The public sector should mirror the private sector in appreciating that the most valuable organizational asset is the workforce itself and in recognizing that "you get what you pay for."

---

[13] *Government Executive*, "The Loneliest Number," Brian Friel.
[14] *Hart/Teeter*: "The Unanswered Call To Public Service: Americans' Attitudes Before And After September 11," September 2002.
[15] *Partnership For Public Service* Web site: www.ourpublicservice.org

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

PERFORMANCE MANAGEMENT

For agencies to perform at optimum levels, employees must have clearly defined performance standards. These standards should be directly linked to the agency's mission, customer service goals, and their annual performance plan and/or strategic plan.

According to a Merit Systems Protection Board survey[16] conducted during fiscal years 1997 through 1999, on average one of every 8.8 Federal workers received a promotion each year during the three-year period that was studied. In other words, 7.8 of 8.8 employees – or 88.6 percent of the Federal workforce – were not promoted in any given year. At GS-12, the rate of promotion fell to about one in 13 a year; at GS-13, the rate was about one in 20, and at GS-14, the rate was about one in 25. Generally speaking, the rate of promotion slows as the General Schedule grade level increases. With such a low rate of promotion, the problem of putting the right people in the right jobs is aggravated.

We at FMA support implementing a more comprehensive, government-wide appraisal system with a pay-for-performance component. The current "pass/fail" appraisal system, for example, can serve as a disincentive for excellence. An appraisal system that clearly delineates unacceptable, acceptable and excellent performance is recommended. The appraisal rating should be a key consideration in the promotion and award processes.

The current mechanism in place for addressing unacceptable performance should be revised, for it is far too cumbersome and takes too long to document. As a remedial measure, the employee should be provided tutoring and given a reasonable timeframe in which to attain acceptable performance. We as Federal managers want the process to be fair for both the employee and the agency.

We envision a "contract" between the manager and the employee, i.e., if an employee performs at the acceptable level of performance, he/she will retain the position and receive the scheduled within-grade increases; if an employee performs at the excellent level, he/she will receive proper recognition; if an employee performs at the unacceptable level, he/she will receive a reasonable timeframe in which to improve performance.

[16] U.S. Merit Systems Protection Board: "The Federal Merit Promotion Program: Process vs. Outcome," Dec. 2001, p. xi.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

We at FMA recommend an awards system for managers that adequately reflects the manager's level of responsibility, span of control, and level of achievement. Of course, any such system requires sufficient appropriations funds. We have too often seen over time new pay authorities without the necessary dollars to utilize these tools. The Bush Administration has proposed a $500 million Human Capital Performance Fund for fiscal 2004 to "allow managers to increase pay beyond annual raises for high-performing employees and address other critical personnel needs."[17] Mr. Chairman, you have included this provision in your legislation. OPM would administer the Fund for the purpose of allowing agencies to deliver additional pay to certain civilian employees based on individual performance or other human capital needs, in accordance with OPM-approved agency plans. Although this is a step in the right direction in granting managers additional flexibilities, questions must still be answered with respect to the disbursement of the funds:

- Who will decide which employees receive increases, and who will determine the amount of such increases?
- Is $500 million sufficient for a workforce of some 1.8 million Federal employees?
- Will this Fund be renewed every year and appropriated accordingly?

Furthermore, FMA does not believe any new Performance Fund should be used to undercut fair and appropriate annual pay adjustments for Federal employees.

AUTHORITY OF THE SECRETARY OF DEFENSE IN H.R. 1836

FMA is concerned about the far-reaching authority that the legislation gives to both the current Secretary of Defense as well as all future secretaries of DOD, while at the same time, seemingly decreasing the role of OPM and its role as the human resources oversight agency for the Federal government. Sec. 9902 (a) of H.R. 1836 stipulates that:

> "If the Secretary certifies that the issuance or adjustment of a regulation, or the inclusion, exclusion, or modification of a particular provision therein, is essential to the national security, the Secretary may, subject to the direction of the President, waive the requirement in the preceding sentence that the regulation or adjustment be issued jointly with the Director."

[17] Fiscal Year 2004 Budget Proposal of the U.S. Government, p. 38.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

This provision effectively removes OPM from the decision-making process with regards to the human resources management system of DOD in cases of "national security." As Comptroller General Walker testified, " In essence, the act would allow for the development of a personnel system for the second largest segment of the federal workforce that is not necessarily within the control of even direct influence of OPM."[18]

Furthermore, the term "national security" is not defined anywhere in the legislation. Given that DOD seeks to create a "Department of Defense **National Security** (bold added for emphasis) Personnel System" we are concerned that many, if not all, decisions could fall under the umbrella "national security," allowing the Secretary of Defense to have the last word on all decisions related to the human resources system, without consultation and approval from the Office of Personnel Management. To the contrary, we believe that the role of OPM should, in fact, be strengthened in the development of a new personnel system that will affect nearly 700,000 Federal civilian employees.

MSPB APPEAL RIGHTS IN H.R. 1836

FMA also believes that it is necessary for DOD civilian employees – and all civilians for that matter – to retain all of their Merit Systems Protection Board (MSPB) appeal rights. Currently, H.R. 1836 provides that:

> "in prescribing regulations for any such appeals procedures, the Secretary (i) should ensure that employees of the Department of Defense are afforded the protections of due process; and (ii) toward that end, should be required to consult with the Merit Systems Protection Board before issuing any such regulations."

Why is it necessary to draft new regulations in the area of MSPB appeal rights when the MSPB currently operates to serve Federal employees and has long provided fair and appropriate recourse for the Federal workforce? Federal civilian employees at DOD deserve to have all of their MSPB rights fully transferred into any new personnel system that is created.

[18] U.S. General Accounting Office: "Defense Transformation – Preliminary Observations on DOD's Proposed Civilian Personnel Reform," GAO-03-717T, p. 5.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

"PAY FOR PERFORMANCE"

There has been much discussion about the creation of a pay-for-performance system under both DOD's legislative proposal and H.R. 1836. In neither proposal are details released on the creation of this system – there is merely an implication of a move to a pay-for-performance system.

In recent testimony, Comptroller General Walker stated: "In our view, one key need is to modernize performance management systems in executive agencies so that they are capable of adequately supporting more performance-based pay and other personnel decisions. Unfortunately, based on GAO's past work, most existing federal performance appraisal systems, including a vast majority of DOD's systems, are not designed to support a meaningful performance-based pay system."[19]

Indeed, it would be reckless for Congress to allow the Department of Defense to implement a department-wide, pay-for-performance system affecting one-third of the Federal workforce before proving that it has the necessary performance measurement infrastructure in place.

PAY BANDING

DOD has proposed as part of its bill replacing the current pay structure with a broad-banding, or pay-banding, system. Of course, there remain challenges with any proposed pay-band system for that matter. First, pay-for-performance systems are only as good as the appraisal systems they use. Since performance is the determining factor in pay-band movement, if there is no confidence in the appraisal system, there will be no confidence in the pay-band system.

Pay-for-performance systems can be problematic where there is an aging workforce. Experienced employees tend to convert towards the top of the pay band. This provides them little room to progress through the band, and only if they achieve higher levels of performance ratings. This is particularly true for those employees whose GS grade is the highest grade in the new band. (Example: Grade 13 employee placed in an 11-13 band. S/he will be towards the top

[19] U.S. General Accounting Office: "Defense Transformation – Preliminary Observations on DOD's Proposed Civilian Personnel Reform," GAO-03-717T, pp. 6-7.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

and now will need the higher grades to continue to move ahead. Previously s/he only needed time in grade to progress).

Finally, pay-band performance requirements can discourage non-banded employees from applying for banded positions. If the employee is converted in the upper range of a band s/he may not have confidence s/he can achieve the higher ratings requirements.

For additional guidance, Congress should look to the pay-banding systems being implemented at the Internal Revenue Service (IRS) and the Federal Aviation Administration (FAA).

CONCLUSION

As we collectively grapple with the complex issue of compensation reform in the Federal government, we must find where models such as the ones being used at the IRS and the FAA have succeeded – and failed. There have also been numerous instances of demonstration projects in the area of expanding personnel authority bringing success to some Federal agencies, but rarely are these successful initiatives allowed to cross agency lines. The approach the government takes to correct pay systems for civilian workers will decide how this Nation survives the human capital crisis before us – and we believe that this should be a thoughtful and thorough process. More importantly, Congress and the Administration must shift the habitual focus from cutting the size of the Federal workforce to that of recruiting and retaining top talent.

We continue to have deep concerns about the lack of involvement by executive agencies of employee organizations such as ours. As Comptroller General Walker stated:

> "More generally, and aside from the specific statutory provisions on consultation, the active involvement of employees will be critical to the success of NSPS… High-performing organizations have found that actively involving employees and stakeholders, such as unions or other employee associations when developing results-oriented performance management systems helps improve employees' confidence and belief in the fairness of the system and increases their understanding and ownership of organizational goals and objectives. This involvement must be early, active, and continuing if employees are to gain a sense of understanding and ownership for the changes that are being made."[20]

[20] U.S. General Accounting Office: "Defense Transformation – Preliminary Observations on DOD's Proposed Civilian Personnel Reform," GAO-03-717T, p. 11.

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

It is critical that employees and the organizations that represent them play an active role in shaping any civil service reform policies.

We at FMA would like to propose several recommendations. One important priority is to work with both the Administration and Congress to alter the image and perception of the civil service. Far too often, civil servants have unfairly taken the brunt of the blame for ill-advised policies that they had no control over. The public must recognize the important duties our Federal employees perform each and every day on their behalf. Everyday, Federal employees are working tirelessly behind the scenes to ensure that our Nation remains as secure as possible. Everyday, a disaster of some sort is averted through the dedicated efforts of our extremely talented Federal workforce. Yet we often hear stories of blame being assigned to these public servants, rarely about the successes that occur on a daily basis. And while our attention is focused on security, the business of our Nation continues to move forward in an increasingly efficient manner.

All the while, Federal workers at the Departments of Transportation and Justice are providing heightened security of our skies, our shores, and our borders; employees throughout the Department of Defense are supporting our warfighters as they continue fighting the war with Iraq as well as the war on terrorism; and the ongoing endeavors of the talented individuals at the Centers for Disease Control are addressing immediate terrorist threats while preparing us for future contingencies. Time and time again, our civil service selflessly responds in a professional manner – all for the greater well-being of the country they serve.

We also support ways to improve the hiring process for Federal employment, and bring about policies that attract the best and brightest of our society to serve in Public Service. Correspondingly, managers should be afforded the means to continuously enhance their skills. Individual development plans should be devised to maximize each manager's potential. Agencies and departments should increase opportunities for managers to receive training in their respective fields while on-duty by specifically allocating funds for this training. Thus, FMA supports establishing management succession programs to ensure that we have the strongest

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

possible pool of managers to lead tomorrow's civil service. Toward this end, we must address overtime pay for Federal managers and supervisors.

Finally, we encourage a real and sincere look at Federal pay systems, while encouraging structures that attract, retain, and maintain the Federal workforce we need and desire. The system must be fair and realistic in offering career ladder incentives and progression.

FMA has long served as a sounding board for the Legislative and Executive branches in an effort to ensure that policy decisions are made rationally and provide the best value for the American taxpayer, while recognizing the importance and value of a top-notch civil service for the future.

I would like to thank you again, Chairman Davis, for providing FMA an opportunity to present our views. We at FMA look forward to working with you and other Members of Congress to deal with our government's workforce challenges in our mutual pursuit of excellence in public service. This concludes my prepared remarks. I would be glad to answer any questions you and members of the Committee might have.

****

1641 Prince Street • Alexandria, VA 22314 • (703) 683-8700 • FAX: (703) 683-8707 • info@fedmanagers.org • www.fedmanagers.org

Chairman TOM DAVIS. This bill is a hodgepodge. It has some good things and some bad things. That is the way we deal with it. Taking care of this was something that the previous administration had wanted to tackle before they left, so we picked up where they took off and moved from there.

Let me start questioning. First of all, it is my understanding that this bill—notwithstanding other things that DOD is doing, but this bill doesn't get to the outsourcing issue at all. If anything, it is good for employees because by giving more flexibility—we heard Mr. Wolfowitz under oath today say that some of the jobs that are currently being outsourced and performed by uniformed services members could be done by civilian employees, and I believe that. And if you can show me something that is otherwise in there, we will change it. That is our intent here in this case.

There are other outsourcing proposals at DOD that I think we can join forces on. One is this percentage that they have for competitive sourcing and the like, and I have never felt comfortable with that. But this bill doesn't get to the outsourcing per se. If anything, this will create more Federal employees.

What it does do, and what our concern is and where we draw the line, is that things that are currently subject to collective bargaining are not going to be subject to the same rules, and therein lies the nub of how we handle this. I happen to believe that it takes too long to hire somebody right now, and maybe you agree with that.

Let me ask, Dr. Light, do you think it takes too long to hire someone in the Federal Government today?

Mr. LIGHT. Absolutely, even in a down economy. It is a ridiculous situation.

Chairman TOM DAVIS. Mr. Harnage, do you think it takes too long to hire somebody?

Mr. HARNAGE. I agree with that, but I don't necessarily agree with the cause.

Chairman TOM DAVIS. I'm not asking you to agree with the remedy. I'm not trying to trick you. I'm trying to get agreement on some things, and then we can approach how we get there.

Ms. Kelley, you agree as well?

Ms. KELLEY. I think in general that is true, and specifically it was true with the SEC. They made a case that hiring restrictoins were impacting their ability to deliver on their mission. We agreed with the goal to try to correct that, and as the language that we agreed to is what you see included in this bill.

Chairman TOM DAVIS. NASA, they gave their examples. They interview people, and they got tired of waiting in the queue for months and months. Do you agree?

Ms. TURNER. Yes.

Chairman TOM DAVIS. The problem is not that we shouldn't have safeguards. We need safeguards, and we want to write this bill so that we have safeguards. But sometimes you have so many safeguards that you can't get anything done. What is the right balance? We are trying to wrestle with this. We introduced the DOD bill because we thought we ought to introduce the bill as they wanted. That is not going to be the bill that comes out of here or out of conference, but they had to put their marker down, and so Mr. Hunter

and I put up our names and threw it out there. We immediately started to try to work with groups to make changes and find what the right balance is. Reasonable people will disagree over what that right balance might be.

We looked up some of the litigation on issues like whether a restroom should be gender-neutral or whether it should be a men's room. Two years it took to litigate that. That is ridiculous. There has got to be a way to resolve that issue. Now, DOD's way of resolving it, they will listen to you, and they will make the decision. I think from the employees' standpoint you want a neutral arbitrator to make that decision.

But the current system that calls for 2 years to take this up is ways too long, and it is stupid and wasting time and money and everything else. That is what we are wrestling with.

I don't know where I come down. We will keep talking and keep meeting. This is a dynamic process, but it is something that I think needs fixing. I think it takes too long in some cases to terminate people. You can terminate someone without them losing their rights, because if they litigate it, you can come back and restore all the pay, but you can get them out of the work force sometimes where they are a distraction to other people. And so we don't want them to lose their rights, but at same time, should they be successful, they can restore. But that is also something about how do we get to the right balance on that.

Bottom line is this is a system that has been built up protection after protection after protection, and sometimes I think we have more layers than we need. That's my opinion. I've talked to a lot of employees about this, some union, some nonunion. But the question is how do you fix it? That is what this is all about, and that is why we are soliciting your opinions. We are finding some place where reasonable people can disagree about.

I don't see the opportunity for the cronyism and the political favorites in the hiring. That isn't really touched. You can hire people faster, but it is still Civil Service. You will still not have Donald Rumsfeld be able to hire anybody that he couldn't today. If he wants to hire his brother-in-law or his best friend or his grand uncle or whatever, I don't see that opportunity opening up here in terms of dropping that as well.

And, finally, if we were to put a rule in here, and I'm not advocating we do that—if the rules that the Department of Defense promulgates were to come back before Congress, a la BRAC, we would either—if both Houses voted them down, they would not take effect. Would that give a greater comfort level? Where we say to DOD, we are not sure exactly what you want to do, we have given you some criteria, but come back to us, would you feel more comfortable then? Could you support it under those circumstances, or is that too much a burden?

Let me start with Dr. Light and ask that last question.

Mr. LIGHT. I have been a strong supporter of reorganization authority under those conditions. I can take a guess as how the rest of the panel would go on that.

Chairman TOM DAVIS. But that would be something that would be fine?

Mr. LIGHT. Yes.

Chairman TOM DAVIS. Mr. Harnage.

Mr. HARNAGE. Well, if I understand the question, you are saying that DOD would come back to Congress with how they would to do it.

Chairman TOM DAVIS. You would have to have both Houses—under the BRAC, both Houses have to defeat it. If one House defeated it and the other did not, it would go into effect. You have to do that to get along with the separation of powers and Constitutional provision.

Mr. HARNAGE. In this process, are the employees' representatives going to play a role?

Chairman TOM DAVIS. Absolutely play a role. We would hold hearings and everything else. But, you know, again, we are still giving them the authority to do this, and you may not like what they come back with, and you have to beat it again.

Mr. HARNAGE. Of course, I'm willing to work with anyone trying to find solutions to what DOD needs and other agencies need, but I have difficulty in signing any blank checks.

Chairman TOM DAVIS. I'm not asking—it makes it more palatable, but it is still——

Mr. HARNAGE. Look at what we're faced with today. We have a steamroller we can't even slow down, and I'm being asked if they come back with the same thing, if either House of Congress doesn't pass it, it goes into effect. It doesn't take both; it only takes one. You have cut my odds in half being able to deal with this. That's not good odds.

Chairman TOM DAVIS. Cut it worse than that, because we wouldn't allow it to be filibustered. But you get a bite at it on the record, and to some extent DOD is saying, give us the authority; you're asking us to be more effective, and we need to change the rules to do that if you are going to hold us accountable. And no one knows what the final rules are going to look like.

Mr. HARNAGE. I understand, and I hope you understand my concern.

Chairman TOM DAVIS. I do.

Mr. HARNAGE. We are dealing with an agency that did not even bother to talk to us in the past.

Chairman TOM DAVIS. I do, and I respect that.

Ms. Kelley.

Ms. KELLEY. I think the same problem still exists. You know, when you talk about the example of the restroom and the 2 years, I think there are extreme examples out there that we could cite. But here's what I also believe. I believe at the core is the question of whether flexibilities and collective bargaining can coexist in the same arena successfully, and the answer to that, I believe, is yes from NTEU's perspective.

Chairman TOM DAVIS. China Lake showed that you can do that.

Ms. KELLEY. And the work that we have done with other agencies outside the DOD, that we are living proof of that. The IRS, the Securities and Exchange Commission where we negotiated pay. Their pay is out from under Title 5. We worked with the SEC to make that happen, and we have full collective bargaining rights on that issue.

So I think there are a lot of examples as to why a blank sheet of paper with no rules at the sole discretion of the Secretary is not the way to go.

Chairman TOM DAVIS. OK. Thank you.

Ms. Turner.

Ms. TURNER. Our preference is that we go through the legislative process with an overwhelming level of bipartisan support. We are dealing with 100 years of Civil Service law.

Chairman TOM DAVIS. Mr. Davis.

Mr. DAVIS OF ILLINOIS. Thank you very much, Mr. Chairman, and I would just assume either one of you might answer if you would. In your opinion, are you aware of any instance where DOD has been limited in a meaningful way by the Civil Service laws that exist? Anybody?

Mr. LIGHT. Yes. I mean, the employees themselves are telling us that. I mean, are you—I assume that embedded in the question is the notion that the law is not the problem, that it is the implementation at DOD. But I don't think that's the case. I think this is an encrusted statute that over the years has just become too dense and too difficult to manage. And I think that's why we see agencies tunnelling out all over the Federal Government to get away from it, and they are doing it in an entirely ad hoc fashion. So you have DOD going out 1 day, you have SEC going out another, IRS is headed out a different direction, FAA a few years ago dug out. Now we have the greatest breakout imagined in history.

The agencies are saying we can't manage under this statute. It is too difficult to get the people in place and hold on to them.

Mr. DAVIS OF ILLINOIS. And would you agree that additional flexibilities then would provide or take away some of the difficulty that they face?

Mr. LIGHT. All things being equal, I'd like to see Congress mandate a uniform template to govern the flexibilities of the kind that we saw developing in the homeland security legislation so that agencies operate with certain flexibilities but they are not given carte blanche to invent systems that are radically different or that subject their employees to radically different outcomes from other agencies. So I think it's letting them have flexibilities under certain conditions so that no employee is punished from having selected a job at agency X as opposed to agency Y.

Mr. DAVIS OF ILLINOIS. The China Lake demonstration projects have been mentioned time and time and time again as an indication of what can happen. Mr. Harnage, have you studied those very much?

Mr. HARNAGE. We have, and one that we have yet to look at is the one at GAO. The Comptroller, David Walker, has agreed for us to come in there and meet with the employees and talk about that system, see how satisfied the employees are.

But, you know, there's a significant difference in the present demonstration projects and what's proposed in this legislation. The current demonstration projects can be expanded, providing the union agrees. Under this new proposed legislation, union wouldn't play any role in that. It would just be done. There is a significant difference.

Where we have been asked to participate, we've been willing to do so. But most of the time it's simply, you can't play a role in deciding how this is going to be done. We just want your agreement that we can do it, and we don't write blank checks.

Mr. DAVIS OF ILLINOIS. So, in your opinion, does this basically undercut the concept of collective bargaining, which is kind of a give and take, I'm saying a back and forth, as opposed to here it is?

Mr. HARNAGE. Sure. And, you know, Mr. Davis, I don't agree that the current law is all the problem that it's made out to be. I believe if you asked the Director of OPM point blank: Does the law or the implementing regulations, is that the problem? And I believe she would tell you, no, that the problem is all of the bureaucracy that's involved in it such as filling a position that takes the approval of OMB rather than the approval of the supervisor who is charged with the mission that they've got to perform, that it takes approval all the way up the line to fill that position, that's the delay. It's not the law, and it's not the implementing regulation but the bureaucracy that these people have created.

Now it's like the saying you kill your parents and then you throw yourself on the mercy of the court because you are an orphan. That's what DOD has done. They have created this bureaucracy that causes their problems, and now they are saying we are not responsible, the law is or the regulation is. Relieve us from all of this burden, and we'll do it right. They did not do it right the first time.

Mr. DAVIS OF ILLINOIS. Thank you very much.

Chairman TOM DAVIS. Thank you very much.

Mrs. Davis.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Chairman.

Dr. Light, you know, you said that there is time now for reform; and I think almost unanimously in this committee everybody has said there needs to be some reform. I don't think anyone is objecting to that. It's the way we go about the reform. And you said that the frontline employees are concerned about discipline, about poor performance, about filling positions. But is it necessary to give DOD every flexibility they've asked for in this bill for them to be able to handle disciplinary problems, poor performance and filling positions or could they not take care of those situations simply by having the flexibilities we gave DHS that we haven't had time to see how that works yet?

Mr. LIGHT. I think the answer is sort of a qualified yes. I don't think they need to have everything in that bill in order to get the job done. It is not the kind of blank check that you saw in DHS. We had all of two sentences in the original proposal coming over from the White House. It is a much more detailed statement. It's almost a "damned if you do, damned if you don't."

Mrs. DAVIS OF VIRGINIA. It's more detailed but much broader than what left this House and was signed into law.

Mr. LIGHT. Absolutely, and I think passage of this bill coming on the heels of the homeland security would mark the end of the Civil Service system as we know it and the beginning of a new system. Whether you need to go that far on this bill is something for the committee to consider quite closely, but I don't think you can tinker your way out of this.

I don't think it's the kind of thing—give the agency further instruction and go ahead and use those existing authorities. Those authorities are just not usable, so you have got to find some way between what we have currently got—and I don't know if it's the law or the bureaucracy, who knows which came first, but you have got to go beyond the kind of tinkering that we have seen over the last 12, 15 years in order to get the job done. It's just not working at the current level.

Mrs. DAVIS OF VIRGINIA. I think you said a minute ago that what you would like to see is some sort of a blueprint that is used for all the agencies without giving them carte blanche to go out and do what they want to do, and I think that is probably what a lot of us would like to see. I've said it before and I'll say it again, once you pass this for DOD and you have it out there for DHS and you have it for TSA, HHS, Department of Education, all the other agencies are going to be lining up at our door; and we will have the same types of problems if we don't come up with something that is usable for the entire Federal Government as an outline of some sort.

Mr. LIGHT. Have you only noticed that we only deal with Civil Service reform for agencies that are in desperate trouble and that is the only time we help them out? It is an issue of thinking deliberatively about doing this and laying out a framework that will help agencies move ahead with the flexibilities that they do need.

Mrs. DAVIS OF VIRGINIA. If, in fact, our Civil Service needs reform, then it needs reform throughout not just in certain agencies.

Mr. Harnage, would you agree—I mean, we've heard—you have been in all the hearings I've been in here lately. We have heard the DOD say that they've had trouble with collective bargaining, with negotiating with the unions; and I think the example that they have given has been the one on the charge cards where the credit cards were used where they shouldn't have been and they had to negotiate with 2,200 local unions and that is why they want to go to national collective bargaining.

Would that work for you all to give them the right to have national collective bargaining? Although we would probably disagree with them on what this bill does on national collective bargaining, would that be something that would satisfy the workers if there were national collective bargaining with the Secretary of Defense having the ability to negotiate locally if they felt it was something that was necessary?

Mr. HARNAGE. If they were so agreeable to collective bargaining, we wouldn't be here today.

Let's look at what we have really got. We've got collective bargaining at agency level at DLA, Defense logistics. We have it at DFAS, at DeCA, the commissaries. We've got it at the Marine Corps and at the command level in the Air Force, the Air Materiel Command. So we have experience at negotiating at the national level.

But let me give you another experience. In Jacksonville, Florida, with the Navy command there which goes from Key West, FL, to Pax River, MD to Corpus Christi, TX—28 different unions, 28 different locals. We negotiated a contract, one contract, that covers all of those 28 people. In the last renegotiation we did it in less than

30 days, where previously all 28 took much longer to do individually.

We are doing that because the admiral down there was willing to do it, and we agreed to the opportunity. It did not take national recognition. It did not take the Secretary of Defense to accomplish that. All it took was for them to stay out of the business of trying to operate the mission and let the admirals and the generals do their job.

We can do that everywhere, but they have created an anti-union environment that causes us to have to work harder in order to move that recognition up. But when we move it up, it is the employees's choice, not the Secretary of Defense. And I think we have to listen very carefully to what he said: We are going to raise it up to the national level when we choose. We are going to talk about these things at the national level on subjects we choose to. And if we don't agree, I will make the decision.

That's not collective bargaining. That is not even consultation.

Mrs. DAVIS OF VIRGINIA. Thank you, Mr. Chairman. My time is up.

Chairman TOM DAVIS. Thank you very much.

Mr. Janklow.

Mr. JANKLOW. Thank you very much, Mr. Chairman.

I guess I come from a different part of the world. I'm like everybody else. We have a lot of good employees where I come from, a lot of very good employees. But if you ask them, they'll tell you that, too often, they're held up to public obloquy and ridicule, that the system is really stifling. The system is very adversarial. It's very structured. It lacks the ability to let one be creative. It's almost byzantine in terms of how people describe it. Yet, in spite of all that, the job gets done.

What is it—and it isn't to me just a matter of the workers are right and management is wrong or management is wrong and the worker is right. Most management comes from the worker side. The vast majority of them do. Not the political appointees but the ones that are there day in and day out. And I just think we've won the most fabulous war activity that any nation could be engaged in, in spite of the system, not because it all works so well. I think in spite of the system, and part of it is the foe we were opposed to, and part of it is a lot of other things.

And I don't want to minimize in any way shape or form the effort of anybody, because I don't do that. A lot of people had their lives on the line, and a lot of people had other people's lives in their hands every single day.

Having said that, to you, Mr. Harnage, what is it that we need to do to fix what is broken in the Civil Service system? Unless you think it's not broke? I don't mean just a little off kilter, I mean broke. Do you think it's broke?

Mr. HARNAGE. I think it certainly can use a considerable amount of improvement; and I would be most happy to work with any agency in making that improvement, including OPM.

But the problem that I have is the examples that are given are usually hypothetical or extremes. For example, on the credit card, I'm scratching my head. The credit card grievance was used here as an example, national security?

Mr. JANKLOW. Let me give you an example: promotion. Do you think it is inordinately long under normal circumstances to fill a slot by promotion?

Mr. HARNAGE. No.

Mr. JANKLOW. You don't?

Mr. HARNAGE. No.

Mr. JANKLOW. Do you, Ms. Kelley?

Ms. KELLEY. I do not. Under the agreements that we have negotiated with the agencies.

Mr. JANKLOW. So where employees tell people like me that they think that is a real problem, apparently it doesn't fit the two unions that you two are involved in?

Ms. KELLEY. Well, I would suspect that some of those reports come from two other things. One is from a lack of funding that the agencies have. They announce promotions and then end up having to cancel them for budget reasons, and another is sometimes the lack of authority in the management chains who have the authority to make the decision on who gets the promotion. The processes take care of the rest.

Mr. JANKLOW. Let's take the first one. I think the likelihood that there is going to be a lot more money or more money to take care of those problems isn't going to happen. I don't know what it's like for other Members of Congress, but every single group that I see that comes to my office, whether it is nutrition programs for children, prescription drugs for elderly, whether it is K–12 education, special education, higher education, whether it is people with Alzheimer's or muscular dystrophy, these are not screwy things. They are serious things that we deal with. All of them want more money. We are $400 billion in the hole this year at least. That is 40 percent of $1 trillion in 1 year. I think the prospect of more money is not on anybody's radar, even advanced radar. I don't think it is.

What is it, Mr. Light—the Volcker Commission, if I can call it that, how many are Democrats and how many are Republicans?

Mr. LIGHT. I think at the end it was five and five and Volcker.

Mr. JANKLOW. That is the way it always is with him. Were they unanimous in their recommendations? Because these are all people that represent the broad spectrum of folks that have been in public life, very high-level, political hack appointees all of them.

Mr. LIGHT. I think that what they would say to you is that the report was an "architectural rendering." That is Paul Volcker's favorite way of talking about it. It is up to you to put substance to it. That is punting the ball.

Mr. JANKLOW. But they agree the system is broke.

Mr. LIGHT. Absolutely.

And on pay for performance, pay banding, the Volcker Commission's position was that it should be the default position. If you could come up with something better, then prove it, but the default should be pay banding.

Now I'd say on the China Lake experiment that never has such a small experiment launched so much enthusiasm. China Lake was a very small experiment, and I think we are pinning a lot of hope on it. But the Commission was convinced that the private sector experience with pay banding is robust enough so that it could work

very well in the Federal Government, GAO being an example of a much more rigorous experiment.

Mr. JANKLOW. Thank you, Mr. Chairman.

Chairman TOM DAVIS. Thank you very much.

Just a couple of comments, and then I will let you all react to this.

E.J. Dionne in a Washington Post op-ed said former President Clinton was telling the Post's Dan Balz that he respected Rumsfeld's effort to modernize and streamline the military. He even said the Democrats seeking the Presidency might usefully be more like Rummy. I'd like to see our guys debate a lot about the structure of the military. I hope when the smoke clears from the Iraq some more attention would be give to Rumsfeld's ideas.

Look, the J1 chief of plans for CENTCOM said the reason contractors are so heavily involved in Operation Iraqi Freedom were the concerns of getting civilians in a timely manner and concerns with having to deal with unions and restrictions unions place on management flexibility and conditions of employment. As a result, as of April 28th, there were 8,700 contractor employees supporting Operation Iraqi Freedom, as opposed to 1,700 Federal civilian employees. In other words, the contractors represented 83 percent of that work force. That is not a good thing.

We complain a lot about outsourcing, but we have to make the changes in the Civil Service if we are going to have that in-house capability as we do in SAIR. We created an in-house cadre in some of these areas where we could have some of that. We can't keep doing the same-old same-old. We have to make changes.

Now we have set down a marker here. We are going to try to incorporate some of your concerns in this. But I would just honestly say for the average Federal employee looking for a future and the rewards and the kind of respect, pay that they deserve and that are appropriate, a Federal work force which shouldn't be 17 percent of the Operation Iraqi Freedom, that some place changes need to be made.

We need to be positive about the things that could happen. We need to be positive, too, about some changes. Because the same-old same-old, we keep going straight down. That is the concern. We need to have an honest dialog.

I will let you respond.

Mr. HARNAGE. First, I'd say let's first agree on what the facts are, and then we can certainly deal with it. The example given by the first panel today on the ratio in the war is absolutely untrue. It's not true. They may have been that ratio, but during a time of national emergency, during a time of national security and during a time of war, there is no collective bargaining, and there is no collective bargaining agreement. There was nothing preventing them from using civilian employees except their own choosing because there was much more profit to be made by the contractors than there was by sending the civilians over there.

The only complaint I got——

Chairman TOM DAVIS. Why would they care about contractors making money?

Mr. HARNAGE. I don't know? Why do they privatize so much without competition? Why do they fight us on accountability to

show that they are not, in fact, making the savings that they claim they are?

I don't know the answers to all of those questions, but I can tell you this the only complaint I got during the war in Iraq was for people not allowed to go. Not because they had to go, but because they weren't allowed to go. It is a very patriotic, dedicated civilian work force; and they are not the problem when it comes to war.

Chairman TOM DAVIS. The work force is not the problem. The question is, are the rules the problem?

Ms. KELLEY. NTEU is not opposed to the need for change and to identify what those changes are. A blank piece of paper is not our idea of change that is going to be good for anybody.

Some of the most, I think, creative things we have done in the collective bargaining arena we have done with the IRS. Now, interestingly, that happened I think for two reasons. Obviously, first, the IRS and NTEU were willing to do this, but, second, when the President rescinded the Executive order on partnership, just about every agency head took their lead from that and walked away from having day-to-day dealings with the unions.

The IRS did not do that. The IRS Commissioner said, this makes good business sense; we have a lot of good work to do together, we are going to keep doing it. So we were working in partnership on the tough issues facing the agency.

And then we agreed to do parallel bargaining at the same time and, in some cases, expedited bargaining on a 30-day schedule, for example, as Bobby had mentioned earlier.

These are issues that we are more than willing to step up to, when the true problem can be identified, and the agency is willing to engage us in being a part of that solution. We are not only more than willing to do that, we want to do that.

NTEU invites that opportunity so that employees can be involved and so that the solutions can then be embraced and rolled out and supported by everybody, for the good of the agency as well as the employees and the taxpayers.

So we are not opposed to change. But I don't describe change as a blank piece of paper with sole authority.

Mr. BURTON. Thank you. Let me just respond.

Staff was just saying that one of problems on the Sikorsky repairs, is an AFGE unit that they could not reach an agreement on in terms of repairing the helicopters out of Texas that needed to go, so they went private on that.

They wanted to do that in-house. We will try to get to the bottom of that, and maybe you can help us get to the information. We have conflicting information between DOD and you. We want to get the facts.

Mr. HARNAGE. I think we are going to find that there is very conflicting information on that. There is conflicting information where it takes—you know, the last hearing we took 18 months to fire someone. Today, it only takes 9. The last hearing, it took 9 months to hire somebody, today it takes 18 months. They need to get their—first, they need to get the facts, then they need to keep them straight.

Mr. BURTON. But it takes too long to hire people.

Mr. HARNAGE. It takes too long, but it is not the law or the regulation. It doesn't take too long to fire somebody if anybody, easiest case scenario, can be fired in 30 days, not 9 months.

And I have been wondering where this poor performer was that they keep talking about. The day they identified him that manager that took 9 months to fire a poor performer is the poor performer.

Mr. LIGHT. I have got to disagree on this issue. Federal employees are telling us over and over again that there is some flaw in the disciplinary process. And it is the hard-working Federal employee who is being punished by this.

They are looking at this and describing the disciplinary process as ineffective. Now, is this just an urban legend, or is there some fact behind it?

And that is part of the issue that I think you see being debated here, that we have very little knowledge about our work force. But, I am telling you, it comes up over and over again in terms of the disparity between the Federal and the private and nonprofit sectors on ability to discipline or go forward.

It could be a lack of guts among managers. Maybe they are just terrified to ever take a stand.

Mr. HARNAGE. Let's get something straight. I realize—I was wondering what employees Mr. Light is talking to, since I represent 600,000 of them, and over 200,000 are the ones we are specifically talking about today.

Now, I understand how he talks to them, through a survey. I had a problem with that survey too, when it talked about poor performance.

First of all, it didn't identify who was complaining about a poor performer. Was it managers complaining about poor performers? Was it employees complaining about poor managers? And was it good old boys complaining about the diversity? It has allowed the potential of legitimizing discrimination.

If I didn't like you, then I could complain about you being a poor performer. And I can get away with it, putting it in this survey; that survey had absolutely no credibility.

Mr. LIGHT. I don't think we are talking about the same survey. But I am telling you, the front-line employees, in terms of careful survey research, are reporting higher levels of poor performance than their managers and their supervisors. It is the supervisors and the higher SES and the higher-grade civil servants in the system who like the way things are. They are the ones with the resources. They are the ones with no vacancies.

It is down at the bottom where you find the greatest frustration with this current system.

Chairman TOM DAVIS. Needless to say, I represent a lot of the Federal employees. Really, attitudes are very split among civil servants on this issue. There is a fear on the one hand that things could get worse, but there is a yearning that they can get better.

How we do split that and do the right thing is going to be what we are wrestling with over the next few weeks. But you all have added a lot to the debate. Is there anything else anyone wants to add before we conclude for the day?

Ms. TURNER. I just wanted to mention one thing.

Of course, I am representing on the management side. I think one of our concerns is that performance appraisals and the pass-fail system really fail. It doesn't work well for a manager. It just allows for mediocrity.

So in that respect, as far as having to relieve someone from duty, if you had a better performance appraisal system, it would be helpful. And also we all do recognize that there are barriers when you are having problems with hiring and firing. What we need to do is to get some flexibility in there before we overhaul the whole system.

Ms. KELLEY. Chairman Davis, I would just ask that this committee and the Congress think very, very seriously about the speed with which a change like this should even be considered or voted on. This is not a definable change. This is a huge, undefined change, the ramifications of which are unknown. And until there are results from a place like Homeland Security, which has not even started to use the flexibilities that they were given, I would urge that this be taken off of a fast track to provide adequate time to realize the impact that it could have.

Chairman TOM DAVIS. Unfortunately, this committee doesn't set that agenda. We have a vehicle going through where we can either be part of it or we can sit back and let another committee take control of this. We elected not to do that.

But let me assure you that however speed we run here, whether it is tomorrow or next week or whatever, and whatever we do on the floor, there is a conference after that. We are in constant touch with the Senate. I hope we will be in constant touch with you. And I think we will try to keep this better as it moves through the process.

I don't want anyone to sit here, at the end of tomorrow if we should mark this up, thinking it is the end of the world or that I have lost flexibility of anything else. This is a dynamic process. We understand—at least my belief, I think the majority of the committee's belief—we need to make some changes. We share some of the concerns that you have articulated.

We are not exactly sure how to get at that, or at what stage we do that. But I hope that we will continue to stay in touch as we move through this, because this is a dynamic process that will change drastically even when it leaves here. I just want to assure you of that and put that on the record as well.

You all have added significantly, I think, to the debate on this and to our deliberations. I am sorry more members weren't here to hear all of this, but they will get it. We will digest it for them, and I am sure both sides will make sure that Members are aware of that.

But you have been articulate spokespeople for your particular points of view. We appreciate it. I just again want to thank you for taking the time out of your busy schedules to appear before us today.

And the committee stands adjourned.

[Whereupon, at 2:40 p.m., the committee was adjourned.]

[The prepared statement of Hon. C.A. Dutch Ruppersberger and additional information submitted for the hearing record follows:]

Congressman C.A. Dutch Ruppersberger
Committee on Government Reform
H.R. 1836, Civil Service and National Security Personnel Improvement Act
05.6.03

Thank you Mr. Chairman for holding this hearing concerning the "Civil Service and National Security Personnel Improvement Act"

Recently, a hearing was held to address proposed changes effecting federal government civil service employees. While I agree with the intent of the legislation the importance of National Security and the need for efficient federal agencies and staff to deal with 21st century priorities. I have serious concerns about these proposed changes. These proposed changes will affect the civilian employees' livelihood. We have to fight for the front line civilian workers and support of our men and women in uniform.

The federal civil service employees do great work on a daily basis, including strategic planning and preparation services. We need to seriously examine the contributions made by these employees to the successful campaign in Iraq.

Civilian employees are critical in demonstrating that the federal workforce is a valued component to our country and our national security. I urge my colleagues to listen closely to the testimony today and to ensure that adequate protections and safeguards are in place to protect civilian employees from harmful proposed changes.

I look forward to hearing the testimony presented today and look forward to asking questions of the witnesses. I look forward to hearing the testimony presented today and asking questions of the witnesses.

American Federation of Government Employees, AFL-CIO, Local 2119
P.O. Box 818
Moline, IL 61266-0818
(309) 782-6064
Email – afgeria@aol.com

May 5, 2003

The Honorable Dennis J. Kucinich
United States House of Representatives
1730 Longworth Office Building
Washington, DC 20510

Dear Representative Kucinich,

Thank you for your time and understanding regarding this letter. Secretary Donald Rumsfeld has recently sent to Congress legislation, which would place Department of Defense (DoD) employees under a completely new personnel system. Furthermore, DoD has requested Congress to include these changes in the FY 2004 Defense Authorization Bill, which is to be considered by the Senate and House Armed Services Committees at the end of April.

The proposals requested by Secretary Rumsfeld would allow DoD to waive twelve (12) major chapters of "Title 5" of the United States Code ("Title 5" is the section of law which covers organization and federal employment), and create a new personnel system in place of those chapters.

Understanding that Mr. Rumsfeld is trying hard to stay abreast of events of our fast paced environment, it could also be stated that it appears that he sometimes gets so carried away in his own enthusiasm that routine but necessary details are overlooked.

Please understand the government does not need to reinvent itself. It just needs to exhibit a desire to conform to the standards we have already established. Congress needs to objectively evaluate evidence and conditions and quit being bogged down in petty insignificant details.

We ask that you not be premature in your judgment and take Mr. Rumsfeld decisions as the right approach. Establish the facts, look at each chapter and use your own good judgment to keep our Civilian workforce in tact and not impaired with shortcomings.

I trust your integrity and leadership to do the right thing for the Federal employee and America's future. I'm sending you a copy of the concerns we have with Secretary Rumsfeld's request.

Sincerely,

Joseph P. Findley
Vice President
AFGE Local 2119

Chapter 31 and 33 Hiring and Examination

If this section of the law is eliminated supervisors will be able to hire and promote cronies, relatives and political favorites. This shows total lack of amenability to structured work environment and would eliminate requirements for merit based testing for competitive service positions.

Chapter 35 Reduction In Force (RIF)

Would eliminate the requirement based on tenure, length of service and efficiency or performance ratings. Supervisor would be able to pick and choose whom they wish to retain. This flexibility is being sought even after several hundred thousand civilians lost their jobs due to downsizing after the cold war without loss of mission essential efficiencies and capabilities. These actions will adversely affect operations and moral of the federal employee.

Chapter 41 Training

The DoD has not made it clear what flexibilities they want to implement on training at this time, and does not consider the gravity of the situation at hand.

Chapter 43 Performance Appraisal System

Allow employees to undergo performance improvement period (pip) before being disciplined for poor performance. A new system by DoD the P-I-P could be eliminated and/or the ability to appeal disciplinary action could be eliminated.

Chapters 51 and 53 Pay and Position Classification

Wage Grade (WG) General Schedule (GS) and Federal Wage System (FWS) could be eliminated and replaced with a new system that does not allow for with-in grade step increases, and/or annual pay raises. Also would allow for pay banding, which allows for supervisor to decide whether or not employees gets a pay raise instead of Congress. Employees will unlikely be able to appeal supervisors decision even when they have displayed ample knowledge and skill to perform necessary task without supervision. The current classification system requires different pay levels for different jobs based on the concept of "equal pay for substantially equal work". A new system would not necessarily adhere to that standard and these action will frequently be riddled with paradox.

Chapter 55 Pay Administration

Waving this chapter could reverse years of progressive legislating matters that are crucial to the economic security of federal employees and fails to abide by rules and regulations on numerous issues. These include but are not limited to overtime and compensatory time calculations, firefighters pay, Sunday pay for National Guard and Reserve

technicians, jury duty, severance pay and back pay due to unjustified personnel actions. These actions are unyielding to reason or rational.

Chapter 59 Allowances

As with chapter 55 if this is allowed the federal employees representatives will have no voice in what if anything is established in its place. This plan lacks latitude, originality and substance because it show little forethought or preparation to the responsibility of the task or mission at hand.

Chapter 71 Collective Bargaining Rights

Waiving this chapter allows DoD to create a new labor-management system more in favor of management. Also allows DoD to bypass local unions bargaining rights and eliminates process by which disputes between employees and management are resolved. Would also prevent any third-party dispute resolution outside DoD. This action would eliminate or prevent any bargaining impasses no matter how routine or unrelated to national security from going to Federal Service Impasse Panel (FSIP). Ultimately would make the whole process a sham. This will become apparent when organizations lack order and cohesiveness

Chapters 75 and 77 Due Process and Appeal Rights for Disciplinary Actions

Waving chapters 75 and 77 allows DoD management to set up a personnel system whereby employees have little or no right to information about why they are being disciplined and little or no right to appeal decisions against them. This **"managerial flexibility"** raises profound constitutional questions and lacks good judgment or common sense.

○