

THE GOVERNMENT AND ITS EMPLOYEES

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I

INTRODUCTION

SO EXTENSIVE and diversified have become the activities of federal agencies and services that the employees of the executive branch alone now number some eight hundred thousand.¹ Though they range all the way from riveters to entomologists, from clerks to engineers, all are identified in the popular mind by one common characteristic: they work "for the government." This special status encumbers any analysis of the rights, privileges and duties of government employees with many considerations supposedly inapplicable to a discussion of labor problems in private industry. The political theorist, for example, is troubled by the whole gamut of metaphysical notions conjured up by the concept that the employer is "the State." The assertion of any rights by government employees against the employer-state is branded as a derogation of sovereignty. A "strike" becomes tantamount to treason itself. Some go so far as to analogize all government workers to the military forces, despite the obvious distinction on the basis of the urgency of the services rendered. The chief fallacy in this entire approach lies in its failure to differentiate the government as sovereign from the government as an employer of civilian workers.² In its latter capacity the government merely hires people to perform essential work.³ Particularly from the standpoint of the employee—whether it be stenographer, printer, messenger or draftsman—the job is a job and the government little more than an ordinary employer.⁴

The government employee is also often distinguished from his industrial counterpart on the tenuous ground that he is employed by an organization which is not run for profit. While this may be literally true, especially if "profit" is understood in a very narrow sense, the differentiation is both useless and unrealistic. As a practical matter, employees work not for the Government as an abstraction but for and under the control of certain individuals, section chiefs or division heads as the case

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1. See U. S. Civil Service Commission, FIFTY-THIRD ANNUAL REPORT (1936) 34 *et seq.*

2. For a discussion of the patriotic issue and soldier analogy see SPEDO, THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY (1927) 17-20.

3. The work of the largest departments is often of a "non-governmental" character, in the past conducted by private agencies. *Id.* at 12.

4. See Dykstra, *In Defense of Government* (1937) 169 ANNALS 5.

may be. Strongly actuated by a desire for advancement or for the added personal prestige which results from outstanding division records, supervising government officials behave in much the same fashion as many less enlightened private employers. The history of the Post Office Department, greatest of government industries, is replete with illustrations.⁵ Nor are others hard to unearth. The flimsy charge of inefficiency has shielded not a few dismissals of government employees because of union activity.⁶ Similarly, that perennial source of complaint for some industrial workers, the speed-up, has often plagued government employees, especially in such large semi-mechanical units as the Bureau of Internal Revenue, the Treasury and the Social Security Board.⁷ Dissatisfaction and unrest among employees were particularly rife in the latter department, where new supervisors were striving to enhance their own reputation by exacting the maximum work from their units.⁸ All too often the ambitious official, challenged by employees to readjust unfortunate conditions, takes refuge in the concept of "executive responsibility" and its supposed corollary that his authority brooks no interference. His reaction is not unlike that of the business man who "will not be told by any damned union how to run his business" and proceeds from the same unconscious emotional bias. Indeed the government official is more fortunate in that "executive responsibility" sounds so much more important and mysterious.

Another obstacle to a dispassionate analysis of the problems confronting government employees is the popular conception of the character of those who occupy positions in the government service. The general public is inclined to view the civil servant as a surly, uncooperative individual, who has procured a soft job through political pull and who has never done an honest day's work in his life. He is regarded as a person with no real ambition or ability, for otherwise he would be "out in the world" doing something worth while and getting somewhere instead of putting his nose into other people's business. This popular attitude may be explained in part by the long association of government service with the spoils system. In the earliest days of the Republic,⁹ precedents were created for a practice which still rankles the reformer.¹⁰

5. SPERO, *op. cit. supra* note 2 at 139, 141, 144.

6. See *e.g.*, Am. Fed. of Gov. Employees *ex rel.* Donovan, 1 NLRB 24 (1934).

7. See Testimony, pp. 89 *et seq.* Sumpf & Shultz v. Social Security Board (1937).

8. See Findings and Recommendations, Sumpf & Shultz v. Social Security Board, William Savin, Arbitrator, Oct. 20, 1937.

9. See Friedrich, *The Rise and Decline of the Spoils Tradition* (1937) 189 ANNALS 10-11.

10. President Jackson justified the spoils system in the name of efficiency; long tenure, he believed, resulted in "a habit of looking with indifference upon the public interests." President Jackson's First Annual Message to the Congress, quoted in WHITE, PUBLIC ADMINISTRATION (1926) 223, 224. For a modern statement of a similar

Though some progress has been made in the development of a "merit system," it was not begun until another means of support for political parties had been found¹¹ in the growing industry and business of the post-Civil War period.¹² And while today some sixty percent of the federal employees are sheltered under the civil service, a government job is still considered, in the public mind, to be a political plum.¹³

II.

The supposed differences between government and private employees, whatever their validity, should not obscure the similarity of the problems confronting both groups. But while resolution of these problems through unionization has come to be recognized as commonplace in private industry, organization of federal employees has been hampered by the popular conception of the uniqueness of the government service. Whether working conditions in the government are so singular that unions are unnecessary can best be discovered by examining in their historical setting specific federal problems of wages, tenure and hours.

COMPENSATION

The average government employee receives an annual salary of \$2146.¹⁴ The wage rates included in this estimate are usually set by reference to legislative standards and occasionally by some form of collective bargaining. The first method represents substantially an application of the Classification Act of 1923.¹⁵ This important piece of legislation was passed on the initiative of the National Federation of Federal Employees¹⁶

position see Turn, *In Defense of Patronage* (1937) 189 ANNALS 22, 25. A more popular and respectable sentiment was voiced by Justice Peckham in condemning as semi-barbarous the maxim "to the victor belong the spoils." *Rogers v. City of Buffalo*, 123 N. Y. 173, 177, 25 N. E. 274, 275 (1890).

11. See FISH, *THE CIVIL SERVICE AND THE PATRONAGE* (1905) 234-235.

12. See Friedrich, *supra* note 9, at 15. Another cause for the gradual elimination of the spoils system is the greater need in modern government for employees of technical training. See Sharp, *Public Employment* (1934) 12 ENCYC. SOC. SCIENCES 628, 632.

13. Considerations of political affiliation may determine the filling of some three hundred thousand other jobs. U. S. Civil Service Comm., *FIFTY-THIRD ANNUAL REPORT* (1936) 4. In addition to the exceptions made in the Civil Service Law itself [See *Civil Service Act and Rules, Statutes, Executive Orders, and Regulations* (1934) 60 *et. seq.*], a number of recent statutes, such as the Agricultural Adjustment Act of 1933, have allowed some appointment without reference to Civil Service rules. 48 STAT. 37 (1933), 7 U. S. C. § 611 (1934).

14. Sharp, *supra* note 12, at 628. The average appears to be a little too high.

15. 46 STAT. 1003 (1930), 5 U. S. C. § 673 (1934). Postal employees have been subject to various special classification acts, *e.g.*, 34 STAT. 1206 (1907), 39 U. S. C. § 103 (1934); 42 STAT. 1491 (1923), 5 U. S. C. § 1062 (1925), 39 U. S. C. § 610 (1934).

16. See MAYERS, *THE FEDERAL SERVICE* (1922) 553.

and others, for the purpose of achieving uniformity of pay schedules for similar work, thereby relieving the discontent and uneasiness caused by the wide variations. The Act classifies offices according to their respective duties, with fixed salary schedules arranged by grades.¹⁷ To facilitate a workable system, however, the Act permits the grades and subsidiary classes to be changed whenever necessary.

The Government Printing Office and the Tennessee Valley Authority present the outstanding illustrations of wage fixing by collective bargaining. In the Printing Office a minimum of ninety cents an hour is set for time actually worked, but above that the Public Printer has authority to set wage scales in the public interest.¹⁸ In practice, the wages, including night and overtime compensation, are determined by "a conference between the Public Printer and a committee selected by the trade affected, and the rates and compensation so agreed upon shall become effective upon approval by the Joint Committee on Printing." In the event of disagreement, appeal may be taken to the Joint Committee (a committee of Congress) for final decision. The wages thus fixed may not be changed for a year.

The Tennessee Valley Authority follows a somewhat similar practice. Although the statute merely requires payment of the prevailing wage,¹⁹ the scale adopted for manual workers has many of the earmarks of a collective bargain.

"19. In accordance with Section 3 of the Act creating the Authority not less than the rate of wages for work of a similar nature prevailing in the vicinity shall be paid to laborers and mechanics. In the event any question arises as to what are the prevailing rates of wages, which question cannot be settled by conference between the duly authorized representatives of the employees and the Authority, it shall be referred to the Secretary of Labor for determination, and the decision of the Secretary shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreements by representatives of employers and employees."²⁰

17. The compensation schedules fixed by Congress [42 STAT. 1491 (1923), 5 U. S. C. § 673 (1934), as amended by 45 STAT. 776 (1928); 46 STAT. 1003 (1930); 49 STAT. 724 (1935), 5 U. S. C. § 633 (Supp. III 1937)] apply only to civilian employees of the departments in the District of Columbia and not to employees in the field service nor to workers whose work comes within the classification of any recognized craft or skill. 46 STAT. 1005 (1930), 5 U. S. C. § 663 (1934). The heads of the various executive departments are authorized to adjust the salaries of field employees to correspond as far as possible with those in the departmental service. 48 STAT. 308 (1933), 5 U. S. C. § 678 (1934).

18. 42 STAT. 1489 (1923), 5 U. S. C. § 664 (1934).

19. The statute only makes wage provision for mechanics and laborers. 48 STAT. 59 (1933), 16 U. S. C. § 831(b) (1934).

20. EMPLOYEE RELATIONSHIP POLICY, TENNESSEE VALLEY AUTHORITY (1935) 10. A different plan, which does not come within the bounds of the collective bargaining

Here, too, it is provided that schedules once fixed shall not be open to revision more than once a year.²¹ By 1937, two wage conferences had been held, at which agreements were reached on the basis of material on the prevailing wage presented by both the management and the ten unions interested.²²

Another example of wages not fixed by or with reference to the Classification Act is the compensation paid to employees of the navy yards. Their wages are fixed by the commandants of the yards, and are supposed to "conform as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity."²³

Adjustment of compensation by collective bargaining raises the important problem of the relationship of government wage scales to those of corresponding private industries. Although the test of conformity with outside wages is sometimes an explicit, and probably always an unexpressed consideration in fixing wage schedules, on the whole American unions of government employees have been sparing in their criticism of this standard. On the other hand, English Civil Service organizations have bitterly opposed the test on the theory that the comparison is irrelevant—that men and women in the service have no alternative but to remain in their positions, for in most cases their skill has no market value.²⁴ A broader argument against fixing government salaries in accordance with the prevailing rate may be based on the "model-employer" theory of public personnel relations. According to this view, the government should have the affirmative obligation of setting the pace toward adequate wage standards, rather than merely keeping abreast of existing levels.²⁵ The National Labor Relations Board intimated a similar viewpoint when it said in its opinion in the *Donovan* case, in reference to another phase of labor relations, ". . . When the NRA is engaged

method of wage-fixing, has been adopted for clerical and other non-manual employees. *Id.* at 11.

21. *Ibid.*

22. Clapp, *Principles of the T.V.A. Relationship Policy and Their Application*, Address before Annual Meeting of the Civil Service Assembly of the United States and Canada, Oct. 6, 1937. A similar plan of conferences with union representatives has been followed for the non-manual workers. *Ibid.*

23. 12 STAT. 587 (1862), 34 U. S. C. § 505 (1934). Compare the Executive Order of Dec. 7, 1913, which provided that all artisan and supervisory artisan positions under the Navy Department were to be included in the competitive classified service. However, no schedule of wages has been provided for this group; wages seem to be fixed per statute. The clerical forces of the navy yards are paid at the rate determined by the Secretary of the Navy. 35 STAT. 754 (1909). The same is true for employees engaged in drafting, technical, and inspection work. 39 STAT. 558 (1916), 39 U. S. C. § 504 (1934).

24. See WHITE, *WHITLEY COUNCILS IN THE BRITISH CIVIL SERVICE* (1933) 158.

25. See MOSHER & KINGSLEY, *PUBLIC PERSONNEL ADMINISTRATION* (1936) 472; SPERO, *The State as Sovereign and Employer* in *PROBLEMS OF AMERICAN PUBLIC SERVICE, THE COMMISSION OF INQUIRY ON PUBLIC SERVICE PERSONNEL* (1935) 197.

in compelling employers to observe strictly the provisions of Section 7(a), it should, in dealing with its own employees, carry out the purposes of that section with even more scrupulous care than might be expected of ordinary employers."²⁶ Government agencies, however, show no eagerness to assume such a responsibility. Probably the more common attitude goes no further than desiring the Government not to prescribe terms of employment which compare *unfavorably* with those obtaining outside the Civil Service among good employers.²⁷ Some²⁸ have even gone to the extreme of arguing that compensation of government employees *should* compare unfavorably with salaries available in private industry since government employees have advantages in the form of retirement provisions and sick leave.²⁹ But this claim hardly merits consideration, for many large companies have pension schemes and almost all private employees now have the benefits of Social Security.

TENURE

The supposed security of tenure of government employees, especially in the classified civil service, also is often regarded as a justification for a lower wage scale. Yet experience has demonstrated that, at least so far as his legal rights are concerned, the government employee has little cause for a feeling of security, even in the classified civil service—the only group of employees having any protection in this respect. An illustration is afforded by the probationary system.

A person who has been selected from the list of civil service eligibles receives at first only a six months probationary appointment. If after trial during this period, the "conduct or capacity of the probationer be not satisfactory to the appointing officer, the probationer shall be so notified in writing, with a full statement of reasons, and this notice shall terminate his service."³⁰ The probationer has no opportunity for either a reply or a hearing. There are no bounds to the appointing officer's power to discharge. He may dismiss an appointee whose conduct is displeasing for any reason whatsoever. In justification of this sweeping power the Civil Service Commission has only been able to say that the six months probationary period is in effect a part of the examination and therefore the probationer is not entitled to the protection afforded to permanent appointees.³¹

26. Am. Fed. of Gov. Employees *ex rel.* Donovan v. Johnson, 1 NLRB 24, 28 (1934).

27. See WHITE, WHITLEY COUNCILS IN THE BRITISH CIVIL SERVICE (1933) 159.

28. *Id.* at 158-159.

29. See statutory provisions for retirement. 46 STAT. 468 (1930), 5 U. S. C. § 691 (1934); Employees Compensation Act, 39 STAT. 742 (1916); 5 U. S. C. § 751 (1934).

30. CIVIL SERVICE ACT AND RULES, STATUTES, EXECUTIVE ORDERS, AND REGULATIONS (1938) 32 (Rule VIIc).

31. *Id.* at 57, n. 4.

Security for employees in permanent status is contained in the Lloyd-La Follette Act of 1912.³² While today this Act seems to afford only paltry protection in comparison with the safeguards granted to private employees by the National Labor Relations Act, in its day it was deemed the *Magna Charta* of government employees. Its great importance and uniqueness make it worth quoting almost in full.

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; . . . Membership in any society, . . . or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects among other things, improvements in the conditions of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person . . . in said Postal service, or the presenting of any grievance . . . to the Congress or any member thereof shall not constitute or be the cause for reduction in rank or compensation or removal of such person or groups of persons from said service. The right of persons employed in the Civil Service . . . either individually or collectively, to petition Congress, or any member thereof, or to furnish information to either House of Congress, or to any committee or member thereof shall not be denied or interfered with."

As some of the wording indicates, this statute resulted from an incessant struggle between the administration and the postal employees, in which the latter had been hampered by the so-called gag rules. The first part of the Act is substantially a codification of the Executive Order of July 27, 1897, made pursuant to the provisions of the Civil Service Law, which prohibited removals from positions subject to competitive examinations except upon written charges plus notice and opportunity to answer.

Employees and Congress alike, however, came to regard this Executive Order as insufficient. Perhaps one of the chief reasons for this dissatisfaction was the emasculating effect of certain court decisions. A number of suits had been brought by employees to enjoin their superiors from dismissing them without following the Order's requirements of notice

32. 37 STAT. 555 (1912), 5 U. S. C. § 652 (1934).

and opportunity to answer. With but two exceptions,³³ the courts ruled that they lacked equity jurisdiction.³⁴ The Regulation was treated simply as an instruction to subordinates within the general executive power of the President, carrying with it no judicial remedy for a violation.³⁵ The court was of the opinion that its equitable jurisdiction was limited to the protection of property interests; that it had no concern with the removal of public officers unless they had a vested right in the office and were being illegally removed; and that the Regulation was insufficient to vest any property right in the office. One court went so far as to say that while the President has the power to make regulations concerning removals, the regulations could not be regarded as laws because they were completely subject to modification or revocation at his whim.³⁶ While it might have been hoped that codification of the regulation in the Lloyd-La Follette Act would give employees such property rights as would be protected by courts of equity, apparently no suits have been brought under it in that form. Only mandamus, of all the other ways suggested by the Supreme Court for the trial of the right to office, has been used very frequently and since it is available only to force officials to do purely ministerial acts,³⁷ it has not proved very successful.³⁸

But a number of suits have been brought prior to and subsequent to the passage of the Lloyd-La Follette Act to recover salary lost because of unjust dismissal. Salary can be recovered for the period of an illegal suspension, even though the suspension may culminate in ultimate dismissal.³⁹ But should the employee be illegally dismissed, there is grave doubt whether he can recover anything at all. Some courts rationalize that removal in disregard of the procedure required by the Lloyd-La Follette Act does not make the dismissal illegal and void. The incumbent is disabled from claiming he has not been removed; his only

33. *Priddie v. Thompson*, 82 Fed. 186 (C. C. D. W. Va. 1897); *Butler v. White*, 83 Fed. 578 (C. C. D. W. Va. 1897).

34. *Flemming v. Stahl*, 83 Fed. 940 (C. C. W. D. Ark. 1897); *Morgan v. Nunn*, 84 Fed. 551 (C. C. M. D. Tenn. 1898); see *HIGH INJUNCTIONS* (2d ed. 1880) § 1315.

35. *Carr v. Gordon*, 82 Fed. 373 (C. C. N. D. Ill. 1897).

36. *Page v. Moffett*, 85 Fed. 38, 40 (C. C. D. N. J. 1898); see *Cowper v. Smyth*, 84 Fed. 757 (C. C. N. D. Ga. 1897); *Taylor v. Taft*, 203 U. S. 461 (1906). The courts appear to have the feeling that it would be an undue interference with administration to substitute their discretion for that of an executive officer by taking jurisdiction and enjoining an illegal dismissal. *Keim v. United States*, 177 U. S. 290 (1900); *cf.* 26 *OPS. ATT'Y GEN.* 363 (1907).

37. *United States v. Postmaster of City of Buffalo*, 221 Fed. 687 (W. D. N. Y. 1915).

38. *Taylor v. Taft*, 203 U. S. 461 (1906); see (1936) 5 *Geo. Wash. L. Rev.* 145.

39. *United States v. Wickersham*, 201 U. S. 390 (1906); *Corcoran v. United States*, 38 Ct. Cl. 341 (1903); *Steele v. United States*, 40 Ct. Cl. 403 (1905); *Beuhring v. United States*, 45 Ct. Cl. 404 (1910).

remedy is to proceed without delay to try his right to the office.⁴⁰ Furthermore, the illegal removal does not create an obligation upon the Government to pay a salary to a person so removed after his removal and for an indefinite time thereafter. It becomes the duty of the person dismissed to appeal, with reasonable diligence, to the officer having authority to revoke that illegal order.⁴¹ While this may appear to be reasonable, it gives the employee very little satisfaction if the officer refuses to withdraw the unreasonable order. Some of the cases place considerable emphasis upon the requirement that the claimant shall act with reasonable diligence and are quick to eradicate all claims by holding the claimant guilty of laches.⁴² If the claimant acquiesces in receiving oral charges by answering them orally, he may be held to have waived his rights under the Act.⁴³ If these hazards are overcome and if the removing officer refuses to recall the order, the claimant's recovery is still problematical. In none of the dismissal cases is it stated how much salary the claimant should receive.⁴⁴

Another problem arises where an employee claims his dismissal is unmerited, despite compliance by the superior official with the procedural steps required by the Lloyd-La Follette Act. In France, government employees may sue in the administrative courts for damages caused by unfair acts of superior officials.⁴⁵ But apparently no suit for damages has ever been brought in the United States, and there is little reason for believing that such an action would fare any better than the suit for an injunction or salary. The courts have refused to interfere with the actions of administrative officers in this respect, despite the rather clear words of the statute.⁴⁶ So long as the procedure required by the Lloyd-La Follette Act is followed, the courts have expressed themselves as unwilling to go into the merits of the decision.⁴⁷ In a recent case, for example, an employee had been accused of rather serious misconduct and the removing officer, without any hearing, simply found the answer

40. *O'Neil v. United States*, 56 Ct. Cl. 89 (1921); *Richardson v. United States*, 64 Ct. Cl. 233 (1927).

41. *Nicholas v. United States*, 55 Ct. Cl. 188, 191 (1920), *aff'd*, 257 U. S. 71 (1921) (*Wickersham* case distinguished on ground that suspended employee immediately protested against the illegal order).

42. *Norris v. United States*, 257 U. S. 77 (1921); *Richardson v. United States*, 64 Ct. Cl. 233 (1927).

43. *Morse v. United States*, 59 Ct. Cl. 139 (1924), *appeal dismissed*, 270 U. S. 15 (1926).

44. Since many employees have indefinite appointments, the measure of recovery in *Myers v. United States*, 272 U. S. 52 (1926)—salary for the term of appointment—is inapplicable.

45. WHITE, *THE CIVIL SERVICE IN THE MODERN STATE* (1930) 259-261.

46. *Cf. United States v. Postmaster of City of Buffalo*, 221 Fed. 637 (W. D. N. Y. 1916).

47. *Eberlein v. United States*, 53 Ct. Cl. 466 (1918).

to the charges "unsatisfactory." Contending that the accusations were perjured, the employee sued for his salary, but the court said, "It is not within the jurisdiction of the court to inquire into the guilt or innocence of the plaintiff as to the charges upon which he was removed . . . it appearing from the averments . . . that every step requisite to the removal from office was taken by the Bureau officials . . . that their action in removing him . . . is conclusive and is not subject to review by the court."⁴⁸ This attitude⁴⁹ is in marked contrast to the position of the courts on the question of the review of administrative decisions in other fields.⁵⁰

Clearly, the courts have failed to enforce the law and have refused to give employees the protection under it which Congress apparently intended. But much of the blame may be attributed to the weakness of the Lloyd-La Follette Act itself. The rights granted by the Act are vague; the remedies non-existent. Although the Act forbids dismissals except for "such cause as will promote the efficiency" of the service, the statement is so broad and indefinite that it may easily be twisted to serve unwarranted ends. There is, of course, a tendency to bring unpopular persons within the terms of the Act by calling them incompetent.⁵¹ Before an impartial tribunal, no charge is more difficult to combat. Before an official who has already made up his mind, the task is insuperable.

Furthermore, by its terms the Act applies only to the classified civil service, and omits emergency employees, laborers or persons holding exempted offices.⁵² Another great weakness is the failure to require a hearing, even before the dismissing officer. Since the civil servant is still practically at the mercy of his supervising officer, a hearing before some impartial, disinterested person or body would be infinitely preferable. If the dismissing official himself were required to give the discharged employee a hearing, the employee would be protected only in the case of a conscientious supervisor who was not affected by the departmental policies and intersectional feuds and pride which abound in

48. *Golding v. United States*, 78 Ct. Cl. 682, 685 (1934); *cf. Kellom v. United States*, 55 Ct. Cl. 174 (1920); 30 Op. Atty. Gen. 79, 83 (1913). ("It is for the head of a Department and not the Civil Service Commission to determine when there exists proper cause for the removal of a classified civil service employee in his Department.").

49. But *cf. MASS. GEN. LAWS* (1932) c. 31, § 43 (giving employees, primarily policy officers, the right to appeal to the courts in the event of dismissal); WHITE, *PUBLIC ADMINISTRATION* (1926) 333 (system of reviewing dismissals in Chicago).

50. *Crowell v. Benson*, 285 U. S. 22 (1932) (trial *de novo*); *St. Joseph Stockyards v. United States*, 298 U. S. 38 (1936) (independent weighing of facts in rate case upon claim of a constitutional issue).

51. The cause given may simply be "for the good of the service." *Burnap v. United States*, 252 U. S. 512 (1920).

52. 30 OPS. ATT'Y GEN. 181 (1913).

government departments of any size. But rare indeed are such officials, and the dismissing official who meets the requirements of disinterestedness is usually far too busy with more important matters to listen to a thorough hearing and to witnesses. A hearing before another official of the same Department is unsatisfactory because witnesses are afraid of the penalties which might result if they testify in a manner obnoxious to their supervisors.⁵³ Even the Civil Service Commission, which is not generally known as a friend of the government worker,⁵⁴ has recognized the need for some sort of impartial board of review.⁵⁵ But in spite of this pressing need for an independent review agency, and in spite of considerable employee pressure on its behalf, scant progress in that direction has been made.

In addition to these loopholes, the Act provides no protection against either waves of governmental economy or against the abolition of offices. The feeling of the courts seems to be that the purpose of the Act is to protect only those accused of malfeasance, not those who are merely no longer needed in a given department.⁵⁶ And the Civil Service Commission has so ruled.⁵⁷ In making reductions in the force of employees, the head of the department or agency may apparently not only disregard the Lloyd-La Follette Act but may also override with impunity statutes and executive orders which expressly relate to orders of reduction. The case of *United States ex rel. Rhodes v. Helvering* is an example.⁵⁸ There the petitioner, an accountant in the Bureau of Internal Revenue, was dismissed because inadequate appropriations necessitated a reduction in the force. The petitioner contended that she had been dismissed in violation of two Executive Orders⁵⁹ and a statute.⁶⁰ Order number 4240

53. See Record, pp. 168, 362, 380, 1890, 1930, *Sumpf & Shultz v. Social Security Board*.

54. See 1 STUDIES ON ADMINISTRATIVE MANAGEMENT (1937) 5.

55. U. S. Civil Service Commission, FIFTIETH ANNUAL REPORT (1933) 11; cf. *Durand v. Federal Power Commission* (unpublished) where the NLRB, as arbitrators, strongly recommended an impartial body to hear cases of union discrimination.

56. *Longfellow v. Gudger*, 16 F. (2d) 653 (App. D. C. 1926) held that it is not necessary to prefer charges and follow the procedure prescribed by the Act in order to determine that an employee is surplus. In *Stilling v. United States*, 41 Ct. Cl. 61 (1906), which arose under the Civil Service Regulations requiring notice and opportunity to reply, it was held that an employee whose services were no longer required might be dismissed even if another were appointed to his place within a very short time. This provides an easy way of getting rid of an employee politically or personally distasteful to the supervising official. Accord: *Brown v. United States*, 39 Ct. Cl. 255 (1904).

57. CIVIL SERVICE ACT AND RULES (1936) 53; see Comment (1934) 2 GEO. WASH. L. REV. 463, 464. It is a question of fact whether the office has been abolished in good faith. The presumption is in favor of a proper exercise of authority. *People ex rel. Nuttall v. Simis*, 18 App. Div. 199, 45 N. Y. Supp. 940 (1897).

58. 84 F. (2d) 270 (App. D. C. 1936).

59. Executive Orders 4240 of June 4, 1925, and 6175 of June 16, 1933.

60. 42 STAT. 1491 (1925), 5 U. S. C. § 673 (1934).

provides that reductions shall begin with the lowest efficiency ratings, with additional credits for length of service.⁶¹ The statute provided that the departments might furlough employees in rotation in order to spread the work. Petitioner's efficiency rating was above that of a number of others who were not dismissed. However, the court, with practically no discussion of petitioner's contentions, held that there was no evidence that the Commissioner of Internal Revenue had abused his discretion or had violated any duty in passing upon the facts involved. Judge Stephens dissented, holding that the clause in the economy act requiring the dismissal of married persons first was not inconsistent with the statute requiring that employees with the lowest efficiency ratings should go first. In this case there were a number of married employees with lower efficiency ratings than the petitioner who were not dismissed.⁶²

The statutes and executive orders regulating dismissals had as their purpose the elimination of the personal element and substitution of the merit system, with some exceptions such as the married persons clause. But the court by refusing to recognize the statutes and orders, allowed administrators to exercise their personal, unguided and unlimited discretion. Perhaps the court was influenced by some thought that administrators should be able to exercise wide discretion over their assistants in order to effectuate desired policies. However, the people sought to be sheltered from unrestrained personal discretion are similar to the employee involved in the *Rhodes* case: technicians, clerks, stenographers and the like. It is immaterial to the administrator if such positions are occupied by A or by B. While no cases have arisen in which injunctive relief was sought there is little doubt that the courts would not enjoin a dismissal illegal under the priority regulations any more than a dismissal contrary to the regulation requiring notice of charges and an opportunity to reply.⁶³

HOURS

A wide area of administrative discretion characterizes the determination of the work-day of most government employees. As a result, the number of hours varies considerably. For example, the basic law applying to hours of work in the executive departments provides for a *minimum* seven-hour day, exclusive of Sundays and holidays, and for a further

61. Order No. 6175 made immaterial changes in the additional points for length of service.

62. For a criticism of the majority opinion see (1936) 5 GEO. WASH. L. REV. 145, 146.

63. Cf. *Longfellow v. Gudger*, 16 F. (2d) 653 (App. D. C. 1926) (the requirement that employees with military preferences should be the last dismissed was completely disregarded).

extension upon a statement of reasons.⁶⁴ This prescribed amount of time has been interpreted to be exclusive of the luncheon period; the law, it is said, requires seven full hours of labor for the Government.⁶⁵ However, the absence of any reference to a Saturday half holiday⁶⁶ was bridged by a rather ingenious ruling of the Attorney General.⁶⁷ Since Saturday is a half holiday in the District of Columbia according to the Code of the District, the employees within the District were not required to work after noon. And the present statute extends the half-holiday to almost all government employees.⁶⁸ The reasons which must be given for extending the working hours beyond seven are entirely within the discretion of the head of the Department, since the law sets up no standards.⁶⁹

To a limited extent, some degree of uniformity has been achieved as a result of recent Congressional legislation. In 1936, Congress passed a law requiring the heads of departments and independent agencies to meet for the purpose of issuing regulations as nearly uniform as possible governing the hours of work in their respective agencies.⁷⁰ Pursuant to this legislative direction, a meeting attended by representatives of almost all of the government agencies was held on March 26, 1936.⁷¹ A Com-

64. And no additional compensation is allowable in case of an extension. 30 STAT. 316 (1898), 5 U. S. C. § 29 (1934). If public business is in arrears, the head of the department *shall* extend hours of service. 30 STAT. 316 (1898), 5 U. S. C. § 31 (1934). This statute applies only to employees of the executive departments in Washington. 22 OPS. ATT'Y GEN. 62 (1898).

65. 22 OPS. ATT'Y GEN. 62 (1898).

66. The present statute reads: ". . . four hours, exclusive of time for luncheon shall constitute a day's work on Saturdays . . . for all civil employes of the Federal Government . . . exclusive of employees of the Postal Service . . . employees of the Interior Department in the field, whether on hourly, per diem . . . or other basis: Provided that . . . where for special public reasons, . . . determined by the head of the department, the services of . . . employees cannot be spared, such employees shall be entitled to an equal shortening of the workday on some other day . . ." 46 STAT. 1482 (1931) 5 U. S. C. § 26(a) (1934). Note that the statute relates only to time worked Saturday afternoons.

67. 25 OPS. ATT'Y GEN. 40 (1903).

68. See note 66 *supra*. The employees of veterans' agencies (hospitals, etc.) are exempt at the discretion of the administrators and no time off is given for working full hours. 47 STAT. 1482 (1931), 5 U. S. C. § 26(b) (1934). For other exemptions, see 50 STAT. 269 (1937), 5 U. S. C. § 26c (Supp. III 1937); 50 STAT. 706 (1937), 12 U. S. C. § 640 r(c) (Supp. III 1937).

69. 20 OPS. ATT'Y GEN. 728 (1894) (referring to the statutory provision which gives the heads of departments authority to make rules for the government of their respective departments). 17 STAT. 283 (1872), 5 U. S. C. § 22 (1934).

70. 49 STAT. 1161 (1936), 5 U. S. C. § 29(a) (Supp. III 1937). The Post Office and the corporations under the supervision of the Farm Credit Administration are exempted from the provisions of this Act. 49 STAT. 1161 (1936), 5 U. S. C. § 30(b) (Supp. III 1937); 50 STAT. 706 (1937), 12 U. S. C. § 640r(c) (Supp. III 1937).

71. Report of Civil Service Commission to Congress, January 31, 1937 (unpublished).

mittee on Hours of Duty and Overtime made a study of existing conditions and recommended a uniform schedule based on a threefold classification of workers.⁷² Fifty-two agencies reported that they had schedules substantially similar to the recommendations: of these some of the larger employers are the Post Office, Federal Emergency Administration of Public Works, General Accounting Office, Resettlement Administration, Tennessee Valley Authority, and Works Progress Administration. Other agencies departed from the schedules recommended by the Committee, including the Departments of State, Treasury, War, Navy, Interior, Agriculture, Labor, the Government Printing Office and the Veterans Administration. Most of the deviations were on the side of longer hours, but they may probably be excused by the words "as nearly as may be practical" which appear in the legislation providing for uniform hours among the departments.⁷³

The achievement of an eight-hour law was an objective of some of the earliest union activity in the government service. The letter carriers, whose tours every day lasted from nine to eleven hours, enlisted the aid of the Knights of Labor in their fight.⁷⁴ Despite the opposition of the Department, which tried to discourage the movement by suspension and removal of participating employees to inconveniently located routes,⁷⁵ the first eight-hour law applying to Post Office employees was secured in 1888.⁷⁶ For three months, however, no attempt was made by the officials to enforce it and for five years after its passage "enforcement was but half-hearted and every effort was made to evade it."⁷⁷ The Department contended that the eight-hour day meant a fifty-six hour week and that "if a man worked nine hours a day for six days, he still

72. The schedule may be summarized as follows:

Group I. Office workers, professional, scientific and sub-professional employees; office messengers and laborers, investigational and inspectional employees: Seven hours per day, 39 hours per week is recommended.

Group II. Professional, scientific and technical employees engaged primarily in outdoor work; custodial employees, messengers with special assignments, laborers in shops or in outdoor work; mechanical and crafts employees; employees protecting life and property: Eight hours per day, 40 or 44 per week is recommended.

Group III. Custodial and guard employees in penal institutions; seamen, farm and railway laborers, professional employees and custodial workers in hospitals: An average of 8 hours per day, or 44 hours per week, with the enforcement of this average distributed over a three-month period.

73. 49 STAT. 1161 (1936), 5 U. S. C. § 29(a) (Supp. III 1937).

74. SPERO, *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY* (1927) 64. In 1889 the Letter Carriers' National Association was organized by the Knights of Labor. MOSHER & KINGSLEY, *PUBLIC PERSONNEL ADMINISTRATION* (1936) 495.

75. SPERO, *op. cit. supra* note 74, at 65.

76. 25 STAT. 157 (1888). Provision was made for extra pay for overtime, but the act applied only to letter carriers.

77. SPERO, *op. cit. supra* note 74, at 72.

owed the government two hours at the end of the week."⁷⁸ The Department's contention was repudiated by the Court.⁷⁹

But the postal clerks were not so successful as the letter carriers. In spite of great dissatisfaction and considerable agitation, the passage of an eight-hour law for them was delayed until 1912⁸⁰ by their own internal division into several organizations, the extremely adverse attitude of the Department and the "gag rules" which prevented the clerks from petitioning Congress.⁸¹ Moreover, the law was not strictly an eight-hour law since it provided for an eight-hour working day which was not to extend over ten consecutive hours.⁸²

Today, the eight-hour day law applies to all mechanics and laborers employed by the government or through contractors on public works or in connection with harbor work, except in cases of "extraordinary emergency."⁸³ The Attorney General has interpreted the Act to cover all laborers and mechanics in the government service, without limitation to public works.⁸⁴ But a number of other questions have arisen under the Act. The determination of those included in the classification of laborers or mechanics is largely a matter of interpretation of specific fact situations. There is some disposition to limit overtime to those situations which the ordinary person would denote as being in fact an "extraordinary emergency."⁸⁵

Overtime, however, is still a source of grievance for government employees, and at almost any union meeting some discussion of the problem may be heard. Usually, the chief complaint is directed against the government's failure to give extra pay for overtime or to provide for compensatory time-off. The factual basis for this complaint is apparent from a reading of the relevant acts and their interpretation.

78. *Id.* at 73.

79. *Post v. United States*, 148 U. S. 124 (1893). As a result of this decision, the Department paid claims for overtime amounting to approximately \$3,500,000. *SPEERO, op. cit. supra* note 74, at 73.

80. 37 STAT. 554 (1912), amended 43 STAT. 1059 (1925), 39 U. S. C. § 118 (1934).

81. *SPEERO, op. cit. supra* note 74, at 93-94, 111-179.

82. The present law provides for an average of eight hours per day for 306 days per annum and for overtime pay above eight hours. 43 STAT. 1063 (1925), 39 U. S. C. § 613 (1934).

83. It is unlawful for a government officer to keep laborers working longer than eight hours. 27 STAT. 340 (1892), 40 U. S. C. § 321 (1934). The provisions of the eight hour law have been applied to the employees of the Printing Office. [28 STAT. 607 (1895) 44 U. S. C. § 42 (1934)]; Post Office [43 STAT. 1063 (1925), 39 U. S. C. § 613 (1934)]; and Customs Inspectors, 41 STAT. 402 (1920), 19 U. S. C. § 267 (1934).

84. 20 OPS. ATT'Y GEN. 459, (1892); 29 OPS. ATT'Y GEN. 505 (1912).

85. See Circular Letter from Attorney General to U. S. Attorneys, Oct. 31, 1906, quoted in CIVIL SERVICE ACT AND RULES (1934) 193, n. 6.

Only one statute authorizes the granting of overtime leave to employees in general and that applies only to hours worked on Saturday afternoon.⁸⁶ If the employee has worked two Saturday afternoons without getting his time off, he may not combine them and take one whole day off, for the Comptroller General has ruled that the "statute may be properly applied only by granting compensatory time off from duty in units of less than one regular working day."⁸⁷ Fortunately, the lack of legislative authorization has not prevented some of the more progressive agencies from taking the matter into their own hands and granting "overtime leave" for overtime worked on Sundays and other days as well as on Saturday afternoons. Thus the Tennessee Valley Authority has made an arrangement in regard to overtime worked by the annually rated employees (generally the office workers)⁸⁸ which is considerably better for the employees than that provided by the statute governing Saturday afternoon work. All authorized overtime is recorded and is accumulated as earned annual leave.⁸⁹ This gives the employee considerable flexibility with respect to when he will take the earned leave and allows him to add it to his summer vacation if he wishes to take a long trip. However, this action is completely unauthorized and almost always taken informally without any written administrative orders or instructions. In comparison to the subject of overtime leave, overtime pay is well covered by statutory provision. The most general statute provides that: "No money shall be paid to any clerk employed in any department at an annual salary, as compensation for extra services, unless expressly authorized by law."⁹⁰ Since by far the most general rule is that there is no compensation for overtime, most agencies cannot pay for overtime even if they so desire.⁹¹

Complaints against this policy had apparently reached the ears of Congress by 1936, probably through some of the local unions of the American Federation of Government Employees. A law was therefore passed requiring a record of overtime to be kept from July 1, 1936 until the end of the year, and providing for a report to be made by the

86. 49 STAT. 1161 (1936), 5 U. S. C. § 26(a) (Supp. III 1937). In the Post Office Department, overtime leave is allowed by statute at the option of the employee. See note 82, *supra*.

87. 11 Comp. Dec. 159, 161 (1931).

88. The hourly rated employees receive time and a half payment for overtime. EMPLOYEE RELATIONSHIP POLICY, *op. cit. supra* note 20, at 7. This may be done without legislative sanction since the authority is an independent corporation not subject to many laws governing other governmental agencies.

89. *Id.* at 8.

90. 14 STAT. 569 (1867), 5 U. S. C. § 51 (1934).

91. Some offices are specifically granted overtime compensation such as the Post Office, [43 STAT. 1063 (1925), 39 U. S. C. § 613 (1934); 42 STAT. 725 (1928), 39 U. S. C. § 828 (1934) (extra pay for night work)] and the Customs Bureau, 36 STAT. 901 (1911), 19 U. S. C. § 267 (1934).

Civil Service Commission.⁹² This report, based on the records kept at the dates specified,⁹³ has already been made, but the record has never been printed or made public by the Civil Service Committee of the House with which it was filed.⁹⁴ Yet the records show a serious situation. During the six months covered, overtime for 76,448 employees totaled 10,613,698 hours or an average of 1,768,949 hours per month. All of the overtime hours included in this figure, moreover, represented uncompensated overtime and fifty percent of the overtime was accounted for by employees who received less than two thousand dollars a year. \$7,762,393.70 is a rather large gift or tax for government employees to make or give to the Government in six months. If the schedule of hours which was recommended by the Committee on Hours of Duty and Overtime had been adopted, the picture would make the Government look like even less of a model employer.⁹⁵ Yet this report, showing an unfair and unfortunate situation, has remained with Congress for over a year without any remedial action.⁹⁶

In contrast with this policy concerning overtime, however, the Government's treatment of many of its employees in regard to vacation compares favorably with the best industrial practice. For example, since 1936, all civilian employees, with some exceptions, regardless of their tenure, are entitled to twenty-six days annual leave with pay each year, exclusive of Sundays and holidays.⁹⁷ Temporary employees, except those engaged in construction work at hourly rates, receive two and a half days of leave for each month of service.⁹⁸ Employees of government corporations, including the Tennessee Valley Authority, are also given the leave privileges provided for in the statute.⁹⁹

92. 49 STAT. 1161 (1936), 5 U. S. C. § 31(a) (Supp. III 1937).

93. I am fortunate in having obtained a typewritten summary of the report and part of the original in full.

94. Inquiry at several agencies has disclosed that the records were inadequately kept. The overtime was considerably more than the record shows, for in no case was overtime of less than thirty minutes reported.

95. The hours of overtime would have amounted to 13,775,154, with a cost to the Government, if the employees were paid for the overtime, of \$10,269,127.90.

96. "The description of existing Federal personnel legislation as a 'patchwork with many large holes' is perhaps well taken." 1 STUDIES ON ADMINISTRATIVE MANAGEMENT (1937) 1.

97. 49 STAT. 1161 (1936), 5 U. S. C. § 30(b) (Supp. III 1937).

98. The Act applies to the departmental employees of the Post Office Department and to those employed in the Mail Equipment Shops. 49 STAT. 1161 (1936), 5 U. S. C. § 30(1) (Supp. III 1937). Other employees of the Postal Service are entitled to fifteen days a year leave of absence. 45 STAT. 595 (1928) 39 U. S. C. § 823 (1934).

99. 49 STAT. 1161 (1936), 5 U. S. C. § 30(d) (Supp. III 1937). Laborers paid by the hour are apparently not granted annual leave by the T.V.A., perhaps because of the specific exception applying to temporary employees engaged on construction work, 49 STAT. 1161 (1936), 5 U. S. C. § 30(b) (Supp. III 1937), and the application of § 30(b) to government corporations by 49 STAT. 1162 (1936), 5 U. S. C. § 30(d) (Supp. III 1937).

MORALE

The high morale so necessary in public administration suffers in no small degree from a number of defects in the present system. Two of the most important are the absence of a regularized plan of promotion¹⁰⁰ and the inadequate machinery for redress of grievances. The lack of a good plan of promotions has been the subject of complaint by both employees and persons interested in public administration. The laws governing the promotion of civil servants generally are restrictive or permissive; none give employees any right to promotion. Ordinarily, promotions cannot be made unless the employee has passed an examination demonstrating his fitness for the new office.¹⁰¹ However, for many promotions, such as from the lower to the higher clerical grades, no examination is required since the examination passed by the employee upon entering the service is sufficient to demonstrate his fitness.¹⁰² Provision is also made for rating the efficiency of employees, and for a minimum which must be met before an employee is eligible for promotion.¹⁰³ But even when the efficiency requirement is met, the promotion is still dependent upon administrative decision. During economy drives any possibility of promotion vanishes. For example, the Economy Act prohibited any administrative promotions (from grade to grade) during the fiscal year ending in June, 1934.¹⁰⁴ Only in the post office department are automatic promotions made. After a year's satisfactory service, clerks in first and second class post offices and city letter carriers are entitled to yearly promotions from grade to grade until they reach the fifth grade.¹⁰⁵ But in no event may a promotion be made unless the employee has served efficiently and faithfully during the year.¹⁰⁶ Similar provision for automatic promotion up to a certain point is made in the motor vehicle service.¹⁰⁷ None of the other departments, however, provide for automatic promotions, and not even all post office employees receive the benefit of such a system. Unless there is a well-recognized administrative policy to make regular promotions for efficient service, no particular incentive motivates federal workers to do more than is actually required. Certainly there is very little feeling among the majority of government employees that hard work will earn them a rise in the organization. The effect of such an attitude upon morale is marked.

100. See WHITE, PUBLIC ADMINISTRATION (1926) 243.

101. 22 STAT. 406 (1883), 5 U. S. C. § 638 (1934).

102. CIVIL SERVICE ACT AND RULES (1928) 42, n. 35; CIVIL SERVICE ACT AND RULES (1938) 54, n. 39.

103. 37 STAT. 413 (1912), 5 U. S. C. § 648 (1934). By statute, transfers may include promotions. 42 STAT. 1491 (1923), 5 U. S. C. § 670 (1934).

104. 47 STAT. 1513 (1933).

105. 43 STAT. 1059 (1925), 39 U. S. C. § 108 (1934).

106. 34 STAT. 1206 (1907), 39 U. S. C. § 109 (1934).

107. 43 STAT. 1059 (1925), 39 U. S. C. § 117 (1934).

A further cause of irritation and discontent is the unheeded accumulation of grievances. The feeling that one employee has been unjustly treated may undermine the morale of a whole class of employees.¹⁰⁸ Although this fact is widely recognized, no legislative action has been taken to remedy the situation, except for the limited appeals which may be taken to the Civil Service Commission by aggrieved employees. Many types of grievances arise. They deal with everything from insufficient lighting to overtime, improper job classifications, unfair efficiency ratings, and unjust dismissals. Very few departments have made an attempt to set up any sort of machinery to deal with these matters, many of which could be speedily and satisfactorily adjusted within the departments. Other complaints, by their nature, require the intervention of a disinterested agency if they cannot be settled satisfactorily within the department. Even those agencies which have attempted somewhat to deal with the problem have not set up anything remotely resembling adequate machinery. The Social Security Board, after considerable unrest in its Baltimore office, set-up a joint board, composed of representatives of the administration and union members to deal with complaints on efficiency ratings. This, however, has proved in practice quite inadequate to deal with the many types of grievances which may arise. It is fairly typical of what action has been taken. In its 1934 annual report, the Civil Service Commission urged the establishment within the departments of "conciliation committees" with appeal to the Commission, to take care of grievances. One experimental committee was set up but nothing further has been done.¹⁰⁹ That the application of ideas of conciliation and arbitration are not impossible in "a public service, dominated for generations by authoritarian traditions and individualistic ideas" is shown by the existence and accomplishments of the Whitley Councils in England.¹¹⁰ As a result of the work of the various unions through the machinery provided by the councils, the conditions of service of some 300,000 British Civil servants are governed by agreements.¹¹¹ The Tennessee Valley Authority has made a similar effort in its Employee Relationship Policy. This provides:

"22. . . . at least thirty (30) days published notice shall be given of any proposed new rule or change in established rules. No new rule may be adopted or existing rule changed until the duly authorized representatives of employees have had reasonable opportunity to confer with the supervisory staff and the Personnel Division."

While the employee representatives have no actual power, they are at least given an opportunity to be heard and their objections may carry

108. WHITE, PUBLIC ADMINISTRATION (1926) 238.

109. CIVIL SERVICE COMMISSION, FIFTY-FIRST ANNUAL REPORT (1934) 9.

110. See WHITE, WHITLEY COUNCILS IN THE BRITISH CIVIL SERVICE (1933) X.

111. *Id.* at 343.

some weight if a genuine effort is made by the Administration to arrive at a fair understanding.¹¹²

UNIONIZATION

Many of the unsatisfactory phases of government employment outlined above may be attributed to insufficient pressure by the employees themselves.¹¹³ In contrast to the sweeping rights guaranteed all workers by the Wagner Act, the Lloyd-La Follette Act of 1912, the only law dealing with the rights of federal employees to organize, merely provides that membership in a union shall not be a cause for demotion, suspension or dismissal.¹¹⁴ The Act refers specifically to postal employees although it is generally assumed that all employees are protected by the policy there declared. In any event, no head of an agency today is apt publicly to contend the contrary. President Roosevelt, in a letter dated August 16, 1937, to Mr. Luther C. Stewart, President of the National Federation of Federal Employees, stated his views in part as follows:

"Organizations of Government employees have a logical place in Government affairs. The desire of Government employees for fair and adequate pay, reasonable hours of work, safe and suitable working conditions, development of opportunities for advancement, facilities for fair and impartial consideration and review of grievances, and other objectives of a proper employee relations policy, is basically no different from that of employees in private industry. Organization on their part to present their views on such matters is both natural and logical . . ."

Even in comparatively recent times, however, administrative officers have thought it undesirable to have government employees organized and did not hesitate to say so publicly. Postmaster General Burleson, in his annual report to Congress for 1917, said that the formation of organizations with the purpose of "interfering with the discipline and administration of the service, the control of the election of persons nominated for public office, or enactment of legislation for their selfish interests and not for the welfare of the public should cease." He also contended that the organization of government workers was unnecessary since "they

112. Other attempts at employee representation have been made—in the Printing Office and in the Post Office, during the early twenties under Postmaster-General Will Hays. MOSHER & KINGSLEY, *op. cit. supra* note 74, at 488-491.

113. Until the summer of 1937, there were only two unions of any size which covered government employees generally. The larger one, the American Federation of Government Employees (an A. F. of L. affiliate) was opposed to public expression of grievances or agitation by local unions because its President believed such demonstration would interfere with his lobbying activities. Nine locals were expelled in 1937 because of their refusal to abide by this policy.

114. 37 STAT. 555 (1912), 5 U. S. C. § 652 (1934).

can always depend upon public opinion to insure their enjoyment of their full rights under employment."¹¹⁵ It has already been pointed out how little sympathy the generally misinformed public has for federal employees. Mr. Burleson does not say how the public is to be informed if there are no employee organizations to give publicity to existing abuses.

In spite of such officials, the naked right to join labor organizations appears to be fairly well established. But recognition of this right raises the question of the privilege of government employee organizations to affiliate with associations of non-government workers. Isolated government unions are at a great disadvantage in obtaining the passage of favorable legislation: they are thwarted by the popular mistrust and antipathy toward the job-holder on which legislatures capitalize; they are subject to political restrictions which prevent them from taking an active part in politics and elections; they have many members who cannot even vote. Because of these disabilities, affiliation with the national labor movement, which *does* wield political power, is a matter of vital importance.

The Lloyd-La Follette Act appears to guarantee the right of affiliation if the outside organization imposes no duty to strike. At one time and another, vigorous objection to affiliation with the American Federation of Labor, based on a fear that its interests might conflict with those of the Government, has divided the allegiance of federal employees. In 1920 a suggested amendment to the Retirement Act, introduced by Senator Myers, aimed to exclude from the benefits of the Act those persons who belonged to an organization of government employees which was affiliated with a superior body of organized labor.¹¹⁶ The Senator thought that the American Federation of Labor had placed itself in a position of opposition to the Government by the steel strike of 1919.¹¹⁷ He also believed that employees should not be led to criticize the Government,¹¹⁸ and since labor organization was based upon conflict of interest it had no place in the Government where no such conflict existed.¹¹⁹ Fortunately, the amendment failed to pass. However, a similar proposal may soon arise again in view of the growth in membership of government employees in the Union affiliated with the Committee for Industrial Organization.¹²⁰

115. Annual Report of the Postmaster-General, 1917, quoted in WHITE, PUBLIC ADMINISTRATION (1926) 385.

116. 59 CONG. REC. 5131 (1920).

117. 59 CONG. REC. 5133 (1920). The Senator also thought it very bad that government employees should be affiliated with organizations asking for the release of Mooney, Debs and Emma Goldman. *Id.* at 5139.

118. *Ibid.*

119. *Id.* at 5141.

120. Government unions were forbidden to affiliate with the British free labor movement as a result of the hysteria caused by the general strike in 1926, even though the

To many people, the affiliation of any government union with a national labor organization instinctively connotes a strike of federal employees. Perhaps one of the important specific causes of this association is the Boston police strike of 1919.¹²¹ Then almost any discussion of government unionism is likely to degenerate into a parade of the horrors resulting from a strike of government employees. A great point is made of the fact that they are public employees, and patriotic and other irrelevant issues are injected into the discussion. Broad generalizations are made without any apparent attempt to analyze the situation in realistic terms. Even President Roosevelt who has shown himself generally sympathetic to government unionism is apparently somewhat influenced by this point of view and says in his letter to Mr. Luther Stewart:

"Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests *nothing less than an intent* on their part to prevent or obstruct the operations of Government until their demands are satisfied. *Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.*"¹²²

Thus an industrial dispute is unconsciously converted into treason by assuming an intent to obstruct the Government without regard to the unreasonably purpose of the intent. Another possible objection to a statement of this sort is that it lumps together all government employees and assumes that a strike by any of them would inflict great injury upon the public. No doubt the public would be endangered or inconvenienced by the strike of some employees; but as to others the fear is entirely ungrounded. A strike of the research assistants in the Department of Agriculture, of the laborers on a T. V. A. dam, or of the workers in the navy yards would cause the public no particular inconvenience. A strike of the employees of the Chase National Bank would certainly result in much greater public inconvenience than a two weeks strike by the whole personnel of the Government printing office. However, it is not yet treason to strike against the Chase National Bank.

Even assuming that any strike of government employees would directly injure the public, there is really no factual basis for the fear of a strike.

Civil Service did not participate. WHITE, WHITLEY COUNCILS (1933) 297-298. If the fear of the CIO becomes much greater in this country, a similar prohibition is likely to be enforced.

121. MOSHER & KINGSLEY, *op. cit. supra* note 74, at 514.

122. Italics supplied.

The three unions covering government employees generally, and a number of the other unions, have provisions in their charters forswearing their right to strike. Furthermore, government employees as a whole are docile and opposed to the use of the strike. With the exception of a few small strikes in the arsenals, navy yards and the printing office, there has only been one incident resembling a strike in the Departmental service, the so-called Fairmont Strike in the first decade of the twentieth century.¹²³ In view of the history of government unions, their present policy and the temper of government employees, the continual discussion of the strike problem is indeed gratuitous.

It is interesting to note that there is no statute forbidding a strike of government employees. There are, however, statutes which may be used to break a strike, such as that used against the postal employees. It has been suggested that the Sherman Act could be invoked against certain striking government employees, for conspiring to restrain interstate commerce.¹²⁴ But the equity of Civil Service employees in the retirement fund is probably enough to deter them from striking and thereby risking dismissal. For instance, while in England there is no law forbidding public employees to strike, the Attorney General has intimated that "such a strike would violate the conditions upon which His Majesty's Government grants pensions on retirement."¹²⁵

In contrast to our attitude, Mexico allows considerably more freedom to Government employees: Last December, the Senate approved a bill introduced by President Cardenas granting public employees the right to organize and strike.¹²⁶ The scheme provides for the division of all employees into two classes, confidential employees, those holding executive and responsible positions, and "basic employees," including all others. The bill only applies to basic employees. Strikes by government employees are formally recognized as a legitimate means for redressing just grievances, such as non-payment of wages or failure on the part of higher officials to observe the requirements of the law. To be legal they must be supported by a majority of the employees of the department involved and must be peacefully carried out.¹²⁷ While Mexican Government em-

123. A criminal statute forbidding interference with the mails was invoked against the employees of the Fairmont office, who resigned in protest against intolerable conditions. SPERO, *PROBLEMS OF AMERICAN PUBLIC SERVICE* (1935) 184-185.

124. *Cf. United States v. Debs*, 64 Fed. 724 (C. C. N. D. Ill. 1894).

125. WHITE, *WHITLEY COUNCILS IN THE BRITISH CIVIL SERVICE* (1933) 293.

126. *Mexican Labor News*, Dec. 30, 1937.

127. It is pointed out that strikes for the adjustment of intolerable conditions will inevitably occur, whether legal or not. By giving such movements legal status, the government encourages definite norms regulating the relations between state employees and their superiors. The preamble of the bill dispels the fallacy of considering a strike of federal employees as a strike "against the state as such." *Mexican Labor News*, July 7, 1937.

ployees may strike for only certain limited causes, the recognition of the right at all, in an affirmative manner, is revolutionary as compared with the United States and Great Britain.¹²⁸

Although it is considered a legitimate activity for an ordinary labor union to secure favorable legislation from Congress, federal employees are seriously handicapped by the restrictions imposed upon their political activity.¹²⁹ Civil Service Rule 1, § 1, provides in part that "persons . . . in the classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in . . . political campaigns." In defining "political activity," the Commission has ruled that "If politics is involved, active participation by classified employees is prohibited . . . This includes such activity in connection with a labor union interested in the enactment of legislation regarding labor."¹³⁰ Classified employees are forbidden "any political activity which is prohibited by the rule in the case of an employee acting independently" when carried on "in secret or open cooperation with others. Whatever the employee may not . . . do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control."¹³¹ This interpretation of the rule very definitely limits the role which a union of government employees may play in assisting their friends at election time. Employees may not solicit votes or even help in getting out votes on election day.¹³² With these limitations, it is small wonder that Congressmen are slow to respond to requests of federal workers. But these rules are not always obeyed. In 1902, the postal employees, with the aid of organized labor, succeeded in defeating Congressman Lord, who was an enemy of the much needed reclassification in the postal service. But this is one of the few cases in which federal employees politically punished an opponent.¹³³ Every year the Civil Service Commission reports upon cases of political activity investigated and the disciplinary action recommended. In 1935 there were 236 such cases reported.¹³⁴ The employees

128. No law specifically prohibits government employees from striking in this country. But from a practical point of view the strike would not be a very effective weapon in the face of overwhelming executive, legislative and judicial opposition, as well as public hysteria aroused by use of the words "treason" and "mutiny" in describing the conflict.

129. It is ironical that the political restrictions, now considered a handicap, were originally conceived for the protection of public servants. The Civil Service Act thus gave the Commission and the President power to make rules governing political activity. 22 STAT. 403 (1883), 5 U. S. C. § 633 (1934).

130. CIVIL SERVICE COMMISSION, POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS (1936) 1.

131. *Id.* at 3.

132. *Id.* at 5.

133. SPERO, THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY (1927) 99.

134. FIFTY-SECOND ANNUAL REPORT (1935) 12.

who are most likely to engage in such activity are apparently fourth class postmasters and rural letter carriers, who are engaged in local politics.¹³⁵

Under the Lloyd-La Follette Act, however, employees or their representatives are given the right to petition Congressmen on matters affecting their interests.¹³⁶ This provision was made necessary by a series of executive orders, known as the "gag rules," which aimed to prevent any employees going to Congressmen with their grievances.¹³⁷ These orders caused such agitation and unrest in the Post Office Department, at which they were primarily aimed, that they were finally brought to the attention of Congress by Senator La Follette and resulted in the enactment of the Lloyd-La Follette Act.¹³⁸ Now it is well settled that employees may petition Congress but of course there is no effective way of making Congress listen to the petition.

Administrative officials apparently have always been afraid of allowing employees to gain any political power. In 1868 Gladstone was afraid to allow government employees to vote for fear that they would use their votes to secure their own class interests.¹³⁹ It is always contended that if public employees succeed in achieving political power, they will use it for "selfish ends"—that is, for their own good.¹⁴⁰ Yet the organization of special interests politically to obtain ends they believe desirable from their own point of view is so common in American politics as to pass without comment. Apparently Congress really fears the possible political power of organized employees in conjunction with organized labor.

While a Government Union must necessarily devote a major share of its energies to legislation, there is also room for considerable activity in guiding, assisting and putting pressure on administrative discretion. Throughout this article, examples have appeared which illustrate the great breadth of administrative discretion. With regard to hours, compensation (within grades of a classification), promotions, working conditions, tenure and all of the elements making for a high morale, administrative action may accomplish much without additional legislation. The head of a department may even refer disputed discharges to an outside agency for arbitration, if he desires, without any legislation. A government union can and should apply itself to working out schemes for the promotion of the welfare of employees along this line. Compulsory arbitra-

135. FIFTIETH ANNUAL REPORT (1933) 14.

136. 37 STAT. 555 (1912), 5 U. S. C. § 652 (1934).

137. See MAYERS, *op. cit. supra* note 16, at 548-549. The Orders were the Government's answer to the agitation for better classification and automatic promotion in the Post Office Service. SPERO, *THE LABOR MOVEMENT IN A GOVERNMENT INDUSTRY* (1927) 97.

138. *Id.* at 167.

139. WHITE, *WHITLEY COUNCILS IN THE BRITISH CIVIL SERVICE* (1933) 226.

140. MOSHER & KINGSLEY, *op. cit. supra* note 74, at 512.

tion, a higher minimum wage and payment for overtime are examples of things which will require legislation. Yet they are fewer in number and on the whole less important than those reforms which may be achieved if executive cooperation could be obtained, and a collective bargaining system established.

It is sometimes urged that the Government cannot engage in collective bargaining with its employees. In fact, the President in his letter to Mr. Stewart made such a statement.

"All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters."

Yet, it must be noted that the President says "collective bargaining, as usually understood." A collective bargain has been defined as "a statement of the conditions upon which such work as is offered and accepted is to be done."¹⁴¹ Just what the President meant is hard to say, but in terms of the definition cited, the Government can move considerably in the direction of entering into a collective bargain, or more correctly, a government department may engage in collective bargaining. In all of those matters in which the Administrator has discretion, a bargain may properly be made. It is said that the Administrative official cannot "bind the employer." True, his agreement would not be proof against legislative action, for Congress could at any time change the terms of the agreement. However, private contracts of a similar nature are also not completely immune from legislative action, Federal or local. The head of each department has authority to prescribe regulations for the conduct of his department and the conduct of the employees.¹⁴² There is no reason why such regulations cannot be made with the advice and consent of the representatives of the employees. There is no lack of power if the administrator wishes to exercise it.

It may be argued that such a regulation by contract will not be binding upon a successor. But while the ordinary rule that the decision or contract

141. Hamilton, *Collective Bargaining* (1930) 3 ENCYC. SOC. SCIENCES 628.

142. 1 STAT. 28 (1789) as amended, 17 STAT. 283 (1872), 5 U. S. C. § 22 (1934).

of an administrator binds his successor¹⁴³ is probably inapplicable to this type of situation, that hardly seems a valid reason for refusing to make a contract. A collective labor agreement in private industry will not necessarily bind a purchaser or successor of the employer. And there is considerable continuity in the conduct of government departments so that settled practices become adopted and continue regardless of changes at the head of the department. These official customs are sometimes referred to as the "common law of the department."¹⁴⁴ As a practical matter, working conditions agreed to by an administrator would not be subject to violent mutations, but would alter slowly as conditions changed, not as administrators changed.

The union also can render to its members an important service by seeing that existing laws and regulations are followed. Employees are governed by laws and regulations so numerous and diverse that the most conscientious administrator is apt to violate them frequently. By specializing in this highly technical field, the union may assist the administrator as well as its own members. It is, however, of basic importance that the union should not restrict its scope of activity to any one of the three major fronts of legislation, collective bargaining, and enforcement. The union which desires to be of the greatest assistance must attempt to balance the three types of activity equally.

143. 9 OPS. ATT'Y GEN. 32 (1857); 9 OPS. ATT'Y GEN. 300 (1859); 13 OPS. ATT'Y GEN. 3 (1869); 13 OPS. ATT'Y GEN. 226 (1870); 13 OPS. ATT'Y GEN. 387 (1871); 17 OPS. ATT'Y GEN. 315 (1882); 34 OPS. ATT'Y GEN. 55 (1923); 34 OPS. ATT'Y GEN. 320 (1924).

144. *United States v. Macdaniel*, 7 Pet. 1, 14 (U. S. 1833); see 19 OPS. ATT'Y GEN. 401 (1889); 20 OPS. ATT'Y GEN. 730 (1894).