Catholic University Law Review

Volume 21
Issue 3 *Spring 1972*

Article 2

1972

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What kind of labor-management relations program should we have in the federal sector? Those of us who are responsible for personnel and labor relations policies for federal employees have focused on this question since 1962. After four major studies and three Executive Orders in the decade we still do not believe we are close to the final answer.

We do know that no one has yet developed the perfect model for a labor-management relations program, one that is universally applicable, absolutely fair and equitable, internally logical, externally consistent with other established institutions, and guaranteed to produce workable solutions for all labor-management relations problems. Because such a model program does not exist, we have fashioned a program suited to the unique conditions of employment in the federal civil service. And with the dynamic nature of labor relations, we have adapted and refined the program to keep pace with changing times and conditions. Labor-management relations in the federal government is an evolving program. We, therefore, expect additional changes, refinements and hopefully improvements in the future. For the purpose of this paper, I do not propose to prognosticate or predict future developments. Instead, I should like to examine some basic characteristics of the federal public service and to analyze how these characteristics have influenced the development of the federal labor-management relations program.

Union activity in the federal government is not a recent development. Craftsmen organizations were first active in United States Naval installations in the early 1800's. One of the first affiliates of the American Federation of Labor was the National Association of Letter Carriers, which was organized in the late nineteenth century. Neither are work stoppages new to the federal government. The first recorded work stoppage by federal employees occurred in August 1835 at the Navy Yard in Washington, D.C., and dozens more followed during the nineteenth century.

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Not until 1912 with the enactment of the Lloyd-LaFollette Act[1] did the Congress or the President enunciate any sort of formal policy concerning employee unions. That Act guaranteed the right of federal employees to petition and to furnish information to Congress. It also protected the postal employee in the exercise of his right to join a postal union so long as the union was not affiliated with an organization that imposed a duty to strike against the United States. By extension, this Act became "the common law of federal personnel practice that any Government employee has the right to join or not to join any organization which does not assert the right to strike against or advocate the overthrow of the Government."[2] In the fifty years following the passage of the Lloyd-LaFollette Act, only two additional statutes dealing with federal labor-management relations were enacted; both were prohibitions against strikes by federal employees, prescribing penalties for those violating the prohibition.[3]

In 1962 President Kennedy established a comprehensive, government-wide policy on labor-management relations in the federal service. Exec. Order No. 10,988, which officially acknowledged the legitimate role that federal employee unions should have in the formulation and implementation of personnel policies and practices, was a landmark in the history of federal labor-management relations, and was hailed by unions as the "Magna Carta" for labor-management relations in public employment generally.

Actually, Exec. Order No. 10,988 was a modest beginning—realistic in the light of general inexperience by both federal unions and agency management and consciously transitional in concept. It was never considered the "last word" in federal labor-management relations policy by those who participated in its development.

In 1969 the President's Study Committee on Labor-Management Relations in the Federal Service reported that substantial accomplishments had resulted from Exec. Order No. 10,988. However, it concluded that the time had come "to adjust the policies of Exec. Order No. 10,988 to changing conditions in the federal labor-management relations programs."[4] These changing conditions had resulted from the great growth of union representation of federal employees which occurred between 1962 and 1969. This growth is illustrated in

1. Act of August 24, 1912, 37 Stat. 555, *as amended*, 5 U.S.C. §§ 7101-02 (1970).

2. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE REPORT: A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE 2 (1961).

3. Labor-Management Relations Act of June 23, 1947, ch. 120, § 305, 61 Stat. 160 (repealed 1955); Act of August 9, 1955, ch. 690, §§ 1, 2, 69 Stat. 624, 5 U.S.C. §§ 7311, 3333.

4. PRESIDENT'S STUDY COMMITTEE ON LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE: REPORT AND RECOMMENDATIONS ON LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 31 (August 1969).

Appendix 1. Based upon the recommendations of the Study Committee, President Nixon issued Exec. Order No. 11,491 on October 29, 1969.

It is important to remember that the new Order *evolved* from the old. Federal labor-management relations today is still in a state of evolutionary development. Like any other human institution, it is subject to forces which produce change—economic forces, social forces, political forces, legal forces, ethical forces and philosophical forces. Today, we aren't where we were five years ago. And five years from now we won't be where we are today.

While Exec. Order No. 11,491 evolved directly from experience under Exec. Order No. 10,988, it nevertheless represented a radical departure from the old Order. It established new policies, new machinery and a new framework for conducting labor-management relations within the federal government. The changes made by Exec. Order No. 11,491, and last year by Exec. Order No. 11,616,[5] reflect refinement and improvement of the program to deal with the special problems and experiences in the federal system.

These Executive Orders have been based upon the fundamental thesis that public employment policies and practices in the federal sector must adjust to collective bargaining. I believe this adjustment is essential. At the same time, it is equally important that collective bargaining in the federal sector accommodate to fundamental policies and practices of public employment that are essential to good government. We need an accommodation on both sides, and this is what we are attempting to achieve. Some government managers have pushed hard to retain unchanged the public employment policies and practices of the past—"the good old days." These managers should recognize that labor-management relations are here to stay—not just to stay but to grow and to flourish. Labor-management relations provide benefits to managers as well as to employees. Government officials and their employees are provided a means of communication through which each can gain a better understanding of the other's position on issues which tend to divide them. Through labor-management relations, federal employees have increasingly come to participate with management in the development of policies and practices which affect them. Of course, employee unions have long represented federal employees both on the Hill and with political officials in the executive branch.

Critics of the federal program, both union and academic, often seem to favor a blind accommodation of public employment practices and policies to collective bargaining as it has evolved in the private sector during the last 40 years. These critics should recognize that we in the federal government are not where

5. Exec. Order No. 11,491, 3 C.F.R. 260 (1971), 5 U.S.C. § 7301 (1970), *as amended*, Exec. Order No. 11,616, 36 Fed. Reg. 17319 (1971).

private employers were in the 1930's regardless of how compelling the analogy might seem at first glance. I will readily admit that many representatives on both sides of the federal bargaining table may be as unsophisticated in labor-management relations as were many of their private sector counterparts 40 years ago. But that is not the point. The point is that the labor-management relations program in the federal sector was established nearly 30 years after the Wagner Act. Times were different, attitudes were different, and needs were different. The employment conditions faced by federal employees in the 1960's and 1970's bear little resemblance to the employment conditions which prompted the passage of the Wagner Act.

When critics of the federal program draw comparisons with private sector concepts and practices, more often than not their comparisons result in commendation where federal sector practices are similar to the private sector and condemnation where they differ. This is, in my view, a superficial approach. The policies and practices which collectively make up the private sector labor-management relations "model" are a product of many years of American industrial relations history. They have developed and evolved to meet conditions and to solve problems in private sector labor-management relations. We are attempting in the federal sector to fashion and keep up to date a program which meets the conditions and solves the problems in today's federal sector.

Federal employees constitute a special class of employees because of their unique status as part of the machinery of our national government. They perform services or functions which have been judged, under our democratic system, to be essential to the American people. Often these functions constitute a monopoly. But more important they emanate from the authority and structure of the state.

Public policy demands that the performance of such governmental functions not be hampered by any particular group in the interests of its members. The public interest must prevail over the private interest. Under our economic system a private firm belongs to its stockholders; the federal government belongs to all the people. Of course, some private firms perform noncompetitive or essential functions. But there is this basic difference: the government's functions emanate from the power and resources of all the people and therefore must be responsive to the will and the needs of the people.

Labor-management relations in the federal sector take place against a background of constraints quite different from those in the private sector. The pressures of the marketplace impose constraints which discipline unions and managements in the private sector on the terms of the settlements negotiated by the parties. But the very nature of the services performed by the Government make the constraints of the marketplace largely inoperable in the public sector.

The federal government does not sell services as do private firms. Thus supply and demand, profit and loss are not the determinants once a function is entrusted to the Government.

Without the normal disciplines of the marketplace—and with the ability of government to assure essential services to the people at stake—I think it eminently clear that labor-management policy in the federal sector cannot be the same as in the private sector. While Exec. Order No. 11,491, as amended, incorporates some proven practices of labor-management relations in the private sector, it contains significant differences which reflect the fundamental fact that the employer is Government at the same time it is "management." Thus, while many matters dealing with recognition, representation and union rights and responsibilities are common to both the public and private sectors—and are so reflected in Exec. Order No. 11,491, as amended—many other matters, particularly those relating to (1) the legal basis for the system, (2) employer attitude toward union organizing, (3) the scope of bargaining, and (4) the "right" to strike, are not the same and require an approach tailored to federal needs and experiences.[6] Let us examine these areas of significant difference.

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6. Even in representation and unfair labor practice matters the Assistant Secretary of Labor for Labor-Management Relations has, in the exercise of his responsibilities under Exec. Order 11,491, established the general principle that he is not bound by the precedents of the private sector. In the *Charleston Naval Shipyard* case the Hearing Examiner had concluded that in a case involving employee solicitation and distribution of literature he should follow the decisions of the NLRB. He had reasoned that "the Executive Order is plainly modeled on the provisions of the National Labor Relations Act. . . . The inconsequential variances in the text mark no difference in result: so far as we are here concerned the decisions under the statute dealing with employee rights in solicitation and in distribution of literature are applicable under the Order." The Assistant Secretary rejected "the reasoning of the Hearing Examiner . . . insofar as he implies that all of the rules and decisions under the Labor-Management Relations Act, as amended, would constitute binding precedent on the Assistant Secretary with respect to the implementation of his responsibilities under Executive Order 11,491." The Assistant Secretary very rightly pointed out that the "legislative history" of the Executive Orders does not support the view that precedent developed under the National Labor Relations Act, as amended, is binding in the federal sector: "There is no indication in the reports and recommendations which preceded Executive Orders 10,988 and 11,491 that the experience gained in the private sector under the National Labor Relations Act would necessarily be the controlling precedent in the administration of labor-management relations in the federal sector. Thus, many of the provisions of Executive Order 10,988 constituted clear attempts to take into account situations peculiar to Federal sector labor-management relations. Moreover, in 1969, when it was determined that improvements in the federal labor-management relations program were warranted, it was made clear by the Study Committee that the proposed changes dealt only with deficiencies found to exist under Executive Order 10,988, and there was no intention to adopt some other model for Federal labor-management relations." Charleston Naval Shipyard and Federal Employee Metal Trades Council, Metal Trades Department, AFL-CIO, Case Nos. 40-1940 (CA) and 40-1950 'CA), A/SLMR No. 1 (1971).

The American Bar Association, speaking through its section on Labor Relations Law, has also recognized that labor-management relations in the federal government does possess some unique features and, consequently, some federal sector policies and procedures must differ from those in

GROWTH OF FEDERAL UNIONS

Year	Exclusive Units	Federal Employees in Exclusive Units		Total
		Postal	Non-Postal	
1962	29	—	19,000	19,000
1963	61	490,000	180,000	670,000
1964	483	499,000	231,000	730,000
1965	766	515,000	320,000	835,000
1966	1,174	619,000	435,000	1,054,000
1967	1,813	609,000	630,000	1,239,000
1968	2,305	618,000	798,000	1,416,000
1969	2,647	634,000	843,000	1,477,000
1970	3,010	626,000	916,000	1,542,000

Legal Basis for the Labor-Management Relations System

In the private sector the legal basis for most labor-management relations and collective bargaining is found in the National Labor Relations Act, as amended. The legal basis for labor-management relations in the federal government is Exec. Order No. 11,491, as amended. The federal labor-management relations system is often criticized because it is not based on statute. Since it derives from Executive Order there are no legal rights and duties which can be enforced in a Federal Court. The absence of a statute and hence, of broad judicial review,[7] are considered serious defects by these critics.

First, I wish to make it clear that we are not opposed, in principle, to a statute governing labor-management relations in the federal government. As I indicated in my testimony before the House Post Office and Civil Service Committee last year:

> We do not object in principle to legislation in this area. However, we think it should not come until policies and machinery have been tested and conditions stabilized sufficiently to know what will be suitable and effective. I want to emphasize our strong belief in

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the private sector. In proposing the creation of a Federal Labor Relations Board, the ABA said: "Although we have no quarrel with the work of the NLRB in its field, we believe that in view of the problems peculiar to federal labor-management relations, there is need for a new arena for additional development of the law of collective bargaining in the federal sector." Report of the American Bar Association's Committee on the Law of Federal Government Employee Relations, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION, 1971 COMMITTEE REPORTS vol. II, 168 (1971) [hereinafter cited as ABA COMMITTEE REPORTS].

7. Judicial review is not totally absent but it is very limited. As the U.S. District Court for the District of Columbia stated in a recent opinion: "[T]here has not been an intention on the part of Congress or the President to create a role for the judiciary in the implementation of personnel policies, and that jurisdiction of this Court must either rest upon a situation such as was present in Nat'l Ass'n of Gov't Employees v. White, 418 F.2d 1126 (D.C. Cir. 1969) which involved a clash with basic constitutional safeguards, or in a situation which demonstrates that the Executive has proceeded in a substantially arbitrary and capricious manner, far beyond a mere question of due process, to a point where basic inherent rights are being adversely and seriously affected. . . . [T]he Court feels that this is one of those situations where there is no reason in law why a court can intervene with the discretion of the Executive in his handling of a matter so peculiar to the Executive, namely, the labor activities of the Executive departments." American Fed'n of Gov't Employees v. Hampton, Civil No. 1428-71, 77 L.R.R.M. 2977, (D.D.C. July 22, 1971), *aff'd*, Civil No. 71-1581 (D.C. Cir. Aug. 10, 1971) and Wolkomir v. Fed. Labor Relations Council, Civil No. 1442-71, 77 L.R.R.M. 2977, (D.D.C. July 22, 1971), *aff'd*, Civil No. 71-1593 (D.C. Cir. Aug. 10, 1971), *petition for cert. filed*, 40 U.S.L.W. 3280 (U.S. December 8, 1971) (No. 750). In Nat'l Ass'n of Gov't Employees v. White, 418 F.2d 1126, 1130 (1969), the Court of Appeals for the District of Columbia had stated: "We recognize that the Federal Government employee's right to organize is set forth in Executive Order 10,988, and that implementation of this directive is essentially a matter of executive determination. But even where a privilege that has been extended is capable of unilateral revocation, the administration of that privilege cannot be exercised in a manner which clashes with basic constitutional safeguards. Judicial relief is available even when the privilege is not rooted in a statute (footnotes omitted)."

> developing a system of labor relations uniquely designed for the Federal scene; not borrowed from the private sector and not based on provisions of the Postal Reform Act. We can learn from both, but should be bound by neither.[8]

I think there are some important factors to be considered before we abandon Exec. Order No. 11,491, as amended, for legislation. The policies and procedures established by the Order have not yet been fully tested. I do think we need more than ideological disagreement or half-hearted testing of what is, in fact, a radically new labor-management relations system before we conclude that it does not work well and should be changed. Undoubtedly, as it is tested, we will find that changes are required.

By using Executive Order rather than statute as the legal basis, the President is able to adjust the system to meet changing conditions as they develop. This responsiveness is important in a field that is evolving as rapidly as this one. Within the span of the last nine years the President has issued three Executive Orders dealing with labor-management relations in the federal government.[9] Compared with the private sector, this is decidedly rapid change. Within the private sector, there have been three major pieces of labor-management relations legislation enacted within the last 36 years.[10]

Finally, proposals for legislation are often couched in terms of a need for "true collective bargaining" or "full collective bargaining." This implies that all statutes setting terms and conditions of federal employment should be repealed and the matters covered by these statutes left to resolution at the bargaining table. As the American Bar Association has pointed out: "If legislation is enacted, it will be necessary to accommodate or repeal the myriad laws and regulations governing and benefiting Federal employees as demonstrated by the extremely complicated Postal Reorganization Act."[11] The proposal for "true collective bargaining" leaves unanswered such questions as whether the unions would accept the repeal of these statutes as a *quid pro quo* for such bargaining; whether Congress should or would relinquish its right to set basic conditions of federal employment; and whether Congress should or would be willing to automatically appropriate the money needed to pay the cost of settlements reached at the bargaining table.

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8. Briefing by the Civil Service Commission before the House Comm. on Post Office and Civil Service, 92d Cong., 1st Sess., ser. 92-3, at 7 (1971).

9. Exec. Order No. 10,988, 3 C.F.R. 204 (1971) *revoked* 1969; Exec. Order No. 11,491, 3 C.F.R. 260 (1971), *as amended*, Exec. Order No. 11,616, 36 Fed. Reg. 17,319 (1971).

10. National Labor Relations Act, Ch. 372, § 1, 49 Stat. 449 (1935), *as amended*, Pub. L. No. 80-101, 1947 (Labor-Management Relations Act), and Pub. L. No. 86-257, 1959 (Labor-Management Reporting and Disclosure Act), 29 U.S.C. §§ 151-68.

11. ABA COMMITTEE REPORTS, *supra* note 6, at 169.

There are also such difficult questions as who would represent the Government and who would represent the employees. Some have contended that the negotiations could be modeled after the recent negotiations in the U.S. Postal Service. I do not believe that the Postal Service provides a sound precedent for the remainder of the federal sector. The Postal Reorganization Act[12] established the Postal Service as an income-producing, self-sufficient enterprise more like a private, profit-making enterprise than a government service. And the structure for collective bargaining in the Postal Service differs widely from the structure that prevails in the rest of the Government. The seven postal unions that engaged in national negotiations have held national exclusive recognition for the vast majority of postal workers for a number of years. In the 40 remaining departments and agencies in the executive branch where bargaining units exist, some 61 national and international unions and their affiliated locals hold recognition for 2,986 separate exclusive bargaining units, most of these in single government installations located all over the United States—a mixture of units formed in various craft, professional, functional, organizational, blue-collar and white-collar groupings. While this structure is evolving, under Exec. Order No. 11,491 policies, toward a more sensible pattern, it is still far from the kind of structure which might be effective for bargaining basic terms and conditions of federal employment.

I believe the critics of labor-management relations in the federal sector do it a disservice to demand "true collective bargaining" by statute without considering these factors and suggesting what sort of accommodation should be struck between the proposed legislation and the personnel laws currently on the statute books.

Employer Attitude Toward Union Organizing

Another significant difference between the federal sector and the private sector is the positive approach the Government, as employer, has taken toward union organizing.

A private employer may, and often does, exercise his right of free speech to oppose union representation of his employees. In fact, this right is protected by section 8(c) of the Taft-Hartley Act which provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no

12. Act of August 12, 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified in scattered sections of 39 U.S.C.).

threat of reprisal or force or promise of benefit.[13]

In contrast, the federal government has taken a position of neutrality as far as union representation of its employees is concerned, and Government officials do not mount "vote no" campaigns.

Although nothing in the Order expressly prohibits a "vote no" campaign, neither does the Order contain a provision similar to section 8(c) of Taft-Hartley. The policy of management neutrality derives from the preamble to the Order, where the President, speaking as the head of the Executive Branch, has said that "the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment." And it derives from the injunction in section 1 that "[t]he head of each agency shall take the action required to assure that employees in the agency are apprised of their rights . . . [freely and without fear of penalty or reprisal to form, join, and assist a labor organization or to refrain from any such activity], and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization." Obviously, officials within the executive branch are expected to adhere to the labor-management policy directed by the Chief Executive.

This policy coupled with easy access to formal recognition and union dues checkoff during the period 1964 to 1970, under Exec. Order No. 10,988, probably accounts in large part for the dramatic growth of union representation strength in the federal sector at a time when it was stagnant in the private sector.

As I pointed out earlier in this paper, Exec. Order No. 11,491 serves as the legal basis for the labor-management relations system in the federal sector. The Order serves a second purpose as well; it is an affirmative statement of management's policy regarding dealings with labor unions. In the private sector an important statement of management's policy would very likely emanate from the chief executive officer of the company. In the federal government our chief executive is the President. And his Executive Order is policy guidance to management officials as well as a legal basis for the labor-management relations system.

Scope of Bargaining

The "mandatory" scope of bargaining in the private sector is described in the

13. 29 U.S.C. § 158(c) (1970).

National Labor Relations Act, as amended, as "rates of pay, wages, hours of employment, or other conditions of employment." This has been held to include: basic pay and overtime; severance pay; Christmas bonuses; pension and welfare plans; profit-sharing plans; merit wage increases; company housing, meals, discounts, and services; length of workday and workweek; work schedules; grievance procedures and arbitration; layoffs; discharges; workloads; vacations and holidays; sick leave; work rules, seniority, promotions, and transfers; compulsory retirement age; union security arrangements; and safety.[14]

The "mandatory" scope of bargaining in the federal sector is described as: "personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order."[15] The legal limitations which are imposed on the scope of bargaining in the federal sector by "applicable laws and regulations" create significant and distinct differences from labor-management relations in the private sector. In fact, one of the major features that distinguishes public labor-management relations, as it operates at the federal level, from labor-management relations, as it is conventionally conceived to be, is the fact that union negotiations with management in the executive departments and agencies are only subsidiary and supplemental to the major employee benefits and protections which have been granted and are periodically improved through the legislative process.

In 1883 Congress passed the Civil Service Act[16] and, in the nine decades since that time, it has followed with a number of other acts, including the Classification Act,[17] the Pay Comparability Act,[18] the Retirement Act,[19] the Life Insurance Act,[20] the Health Benefits Act,[21] the Leave Act,[22] the Incentive Awards Act,[23] the Performance Rating Act,[24] the Hatch Act,[25] the Veterans Preference

14. Section of Labor Relations Law, American Bar Association, THE DEVELOPING LABOR LAW, 389-423 (C.J. Morris ed. 1971).

15. Exec. Order No. 11,491, *as amended*, 5 U.S.C. § 7301 (1970).

16. Act of January 16, 1883, ch. 27, 22 Stat. 403, *as amended*, 5 U.S.C. § 1101 (1970).

17. Act of October 28, 1949, ch. 782, 63 Stat. 954, *as amended*, 5 U.S.C. § 5101 (1970).

18. Act of October 11, 1962, Pub. L. No. 87-793, 76 Stat. 841, *as amended*, 5 U.S.C. § 5301-04 (1970).

19. Act of July 31, 1956, ch. 804, 70 Stat. 743, *as amended*, 5 U.S.C. § 8331 (1970).

20. Act of August 17, 1954, ch. 752, 68 Stat. 736, *as amended*, 5 U.S.C. § 8701 (1970).

21. Act of September 28, 1959, Pub. L. No. 86-382, 73 Stat. 708, *as amended*, 5 U.S.C. § 8901 (1970).

22. Act of October 30, 1951, ch. 631, tit. II, 65 Stat. 679, *as amended*, 5 U.S.C. § 6301 (1970).

23. Act of September 1, 1954, ch. 1208, 68 Stat. 1112, *as amended*, 5 U.S.C. § 5541 (1970).

24. Act of September 30, 1950, ch. 1123, 64 Stat. 1098, *as amended*, 5 U.S.C. § 4301 (1970).

25. Act of August 2, 1939, ch. 410, 53 Stat. 1147, *as amended*, 5 U.S.C. § 7311 (1970).

Act,[26] and the Training Act[27] which govern the most important terms and conditions of federal employment. Thus, those basic terms and conditions of employment which are typically parts of the collective bargaining process in the private sector are determined largely by law and regulation in the federal sector. These include:

> (1) *basic economic items* (pay, hours, fringe benefits, and retirement);
> (2) *fundamental personnel policies* (merit staffing, job classification, training, promotion, performance rating and layoff); and
> (3) *protection of individual job security* (through statutory appeal rights to the Civil Service Commission).

To say that these fundamental terms and conditions of employment are established by statute rather than at the bargaining table is not to say that unions play no part in their development. Under the Lloyd-Lafollette Act, which I described earlier, federal unions have had the right for nearly 60 years to organize and represent employees directly to the committee and members of Congress—in drafting legislation, in hearings on legislation, and in complaints about management's wrongdoing, real or fancied, in the departments and agencies of the Executive Branch. Unions have their right and they have exercised it very effectively. They are persuasive and forceful lobbyists.

The Civil Service Commission, as the central personnel agency of the Executive Branch, is responsible for administering numerous statutes which set basic terms and conditions of federal employment. In implementing these statutes, the Commission establishes personnel policies and standards and issues personnel regulations for the Executive Branch; and, in performing this function, it consults regularly with union leaders, as well as agency officials, and carefully considers their views.

Even though few of the "bread-and-butter" issues are left for bargaining in the federal sector, this does not mean that there is nothing left for bilateral negotiations between labor organizations and agency management. Indeed one major agency has catalogued some 250 different matters covered by provisions in its negotiated agreements. Although these matters deal primarily with immediate working conditions on the job, it should not be thought that they are of little importance to either employees or to management. Their importance to employees rests, I believe, in their direct relevance to on-the-job conditions and in the opportunity for employee participation in shaping policies and practices that affect their day-to-day work life. For management, their importance goes directly to its need to get the work of Government carried out effectively,

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26. Act of June 27, 1944, ch. 287, 58 Stat. 387, *as amended*, 5 U.S.C. § 2108 (1970).
27. Act of July 7, 1958, Pub. L. No. 85-507, 72 Stat. 327, *as amended*, 5 U.S.C. § 4117 (1970).

efficiently and with good morale.

Perhaps the best evidence of its importance to employees is the phenomenal increase in union organization since Exec. Order No. 10,988 established the formal labor-management relations system in 1962. Today, as shown in the chart earlier, almost 1 ½ million federal employees are under exclusive recognition, with negotiation rights—more than one-half the federal work force. Exclusive recognition covers roughly 81 percent of our blue collar work force and 35 percent of the white collar group.

Even though many of the substantive matters which are within the scope of negotiations in the private sector have been preempted by statute in the federal sector, there is still much that can be done to improve the collective bargaining relationship in the federal sector.

> *First,* parties should take full advantage of the existing opportunities for collective bargaining available to them under Exec. Order No. 11,491. They have not yet done so. Unions have not yet attempted to negotiate substantive agreements within the full scope of negotiations authorized by the Order. In fact, a recent review of the program revealed that agreements have been negotiated in only half of the existing units of exclusive recognition, and that only half of those agreements contained a negotiated grievance procedure. One of the 1971 amendments to Exec. Order No. 11,491 requires that all future agreements contain a negotiated grievance procedure.
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> *Second*, the 1969 Study Committee Report accompanying Exec. Order No. 11,491 counseled agencies to expand the scope of negotiations by (1) delegating more personnel policy authority, where practicable, to officials at the level of the bargaining unit, and (2) making exceptions to agency regulations in order to permit negotiations where uniformity is not essential in a given situation. More of this should be done, and the Civil Service Commission, in conjunction with the Office of Management and Budget, will emphasize it in policy guidance to agency management.
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> *Third,* the federal government is moving towards a structured means of union involvement in matters which are currently outside the scope of negotiations under the Executive Order—for example, the joint union-management arrangements for setting wage rates in the coordinated Federal Wage System, and the Federal Employees' Pay Council provided by the Pay Comparability Act for union participation in making salary adjustments.

In fashioning a labor-management relations system for the federal sector, we recognize that we are dealing with an ever-changing set of problems. Union and management representatives are gradually acquiring an expertise in labor-management relations just as did their private sector counterparts in this coun-

try 35 years ago. But we cannot afford to allow the turbulence that marked that era to develop in the federal government because it represents the public service and all the responsibilities to the public that the term implies.

The Civil Service Commission has recognized the need for union involvement in the broad area of personnel management which it regulates. Effective bilateral labor-management relations require that as many subjects as practicable be opened for negotiation. We are working towards this in two ways:

> *First*, a thorough review is being made of published Civil Service Commission regulations and policies as they may affect the scope of negotiations between federal agencies and labor organizations. The objective is to eliminate Federal Personnel Manual materials that may be limiting the scope of negotiations beyond that required to protect basic merit principles, essential management rights and the public interest. I should emphasize that this review encompasses Civil Service Commission regulations and policies; it does not extend to matters which are outside the Commission's regulatory authority. Therefore, it will not extend to statutes, Executive orders or regulations of other federal agencies, including those of departments and agencies in which negotiations are taking place.
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> *Second*, in certain areas in which the Civil Service Commission must continue to regulate, we have moved to maximize union involvement in the process. The provision for union involvement in the development of blue collar wage scales under the Coordinated Federal Wage System was a major step in this direction. Union representatives participate at the local, agency, and national levels in functions which include determining wage areas, survey coverage, data collection, review of data and calculating wage rates, and, at the national level, recommending changes in basic wage policy.

"Right" To Strike

There is no right to strike among employees of the United States Government.[28] Strike activity in the private sector is protected (as well as regulated) by federal statutes. In the federal sector, on the other hand, strikes are prohibited by statute.[29]

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28. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), *aff'd*, 404 U.S. 802 (1971).

29. 5 U.S.C. § 7311(3) prohibits an individual from accepting or holding a position in the Federal Government or in the District of Columbia if he—

. . . .

(3) participates in a strike . . . against the Government of the United States or the government of the District of Columbia . . .

The appointment affidavit required by 5 U.S.C. § 3333, which all Federal employees are required

Last year the statutory ban against strikes by federal employees was upheld by a three-judge panel of the U.S. District Court for the District of Columbia, and the decision of the district court was affirmed by a 6-1 vote of the Supreme Court of the United States. The Court held that federal employees have no constitutional right to strike and that federal law prohibiting strikes by federal employees is neither unconstitutionally vague nor overly broad.[30]

The majority opinion of the district court contains a very pertinent analysis of the strike ban which I believe bears repeating:

> Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons. Although plaintiff [the union] argues that the provisions in question are unconstitutionally broad in covering all Government employees regardless of the type or importance of work they do, we hold that it makes no difference whether the jobs performed by certain public employees are regarded as "essential" or "non-essential," or whether similar jobs are performed by workers in private industry who do have the right to

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to execute under oath, states, in part:

> I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

18 U.S.C. § 1918 (1970), in making a violation of 5 U.S.C. § 7311 (1970) a crime provides:

> Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he . . .
>
> . . . .
>
> (3) participates in a strike against the Government of the United States or the government of the District of Columbia . . .
>
> . . . .
>
> . . . shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

Section 2(e)(2) of Exec. Order No. 11,491, *as amended* exempts from the definition of a labor organization any group which:

> . . . assists or participates in a strike against the Government of the United States or any agency thereof or imposes a duty or obligation to conduct, assist or participate in such a strike . . .

Section 19(b)(4) of Executive Order, makes it an unfair labor practice for a labor organization to

> . . . call or engage in a strike, work stoppage, or slowdown; or condone any such activity by failing to take affirmative action to prevent or stop it . . .

30. *Supra* note 28.

> strike protected by statute. Nor is it relevant that some positions in private industry are arguably more affected with a public interest than are some positions in the Government service . . . .
>
> . . . There certainly is no compelling reason to imply the existence of the right to strike from the right to associate and bargain collectively. In the private sphere, the strike is used to equalize bargaining power, but this has universally been held not to be appropriate when its object and purpose can only be to influence the essentially political decisions of government in the allocation of its resources. Congress has an obligation to ensure that the machinery of the federal government continues to function at all times without interference. Prohibition of strikes by its employees is a reasonable implementation of that obligation.[31]

The strike, or the threat of a strike, is the basic leverage which employees in private industry are able to use in securing improvements in their working conditions and terms of employment. Government is not "just another industry," as Professors Wellington and Winter have pointed out.[32] Acceptance of collective bargaining must not undermine the ability of the Government to perform its basic functions. Moreover, as they, (as well as other, such as the Taylor Committee) have so clearly demonstrated, collective bargaining in public employment cannot be separated from the political process.

The allocation of services and resources by the federal government is a political process. To permit a group of federal employees to strike goes far beyond the guarantee that federal employees, like any other group of American citizens, may petition the government for redress of their grievances. If federal employees were able to withhold their services in addition to engaging in the accepted methods of political activity of private interest groups, it could not only result in the reallocation of national resources in their favor but also could leave competing private interest groups at a permanent and substantial disadvantage. As Wellington and Winter have put it:

> But there is trouble even in the house of theory if collective bargaining in the public sector means what it does in the private. The trouble is that if unions are able to withhold labor—to strike—as well as to employ the usual methods of political pressure, they may possess a disproportionate share of effective power in the process of decision. Collective bargaining would then be so effective a pressure as to skew the results of the " 'normal' American political process."
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> . . . .

31. *Id.* at 883-84.

32. H.H. WELLINGTON & R.K. WINTER, THE UNIONS AND THE CITIES (1971).

> Since other interest groups with conflicting claims on . . . government do not, as a general proposition, have anything approaching the effectiveness of this union technique—or at least cannot maintain this relative degree of power over the long run—they are put at a significant competitive disadvantage in the political process. Where this is the case, it must be said that the political process has been radically altered.[33]

By the strike prohibition federal employees are denied the leverage of the strike, but this does not mean that they are relegated to second-class status in our nation's work force. The federal government, as an employer, has no desire to deny to federal employees the general level of rights and benefits which employees are able to secure through collective bargaining in the private sector. On the contrary, the record is clear that the rights and benefits which federal employees enjoy are comparable to those in the private sector of our economy.[34] As Chairman of the Civil Service Commission, I am proud of the enlightened personnel management system we have developed in the federal government. I believe that it is resposive to the needs of both employees and management.

Even though our federal personnel management system has developed under circumstances in which employees did not possess the right to strike, they have possessed and used the right to participate in its development. Regardless of what critics might allege about "paternalism," the federal personnel management system was not developed by a group of "philosopher-kings" and then handed down for employees to enjoy. As I pointed out earlier, the basic rights and benefits have been developed through the political process, with federal unions playing a large part in their development.

Turning more specifically to labor-management negotiations within the context of our existing program. Exec. Order No. 11,491 provides a means for resolving negotiation impasses fairly and finally without the need for strikes and lockouts. First, the Order assigns the Federal Mediation and Conciliation

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33. *Id.* at 24-25.

34. The pay for white collar employees is set under the Pay Comparability Act of 1970, which provides that salaries must be reasonably comparable to those for similar work in the private sector. Salary surveys are made annually by the Bureau of Labor Statistics, reviewed by the President's Advisory Committee on Federal Pay, and effectuated by Executive Order.

Pay for hourly employees is fixed by the head of each department under authority of 5 U.S.C. § 5341(a) which provides that the pay of these employees "shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates." Fringe benefits for federal employees are estimated at 27.8 percent of basic wages and salaries compared to 26.6 percent in private industry according to a recent study by BLS, OMB, and CSC. (As a percentage of total compensation including overtime and premium for shift work, the figure would be 23.9 in the federal government and 22.6 in private industry.)

Service the responsibility for mediating negotiation disputes. It may proffer its services to assist the parties in reaching agreement and may provide preventive mediation services at other times when needed to improve labor-management relationships.[35]

When a negotiation impasse defies settlement by the parties even after exhausting mediation efforts, the Order provides machinery which we hope will guarantee final settlement of even the toughest negotiation impasses. That machinery is the Federal Service Impasses Panel. The Panel is composed of seven members appointed by the President from outside the government. They are persons of high reputation for impartiality and expertise in labor relations, especially in the field of arbitration.

Following initial inquiry into the circumstances surrounding an impasse, the Panel may proceed to fact finding with recommendations as a basis for further negotiation or settlement by the parties. In the event that the parties are unable to settle within thirty days, they must report back to the Panel which may then "take whatever action it deems necessary to bring the dispute to settlement."[36] This means that the Panel may take any of a variety of actions which it believes appropriate to the situation, including directing final and binding arbitration or itself directing a settlement of the unresolved issues. It is hoped that this process, with its uncertainty as well as its finality will help reluctant parties see the wisdom of engaging in serious collective bargaining and, in any event, provide an impartial and equitable resolution of issues as a proper alternative in the governmental setting to the strike or lockout alternative in private sector collective bargaining.

Summary

Labor-management relations in the federal government is an evolving program. In its initial version it was designed to meet the needs and fit the circumstances of the federal government, its employees and their unions in that day. As times, problems and conditions have changed, and as the labor-management relationship has matured, the program has, in turn, been modified and refined. It will undoubtedly continue to undergo evolutionary changes in the future.

While many of the labor-management relations policies and practices in the federal sector have been adopted from the private sector, others are quite different, reflecting the special characteristics of government as an employer. Four of the major areas in which the policies and practices of the federal sector differ significantly from those of the private sector are (1) the legal basis for

35. Exec. Order No. 11,491, *as amended*, 5 U.S.C. § 7301 (1970).
36. *Id.*

the labor-management relations system; (2) employer attitude toward union organizing; (3) the scope of bargaining; and (4) the "right" to strike.