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Daniel Matthews

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In January 1962, one hundred and thirty years after federal employees' unions first appeared, a presidential order authorized a limited form of collective bargaining. Prior to this date federal union membership had slowly grown over the years and was particularly widespread in the postal service. There were also two large service-wide unions for classified employees, the American Federation of Government Employees (AFL-CIO) and the National Federation of Government Employees (Ind.). In addition, blue collar employees were heavily represented by various craft unions.

The right of federal employees to join unions had first been established by Congress in 1912. Having learned early in their existence that Congress was the source of basic employee benefits, the unions had directed most of their energies toward developing congressional relationships and their officials had become skilled lobbyists for employee benefits legislation. The unions representing classified employees had a heterogeneous membership often extending into management ranks. Emphasis was placed on cooperation and attention was given to consultative activity especially with officials of the Civil Service Commission. Considerable time was spent in the handling of grievances. As late as 1961 the situation was reminiscent of the 1920's period of employer-sponsored employee representation plans in private industry.[1] Two agencies, the Tennessee Valley Authority and the Department of Interior, engaged in collective bargaining. Approximately 19,000 of their employees were represented in bargaining units.[2]

Consequently, granting federal employees the right to bargain collectively, no matter how limited in scope, was recognized as epochal. The Executive

* A.B. Canisius University 1937, J.D. American University 1954, LL.M. Georgetown University 1956. Mr. Matthews, formerly with the NLRB, is presently in private practice in the District of Columbia, with the firm of Dalton and Matthews.

1. The Task Force, appointed by President Kennedy, in its 1961 report, noted that unionization of Federal employees had followed the pattern of private industry; in 1960, some 33 percent of federal employees, totalling 762,000 persons including 489,224 in the Post Office Department, belonged to employee organizations, whereas 32.4 percent of nonagricultural workers, in the private sector, belonged to unions. PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961).

2. *Id.*

Order was hailed as a "magna carta" for federal employees and proved to be the catalyst for a union-organizing explosion. By November 1970, 58 percent of the federal work force was represented in 2,426 exclusive units.

With the passing of the initial stages of organizing, the unions turned to negotiating and within a few short years were disillusioned by such factors as their lack of bargaining power, the limited subject matter on which they could bargain, the absence of central administration, the non-availability of neutral third-party tribunals for impasse resolution, unfair labor practice complaints, and arbitration of disputes and grievances.[3] Federal administrators reluctantly recognized that the pronounced weaknesses in the Order threatened stable labor-management relations and Executive Order No. 11,491 was issued by President Nixon on October 29, 1969.[4]

The new Order was the outgrowth of study and committee work spanning two administrations and is based on the 1969 *Report and Recommendations on Labor-Management Relations on the Federal Service*.[5] The Report was issued by a study committee consisting of the Secretary of Defense, the Secretary of Labor, the Postmaster General, the Director of the Bureau of the Budget, and the Chairman of the U.S. Civil Service Commission. The principals had changed, but in 1967 incumbents of the same positions had been designated as members of a Presidential Committee to conduct hearings and make findings and recommendations regarding the operation of the Federal Labor management program.[6]

The work of the first Committee was made public only in draft form, as an attachment to the Annual Report of the Secretary of Labor, dated January 16, 1969.[7] The final report and Executive Order No. 11,491 depended on the substance of the draft report. But the new Order and Report also reflected additional work on the part of a new set of officials representing a different administration. The few major differences in the reports seemed to reflect a change in philosophy and a belief in the need for a more firm management attitude.[8]

3. *See* Remarks of Otto Pragan, Assistant Director, AFL-CIO Education Department, 20 GOV'T EMPLOYEES REL. REP. C-1, 2 (Jan. 20, 1964) [hereinafter cited as G.E.R.R.].

4. 34 Fed. Reg. 17605, October 31, 1969.

5. LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, REPORT AND RECOMMENDATIONS, EXECUTIVE ORDER NO. 11,491 [hereinafter cited as COMMITTEE REPORT].

6. President Lyndon B. Johnson, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Sept. 8, 1967).

7. FIFTY-SIXTH ANNUAL REPORT OF THE SECRETARY OF LABOR, ATTACHMENT "B", Jan. 16, 1969 [hereinafter cited as DRAFT REPORT or WIRTZ COMMITTEE REPORT]. *See* REPORT OF PRESIDENT'S REVIEW COMMITTEE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, 280 G.E.R.R. (Special Supp. Jan. 20, 1969) [hereinafter cited as REPORT OF PRESIDENT'S COMMITTEE].

8. *See* Remarks of Harold S. Roberts to Industrial Management Club of Oahu, 327 G.E.R.R. E-1 (Dec. 15, 1969).

Executive Order No. 11,491 was responsive to the testimony proffered by both labor and management representatives.[9] Some sections clearly reflected the impact of experiences of state and local bodies and points of view expressed by experts in the field.[10] The Order appeared to be a document that would make collective bargaining for federal employees a viable institutional process.[11] But union leaders were restrained in their praise, vigorous in their criticism of sections which ran counter to their particular interests, and somewhat skeptical of the future course of the program.[12]

Unfortunately the new Order had issued too late. For more than two years prior to the hearings conducted by the President's Review Committee in October 1967, labor had called vigorously for fundamental changes in federal labor relations. At the hearings, its representatives repeated in detail the changes they deemed necessary to achieve a climate for stable labor-management relations. Yet another two years passed before the Order was issued. In this period, employee militancy increased, inflation eroded pay raises, and the salaries of top executives and legislators were significantly increased. Furthermore, state, county, and municipal employees had demonstrated that illegal strikes could bring about employee benefits—and overall the federal government had not been a responsive employer.

This employee unrest was reflected in a series of events in 1970 which threatened to make the new order obsolete. In March, an illegal strike of postal employees at local levels crippled the operations of metropolitan mail centers throughout the country. No legal or disciplinary action was taken against the unions, their leaders, or employees participating in the strike. On the contrary, negotiations were held with federal officials and indirectly with the Congress itself. A general pay raise, retroactive to December 1969, was enacted into law. Also, agreement was reached for legislation to transform the Department into an independent government organization, to provide an additional eight percent pay increase, and to institute a collective bargaining system for establishing wages, hours, and working conditions, with impasses being subject to bind-

9. PRESIDENTIAL REVIEW COMMITTEE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 1967-1968, TRANSCRIPT OF HEARINGS, Oct. 23-27, 1967, Department of Labor [hereinafter cited as TRANSCRIPT OF HEARINGS].

10. REPORT OF PRESIDENT'S COMMITTEE, *supra* note 7. The Review Committee of 1967 had the services of an Advisory Panel composed of labor-relations specialists and educators.

11. Robert E. Hampton, Chairman, Civil Service Commission, expressed a view that the Order established a framework and procedure for broadened collective bargaining in the federal government. Address by Robert Hampton to Fed. Bar Ass'n Briefing Conference on Exec. Order No. 11.491, Jan. 19, 1970.

12. James H. Rademacher, President, National Association of Letter Carriers, AFL-CIO found in the Order a ". . . harder line towards federal government employees and their unions as compared to the official policy for the previous seven years and nine months . . ." 324 G.E.R.R. F-1 (Nov. 24, 1967). George Meany, President, AFL-CIO called the Order an important step forward, but noted that there were some areas only partially improved and others not improved at all. 332 G.E.R.R. A-5 (Jan. 19, 1970).

ing arbitration. These proposals became law in August 1970.[13]

However, unions representing classified employees were not as successful. For example, the Professional Air Traffic Controllers Organization (PATCO), which represents air traffic controllers in the Federal Aviation Administration, initiated a "sick out" in March 1970. The Departments of Justice and Transportation began legal action and rival unions attacked PATCO through processes available under the Executive Order. The "sick out" was ineffective and both the union and employees suffered penalties.[14]

The pragmatic attitude of the government and the firm handling of the air controller "sick out" appeared to relieve the crisis atmosphere and provide an opportunity for implementation of the new Order.[15] There is also little doubt that the enactment of true collective bargaining legislation for postal employees, while providing a long range goal for classified and blue collar employees, actually lightened the responsibilities of those administering labor relations under Executive Order No. 11,491.

In signing Executive Order No. 11,491, President Nixon had directed that a review and assessment of operations under the Order be made after one year. Public hearings for this purpose were held in October 1970. Executive Order No. 11,616, amending Executive Order No. 11,491, and an accompanying report were issued on August 26, 1971.[16]

With few exceptions, the amendments consisted of changes directed toward improving the administrative processes under the Order. Union spokesmen considered the amendments inadequate.[17] At this time, after a decade of collective bargaining within a framework established by Executive Order, labor is firmly committed to seeking legislation to replace the present system.[18]

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13. Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (Aug. 12, 1970).

14. 370 G.E.R.R. G-1 (Oct. 12, 1970). In an action consolidating a representation petition by PATCO and an unfair labor charge against PATCO, a Department of Labor Hearing Examiner found that PATCO was not a labor organization under Section 2(e), Executive Order No. 11,491 because it has participated in and condoned a work stoppage. It was also found that PATCO had violated Section 19(b)(4) of the Order by participating in and condoning a work stoppage. The Assistant Secretary of Labor for Labor-Management Relations accepted and modified the findings of the Hearing Examiner. DEP'T OF LABOR, DIGEST AND INDEX OF PUBLISHED DECISIONS OF THE ASSISTANT SECRETARY OF LABOR FOR LABOR-MANAGEMENT RELATIONS, PURSUANT TO EXECUTIVE ORDER NO. 11,491, AS AMENDED 131 (1971) [hereinafter cited as DIGEST AND INDEX]. 376 G.E.R.R. A-3 (Nov. 23, 1970) reported 56 Air Controllers had been fired and 2,000 suspended.

15. *See, e.g.*, Lydon, *Fed. Unions Seem to be Calm*, New York Times, May 17, 1970, at 92, col. 1. ". . . [T]he 'militancy' of Federal Government workers is in the eye of the beholder and the 'strike fever' that many people worried about seems non-existent."

16. FEDERAL LABOR RELATIONS COUNCIL, REPORT AND RECOMMENDATIONS ON LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE—Exec. Order No. 11,491, *as amended by* Exec. Order No. 11,616 of Aug. 26, 1971 [hereinafter cited as COUNCIL REPORT].

17. 417 G.E.R.R. A-12 (Sept. 6, 1971).

18. 389 G.E.R.R. A-13 (Feb. 22, 1971). The AFL-CIO Executive Council places the attaining of a Labor-Management Act replacing Executive Order No. 11,491 as its first priority.

Among professional observers, there is considerable support for the union position.[19] The administration viewpoint, as expressed by Civil Service Commission Chairman Robert E. Hampton, is that there is no objection in principle to labor relations legislation but that the time is not yet ripe.[20] Thus there seems to be little dispute as to the need for legislation dealing with labor-management relations. The questions concern the content and timing of such legislation.

This article assumes that the process of collective bargaining has been accepted as necessary and appropriate in the scheme of federal personnel management. It is intended to review the federal labor-management relations scene, including the development of Executive Order No. 10,988, the problems encountered in the administration of the program under that Order, the significant improvement achieved through Executive Order No. 11,491, and the changes made by Executive Order No. 11,616.

This review leads the writer to conclude that the Executive Branch has developed a sound procedural framework for labor-management relations with its own employees; but it is also concluded that the program is inherently limited in substance, because of the management authority retained by Congress and the natural reluctance of the Executive Branch to allow its management powers to be subject to collective bargaining. Stable labor-relations require an impartial body or bodies to administer the program with recourse to judicial review. These problems demand legislative solution. Consequently, attention will be given to the substance of labor-management relations legislation and to the reshaping of government organizations to make it effective.

II. The Executive Orders

Events Leading to Executive Order No. 10,988

As early as 1949, federal employee unions had supported legislation that would have provided union recognition and established a labor relations sytem for federal employees. The most prominent of those bills were known as the Rhodes-Johnston bills, after their sponsors, Congressman George M. Rhodes and Senator Olin D. Johnston.[21]

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19. *See, e.g.*, 2 ABA, SECTION OF LABOR RELATIONS LAW, COMMITTEE REPORTS 166 (1971).

20. 394 G.E.R.R. A-1 (Mar. 29, 1971). Testifying before the House Post Office and Civil Service Committee, Chairman Hampton said, "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."

21. H.R. 3702, 81st Cong., 1st Sess. (1949); H.R. 554, 82d Cong., 2d Sess. (1951); H.R. 172, 83d Cong., 2d Sess. (1953); H.R. 10237, S. 3593, 84th Cong., 1st Sess. (1955); H.R. 6, 386, 8th Cong., 2d Sess. (1957); H.R. 6, 95, 86th Cong., 1st Sess. (1959); H.R. 12, S. 473, 87th Cong., 1st Sess. (1961).

By the mid-fifties leaders of organized labor had joined actively with their federal brethren in supporting legislation. This was a result of the recognition that public employees on all levels constituted an untapped source for organization. Other respected voices were also calling for change. The Hoover Commission of 1949 recommended that policies be developed for the participation of employees in formulating and implementing personnel policies and practices. In 1955, the Labor Law Section of the American Bar Association concluded that a government which sponsored a public policy of collective bargaining in the private sector could not, in good faith, refuse to deal in a similar fashion with its own public servants.[22]

John F. Kennedy had endorsed the Rhodes-Johnston bill in 1956, as a Senator. Later, as a candidate for President, he had reaffirmed his endorsement. With his election in 1960, the stage was set for positive federal action in labor relations.

In June 1961, the President appointed a Task Force to review employee-management relations in the federal service and to make findings and recommendations not later than November 30, 1961. The Task Force, with Secretary of Labor Arthur Goldberg as Chairman and John W. Macy, Jr., Chairman, U.S. Civil Service Commission as Vice-Chairman, submitted its report in timely fashion.[23] In summary, the Task Force found that: (1) there was no uniform federal policy on labor relations—for the most part, federal employee unions had received limited recognition for limited purposes; (2) unions were capable of contributing more to the effective conduct of the public business and the Task Force endorsed the President's view that the public interest called for a strengthening of employee-management relations within the federal government; (3) approximately one-third of federal employees—with the Post Office employees comprising more than sixty percent of the total—were union members; (4) granting that there were similarities between the conditions of private and public employment, dissimilarities were such that it was neither desirable nor possible to fashion a federal system of employee-management relations directly upon the private system—it would be sufficient merely to extend the operation of the best existing government practices; (5) certain of the ground rules which Congress had laid down for employee-management relations in the private sector should be carried over to the federal government in order to ensure that the interests of both the public and the individual employees would be protected; (6) and, there need be no conflict between the system proposed

22. W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 141-70 (1961). W. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE 45-67 (1966). Both authors provide an analysis and history of the extended union campaign for favorable legislation in the years immediately preceding Executive Order No. 10,988.

23. *Supra* note 1.

and the Civil Service merit system, which should remain the essential basis of the personnel policy of the federal government.

Based on these findings, a number of recommendations were made. The Task Force proposed that employee unions should have the right to be recognized by agency management. Because of the nature of government business and the wide variations in the extent of employee organizations, three forms of recognition were proposed.

First, when certain conditions were met, the principle of exclusive representation should be accepted with provisions for limited collective bargaining including the execution of written agreements.

Second, the responsibility for administration of the program should be decentralized to each Department and Agency. The Civil Service Commission and the Department of Labor would provide technical assistance.[24]

Third, neither a union nor closed shop would be permitted because both arrangements were contrary to the civil service concept and inappropriate to the Federal Service.

The Task Force did not accept some proposals by the AFL-CIO such as the establishment of a central government labor relations panel, the use of the Federal Mediation Service and binding arbitration to resolve bargaining impasses. Nor did it accept the proposals of the National Postal Union (Ind.) and the National Federation of Federal Employees which spoke against the principle of exclusive recognition.[25]

Executive Order No. 10,988

Executive Order No. 10,988 was issued in January 1962. Based on the Task Force Report, it was a carefully drawn document that provided for the beginnings of collective bargaining, yet preserved intact the fundamental sovereign attributes of the federal establishment.[26] The Order set forth three forms of recognition, based upon the extent of membership within an appropriate unit. Informal recognition (some members in unit) granted the right to present views

24. 25 G.E.R.R. A-10 (March 2, 1964). That the Task Force did consider the possibility of a central administrative authority was indicated in 1964 by H.T. Herrick, a staff member. Mr. Herrick said, "politically it was not in the cards to establish another agency under the Executive Order of the President," and that during the drafting period, the Task Force was advised that agency heads must retain final authority. Therefore, it was "a legal and political reality that things came out the way they did."

25. U.S. CIVIL SERVICE COMMISSION, EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE, PERSONNEL METHODS SERIES, NO. 15, at 3.06 (1962).

26. *See* President John F. Kennedy, Memorandum of Transmittal, Dec. 4, 1961.

on matters of concern to its members. Formal recognition (at least 10 percent membership) granted the right to consultation, and exclusive recognition (10 percent membership and designation as representative by a majority of employees in the unit) granted the right to negotiate written agreements and the duty to represent all employees in the unit.

For purposes of exclusive representation, units were to be established on ". . . any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned, but no unit shall be established solely on the basis of the extent to which employees have organized . . . ." Managers and personnel staff were excluded. Supervisors and the employees whom they supervised were not to be in the same unit. Professional and non-professional employees were not to be included in the same unit unless a majority of professionals voted for inclusion. These concepts and the machinery for unit determination were drawn from the practices of the National Labor Relations Board (NLRB) in administering the National Labor Relations Act, as amended, with respect to employees in the private sector.[27] Advisory arbitration through the Secretary of Labor was made available for unit questions and elections at agency expense.

Unions with exclusive recognition had the right to negotiate written agreements, but the subject matter and scope were limited by extensive management prerogative clauses. Management's obligation to negotiate did not extend to "the mission of the agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work."

Executive Order No. 10,988 required that all agreements be approved by the head of the agency or his designate. The administration of agreements was "governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and agency regulations . . . ." Management officials retained the right in accordance with applicable laws and regulations:

> (a) to direct employees of the agency, (b) to hire, promote, transfer, assign and retain employees in positions within the agency, and to suspend, demote, discharge or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or other legitimate reasons, (d) to maintain the efficiency of the Government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted, and (f) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

27. Labor-Management Relations Act (Taft-Hartley Act). 29 U.S.C. §§ 141-91 (1947).

The Order contained no provisions for the arbitration of impasses and gave employees the right to join or not to join unions, thus barring the union or agency shop. Both negotiated grievance procedures and advisory arbitration were authorized, but they were limited to matters concerning the interpretation or application of agreements or agency policy.

The Department of Labor and the Civil Service Commission were assigned certain responsibilities in assisting the agencies. These included program guidance, technical advice and training, as well as preparation of both standards of conduct for unions and a code of fair labor practices. A Temporary Committee was established to implement the Order, advise the President, and report to him on the standards of conduct and the code of fair labor practices.

In all of its major provisions the Order placed the primary responsibility for administration on each agency. This approach was continued in 1963 with the issuance of "Standards of Conduct for Employee Organizations" and the "Code of Fair Labor Practices in the Federal Service."[28] Each agency had the primary responsibility for enforcing both the standards and the code—including the adjudication of any unfair labor practices it was alleged to have committed.

Executive Order No. 10,988 legitimatized a limited form of collective bargaining for unions representing federal employees, but it gave these unions no correlative powers at the bargaining table. Deference to agency powers resulted in individual grants of authority that were not conducive to the development of uniform policy and practice throughout the government; it asked of agency officials a committment beyond enlightened self-interest.[29] These officials were instructed, by the Order, to replace unilateral action with bilateral decision-making in various personnel practices. At the same time, as the enforcement authority, they were to review the propriety of their own actions.[30]

Experience Under Executive Order No. 10,988

With the promulgation of the Order, both labor and management immediately became involved in recruiting, organizing, and training staff for the handling of representation questions, negotiating agreements, and administering contracts. Except for the expertise available at AFL-CIO headquarters and its

28. President John F. Kennedy, Memorandum to Agency Heads May 21, 1963.

29. Speaking of the reasons for the financial community's dislike of President Franklin D. Roosevelt, Stewart Alsop comments, "[b]ut power as well as money was at stake, and more even than the loss of money, men instinctively resent, and bitterly resist the loss of power." S. ALSOP, THE CENTER 10 (1968).

30. D. Barr, *Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service*, 52 GEO. L.J. 445-49 (1964).

departments, federal employee unions were not ready for collective bargaining. They were short of both skills and bodies. However, the unions received a tremendous financial lift when regulations were issued in 1963 which authorized the voluntary withholding of union dues by agencies.

Management had similar problems. There was little labor-management expertise in the federal personnel staffs. Furthermore, it was imperative to develop and inform supervisors and executives of the philosophy, principles, and machinery required to implement the Order. The Department of Labor established an Office for Labor-Management Relations and made ad hoc arbitrators available for determining appropriate units and majority status. The Civil Service Commission established advisory services and programs for training agency staffs at both regional and headquarters levels. Major departments and agencies set up extensive "in-house" training programs, often contracting with outside experts to serve as instructors.[31]

Initial problems centered on the determination of appropriate units and the application of the conflict on interest provisions of the Order. Some agencies, notably the Department of the Navy, tended to seek the most appropriate unit and usually determined that it was the installation as a whole. Early arbitrations, relying on NLRB decisions as guides, usually recommended smaller units.[32]

The conflict of interest problem had a twofold origin. The federal-service type unions, the National Federation of Federal Employees and the American Federation of Government Employees, as well as some single agency organizations, such as the National Association of Internal Revenue Employees, had long included supervisors as members, leaders, and often representatives. Section 1(b) of Executive Order No. 10,988 prohibited an employee from participating in the management of a union or acting as its representative when such participation or activity would result in a conflict of interest or would otherwise be contrary to law, or with official duties. Section six of the Order excluded managerial executives from the unit for the purpose of exclusive representation and also prohibited supervisors and employees supervised by them from being in the same unit. Implementation of these provisions was a serious threat to the leadership of the unions mentioned above. Secondly, there were various interpretations of these two sections by the different agencies, some of which originally would have placed undue restrictions on union membership.

As negotiations became more prevalent, the unions found that the scope of bargaining was severely limited by agency interpretation of the management

31. For a more detailed chronicle of these events, *see* VOSLOO, *supra* note 22.

32. 5 G.E.R.R. 39 (Oct. 14, 1963).

rights clauses, the primacy given to agency regulations, and the lack of authority that local managers brought to the bargaining table. The unions also found that in the absence of the right to strike or to resort to some impartial third party, they had little or no power to enforce or achieve their bargaining demands.[33]

The implementation of Executive Order No. 10,988 also clarified the management role of the Civil Service Commission. Prior to the advent of the collective bargining process, employees and unions had looked upon the Civil Service Commission as their friend and protector, their representative against agencies.[34] Under Section 12 of the Order, the Commission openly accepted its responsibility as the central personnel-management organization of the Executive Branch. In this primary role it was not the impartial protector of the merit system, but properly a management body. This demarcation of the Commission's management function had at first a traumatic impact on union leadership, but later contributed to a growing sophistication in labor-management relations. Less notable publicly, the management role of agency personnel staffs was crystallized in similar fashion.

By 1967, both management and labor recognized that the decentralized program had developed serious weaknesses which required correction if a labor-relations program based on collective bargaining was to endure. Consequently, extensive hearings were conducted in 1967. Because of personnel changes, and the 1968 elections, a new order was not issued until October 29, 1969.

Executive Order No. 11,491

The new Order, taken as a whole, represented significant, indeed radical, progress towards a collective bargaining system. Centralized administration replaced agency control of the program; Executive Order No. 11,491 provided for third-party handling of grievances, disputes, bargaining impasses, representation questions, and unfair labor practices. There was an attempt to balance bargaining power, and binding arbitration of impasses was made possible. The principal thrust of the Order was to establish a well conceived procedural framework for the operation of a system of collective bargaining.

The methods used to establish this framework are of interest. No new agency

33. *See* ABA, SECTION OF LABOR RELATIONS LAW, COMMITTEE REPORTS. These reports provide annual reviews of the federal programs.

34. HART, *supra* note 22, at 241, "Many government employees live out their lives without ever being disabused of the notion that the Civil Service Commission is a benign force created by Congress to protect them from the perfidies of their bosses. It would be a shock to them to find that the Commission is nothing but a staff adviser to the boss's bosses."

was established. Rather, the Order provided that all final decisions in case-handling or administration would be made by Executive Branch employees. Thus relations with Congress were not disturbed and questions concerning improper delegation of authority were foreclosed.

The Order did little to expand the scope of bargaining. That remains limited and continues to frustrate union efforts to gain a greater voice in determining the conditions under which their members work. The Order also created conditions favorable to large unions and to national headquarters. Successful and realistic local bargaining could well be the cornerstone of stable and successful labor-management programs that would serve the public interest. The effort in this area was largely hortatory.

Central Organization

Any discussion of Executive Order No. 11,491 logically starts with Section four, establishing the Federal Labor Relations Council. The Council consists of the Chairman, Civil Service Commission acting as Council Chairman, the Secretary of Labor, an official of the Executive Office of the President, and such other officials of the Executive Branch as the President may designate from time to time. Staff services and assistance were to be supplied by the Civil Service Commission.

The Council is the central body for administering and interpreting the Order. Its other functions are to decide major policy and to regulate the program. In representation, unfair labor practices, and standards cases, the Council may, at its discretion, consider appeals from decisions of the Assistant Secretary of Labor. The Council considers appeals directly from certain agency decisions regarding negotiability of issues and exceptions to arbitration awards. Its powers are strengthened by a broad grant giving it the right to consider "other matters it deems appropriate to assure the effectuation of the purposes of the Order." The formation of the Council and the concurrent grant of authority for overall direction of the program seemed to meet the express recommendations of the unions as well as some agency representatives.[35] But there have been objections on the grounds that there are no labor representatives on the Council.[36]

Under Section 5 of the Order, a Federal Service Impasses Panel was estab-

35. TRANSCRIPT OF HEARING 22, 120, 408-09, 417-19, 634, 641-42.

36. Young, *Labor Management Order Draws Mixed Reaction*, Washington Sunday Star, Nov. 9, 1969, at A-2, col. 1; Cramer, *Unions Mark Time on Nixon Order*, Washington Daily News, Dec. 1, 1969, at 2, col. 4; Berger, *The Old Order Giveth Way to the New: A Comparison of Exec. Order No. 10,988 with Exec. Order No. 11,491*, 21 LAB. L.J. 79, 81 (1970).

lished as an agency within the Council. The Panel consists of at least three members appointed by the President, and is authorized to consider, assist in, or actually resolve negotiation impasses. Sections 16 and 17 set forth the procedures to be followed by the Panel, including the use of the Federal Mediation Service. However, arbitration or fact-finding with recommendations is to be employed only when directed by the Panel. The charter of the Panel seemed to be a direct, if belated, response to union recommendations.[37]

The Wirtz Committee Draft Report had encouraged the use of voluntary techniques by the parties. But the Hampton Committee was of the opinion that arbitration or third-party fact-finding should be available only when authorized by a governmental authority separate from the parties involved. Hence, the Federal Service Impasses Panel was granted plenary authority in this area.

Section 6 of the Order completed the basic machinery for centralized administration of the program by assigning the principal case-handling responsibilities to the Assistant Secretary of Labor under regulations prescribed by him. He is responsible for deciding unit and related representation questions, supervising elections, deciding complaints of unfair labor practices and alleged violations of the standards of conduct for labor organizations.

This broad grant of authority for adjudication and enforcement in the key areas of unit and representation issues, unfair labor practices, and conduct of labor organizations gives to the Department of Labor a crucial role in administration of the program. Under Section 11 of Executive Order No. 10,988, the Department successfully exercised a limited rule-making function in elections and unit and representation questions, and also arranged for advisory arbitration. Some criticism was directed at alleged inconsistencies in the decisions of the arbitrators. Arbitrators were selected from panels on a contract basis, bound by no precedents, and occasionally limited in their knowledge of the federal personnel system or representation case law in the private sector.

The Department of Labor, although authorized by Section 6(c) of the new Order to borrow employees from other agencies, has relied primarily on its own personnel. It has established a new unit with field and headquarters personnel to investigate and adjudicate cases arising under the Order and, in the absence of voluntary compliance, to issue orders for enforcement.

The Assistant Secretary is required not only to decide appropriate unit questions but also to supervise representation elections and to certify results. Cen-

37. TRANSCRIPT OF HEARINGS 12. Statement by AFL-CIO President George Meany, "In our 1961 statement to the Task Force, we proposed procedures which in the last analysis relied on arbitration to settle unresolved disputes involving conditions of employment or grievances. Such procedures are essential in view of the denial to Federal workers of the right to strike."

tralization of these responsibilities was urged before the Review Committee in 1967 by both labor and management representatives.

The Order does not specifically authorize the Assistant Secretary to prosecute complaints of unfair labor practices, as is done by the National Labor Relations Board, for the private sector.[38] The Committee Report recommended that informal and formal attempts at resolution by the agency and union should precede any consideration by the Assistant Secretary. If the Assistant Secretary finds a reasonable basis for the complaint, a hearing is to be directed, and, after a report, a decision is to be issued by the Assistant Secretary.[39]

Although the Committee offered no explanation for excluding prosecutory functions from the unfair labor practice procedures, there may be some apparent validity to the decision. First, if the Department of Labor were to undertake such a responsibility, the manpower costs would be substantial. Second, since this program is based on affirmative action by the President, and since experience has shown that agencies will support the program, it seems appropriate to place the emphasis on voluntary resolution of issues by the parties and to require third-party adjudication only when such joint efforts have failed. The need for a prosecutor appears superfluous.

Recognition

In Sections 7 through 10, the Order covered the subject of recognition. The key features eliminate multiple forms of recognition, bar elections in a unit or subdivision thereof for twelve months after a valid election in such unit, require agencies to establish systems for dealing with supervisors outside the framework of regular union-management relations, and provide a new relationship of national consultation rights. Units seeking exclusive recognition shall not include supervisors or guards, but guards may organize in separate units, unaffiliated with the labor organizations that represent other categories of employees. There is an additional guide to the "community of interest" requirement in determining the appropriate unit, that it "will promote effective dealings and efficiency of agency operations." Exclusive recognition is available without the membership requirements that had been called for by Executive Order No. 10,988. However, it is to be determined by use of secret ballot elections in all cases.

These changes clearly resulted from experience under Executive Order No.

38. 29 U.S.C. § 153 (1970).
39. COMMITTEE REPORT, *supra* note 5, at 37.

10,988. At times, they reflect the views of some but not all unions and respond to some agency recommendations. They also strengthen the principle of exclusivity and consequently that of collective bargaining. They accept some guidance from the National Labor Relations Act and reject other provisions of that Act as administered by the National Labor Relations Board and interpreted by the courts. Some of the changes are controversial, but the overall impact would seem to bring increased order and balance to the program.

Section 7(a) taken with Section 18(a) follows the requirement of Executive Order No. 10,988 that recognition will not be accorded to labor organizations subject to corrupt or undemocratic influences. But, under Section 6(a)(4), any decision of this kind is now the responsibility of the Assistant Secretary instead of agency heads as the former order provided.

Section 7(c) bars new representation decisions for a twelve-month period after an election, and extends the bar to subdivisions of the unit. The Committee Report noted that there had been some confusion in the interpretation of Section 3(b) of Executive Order No. 10,988, which covered this subject. Accordingly, it recommended that the rule governing the private sector be followed.[40]

Section 7(f) eliminates informal recognition. This action had wide support from union and management representatives. It may have once had a place in the program, but it no longer serves a useful purpose.

Section 8 provides that formal recognition shall no longer be accorded but that any existing arrangement shall continue until the labor organization ceases to be eligibile for formal recognition or until a labor organization wins exclusive recognition for the unit or the formal recognition is terminated under regulations prescribed by the Federal Labor Relations Council. Grants of formal recognition terminated July 1, 1971. The testimony of most agencies in the 1967 hearings recommended discontinuing formal recognition. It was pointed out that formal recognition produced problems which hindered stable labor relations, contributed to unit fragmentation, caused confusing and overlapping relationships, and resulted in difficulties in maintaining an appropriate difference in the rights and obligations under this form of recognition compared with those prescribed for exclusive recognition. Most unions recommended its retention on the grounds that it assisted organizational efforts and made possible dues withholding privileges.[41]

The Wirtz Committee Report recommended retention of formal recognition but would have restructured the concept by raising the membership require-

40. *Id.* at 35.
41. *Id.* at 33-34.

ment from 10 to 30 percent and by limiting consultation rights to allow only conferring on proposed changes in personnel policies which are of concern to their members.[42] The Committee also recommended that application of the increased membership requirement to unions currently holding formal recognition be deferred for a two year period.

This proposal would have provided a powerful incentive for unions to seek exclusive recognition. If it was followed, formal recognition would have disappeared in time. However, the Hampton Committee was of the opinion that such a proposal "would not adequately alleviate present difficulties and could produce additional problems." Noting that over fifty percent of the federal work force was covered by exclusive recognition, the Committee concluded that employees and labor organizations no longer needed the special assistance in organizing that formal recognition provided and that its continuance was not warranted in view of the problems involved in administering multiple forms of recognition.[43]

Section 9 of the Order substituted "national consultation rights" for formal recognition at the national level. This form of recognition is to be granted by the agency to a labor organization which represents a substantial number of employees of the agency. The criteria for granting these rights have been established by the Federal Labor Relations Council. "National consultation rights" will not be granted if another labor organization holds exclusive recognition for that unit at the national level. Agency decisions concerning this form of recognition may be appealed to the Assistant Secretary of Labor.

A labor organization holding national consultation rights will be notified of those proposed substantive changes in personnel policies that affect employees it represents and have the opportunity to comment; it may suggest changes in personnel policies and its views will be carefully considered; it may confer in person at reasonable times on request, and at all times it may present its views in writing. An agency is not required to consult on any matter on which it would not be required to meet and confer if the union was entitled to exclusive recognition.

The proposal for a system of national consultation rights originated with the AFL-CIO.[44] Contending that formal recognition at the national level was confusing, and often ineffective, union spokesmen suggested its replacement with a system of comprehensive consultation rights regarding the formulation, implementation, and interpretation of all personnel policies and practices, and

42. REPORT OF PRESIDENT'S COMMITTEE, *supra* note 7.
43. COMMITTEE REPORT, *supra* note 5, at 34.
44. TRANSCRIPT OF HEARINGS 15-16.

that agency level rights extend to discussions with the Civil Service Commission.

Both the Draft Report and the 1969 Committee Report found merit in the labor testimony. Beyond the semantics intended to clarify the relationship, the third-party role in the development of criteria and the right to appeal agency determinations to the Assistant Secretary of Labor seem to provide a more solid base for stabilizing union-agency relations at the national level. Such a device is necessary in large departments, where exclusive recognition may be won by labor organizations representing large numbers of employees. The representatives then find themselves dealing with agency management at levels as much as three times removed from the personnel policy makers. Thus, national consultation rights may give such labor representatives a voice at the top.

Section 10 of Executive Order No. 11,491 made significant changes in the procedures and criteria for the granting of exclusive recognition. All membership requirements are dropped, but an election supervised by the Assistant Secretary of Labor is required in every case. Elections will be decided by the majority of employees voting. Supervisors are to be excluded from units and guards will neither be in the same unit with other employees nor represented by a labor organization which includes other employees as members or is affiliated with such an organization. The criteria for determining an appropriate unit is amended by adding to the "community of interest" requirement the consideration that the unit will be one that "will promote effective dealings and efficiency of agency operations." National exclusive recognition is no longer discouraged. Section 10 is silent on the subject, but the Committee Report clearly accepts this form of recognition.[45]

Section 10(e) provided essentially the same rights and obligations for a labor organization holding exclusive recognition as did Executive Order No. 10,988. However, the opportunity to be present at discussions between management and employees is now limited to "formal" discussions.

On the whole, Section 10 clarified the composition of the unit, stream-lined procedures for recognition, and strengthened the third-party role of the Assistant Secretary of Labor. It is a curious amalgam, responsive in part to both union and agency proposals made in open hearing. Some provisions are apparently based on experiences and conclusions of labor relations managers and experts at the state and local levels. Yet, in part, Section 10 also reflects the philosophy or goals of the Administration.

The testimony at the 1967 hearings reflected widespread support for third-

45. COMMITTEE REPORT, *supra* note 5, at 35-36.

party administration of bargaining unit determinations and majority representation questions from both unions and federal agencies. The agencies had found the problems of administering elections and related questions increasingly complex and burdensome. The arbitration process for unit determinations was uncertain and failed to develop, through precedent, a reliable body of law. The unions objected to the initial agency authority, to the process itself as cumbersome, and to the "so called" 60 percent rule as inequitable, and inconsistent with the principles followed by the NLRB and those governing federal, state, and local political elections. Both the Wirtz Committee and the Hampton Committee accepted these proposals. Thus, the provisions in Executive Order No. 11,491 assigning to the Assistant Secretary of Labor the responsibility for unit determinations and questions of majority status, including the supervision of elections, responded to problems and needs expressed by the parties involved.

The requirement making a secret ballot election mandatory for the granting of exclusive recognition is not a provision nurtured in the 1967 hearings nor is it consistent with policy followed by the federal government for the private sector. At the hearings, only one agency proposed the elimination of the use of authorization cards in determining majority status for exclusive recognition.[46] The Wirtz Committee recommended following the practices used in the private sector.[47] The Hampton Committee, however, recommended that exclusive recognition should be determined by use of secret ballot elections in all cases. After noting that the 10 percent membership requirement had not proven significantly beneficial and had created administrative problems in determining eligibility, the Committee said:

> Similarly, experience has been unsatisfactory with the use of authorization cards, dues withholding authorizations, petitions and other such materials as the basis for determining whether a majority of the employees in a unit wish to have a labor organization as the exclusive representative. While such signed materials can adequately show the interest of employees in choosing a representative, or in changing or discontinuing a representative, they are not sufficiently conclusive to be the basis for a determination of the will of the majority without an election.[48]

In light of the absence of testimony before the Review Committee supporting the above conclusions, and the lack of attention given to this subject by the Wirtz Committee, it must be assumed that the Committee had access to infor-

46. Statement by W. L. Johnson, Jr., Assistant Administrator for Administration, General Services Administration, before the Review Committee, TRANSCRIPT OF HEARINGS 162.

47. REPORT OF PRESIDENT'S COMMITTEE, *supra* note 7.

48. COMMITTEE REPORT, *supra* note 5, at 35.

mation which has not been made public. Some published quantification, or at least a number of examples from agency experiences would have made the conclusions more acceptable. An attorney, commenting on this provision, observes that management organizations, management attorneys, and personnel experts in the private sector have long questioned the true value of authorization cards in unit elections, but were rebuffed by the Supreme Court in *NLRB v. Gissel Packing Company, Inc.*[49] He acknowledges that in some phases of labor policy the federal government may justify different approaches for government and industry, but he questions whether any basis, other than philosophical, can be established for determining that elections are mandatory in majority status determination among federal employees and optional for employees in the private sector.[50]

As a practical matter, the election requirement removes considerable discretion from the parties and adds what may be unnecessary bureaucratic procedures to the process of exclusive recognition. Without further data, the Committee recommendation cannot be evaluated on either substantive or administrative grounds.

The consideration of "effective dealings and efficiency of agency operations" along with the standard employee "community of interest" as the basis for determining the appropriate unit is likewise a step away from federal policy governing the private sector. Congress, in Section nine of the National Labor Relations Act, was concerned with assuring employees the fullest freedom in exercising their rights and providing some protection to craft units.[51] However, the Committee Report seems more concerned with administrative convenience. The Report says:

> The present Order's language has been criticized as deficient in that it does not provide adequate criteria for purposes of appropriate unit determination. We are aware of the difficulties encountered in this area of public sector labor relations. We recognize that the element of uniqueness in each situation requires handling appropriate unit determinations on a case-by-case basis, and that such determination must be tied basically to a clear and identifiable community of interest of the employees involved. However, we recommend that in addition to meeting the "community of interest" criterion, an appropriate unit must be one that promotes effective dealings and efficiency of agency operations. We believe that these additional criteria are essential to insure effective Federal labor-management relations.[52]

49. 395 U.S. 575 (1969).
50. Wallenberger, *Nixon v. Gissel, Shall the Twain Ever Meet?*, 20 LAB. L.J. 787 (1969).
51. 29 U.S.C. § 159 (1970).
52. COMMITTEE REPORT, *supra* note 5, at 35.

The Wirtz Committee used essentially the same language in making the same recommendation and also pointed out "that providing for a centralized responsibility for the determination of appropriate units should bring greater order and consistency to the resolution of such questions. As unit decisions are issued, a body of precedent will be developed on which interested parties will be able to draw for guidance."[53]

It does not seem illogical to conclude that the replacing of ad hoc arbitration by a centralized authority should reduce, if not eliminate, the need for additional criteria for determining the appropriate unit. Yet both Committees reached the contrary conclusion. The basis for the Committee recommendations may have originated in the 1967 hearings, but state and local laws and the viewpoint of officials and commentators on public employee labor-management relations seem to have had considerable influence.

The labor relations managers and writers, who support the need for additional criteria in determining the appropriate unit in public employment, emphasize the differences between the public and private sectors. It is contended that, because of the peculiarities of public employment relations, determination of the appropriate unit for bargaining may well present greater difficulties.[54] The proponents of this point of view agree that the scope and nature of the bargaining unit affect the range of negotiations, the role of the separate branches of government, the likelihood of peaceful resolution of disputes, the proportion of order versus chaos in bargaining, and, ultimately, the success of the whole idea of collective bargaining for public employees. The conclusion is that larger units should be favored over smaller ones.[55] Other experts recognize that there are strong reasons for broad units in the public service. However, they note that the larger the units, the more likely it is that minority interests will not be adequately recognized and the greater the possibilities of internal friction.[56] Some suggest that statutes be general so that agencies remain flexible and free to improve unit determinations to the benefit of the collective bargaining process.[57]

Those who do not agree that public sector bargaining is significantly differ-

53. REPORT OF PRESIDENT'S COMMITTEE, *supra* note 7.

54. Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 903 (1969).

55. Rock, *The Appropriate Unit Question in the Public Service*, 67 MICH. L. REV. 1001 (1969). *See also* HABER, THE RELEVANCE OF PRIVATE SECTOR EXPERIENCE TO PUBLIC SECTOR COLLECTIVE BARGAINING, CONFERENCE PROCEEDINGS, THE INSTITUTE OF MANAGEMENT AND LABOR RELATIONS, RUTGERS UNIVERSITY (1968). Mr. Haber provides a pragmatic analysis of differences in public and private sector employment and the problems caused by excessive unit fragmentation.

56. A SUMMARY OF PROCEEDINGS, NEW YORK STATE GOVERNOR'S CONFERENCE ON PUBLIC EMPLOYMENT RELATIONS (1968), excerpt of remarks by John T. Dunlop.

57. *Id.* at 10, excerpt of remarks by Morris Slavney.

ent from private employment practices hold that determining the appropriate unit in public employment should present no essentially different problems. They argue that one finds the same considerations of gerrymandering, community of interest, and bargaining history that have prevailed in the private sector. Different levels of bargaining are suggested for various categories of bargaining subjects, with different representatives for the different units.[58]

It appears that the new criteria in Executive Order No. 11,491 represents an acceptance of the theory that public employment is different from employment in the private sector and requires broader bargaining units.[59] The development of this theory in the federal sector will depend on the weight given the new requirement that "the unit be one which will promote effective dealings and efficiency of agency operations." This requirement is to be used by the Assistant Secretary of Labor in determining the appropriate unit on a case-by-case basis under Section 6(a)(1) of the Order, and by the Federal Labor Relations Council in adjudicating appeals under Section 4(c)(1). Since many of the parties involved are responsible for the new standard, it can be anticipated that it will be given considerable weight. The cases will probably arise not only when two unions are contending for representation status, but also when there is a petition for less than an installation-wide unit and the agency, in the interest of effective dealings and efficiency of operations, contends that only the installation-wide unit meets the test. Some agencies, the Departments of the Navy and Air Force, in particular, had initially sought installation-wide units under Executive Order No. 10,988. After being overruled in a number of advisory arbitrations, the Navy changed its position. The Air Force, however, continued to seek installation-wide units and its employees are generally represented in larger local units than other Departments.

Despite the impressive group of witnesses who support broad units as necessary because of the peculiarities of public employment, there are objections to the theory and to the unilateral decision to tilt the guidelines in that direction. It was the experience of the private sector that units evolved in accordance with the situation, pressures from management and unions, and organization structures in the plant, corporation, or industry. The patterns are many-faceted and ever-changing.[60] Depending on "community of interest" and bargaining history, the federal bargaining structure also saw a variety of units recognized under Executive Order No. 10,988. The process was not always orderly, but

58. Address by Clyde W. Summers, Sixth Annual Midwest Labor Law Conference, Columbus, Ohio, Oct. 4, 1969. 318 G.E.R.R. B-6 (Oct. 13, 1969).

59. Support for the larger unit theory is found in PICKETS AT CITY HALL, REPORT AND RECOMMENDATIONS OF THE TWENTIETH CENTURY FUND TASK FORCE ON LABOR DISPUTES IN PUBLIC EMPLOYMENT (1970) [hereinafter cited as PICKETS AT CITY HALL].

60. THE STRUCTURE OF COLLECTIVE BARGAINING (Weber ed. 1961).

there was considerable employee participation in determining the appropriate unit.

Although the new Order tends to favor the broad bargaining unit, both the Wirtz and Hampton Committees recommended consideration by agencies and unions of multi-unit and joint bargaining covering any combination of units at any level of the agency where the parties are in agreement that such an arrangement would provide for more productive negotiations. It was also recommended that the Council study this aspect of collective bargaining to determine whether further guidance on this matter is warranted in the federal program.[61] The Report fixes rules favoring broad units and suggests that by agreement these units may be joined in varying combinations to produce effective negotiations. The concept of joint and multi-unit bargaining provides a pragmatic solution that affords employees a maximum role in exercising their rights and adjusts the unit to the issues to be negotiated. In this process, there is no need to require homogenized broad units as the building blocks for multi-unit or joint bargaining.

In concluding the discussion on the appropriate unit, this writer is not convinced that the additional standard in Section 10(b) of the Order will ensure the fullest freedom to employees in exercising their rights under the Order, or in evolving a flexible bargaining structure that can be used by the parties for effective dealings at many levels and on many different issues.

Agreements

The rule and procedures concerning the negotiation and approval of bargaining agreements were set forth in Sections 11-15 of the Order. Executive Order No. 10,988 had placed on agencies and unions a joint obligation to record, in writing, agreements reached through negotiations. Although circumscribed by laws, regulations, and broad management rights provisions, the unions had utilized the opportunity to secure 1,181 contracts covering 1,175,524 employees or 43 percent of the federal work force. This is without reference to the more than 20,000 supplemental postal agreements.[62]

Despite this evidence of successful bargaining, labor spokesmen were unhappy with agency implementation of bargaining. They had found, *inter alia*, a bewildering complex of agency regulations, a lack of delegated authority to

61. REPORT OF PRESIDENT'S COMMITTEE, *supra* note 7.

62. Wilfred V. Gill, Director, Office of Labor-Management Relations, U.S. Civil Service Commission, during *Hearings on Postal Labor Relations and Employee Morale Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess., ser. 91, pt. 7, at 100 (1969).

local agency officials, and unilateral agency decisions removing items from the bargaining table—all of which limited meaningful bargaining.

Sections 11 through 15 of Executive Order No. 11,491 responded in part to these criticisms. Those sections provided in relevant part as follows:

(1) The obligation of the parties to meet, confer, and negotiate written agreements was buttressed by a requirement that such negotiations be "in good faith."

(2) The framework of law and policy governing negotiations was clarified. The Order continued to exclude broad policy areas from content of negotiation. But it did authorize the parties to negotiate "agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

(3) Procedures were established to resolve disputes concerning the negotiability of a matter. If a union disagrees with an agency determination that a proposal is non-negotiable because it would violate law, government regulation, or the Order, or if the union believes that an agency regulation, as interpreted by the agency violates law of regulation, the union may appeal to the Federal Labor Relations Council (FLRC) for final resolution.

The Order restated the requirement to incorporate a number of standard provisions in all labor-management agreements. These include a broad management rights clause and a prohibition of the union or agency shop. However, an agency is no longer free to change a negotiated agreement unilaterally by revising agency regulations.

Agreements remained subject to agency head approval, but disapproval could only result from failure of the agreement to conform with law, policy, or regulation. Agreements could establish grievance procedures to cover employee grievances and disputes over the interpretation and application of agreements. The negotiated grievance system was to be the exclusive procedure available to employees in the unit. Advisory arbitration was eliminated. Agreements could provide for the arbitration of employee grievances and disputes over the interpretation or application of existing agreements, subject to the right of either party to file exceptions to the arbitration award with the FLRC. Arbitration did not extend to changes or proposed changes in agreements or agency policy.

In summary, these sections of the Order are intended to clarify the framework of law and policy surrounding negotiations, increase the scope of bargaining, encourage the delegation of authority, reduce unilateral decision making, and provide for more effective third-party resolution of employee grievances and disputes arising out of the administration or interpretation of contracts. Evaluation of these provisions and their potential effectiveness requires consid-

eration of the proposals for changes made by both labor and management in 1967.

The AFL-CIO and its many affiliates, appearing before the President's Review Committee in 1967, took the position that "collective bargaining in the Federal Service has not yet become the recognized process for determining personnel policies and working conditions" and that "to achieve genuine collective bargaining it is necessary to widen the scope of collective bargaining and to enlarge the authority of local activity management." The various witnesses consistently pointed out that the local installation manager could bargain on subjects only within his administrative discretion. Further discretion was determined by agency regulations, which were unilaterally established and amended.[63] They also found frustrating, and contrary to principles of collective bargaining, the experience of reaching agreement on terms of a local contract only to have top-agency management veto clauses for reasons other than a violation of law. Accordingly, the AFL-CIO recommended that all matters concerning personnel policy and practices and affecting working conditions should be negotiable items where consistent with law. Agency regulations, present and future, would not limit bargaining. A second recommendation was to abolish the requirement of agency approval of a negotiated agreement. The signature of the agency bargaining representative would be binding.

A third specific recommendation was to amend the last sentence of Section 6(b) of Executive Order No. 10,988 and to delete Section 7(2). These sections constituted the formidable management rights provision which narrowed the scope of bargaining. Section 6(b) excluded from bargaining the subjects of mission, budget, organization, the assignment of personnel, and the technology of performing work. The latter items directly affected the jobs of employees, particularly those displaced by technological changes. The major purpose was not to hinder change, but rather to negotiate procedures that would protect workers in such instances.

Section 7(2) allowed management the right to hire, assign, and promote personnel and to determine the methods, means, and personnel for performing agency work. Since most of these items were governed by law, the union representatives argued that there was no reason why such items could not be subject to negotiations within the framework of those laws.

Some labor organizations were not willing to limit their bargaining interests. The National Federation of Federal Employees recommended that the scope of bargaining be expanded to include negotiations on personnel policies affect-

63. TRANSCRIPT OF HEARINGS. The labor and management viewpoints presented and discussed here are based on this transcript unless otherwise noted.

ing changes in mission, budget, organization, assignment of personnel, and technology of performing work. The National Association of Letter Carriers (AFL-CIO) was more succinct, contending that union representatives should be permitted to discuss and negotiate in any area which affects the welfare of their members.

These union recommendations found support in the testimony of Professor Russell Allen, School of Labor and Industrial Relations, Michigan State University. Professor Allen observed that the two management rights sections were so comprehensively worded that management, if so disposed, could rule out virtually all bargaining. He recommended that the language of the Order should be changed to provide that where the Federal Personnel Manual or agency regulations conflict with negotiated agreements, the latter should govern. He saw no necessary conflict with the merit system.

The Departments of the Government did not agree. Army argued that rather than change the scope of bargaining, alert representation would find more areas to negotiate within the present rules. Navy and Air Force would retain and reemphasize the management rights sections. Commerce and Treasury maintained that there should be no change that would impede management's final authority for the operation of the agency. The Department of Interior on the other hand, contended that executive action should be taken to bring the federal program in closer alliance with the policies and procedures followed in the private sector. It recommended that the scope of bargaining be expanded and that unilateral management regulation be de-emphasized.

Generally, the August 1969 Committee Report followed the reasoning and recommendations of the Draft Report of January 1969. Section 11(b) of the Order reflected the unions' strong interest in the right to negotiate protective arrangements for employees adversely affected by changes in work and technology.[64] The Committee also concluded that the phrase, "assignment of personnel," had sometimes been interpreted to exclude from negotiation the policies followed by management in such actions as assigning employees to particular shifts or tours of duty. Finding that the language's intent applied only to the agency's right to establish staffing patterns, the Committee recommended the clarifying language now also part of Section 11(b).[65]

While it was accepted that local managers lacked authority to bargain, the recommendation to authorize bargaining on any subject, not inconsistent with law, was rejected. The Committee urged agencies to increase, where practical, delegations of authority to local managers.[66] The Committee also recognized

64. COMMITTEE REPORT 38.
65. *Id.* at 39.
66. *Id.*

the need for procedures to reduce unilateral agency decisions on negotiability questions and responded by including, under certain circumstances, an appeal to the Council.[67]

The Committee also stated that a labor organization should be permitted to file an unfair labor practice complaint whenever it believed that a management official had been arbitrary or in error in excluding a matter from negotiation which had been determined negotiable through the process now described in Section 11(c).[68] While agreeing with the unions that the requirement for agency approval of negotiated agreements had resulted, at times, in unnecessary or arbitrary revisions, the Committee maintained retention of the requirement was necessary. It was also convinced that limitations were appropriate and the result is Section 15 of the Order.[69]

Further, the Committee stated that the alleged practice of changing agency regulations to nullify clauses in negotiated agreements should not continue. Section 12(a) of the Order negates the impact of agency regulations subsequent to an agreement unless required by law or other outside authority.

The management rights provisions of Section 7(2) of Executive Order No. 10,988 were incorporated without change in Section 12(b) of Executive Order No. 11,491. While the Hampton Report is silent on the subject, the Wirtz Committee Draft Report would have modified this clause. Stating that many of the practices and procedures followed by management in the exercise of these rights were appropriate subjects for negotiation, the Wirtz Draft would have continued the requirement that agreements recognize the responsibility of management officials to take such actions as were necessary to carry out their prescribed duties and responsibilities. The requirement, the Draft continued, should recognize that the exercise of such rights must conform to the terms and conditions of the negotiated agreement.[70]

In commenting on the events leading to the Executive Order No. 11,491 changes, it is well to remember that the limited scope of bargaining has been one of the major obstacles to developing balanced and fruitful labor relations in the federal sector. The pre-emption by Congress of the "bread and butter" items—pay, insurance, health benefits, and retirement—reduces the parties to negotiating personnel policies, procedures, practices, and specific working conditions. The strong management rights provisions of Executive Order No. 10,988 often limited bargaining on these subjects to collaboration on procedures. The scope of negotiation remains limited. The favorable aspects lie, first,

67. *Id.*
68. *Id.*
69. *Id.* at 40.
70. REPORT OF PRESIDENT'S COMMITTEE, *supra* note 7.

in the increased emphasis of delegating greater authority to local managers and encouraging multi-unit bargaining. Second, the limitation on the authority of the agency head to reject or modify agreements should reduce frustration at local levels. Finally, third-party review of negotiability issues adds some balance to the bargaining table.

It is safe to say that the modification of Section 7(2) of Executive Order No. 10,988 would have broadened the ability to bargain while leaving fundamental authority and relationships unchanged. Until the Section 7(2) management rights are brought within the collective bargaining process, meaningful negotiation is unduly limited. Private management has yielded, albeit 'grudgingly' in this area and industry still functions.[71] A government that proclaims its belief in the validity of collective bargaining should not follow this same line of resistance. Viable labor relations will demand a widened scope of bargaining through either executive or legislative action.

In concluding this discussion, a final reference to Sections 13 and 14 is necessary. In their testimony, the agencies offered few positive comments on changes in the grievance system. The unions favored a single system for all grievances and appeals and the use of the negotiated procedure to the exclusion of any agency procedure and binding arbitration. The Hampton Committee, however, did not accept this proposal.[72] It recommended eliminating the dual agency system, broadening of the scope to include disputes over the administration and interpretation of agreements, and establishing binding arbitration subject to appeal by either party to the Council. These recommendations are now part of the new Order.

In the 1967 hearings, the Departments and Agencies strongly recommended that the role of the supervisor be clarified, that he not be a member of the bargaining unit, and that he not be an official or representative of a labor organization.[73] Those unions oriented to bargaining in the private sector had little or no comment on this subject. Two large government service unions, the AFGE and the NFFE, proposed that the application to employees and unions of any conflict of interest provision be liberally construed and that consideration be given to prohibiting only those situations where there was a "conflict in fact."[74]

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71. Address by Neil W. Chamberlain, 5th Annual Orvil E. Dryfoos Conference on Public Affairs, Public Affairs Center, Dartmouth College, May 1968, *Collective Bargaining in the Public Sector*, in NAT'L EDUC. ASS'N, NEGOTIATION RESEARCH DIGEST (1968). Dr. Chamberlain notes that the principle of the management prerogative now laid to rest in the private sector is very much alive in the public sector and supported by basically specious argument.

72. COMMITTEE REPORT 41-42.

73. TRANSCRIPT OF HEARINGS 118, 121, statement by Arthur W. Alkins, Deputy Undersecretary of the Army for Manpower.

74. *Id.* at 661-62.

The Committee viewed supervisors as part of management. It recommended:

> The term 'supervisor' should be expressly defined and supervisors should be considered part of management. Recognition should not be granted for mixed units or for units consisting solely of supervisors. Supervisors should not participate in the management or representation of labor organizations which represent other employees. Agencies should take steps to improve the status of supervisors and associations of supervisors by insuring that they are afforded the opportunity to participate in a meaningful way in the management process and to have their problems carefully considered.[75]

These recommendations were incorporated into the Order. The conflict of interest provision was expanded and specifically prohibited supervisors from acting as union officers or representatives. A definition of the term "supervisor" similar to that found in the LMRA, as amended, was included.[76] It was provided that a supervisor is not an employee for the purpose of formal or exclusive recognition or national consultation rights. Supervisory groups were excluded from recognition as labor organizations. Establishing a unit for purposes of exclusive recognition which included any management official or supervisor was prohibited. There was also a limited savings clause for certain supervisory representation in units which have historically functioned in this manner. Finally, agencies were instructed to establish a system for intra-management communication and consultation with supervisors or associations of supervisors.

These provisions of the Order formed a comprehensive approach to the problems relating to the role of the supervisor. The transition period initiated under Executive Order No. 10,988, which found supervisors in various union roles, could be at an end. However, the definition of "supervisor" and the extent to which the Executive Branch can limit the composition of employee participation in union activities must be buttressed by criteria in specific cases.

Conduct of Labor Organizations and Management

Sections 18 and 19 of the new Order incorporated with modifications the *Standards of Conduct for Employee Organizations* and the *Code of Fair Labor Practices in the Federal Service*, promulgated May 21, 1963. There were a number of key changes. The plenary power of the agencies inhibited unions from seeking relief through the filing of an unfair labor complaint and there was little reported activity. The Assistant Secretary of Labor now has initial jurisdiction in these areas under Section 6(a)(4) of the Order; this third-party

75. COMMITTEE REPORT 36.
76. 29 U.S.C. § 151 (1970).

administration should give an aura of due process that has heretofore been lacking.

The Standards of Conduct set forth in Section 18 contained one significant change from the previous Standards. Section 18(c) and (d) requires unions, having or seeking recognition, to file financial and other reports, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards under regulations to be issued by the Assistant Secretary. The regulations were to conform to the principles applied to unions in the private sector.

Both Review Committees believed that the above requirements were necessary. Some unions were already under such reporting and financial obligations required by the Labor-Management Reporting and Disclosure Act of 1959. The Committees maintained that all unions should meet the same requirements and recommended accordingly.[77] Many union leaders have protested the imposition of these reporting requirements as extremely burdensome on small locals. After some experience in administering these provisions on the public and private sectors, it would seem that the Assistant Secretary of Labor could adjust inequities by regulatory changes. This provision of the Order is consistent with a belief that, as unions grow and acquire stature, they are expected to accept responsibility, including the reporting and disclosure of financial data.

Section 19(a) carried over, unchanged from the Code of Fair Labor Practices, the management actions prohibited as unfair labor practices. Thus, management cannot: interfere with employee exercise of rights assured by the Order; encourage or discourage union membership by discrimination in hiring, tenure of employment, etc.; sponsor or control a union; discipline or discriminate against an employee because he has filed a complaint or given testimony; refuse to accord recognition to a qualified union; or refuse to consult, confer, or negotiate with a union when required by the Order.

Section 19(b) enumerated these to be unfair labor practices. These, with few exceptions, also were in the original Code. In Section 19(b)(3), however, the new Order added to the Code provisions which, in Section 3.2(b)(3), prohibited a union from "coercing, or attempting to coerce or discipline any member of the organization as punishment or reprisal for, or for the purpose of hindering or impeding his discharge of his duties owed as an officer or employee of the United States."

Section 19(b)(3) reads:

> A labor organization shall not—. . . (3) coerce, attempt to coerce, or discipline, *fine, or take other economic* sanction against a mem-

77. COMMITTEE REPORT 42.

> ber of the organization as punishment or reprisal for, or for the purpose of hindering or impeding *his work performance, his productivity*, or the discharge of his duties owed as an officer or employee of the United States. (Emphasis supplied to show new language.)

The Committee was silent on the reasons for this language. Support for the view that this is clarifying language is found in the United States Civil Service Commission FPM Letter No. 711, dated August 30, 1963, which offered an explanation of the original Standards and Code. Speaking with reference to Section 3.2(b)(3), the Commission stated it was included in the Code "in recognition of the special obligation that all parties to employee-management relations in the Federal service have to conduct themselves in such a manner as not to interfere with the proper performance of the Government's business. . . ."

The specificity of the new language, including the prohibition against a union fining a member as punishment to control his productivity, would seem to be based on the theory that federal labor relations are indeed different from those in the private sector. Sovereignty appears in many guises. The alternative theory is to accept the contention that the Committee agreed with private management that the federal labor policy governing unions in the private sector is incorrect in this regard.[78] At issue is a Supreme Court decision holding that a union may fine a member for immediately accepting pay for work which exceeded a production ceiling.[79]

"Off the Clock" Negotiations

Another controversial change in Executive Order No. 11,491 was the requirement that employees, negotiating for a union with agency management, should not do so on official time.

While the previous Order had stated that consultations and meetings between management and unions would be conducted whenever practicable on official time, it authorized agencies to require that negotiations could be conducted during non-duty hours. The Hampton Committee found that this "permissiveness" had resulted in widely divergent agency practices, inconsistent treatment of employees similarly situated, and unduly protracted sessions. It concluded that "an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be a duty status when so engaged."[80] However, the omission in Section 20 of any guideline for the use

78. *See* Wallenberger, *supra* note 50.
79. Scofield v. NLRB, 394 U.S. 423 (1969).
80. COMMITTEE REPORT 40.

of official time by employees representing unions in consultations and meetings other than negotiations would seem to continue the same type of "permissive" situation now eliminated by the Committee with respect to negotiations. Moreover, collective bargaining at any level will inevitably result in inconsistent treatment of employees similarly situated. Consequently, one must conclude that the Committee believed that agencies could not control protracted negotiations.

It is safe to predict that small unions, unable to afford paid representatives, will avoid protracted negotiations. However, the resulting agreements may contribute little to the goals of the program. The large government union will not be reached by this rule, except perhaps at the local level.

There is an appearance of inequity when management representatives, normally "on-the-clock," deal with employees, who are required to be on their own time. The principle has been abandoned in much of industry.[81] As early as 1959, a Department of Labor study noted that while labor contracts generally did not provide pay for attendance at union meetings, conferences, and conventions, there were provisions in some contracts for pay in activities of more direct concern to the company including contract negotiations.[82]

The rule is not consistent in a federal labor-management relations program which has an expressed goal of greater employee participation in decisions affecting their working conditions. It treats negotiations as a purely adversary situation. It has been opposed not only by unions, but also by some members of Congress.[83]

Amendments to Executive Order No. 11,491

With the issuance of Executive Order No. 11,491, the Council, the Assistant Secretary of Labor, and the Federal Mediation and Conciliation Service began organizing staff and preparing regulations. Despite the impact of the postal strike and the Air Traffic Controllers' "sick out," these efforts were virtually

81. Remarks by Harold S. Roberts, *supra* note 8.

82. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1266, COMPANY PAY FOR TIME SPENT ON UNION BUSINESS (1959).

83. *See* letter from Rep. David N. Henderson, Chairman, Manpower Subcommittee, House Post Office and Civil Service Committee, to Chairman Hampton, Civil Service Commission, reported by Cramer, Washington Daily News, Feb. 6, 1970, at 2, col. 4. The Congressman is quoted,

> [i]f in fact, as stated in the introductory statement of the executive order 'efficient administration of the government is benefited by providing employees an opportunity to participate in the formulation of personnel policies and practices affecting the conditions of their employment' then both agency management and labor organizations are working for the good of the government and should be treated equally.

completed in 1970. Although there was considerable opinion expressed that the critical work stoppages showed that the Order was obsolete, the Council did not agree.[84] Chairman Hampton stated, "The Order is the best vehicle for both sides to develop the necessary expertise for the day when it may be appropriate to expand the scope of the bargaining."[85]

In keeping with President Nixon's direction to institute a review and assessment of operations under the Order, the Council held public hearings October 7-9, 1970.

They emphasized their belief that legislation is essential to establish meaningful collective bargaining and called for radical revision in both the administration and substance of the federal program.[86] They recommended enlarging the scope of bargaining, developing more effective machinery to break negotiation impasses, making grievance procedures and arbitration more meaningful, and establishing an impartial government board to deal with unfair labor practice charges.

AFL-CIO President George Meany urged adoption of the procedures of fact finding and binding arbitration from the Postal Reorganization Act. He also favored government-wide bargaining between a five member council of unions and the Civil Service Commission, with unresolved issues after 90 days of negotiations referred for fact finding and, if necessary, binding arbitration.

The American Federation of Government Employees, the National Federation of Federal Employees, and representatives of professional groups agreed that the restrictions on supervisory participation were too broad, reached too

84. Raskin, *Uncle Sam Learns About Living With Labor*, New York Times, April 20, 1970, at 38, col. 5, "[f]rom now on governmental collective bargaining will correspond much more to the industrial pattern than it ever did under the pioneering Executive Order President Kennedy promulgated in 1962 or even under the liberalized version President Nixon signed, to labor's delight less than six months ago." *See* 344 G.E.R.R. A-1 (Apr. 13, 1970). Paul Treusch, President Federal Bar Association, questioned the relevancy of the Order and requested the Federal Labor Relations Council to hold "an immediate summit labor relations conference." The Council declined on the ground that legislation was before Congress and there had been insufficient experience to gain the perspective needed for a productive conference, 346 G.E.R.R. A-4 (Apr. 27, 1970). 2 ABA, SECTION OF LABOR RELATIONS LAW, REPORT OF THE COMMITTEE ON THE LAW OF FEDERAL GOVERNMENT EMPLOYEE RELATIONS, 1970 COMMITTEE REPORTS, holds the Order obsolete because of the Postal and Air Controllers' strikes.

85. 362 G.E.R.R. A-13 (Aug. 17, 1970).

86. *See* 370 G.E.R.R. A-6 (Oct. 12, 1970); Memorandum, Anthony F. Ingrassia, Director, Office of Labor-Management Relations, U.S. Civil Service Commission, Three-part briefing on October 7-9 hearings of the Federal Labor Relations Council, Oct. 12, 1970. These documents offer summaries of major points of testimony at the hearings. It should be emphasized that they are not official reports. The discussion herein is based on these documents. The official transcript was compiled by the Hoover Reporting Company, Inc., 320 Massachusetts Avenue, N.E., Washington, D.C.

far down in the organization levels, and denied career supervisors of due process.

President Vincent Connery, National Association of Internal Revenue Employees, noted that the Civil Service Commission exercised unilateral control over the scope of negotiability through the Federal Personnel Manual and that neither bargaining party could negotiate with the Commission on the contents of the FPM. He concluded, "to have to say that this vitiates the entire bargaining process is almost to find oneself a disciple of the obvious." Michael B. Ryan, President, National Labor Relations Board Union, also expressed concern over the limited scope of negotiations and consultation stating that:

> In the opinion of our organization, the management and efficiency of the government would benefit from a total absence of language restricting subjects of consultation and negotiation. There are obviously areas in which management cannot be bound by negotiated agreements. That does not mean that management would not benefit from a thorough discussion of those areas with union representatives—even including methods and means of accomplishing the assigned mission . . . . At the very least, Section 11(b) should make it plain that managers are not restricted from consulting with union officials on those matters mentioned, even though the matters may not become the subject of a negotiated contract.

Management representatives strongly supported the Order as an instrument for progress in federal labor-management relations. Some opposed the statutory approach as premature. There was also testimony against lifting the election requirement for exclusive recognition or permitting any form of union security. Management was divided on the issue of union negotiators being "off the clock." Some would make it a negotiable item; others would extend the concept.

Amendments to Executive Order No. 11,491 in the form of Executive Order No. 11,616, with an accompanying report and recommendations of the Federal Labor Relations Council, were published August 26, 1971.[87]

The substantive changes were few, reflecting the Council's conclusions that

> it was clear throughout the proceedings, that, in general, the Order has greatly enhanced the climate for collective bargaining in the Federal service. . . . Other proposals were determined to be outside the scope of the current review or not appropriate for consideration at this time in view of the limited experience under Executive Order 11491.[88]

87. COUNCIL REPORT.
88. *Id.* at 27.

The principal amendments are as follows:

(1) Professional associations are granted rights analogous to the lawful associations not qualified as labor organizations; and,

(2) Collective bargaining agreements must include a grievance procedure which shall be the exclusive procedure available to the parties and the employees in the unit for differences for the interpretation and application of the agreement. The negotiated grievance procedure may not cover any other matters, including matters for which statutory appeal procedures exist. An employee or group of employees in the unit may present such grievances directly to the agency, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given the opportunity to be present at the adjustment. (Section 13 (a)); and,

(3) The negotiated procedure may provide for arbitration over the interpretation or application of the agreement but not over any other matters. Either the agency or exclusive representative may invoke arbitration and either party may file exceptions to the arbitrator's award with the Council. The requirement for sharing of the costs of arbitration has been eliminated and is now negotiable. (Section 13(b)); and,

(4) An employee, regardless of whether he is in a unit of exclusive recognition, is not precluded from exercising grievance or appellate rights established by law or regulation or from choosing his own representative, except when presenting a grievance under a negotiated procedure. Grievance on matters outside the contract may be presented under any procedure available. (Sections 13(c), 7 (d)(1)); and,

(5) The Assistant Secretary of Labor will rule on unresolved issues concerning whether a grievance is subject to the negotiation procedure or to arbitration. (Section 13(d)); and,

(6) The provision that an issue which can properly be raised under an appeals procedure may not be raised as an unfair labor practice is continued. But if an issue may be the subject of a grievance or raised as an unfair labor practice, the aggrieved party may elect the procedure to follow. (Section 19(d)); and,

(7) The prohibition against union negotiators being on official time is modified to the extent that negotiating parties may agree that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives. (Section 20); and,

> (8) Agencies are no longer required to recover the costs of dues deductions. The subject is negotiable. (Section 21); and,
>
> (9) The Office of Management and Budget now joins the Civil Service Commission in policy guidance of agencies on labor-management relations and periodic review of the implementation of such policies. (Section 25 (a)).

Including professional associations in those groups with which agencies may have limited dealings is an effort to ease the problems of these organizations. The Council Report states that

> [I]n some instances, agencies may be overly fearful of violating the rights of recognized labor organizations and unnecessarily refrain from proper dealings with professional associations on purely professional matters. To maintain such communications and to avoid further misunderstandings we recommend that "professional" be explicitly included among the types of associations listed in section 7(d)(3). . . .[89]

For many years prior to the formalizing of labor relations under executive orders, the professional associations had the support of agency management. Their membership included professional employees at all levels: rank and file and supervisors and managers. Individual participation in professional activity was encouraged and often funded. With the advent of recognized unions, many of the professional groups faced difficult problems. If they did not seek recognition and function as a labor organization, they faced loss of membership to unions who were actively organizing. Should they obtain recognition, they were required to remove supervisors and managers from any active leadership roles and forfeit privileges they had long enjoyed. The problems still must be worked out by the parties, but the amendment offers a reasonable option for consideration.

The amendments make considerable change in the grievance and arbitration system. The primary goal of the Council seems to have been clarification and elimination of confusion. An incidental result of the changes is a reduction in the content of negotiated grievance procedures and the issues that can be taken to arbitration. Unfortunately, the Council Report, much as the August 1969 Report accompanying Executive Order No. 11,491, does not fully explain the rationale behind the specific changes. Slightly over one page of the Report is devoted to discussion of the amended grievance and arbitration system.[90]

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89. *Id.*

90. *Id.* at 28-29. In the immediate discussion all references to Council statements on this subject are based on these two pages of the Council Report.

Several of the amendments improve the grievance system. No problems are raised by the provision that matters on which employees have statutory appeal rights are excluded from the negotiated grievance procedure nor by the dropping of the requirement that such procedures must conform to Civil Service regulations. Finally, an employee cannot utilize an outside representative to act for him in a grievance under the negotiated procedure. These provisions remove incentives for inter-union conflict, add to the authority of the exclusive representative, and are not inconsistent with judicial reasoning.[91]

The reasons for mandatory inclusion of a grievance procedure in all negotiated contracts are not clear. Limiting the grievance and arbitration procedure to grievances over the interpretation of the contract seems to reduce the influence of the exclusive representative. The Council's reasoning follows:

> By thus delineating the scope of the negotiated grievance procedure, the confusion and anomalies in present arrangements can effectively be eliminated. In addition an incentive will be created for unions to negotiate substantive agreements within the full scope of negotiations authorized by the Order. The exclusive representative will be clothed with full authority and responsibility for grievance processing on the bilaterally determined conditions of employment.[92]

The Council does not mention that this provision is a limiting of language in both Executive Order Nos. 10,988 and 11,491. The first Order in Section 8(a) authorized "procedures for consideration of grievances" and in Section 8(b) allowed advisory arbitration which "shall extend only to the interpretation or application of agreements or agency policy and not to changes in or proposed changes in agreements or agency policy." Section 13, Executive Order No. 11,491, authorized procedures for "consideration of employee grievances and of disputes over the interpretation and application of agreements." Section 14 provided for "the arbitration of employee grievances and of disputes over the interpretation or application of existing agreements." And further stated, "[n]egotiated procedures may not extend arbitration to changes or proposed changes in agreements or agency policy." In attempting to develop standards for a satisfactory grievance system, the Council faced a complex situation. Absent amendments expanding the scope of bargaining, limiting the negotiated grievance procedure to dealing with provisions of the contract simply gives the exclusive representative more authority over less subject matter. This amendment, therefore, does not seem to strengthen either the grievance system or collective bargaining.

91. *See* Douds v. Local 1250, Retail & Wholesale Department Store Union of America, CIO, 173 F.2d 764 (2d Cir. 1949); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

92. COUNCIL REPORT 28-29.

The negotiability of arbitration costs probably should have little impact. Neither labor nor management is in a position to do more or less than share the costs of arbitration. Similarly, opening the costs of dues deductions to negotiations is a small step forward.

The Council sidestepped a more significant expansion of bargaining by authorizing negotiating within limits for "on-the-clock" bargaining for union negotiators. The reluctance to open the entire subject to negotiation suggests a lack of confidence in agency negotiators.

Given the existence of various grievance systems, there has been a need for ready access to third-party resolution of disputes over arbitrability and even grievability. Thus the assignment of this responsibility to the Assistant Secretary provides such a forum. Since the Council already accepts appeals from arbitration awards, it would appear to have been a logical choice for this task. However it may be that considerable activity is expected in this area, and the Assistant Secretary is organized for more routine case handling.

The posing of these kinds of questions to ad hoc arbitrators will increase both the work load and central control of the Executive Branch over the content of the grievance system. Much depends on the restraint of the parties and the ability of agency management and union representatives to resolve most of these issues. It is also hoped that the regulations of the Assistant Secretary will provide for one appeal to settle both grievability and arbitrability in any one case. Further, the extension of the Assistant Secretary jurisdiction to unfair labor practice complaints is an improvement in the overall process.

An evaluation of the amendments and the Council Report requires an assessment of subjects not considered in the Report. There is no mention of the impact of the 1970 employee strikes, nor any comment on the efficacy of federal anti-strike laws. It is true that the decisions settling the postal strike and removing over 40 percent of federal employees in exclusive units from the Executive Branch jurisdiction were not grounded on the provisions of the Executive Order. Also, the work stoppage of the air controllers was terminated through judicial and agency administrative process. Yet, to properly assess the operations directed by the President, some comment on the general subject is appropriate.

The Council listed 14 policy issues raised by interested parties but not appropriate for action either because,

> the Executive Order appeared to be working effectively in the particular area, experience was insufficient to establish any sound basis for change, or the change proposed would conflict with existing statutory requirements.

More important among these issues were proposals that would broaden the scope of negotiations and negotiated grievance procedures and provide some flexibility to the parties in resolution of impasses.

Further, the Council did not comment on the efficiency or substance of case-handling by the Assistant Secretary of Labor or the Council itself. Yet the Assistant Secretary of Labor had issued over 100 decisions and rulings by August 31, 1971, and the Council had issued a small number of decisions on negotiability questions.

In summary, the Council has said that the Order has greatly enhanced the climate for collective bargaining. Apparently, it believes that the time is not ripe for legislation and that, absent legislation, the Executive Branch should retain unilateral control of all fundamental decisions affecting the federal work force.

Developments in Case Handling

At this point, a brief review of Council decisions on negotiability issues is appropriate. The decisions of the Assistant Secretary seem less critical in terms of policy. Interested persons can obtain information on his decisions from a recently published *Digest and Index*.[93]

The Council has found that a union proposal for an agreement to be subject to Department of Defense Regulations, but not Army or Command policies is non-negotiable, because it violates Section 12 of the Order.[94] A proposal for arbitration that would embrace ". . . any policy, regulation, or practice now or hereinafter enforced wherein the employer has discretion. . ." is non-negotiable because Sections 13 and 14 of Executive Order No. 11,491 limited arbitration to the interpretation and application of the agreement.[95] It would seem that the Council might have found the proposal negotiable on the grounds that it did not exceed the Section 14 limitations that arbitration may not extend to "changes or proposed changes in agreements or agency policy." After obtaining an interpretation of a regulation from the Civil Service Commission, it was found that an agency may impose higher standards than the regulation, and a union proposal to lower the standard to that expressed in the Commission regulation is non-negotiable because of Section 12, Executive Order No. 11,491.[96] In another case, where the parties had negotiated procedures for

93. DIGEST AND INDEX.

94. Federal Labor Relations Council No. 70 A-9 [hereinafter cited as FLRC], *summarized in* 392 G.E.R.R. A-12 (Mar. 15, 1971).

95. FLRC No. 70 A-11, *summarized in* 392 G.E.R.R. A-12 (Mar. 15, 1971).

96. FLRC No. 70 A-5, *summarized in* 401 F.E.R.R. A-4 (May 17, 1971).

determining how employees would be assigned to shifts, the agency decided to eliminate a shift. The union proposed to negotiate. Because it would impinge on management's right to set tours of duty as specified in Section 11(b), it was decided that changes in shifts or work-week assignments are non-negotiable.[97] In this connection, Arbitrator Morris L. Myers found a Navy shipyard in violation of its regulations and the agreement, when it changed the work-week of several employees without consulting the union. He construed the Council decision as saying that a union cannot compel an agency to bargain on a proposal that it cannot establish new or different tours of duty unless agreed upon by the union. In his opinion the Council did not say that the union cannot contractually require consultation before the decision, nor that an agency regulation imposing such a requirement to consult is invalid under the Order. If Navy had consulted them, there would have been no restriction on making the change.[98] Similarly, the Assistant Secretary of Labor found the Veterans Administration had committed an unfair labor practice in changing tours of duty without the required consultation.[99] The Council found a union proposal to bargain on the maintenance of a surveillance road a negotiable item. It held that neither Section 11(b) nor Section 12 bars bargaining on a standard for health and safety.[100]

Progress and Problems

In reaching conclusions on the status of the federal labor relations program, it is helpful to first consider a few reports and comments published both before and subsequent to the latest amendments to the Order.

The Federal Bar Council's Committee on Labor Law issued a report on the federal program in February 1971.[101] This is an organization of attorneys from New York, New Jersey, and Connecticut. The federal program was found to have a number of weaknesses when compared to developments at state level. The defects noted were: (1) the absence of judicial review; (2) administration of the program by managerial officials, serving at the pleasure of the President; (3) unduly severe strike sanctions; and, (4) limited scope of negotiations.

In its review of operations of the federal program, the Committee on Federal Government Employee Relations (CFGER) of the American Bar Association

97. FLRC No. 71 A-11, *summarized in* 412 G.E.R.R. A-6 (Aug. 2, 1971).

98. In re Arbitration between Mare Island Naval Shipyard and AFL-CIO, 419 G.E.R.R. 151 (Sept. 20, 1971).

99. DIGEST AND INDEX 118.

100. FLRC No. 70 A-10, *summarized in* 398 G.E.R.R. A-7 (Apr. 26, 1971).

101. 387 G.E.R.R. A-4 (Feb. 8, 1971).

declared that the postal and air controller strikes demonstrated the need for more concentration on the cause and prevention of strikes in the federal service.[102] It recommended a review of the deterrent and penalty effects of the existing no-strike legislation which should consider whether the law provides a real deterrent and whether present penalties are relevant to the times. Because federal labor-management relations has problems peculiar to it, the CFGER felt the best approach to administration would be to statutorily establish a Federal Labor Relations Board similar to the NLRB. It did not consider the present form of the Council a satisfactory solution stating that:

> The most valid criticisms of this structure are part-time service; lack of term appointment; and potential conflict with institutional responsibilities of their regular offices.[103]

Immediate comments of federal union representatives on the amendments to Executive Order No. 11,491 were negative.[104] At the Second Bi-National Conference on Collective Bargaining in Federal Public Service it was pointed out that, under the Canadian Public Service Staff Relations Act, the scope of union rights and bargaining exceeds the pattern obtained in the United States Postal Service. Vice-President Thomas R. Donahue of the Service Employees Union, and a former Assistant Secretary of Labor, reviewed the United States program.[105] Under the Executive Order, Donahue maintained, the United States had developed an elaborate framework for federal employee relations, but had hedged in the bargainers, thus creating more frustration and less bargaining than under many simpler systems. Further, he asserted, the amendments to Executive Order No. 11,491 were essentially tinkering, which did little or nothing to improve the reality of bargaining or to relieve union frustrations.

These comments are valid criticisms. The initial Executive Order granted basic union recognition, spurred organization, created a climate for cooperation, and served to influence both state and local legislatures. Executive Order No. 11,491 and its amendments established reasonably efficient machinery for a system, but provided little substance. The federal system, at this time, is not equivalent to that in many states.

Under these circumstances, labor relations under Executive Order must be considered experimental and to represent a period of transition from a unilateral merit system to one founded on the process of collective bargaining. Legislation offers the means for this goal and, after ten years of experiment, should

102. 2 ABA SECTION OF LABOR RELATIONS LAWS, 1971 COMMITTEE REPORTS 166 (1971).
103. *Id.* at 168-69.
104. 417 G.E.R.R. A-12 (Sept. 6, 1971).
105. 424 G.E.R.R. A-2 to A-6 (October 25, 1971).

be enacted as soon as possible.[106]

III. Proposals For The Future

Since legislation is the next essential step, attention should be directed to the methods, goals, principles, and systems involved in its formulation and enactment. It may well set the direction and organization of not only federal labor-management relations, but federal personnel management for many years ahead. No one interested group should dominate the statutory process.

The direction of the effort could follow the thought expressed by Civil Service Chairman Hampton in testimony before Congress. After stating that there was no objection in principle to legislation, Mr. Hampton concluded that

> I want to emphasize our strong belief in 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.[107]

It is suggested that Congress seek agreement with the Executive Branch and appoint a commission to make a comprehensive and searching study of federal personnel management including labor relations and submit recommendations for legislation. The commission should include representatives of labor and management but needs a heavy leavening of public members. The proposals that follow identify some of the key issues that should receive consideration.

Organization for Labor Relations

"Responsibility for the administration of public employment relations policies should be placed in an independent agency. It should be a legislative creation with the legislature retaining only budgetary control through its constitutional power over appropriations."[108]

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106. "Federal employees should be accorded the right to collective bargaining by enactment of a federal law. A succession of Executive Orders has opened the way for giving federal employees access to the full measure of bargaining advocated in this Assembly report in other levels of government. A federal law would protect and broaden these employee rights and not leave them to the discretion of a chief executive and would spell out employer rights as well." FOURTEENTH AMERICAN ASSEMBLY, COLLECTIVE BARGAINING IN AMERICAN GOVERNMENT (1971).

107. 394 G.E.R.R. A-1 (Mar. 29, 1971).

108. PICKETS AT CITY HALL 27. It is interesting to note that the National Association of Manufacturers recommends where legislation is necessary it should include provisions for an independent agency to administer labor-management relations. It would limit jurisdiction to the determination of appropriate units and questions involving representation, certification, and decer-

This recommendation was directed to state and local government units. It applies equally to the federal scene. Until Congress enacts labor-management relations policies and establishes an agency with the powers to carry out the policies, labor-management relations are in the discretion of the executive, inherently limited, fragmented, and subject to crisis manipulation.

Such an agency cannot be set up in a vacuum. Its purpose, powers, and organization must be reconciled with the existing structure of government. Developing a comprehensive plan and organization will also require changes in the present structure. The need for institutional reform in federal personnel management encompasses and precedes the problem of incorporating the collective bargaining process into the system.[109]

In the Pendleton Act of 1883, establishing the Civil Service Commission as an independent agency, Congress created the base for federal personnel management. In that Act, Congress provided by law for general policies, leaving detailed civil service rules to the President. The Commission was legally responsible to the President, but independent in its function as the guardian of the merit system. The primary goal of Congress, the public, and the early Commissioners was simply reform. Efficiency was subordinate to elimination of the spoils system.[110]

Since the 1930's, the federal government has become the largest single employer in the United States. The personnel needs of this vast Civil Service have outstripped the political spoilsmen, so that patronage is not a fundamental problem. The problem has been recognized and received the attention of all Presidents since Herbert Hoover. Various committees and boards have recommended substantive changes, and bills have been introduced, but Congress has not been receptive to this goal.[111] The reports usually noted that the Commission was serving two masters and two objectives. In 1958 and 1959, Senator Clark of Pennsylvania introduced legislation that would have separated the Civil Service Commission into two agencies, one concerned with appellate functions and protection of the merit system, the other serving as a central personnel agency responsible directly to the President.

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tification, leaving unfair labor practices to the courts. GOVERNMENT EMPLOYEE NEGOTIATIONS AND THE PUBLIC INTEREST, NAM REPORTS 18 (1970).

109. Hall, *The U.S. Civil Service Commission, Arm of the President?*, 28 PUB. PERSONNEL REV. 114 (1967).

110. *See* P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE (1958).

111. Hall, *supra* note 109; REEVES & DAVID, PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, PERSONNEL ADMINISTRATION IN THE FEDERAL SERVICE (1937); THE COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT, PERSONNEL MANAGEMENT, A REPORT TO CONGRESS (1949); COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON PERSONNEL AND CIVIL SERVICE, H.R. DOC. NO. 89, 84th Cong., 1st Sess. (1955).

At the hearings, the proposed legislation drew strong support from students of public administration. Representatives of the Administration and federal employee unions testified in opposition.[112] The proposals did not survive. Dr. Wilson Hart has observed that Administration opposition was based on the contention that the Civil Service Commission was the personnel arm of the President, while the union leaders feared that the repeal of the Civil Service Act could mean the return of the spoils system.[113]

President Nixon recognized the need for more effective personnel leadership in his Reorganization Plan No. 2 of 1970 when he established the Office of Management and Budget and assigned it responsibilities in the area of executive management. Similarly, the National Civil Service League in publishing a new "Model Public Personnel Administration Law" was cognizant of this fundamental problem. It noted that "[j]ust as in the late 1800's, and early 1900's the reformers who led the National Civil Service League in helping to bring about the famous Pendleton Act needed a law to help fight the battle against problems of that day, contemporary reformers need a new law to help wage the battle against today's problems . . . ." The League recommended continuation of public personnel management founded on merit principles, but operated by a personnel director, who would report to and serve at the pleasure of the chief executive. In addition, there would be a citizen personnel advisory board appointed by the chief executive and confirmed by the legislature. The board's principal functions would be advice and counsel on all aspects of public personnel administration.[114]

Proposal

Legislation, transferring the personnel management functions of the Civil Service Commission to the Executive Office of the President and consolidating its appellate and watch-dog functions with labor management relations under a separate independent agency responsible to Congress, is appropriate and responsive to the public interest.

112. *Hearings on S. 3888, U.S. Post Office and Civil Service Comm.*, U.S. Senate (1958), *S. 1638* (1959).

113. W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 241-53 (1961). Hart discusses the belief prior to 1960, of the Federal employee unions that executive personnel discretion should be controlled by laws prescribing detailed procedures, with a completely independent Commission enforcing these laws. He suggested that when collective bargaining becomes the accepted system for union activity, the unions would support legislation granting more discretionary authority to the executive.

114. NATIONAL CIVIL SERVICE LEAGUE, A MODEL PUBLIC PERSONNEL ADMINISTRATION LAW (1970).

Scope of Bargaining

In this area, the federal program has not given adequate voice to its employees. In proposing legislation, an initial consideration must be the degree of control over personnel administration which Congress will release.[115] The subjects of pay, insurance, health benefits, retirement, hours of duty, and leave are under complete legislative control. The legislature cannot, in terms of order and responsibility, bargain with special interest groups, even those representing federal employees. No union, or group of unions, speaks in a meaningful manner for the majority of federal employees. Consequently, lobbying by employee representatives has been employed to influence legislation. Yet the Post Office strike brought about bargaining between the unions and Executive Branch officials with tacit Congressional approval and consequent legislation on pay which affirmed negotiated agreements.

There is a joint labor-management system covering wage board employees. Also the Federal Comparability Pay Act of 1970 set up a council of unions to assist and advise in the annual salary review.

Proposal

Systems of formalized consultation with joint labor-management recommendations to Congress for final action are a necessary supplement to collective bargaining in the Executive Branch.

Issuance of unilateral regulations by the President, the Civil Service Commission, and the agencies of the Executive Branch has also circumscribed the bargaining process. Obviously, as with actions by Congress, there is no labor group responsible to a majority of government employees so as to represent them in bargaining at the level of Civil Service rule-making. Similar problems exist at agency level in most departments.

Proposal

In adopting government-wide personnel regulations, consultation with representatives of agencies and labor organizations should be required by law.[116]

115. *See* O. STAHL, PUBLIC PERSONNEL ADMINISTRATION 248 (5th ed. 1962). Dr. Stahl suggests that the success of collective bargaining in public employment may well depend on the extent of legislative delegation of personnel matters to executive agencies.

116. *See* REEVES & DAVID, *supra* note 111, at 97. The Civil Service Commission does consult with both agencies and unions in developing policies and procedures. But the Commission does not view this practice as a legal requirement. This 1937 study recommended such a requirement.

At agency level, amended Executive Order No. 11,491 requires consultation with any union holding national consultation rights or negotiation with a labor organization holding national exclusive recognition. Although not yet thoroughly tested, these provisions are directed at the problem. Details for such arrangements could well be left to the discretion of the proposed independent agency.

In addition to the areas of bargaining under the control of Congress and those surrogated by the continuance of unilateral executive regulation, there are limitations arising out of long established concepts cherished by the public administrator. These include sovereignty, "the public interest," the contention that there are essential differences in public employment versus employment in the private sector, and the preservation of the merit system. Such concepts require that broad and detailed management rights provisions be set by statute or executive fiat and not left to the vagaries of collective bargaining. This approach leads to centralized authority, recognition of large units for bargaining, and leaves little to discuss at the local bargaining table.

At the federal level, the events of the 1960's have laid to rest the notion that a sovereign government cannot engage in collective bargaining with its employees.[117] But under the guise of public interest, the substantive content of bargaining has been circumscribed. Obviously, personnel management in the federal service must be directed in the public interest. Ultimate authority rests in the legislature. Executive Branch leadership operates under the mandate of the Constitution and laws. It has responsibility to promulgate broad rules. The courts are the final overseers of the constitutional propriety of the laws and the rules, as well as the reviewers of executive action. The American system will not accept the proposal that the civil servant should "attempt the domination of the service to which he belongs."[118] But the viability of the political system does not require the belief that unilateral regulations at various levels of agency organization are, or should be, wholly beyond the reach of collective negotiations. The latter assertion promotes an image similar to the situation in private sector bargaining which prompted the observation of Reder that the phrase, "public interest," is a symbol to legitimize the commands of an elected official as to the terms of the bargain.[119]

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117. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, A COMMISSION REPORT, LABOR MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 54-56 (1969) [hereinafter cited as ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS]. Views on sovereignty and its impact on public employee labor relations are discussed. *See also* Nigro, *The Implications for Public Administration*, 28 PUB. AD. REV. 137-42 (1968).

118. H. LASKI, AUTHORITY IN THE MODERN STATE 337 (1927).

119. M. REDER, THE PUBLIC INTEREST IN WAGE SETTLEMENTS, IN FRONTIERS OF COLLECTIVE BARGINING 155 (J.T. Dunlop & N.W. Chamberlain eds. 1967). *See also* Higgins, *Public Interest*,

The widely accepted view that there are essential differences between private and public employment has allowed general endorsement of collective bargaining for federal employees, but with considerable caution and reluctance in determining the subject matter that could be entrusted to bilateral determination. The differences that exist may not require such cautious treatment.[120] Wellington and Winter concluded that the claims for collective bargaining in the private sector—that it was a way to industrial peace and democracy, and that the unions also represented their members politically—were valid claims to warrant collective bargaining for public employees. They also concluded that the social costs of bargaining in the private sector are principally economic and inherently limited by market forces, whereas in the public sector the costs are largely political.[121] The evidence does not suggest the differences are of a kind that law or regulation should authorize agency managers or the Executive Branch to segregate a large body of significant issues from collective bargaining channels.

Since 1961, the official view of the Executive Branch has been that there is no incompatibility between the existing merit system and collective bargaining. There is considerable disagreement with this proposition. It seems clear that a merit system—originating in law, including regulations of the Civil Service Commission, and supplementing agency rules—must limit collective bargaining. Some officials contend that the two systems are incompatible. Others are of the opinion that, although a degree of conflict exists, it is not such as to preclude the accommodation of the systems to each other.[122]

It is also necessary to distinguish between a merit system and the merit

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The Catholic Standard (Washington, D.C.), March 6, 1969, at 9, col. 1. Stating that responsible labor leaders in the field of public employment readily admit that public service employees should be conscientiously concerned about the public interest, Msgr. Higgins continues, ". . . but they tend to become very irate—and quite understandably so, in my opinion—when the public interest concept, 'waved like a banner when there is a confrontation between public employees, is used to prejudice the community against the cause of the public employee even though the employee is, himself, part of that tax-paying service-using public.' "

120. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATION, *supra* note 113, at 52. Citing the views of John W. Macy, Jr., that government service is essentially different from private employment, but that this should not limit the role of labor unions, and that the test of labor's success should not be whether the forms and techniques of collective bargaining, in the private sector, are reached, but whether similar results for the workers are achieved.

121. Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

122. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 77-78; Camp & Lomax, *Bilateralism and The Merit Principle*, PUB. AM. REV. 132-37 (1968). *But see* 370 G.E.R.R. B-4 (Oct. 12, 1970). William J. Kilberg suggests that the Civil Service system is a ". . . major stumbling block to free collective bargaining . . ." and supports the idea that ". . . all non-merit functions should be removed from the Civil Service Commission and placed under a labor relations officer . . . ."

principle. The latter presumes that public employment requires the hiring, utilization, and separation of employees on the basis of qualifications without improper discrimination and in accordance with procedural and substantive equity. It was conceived to minimize the effect of patronage. The former is the particular system of laws, regulations, and organizational structure, designed to achieve the fulfillment of the merit principle.

The merit systems in public employment generally have been unilaterally developed. Much of the resistance to increasing the scope of bargaining in the federal service may be centered in the reluctance of managers to share this rule-making authority. Yet there seems to be no inherent defect in bilateral decision-making that should endanger the merit principle.

Unions and managers will never completely agree on the application of the merit principle. The Union's traditional reliance on seniority as merit in many situations is at variance with the administrator's concept supported by research that "really good workers perform far better than those who simply meet minimum standards."[123] On the other hand, individual managers have often worked within merit systems to find solutions to problems which met their specific definition of merit. One commentator suggests that union activity is reducing the scope of unilateral decision-making and that "management is becoming more careful, more responsible, and more responsive." At this time he views the relationship between unions and merit systems as dynamic and unstable.[124]

Viewed in this context, the strong management rights provisions of Executive Order No. 10,988 were expressions of genuine concern on the part of those federal officials who were introducing a form of collective bargaining into the federal service. The unions discovered early that these provisions, when followed literally, left few areas for bargaining. In many instances, bargaining became a process of redefining and eroding the management rights language. Many negotiated agreements contained provisions qualifying or implementing procedures concerning subjects supposedly under the exclusive discretion of management.[125]

When revisions in federal programs which resulted in Executive Order No. 11,491 were being considered, the unions were advocating that negotiations should be permitted on any subject not prohibited by law. This would have made many Civil Service Commission and agency regulations susceptible to

123. Nigro, *supra* note 117, at 144.

124. Stanley, *What Are Unions Doing to Merit Systems?*, PUB. PERSONNEL REV. 109, 113 (1970).

125. *See* DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, BULL. NO. 1451, COLLECTIVE BARGAINING AGREEMENTS IN THE FEDERAL SERVICE (1965).

amendment by collective bargaining. Apparently those who prepared Executive Order No. 11,491 were persuaded by the differences in federal and private employment, the need to protect the merit system against encroachment, and the contentions of agency managers that the public interest and the laws of Congress required specific executive action preserving managerial prerogatives. Despite the fact that evidence indicates similar arguments were originally made by managers in the private sector, this approach has been accepted by other public authorities.[126]

In terms of practical labor relations, management rights can ordinarily be protected by negotiation. The particular needs in a federal program are that "there must be a clear line of communication between the actual participants and that body or official with final authority to accept and implement agreements reached in negotiations" and an understanding that negotiations cannot extend beyond the employer-agency's authority to make binding commitments.[127]

Proposals

Identification of the basic management prerogatives which, in the public interest, should be retained by government officials, is a necessary preliminary step to legislation. Other than the legislated prerogatives, a requirement that areas for unilateral management decision should be subject to negotiation is conducive to meaningful bargaining.

The limitation of the scope of bargaining by agency rule-making, at administrative levels above the parties to negotiation, extends to many employment practices and conditions beyond those excluded as managerial prerogatives. Detailed agency regulations impede the development of the bargaining process at lower levels of the organization, especially at the local installation. The vast majority of federal employees report daily to offices and shops scattered throughout the country. To them, the government is at that place. Washington is a nebulous entity of loosely identified persons and institutions, having little to do with their daily activities at or away from the work place. They have joined unions for the same reasons as their neighbors in private industry. "Unionism springs from the basic aspirations of wage earners who become convinced that they can get more satisfaction by membership in a union than by doing it alone."[128] With government approval of collective bargaining for

126. Chamberlain, *supra* note 71. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 79, 102; PICKETS AT CITY HALL 13.

127. PICKETS AT CITY HALL 14-15.

128. P. RIGORS & C. MEYERS, PERSONNEL ADMINISTRATION 94 (4th ed. 1961), cited by O.

its employees, union membership has soared. Expectations were heightened, and, one might expect, motivation and attitudes improved. But when agreements are frustrated by unknown officials and expected subjects of negotiation shut off by agency regulations, the benefits of collective bargining are aborted. Executive Branch officials in endorsing a system of collective bargaining obviously accept the view that "collective bargaining performs functions that are indispensable to the maintenance of a humane industrial society. It secures, above all, the worker's commitment to political democracy and a free enterprise economy."[129] The regulatory framework should implement this view.

Proposal

If collective bargaining for federal employees is to accomplish its objectives, a proviso is necessary that, unless precluded by law, government-wide regulation, or the terms of a controlling agreement at a higher agency level, terms of a negotiated agreement should prevail over agency regulation.

Union Security

Legal and political factors apparently guided the framers of both Executive Order No. 10,988 and Executive Order No. 11,491 in excluding union security mechanisms such as the union or agency shop from the federal labor-management relations program. While the legal factors would not seem to inhibit Congress,[130] the political factors could well be an obstacle to any Congressional action permitting union security clauses to be freely negotiated.

Opposition to union provisions in public employment is led by the National Right-to-Work Committee "which calls itself a single-purpose citizens 'association' opposed to union security arrangements, including the union shop, agency shop, and maintenance of membership clauses . . . ."[131] The Committee espouses voluntary unionism in both the public and private sectors. Other opponents see a conflict with the merit principle, claiming that a requirement of union membership has no place in a system where employment should be

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STAHL, *supra* note 115, at 223. *See also* K. WARNER, CLIMATE FOR COOPERATION, IN MANAGEMENT RELATIONS WITH ORGANIZED PUBLIC EMPLOYEES (K. Warner ed. 1963).

129. Macdonald, *Collective Bargaining in the Post War Period*, 20 IND. & LAB. REL. REV. 577 (1967). *See also* A. REES, THE ECONOMICS OF TRADE UNIONS 195 (1962).

130. California v. Taylor, 353 U.S. 553, 556 (1957). Sullivan, *The Supreme Court and Public Employee Collective Bargaining*, 35 TENN. L. REV. 452, 456 (1968). In discussing the impact of this case on public employment the author says, ". . . [t]he Court in this decision has made it possible for a union shop to exist."

131. 347 G.E.R.R. A-6 (May 4, 1970).

determined solely on a basis of merit.[132]

The principal arguments in favor of union security provisions are threefold: first, such agreements contribute to stable labor relations; second, they eliminate the inequity arising from the non-member enjoying the benefits of union action but not paying for the services; and, third, since unions are denied the right to strike, the public employer should grant some type of union security.[133]

The final argument does not seem particularly cogent. The political realities also indicate that stability in labor relations is, perhaps, too abstract a concept to overcome the principle of voluntary unionism. However, the "agency shop," which permits an employee to refrain from membership but requires him to pay for representational services, is a reasonable solution. The Advisory Commission on Intergovernmental Relations, after strongly endorsing the right of an employee to refrain from joining a union, suggests this mechanism.[134] Nor does such an arrangement seem incompatible with the federal merit system. But the Congress has not yet indicated it will support an agency shop for federal employees.[135]

Proposal

Provisions, retaining for federal employees the right to join or not to join a union, but authorizing arrangements requiring the regular payment of representational fees by employees in a unit, would avoid compulsory unionism and yet would deal with the patent inequity presented by the "free rider."

Procedures

The federal experience, with a truncated form of collective bargaining under Executive Order No. 10,988, provided the President's Review Committee with considerable insight into operating problems. The resulting Executive Order No. 11,491 consequently set forth a procedural framework that merits considerable attention from those who may be involved in federal labor-management legislative proposals. Although one may be critical of the limitations on the

132. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 76.

133. *Id.* at 76.

134. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 94; 424 G.E.R.R. B-5 (Oct. 25, 1971). The Advisory Commission revised Model Public Employee Relations Law includes the agency shop.

135. 357 G.E.R.R. A-3 (July 13, 1970). Congressman David N. Henderson successfully urged House members of Conference Committee on the Postal Reform Act to eliminate provisions allowing negotiation of the union shop.

substance of bargaining, the system established in the Order gave necessary protection to the public interest; adopted more firmly the essential principle of exclusive recognition; clarified the role of the supervisor; provided mechanisms for the handling of representation questions, grievances, and unfair labor practices; imposed reasonable standards on union leadership; set up machinery for handling negotiation impasses; and formed an organization to administer the program.

There is, however, a tendency of a central body towards arbitrary control of procedures, especially in areas where there seems to be a lack of confidence in the ability of managers to find the preferred solution. In the federal program, it is evinced through provisions for mandatory representation elections, additional criteria for determining the appropriate unit, the requirement for "off-the-clock" bargaining, the mandatory inclusion of a grievance procedure in all negotiated contracts, and the prohibition against any voluntary third-party arrangements to resolve impasses. Also, the Council decisions on negotiability lead one to believe that bargaining would be less inhibited if such questions were resolved through unfair labor practice complaint, citing a refusal to bargain, as in the private sector.[136]

Proposal

Examination of the principles of Executive Order 11,491 and thorough consideration of its procedures should constitute a major part in the formulation of legislation.

In view of the continued pressures for compulsory arbitration of bargaining impasses, the processes for settlement enunciated in Executive Order No. 11,491 deserve special attention. Under the Order, mediation is freely available. Fact finding with recommendations can be authorized by the Federal Service Impasses Panel, and, if the dispute is not resolved, the Panel may take necessary action to settle the dispute. Unfortunately, the parties are not free to develop their own third party procedures. In rare circumstances, binding arbitration might be considered the necessary action for resolution.

Compulsory arbitration amounts to an automatic referral of the issues causing an impasse to a third party for binding determination.[137] In the private sector, labor and management have generally opposed compulsory arbitration as destructive of bargaining and an unwise delegation of authority to less than

136. NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

137. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 82. The report reviews the use of compulsory arbitration and summarizes opposing views of its effectiveness.

omniscient third parties. It is rejected as a process which undermines private decision-making.[138] Those advocating the system for use in the public sector believe that the absence of the right to strike, for public employees, requires a substitute to provide balance in the bargaining process and that final resolution of impasses by an impartial third party accomplishes this purpose.

In the public sector, opponents argue that compulsory arbitration is a questionably constitutional delegation of sovereign authority, a corruption of the bargaining process, and an unrealistic concept in that a third party is expected to have the necessary detachment, impartiality, and expertise to arrive at mutually satisfactory solutions.[139]

Putting aside the questions of unwise or unconstitutional delegation and the competence of third parties, it is clear that ready access to binding arbitration undermines the joint decision-making envisioned in collective bargaining. There is no compulsion to compromise conflicting claims when either side knows there is another available forum.[140] It is equally clear that impasses will arise in negotiations. Absent resolution machinery and the right to strike, the union is in an untenable position, possibly finding relief only through an illegal strike.

The procedures provided in Executive Order No. 11,491 properly do not include compulsory arbitration. They are responsive to the needs of the parties to have third-party assistance; there is no broad delegation of governmental powers to persons not in government service; pressure is maintained on the bargaining parties; and, if necessary, binding arbitration is available as a possible terminal process. This kind of system is essential to preserve both the public interest and the collective bargaining process. At the same time it should minimize the threat of occurrence of strikes.[141]

Proposal

To achieve viable collective bargaining, the proposed Labor Relations Agency

138. Taylor, *Public Employment: Strikes or Procedures?*, 20 IND. & LAB. REL. REV. 617, 632 (1967).

139. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 83.

140. A SUMMARY OF THE PROCEEDINGS, *supra* note 56, at 73-74, excerpt of remarks of Harold S. Roberts; 377 G.E.R.R. B-1 (Nov. 30, 1970). William R. Word suggests arbitration in which the arbitrator has only the authority to choose the proposal of either management or labor. He cites Carl M. Stevens, *Is Compulsory Arbitration Compatible With Bargaining?*, 2 INDUS. REL. J. 38-52 (1966).

141. For similar conclusions as to the need for third-party procedures to avoid both strikes and compulsory arbitration *see*: PICKETS AT CITY HALL 20-24; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 106-07; A SUMMARY OF THE PROCEEDINGS, *supra* note 56, at 47-49, excerpt of remarks by George W. Taylor.

should be empowered to promulgate and utilize procedures for resolving negotiation impasses, including, but not limited to mediation, third-party fact finding with recommendations and, when necessary for final resolution, some form of binding arbitration.

Strikes

One may have believed that the development and implementation of sound labor-management programs for federal and other public employees would have made the issue of public employee strikes a peripheral consideration. This belief could once have been based on the widepsread concept that nobody could or would strike against the government,[142] or that neither legislators nor the courts had sanctioned public employee strikes, and, apparently, public employees were satisfied with the status quo.[143] Any relevancy once attributed to such beliefs has disappeared with the increasingly successful use of the strike weapon by public employees.[144] Strikes by federal employees and a search for means of dealing with concerted work stoppages are now vitally important issues in any review of the labor-management programs.[145]

Prior to 1947, there was no statute explicitly barring federal employees' strikes. The government depended on various laws which indirectly limited the right to strike and acted as if it had some inherent right to bar strikes.[146] In 1947, a provision of the Taft-Hartley Act made these strikes unlawful, and, in 1955, a considerably stronger law was enacted which makes participation in a strike a felony.[147]

Federal employee strikes had occurred occasionally before the passage of these laws, increasing in frequency in the temporary, depression-oriented agencies of the 1930's.[148] After passage of the anti-strike acts, the federal work force was quiescent until the 1960's while the incidence of public employee strikes at state and local levels multiplied. Even in the 1960's, federal employee strikes have constituted a very small percentage of public employee strikes.[149] Ob-

142. Nesvig, *The New Dimensions of the Strike Question*, 28 PUB. ADMIN. REV. 128-29 (1968).

143. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 59.

144. *Id. See also* Nesvig, *supra* note 142, at 131.

145. 116 CONG. REC. S4698 (daily ed. March 31, 1970) (remarks of Senator Goldwater), "I think it is past time that the Congress conduct hearings to look into the problems involved relative to the complaints of the works and to, at the same time, reassess the position of the Federal Government that it is illegal to strike against the Government, which in effect is striking against the people."

146. S. SPERO, GOVERNMENT AS EMPLOYER 16-19 (1948).

147. 29 U.S.C. § 188 (1947). 18 U.S.C. § 1918 (1955).

148. SPERO, *supra* note 146, at 14.

149. PICKETS AT CITY HALL 32.

viously, the strict anti-strike law was one factor in achieving this record of relative peace in labor-management relations. Yet, such laws were of little value in impeding militant action among state and municipal workers. Other reasons for the federal record have been suggested. These include, a greater acceptance of unionism by federal officials, the implementation of the Presidential Executive Orders, higher wage and benefit provisions, civil service protection, a more sophisticated labor and management officialdom, and the success of union lobbying efforts.[150]

There is also a very pragmatic problem to be faced by federal strikers. Since the economic leverage of the strikers in the private sector is missing, the particular strike, if it is to be successful, must create direct and significant political consequences and impact. In the federal government, this requires forcing top Administration officials and the Congress into a position where the strike problems and their resolutions are of a high priority. It is only in a most unusual situation that a large membership can be effectively organized—where the public sympathies will side with the strikers and where the consequences directly concern the federal leadership. Such a combination of circumstances is unlikely to arise in connection with federal hospital workers in Nevada, tradesmen in Oklahoma, or white-collar employees in Ohio. It did occur in the recent postal strike.

The effectiveness of the federal anti-strike law, in critical situations, must be considered somewhat wanting. The propriety of treating a labor dispute as an attack on authority, when employees strike, is also most questionable.[151] Over the years, the federal employee has shown considerable retraint in his use of the strike weapon and displayed a working concern for the public interest and the federal service.[152]

Some argue that the right to strike is a natural right, inherent in human nature, flowing not from the state, but from the dignity and needs of the employees; that a strike which is legitimate may become wrong so that the right is not absolute. The government, rather than outlaw all strikes among public employees, should re-examine its policy and admit the right, but find means to control it where safety and security is endangered.[153]

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150. *Id.* at 33.

151. SPERO, *supra* note 146, at 15.

152. O. STAHL, *supra* note 115, at 251.

153. Eamonn Barrett, Strikes In The Public Sector, Panel, Vol. 20, No. 4, Labor Management School, University of San Francisco (March/April 1970). *See also* discussion of question in PICKETS AT CITY HALL 24-26; Nesvig, *supra* note 142, at 129-32; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 61-63; COLLECTIVE BARGAINING IN AMERICAN GOVERNMENT, AMERICAN ASSEMBLY 6 (1971). Canada and some states including Hawaii and Pennsylvania have followed this course.

Arguments supporting anti-strike laws rest on the concept of sovereignty; they regard any public employee strike as a challenge to the state, which, if permitted, may undermine government. Flowing from the sovereignty concept is the contention that there are basic differences between the public and private sectors. Strikes in the private sector are subject to the economic restraints inherent in the situation. Strikes in the public sector, on the other hand, have political consequences, and the power to withhold labor could give to unions "a disproportionate share of effective power in the process of decision as to skew the results of the 'normal' American political process. . . ."[154] The concept of sovereignty is "the right of government, through its laws, to ensure the survival of the '*normal* American political process' . . . strikes by public employees may, as a long-run proposition, threaten that process. . . ."[155]

Finally, there are many unionists and others who hold that there is no distinction between public and private employment and that giving government employees the same rights to strike as those in the private sector is the proper and practical solution.[156]

Legislative proposals for a labor-management system must deal with the strike question.

Proposals

Provisions that strikes generally not be regarded as proper and reasonable conduct for federal employees and that the right to strike must be circumscribed place this issue in perspective as basically a labor-management relations problem.

Consideration of amendments to the present federal statute which bars all strikes and treats participations by federal employees in such activity as a felony is essential to the development of a sound labor-management relations program.

Methodology

Task Forces or Commissions usually rely on research of literature, consultation with experts and technicians in the field of study, questionnaires, and hearings. In view of the size and extent of the federal service, there is a need for factual

154. Wellington & Winter, *supra* note 121, at 1123.

155. *Id.* at 1125-26.

156. Bilek, *Toward Public Sector Equality: Extending the Strike Privilege*, 21 LAB. L.J. 338 (1970); Address by Theodore W. Kheel to the Federal Bar Association Briefing Conference on Collective Bargaining in Public Employment, San Francisco, Cal., Jan. 24, 1969; ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, *supra* note 117, at 62-63.

information from all levels of the Executive Branch and from as many geographical points as possible. There are excellent resources available within the government which can be utilized. The Civil Service Commission has competent program evaluation staffs and labor-management specialists in each of its regional offices. In accordance with the responsibility vested in it by Executive Order No. 11,491, the Department of Labor also has labor-management specialists in field offices throughout the country.

Proposal

Use of Department of Labor-Civil Service Commission teams for data-gathering surveys and for evaluation of program needs at field installations would give the appointed Commission quick access to basic information not otherwise available.

Legislation of the extent proposed would bring about a radical change in both the organization and operation of federal personnel management. These recommendations are based on a strong belief in both our system of government and the intrinsic value of the collective bargaining process in a democratic society, untidy as such a process sometimes is. The present author concurs with Robert M. Hutchins:

> [T]he democratic concept of self-government based upon an accommodation of conflicting interests through reason and persuasion remains perhaps the most potent idea of modern history. Improved institutional forms provide the best hope for maintaining and furthering the democratic idea . . . if our hopes of democracy are to be realized, the next generation is in for a job of institutional remodeling the likes of which has not been since the Founding Fathers.[157]

157. Robert M. Hutchins, *Is Democracy Possible?* Acceptance speech for the Sydney Hillman Award (Jan. 21, 1959), *cited in* Taylor, *Public Employment: Strikes or Procedures?*, 20 IND. & LAB. REL. REV. 617-18 (1967).