



INSTITUTE FOR DEFENSE ANALYSES

**Civilian Personnel Reform at the  
Department of Defense:  
Lessons from the Failure of the  
National Security Personnel System**

Peter Levine

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## Executive Summary

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Fifteen years ago, the Administration of President George W. Bush was presented with—and helped create—the greatest opportunity for defense civilian personnel reform since the 1970s. The events of September 11, 2001, shook the American political system, raising the stakes for national security and making possible legislative changes that would have been inconceivable only months before. The Administration seized this opportunity to achieve rapid enactment of the Authorization for Use of Military Force, the USA Patriot Act, and the Homeland Security Act before the end of the 107<sup>th</sup> Congress.

In 2003, strengthened by victories in the mid-term elections that restored Republican control of both Houses of Congress, the Administration made defense civilian personnel reform a top legislative priority. The result was the enactment of the National Security Personnel System (NSPS), giving the Department of Defense (DOD) comprehensive authority to develop and implement new approaches to hiring, firing, promoting, rewarding, and disciplining its civilian employees without regard to previously applicable provisions of law and regulation.

The architects of NSPS sought to develop a single personnel system that was flexible enough to meet the full range of the Department's civilian personnel needs in a manner that was efficient and equitable. Their objective was to strengthen the civilian workforce by overcoming rigid job classifications, increasing access to new talent, establishing better links between pay and performance, empowering supervisors to manage the workforce, making employee compensation more responsive to market forces, increasing the retention of top performers, identifying and addressing poor performers, and increasing the agility of the workforce.

For six years, the Department devoted an unprecedented level of time, effort, and resources to implement NSPS, mobilizing a program office supported by senior officials in the military Services and reporting directly to the Deputy Secretary. This effort was initiated at a time of consensus among current and former DOD officials and outside experts that the old civil service system was overly bureaucratic, inflexible, and in need of reform. It drew on the experience of a series of successful demonstration programs run by the Department.

Nonetheless, the experiment failed. In 2009, the NSPS authority was repealed and the Department's civilian employees were returned to the previous civil service system. Legislative authority intended to allow DOD to continue some aspects of the experiment was barely used, resulting in minimal changes at best.

NSPS, during the brief period of its existence, was reasonably successful in achieving some of its objectives, while falling short on others. Although far from a perfect system, it showed positive signs in new talent hiring and increased workforce flexibility and appears to have outperformed the old General Schedule (GS) when it came to addressing poor performers and motivating top performers. However, the system was considerably less successful at empowering managers and responding to market forces.

Nonetheless, the new system suffered from negative employee reviews in almost every area. The use of “pay pools,” “control points,” and internal business rules to allocate pay was particularly unpopular. Given enough time, DOD probably could have overcome this problem. The Department’s experience with other new personnel systems showed that employee criticism at the outset had often changed to acceptance and then approval over a period of five to seven years. In the end, however, the Department did not have that much time.

Building a single personnel system for a workforce as large and diverse as DOD’s would have been a tall order under the best of circumstances. Moreover, by trying to address pay, performance-management, discipline, labor relations, and employee appeals processes at the same time, NSPS established multiple points of failure, ensuring that skeptics and opponents of the new system would always be able to focus on short-comings while ignoring successes.

A series of political mistakes made by the Administration in the enactment and implementation of NSPS heightened opposition and ensured that there would be no shortage of such skeptics and opponents. In particular, the Administration made its task more difficult by

- passing up an opportunity for legislative compromise that could have provided a broad base of bipartisan support for the reform at the outset;
- taking a legislative approach that maximized the authority and flexibility of the Department but meant that Congress would not be committed to the new system as a full partner in its design;
- insisting on far-reaching labor relations and appeals provisions that undermined workforce support and were anathema to the federal employee unions and their allies in Congress; and
- turning the unions’ opposition into an all-out, life-and-death matter by seeking to implement those provisions in a manner that challenged their very purpose of existence.

The architects of NSPS took a “big bang” approach to civilian personnel reform, seeking to capitalize on what they perceived to be a fleeting opportunity to change the

entire system at once. This revolutionary approach to reform may be able to achieve spectacular success if the conditions are precisely right. As the NSPS case shows, however, it is very difficult to get the conditions right, and, if they are not right, the result is likely to be spectacular failure. In this case, the Bush Administration seriously underestimated the strength and staying power of the opposition to NSPS from key stakeholders and their congressional allies, which led to such a failure.

This analysis concludes by suggesting a series of targeted reforms that could help address the original objectives of NSPS (and even go beyond what NSPS was able to accomplish in some areas), but without triggering the substantive and political problems—including all-out opposition by the federal employee unions—that NSPS was unable to overcome. Such reforms could include

- **Overcoming Rigid Job Classifications**
  - Authorizing the Secretary to override the Office of Personnel Management (OPM) job classification system and establish special classifications for occupations or individuals in the best interest of the Department.
- **Increasing Access to New Talent**
  - Permanently authorizing the direct hiring authority for students and recent graduates provided on a pilot basis by the National Defense Authorization Act for Fiscal Year 2017;
  - Documenting additional high-skill career fields for which congressional authorization of enhanced hiring authorities and salary flexibilities would be helpful;
  - Authorizing DOD signing bonuses for new recruits in high-skill, high-demand occupations;
  - Establishing competitive internship programs for high-skill, high-demand recruits that provide a structured opportunity to participate in the important work of the Department.
- **Establishing Better Links between Pay and Performance**
  - Reinstating a four- or five-rating performance management system for high-skill, policy-making, and management positions where performance distinctions are most important;
  - Allowing salary step increases for high-skill, policy-making, and management positions to be based primarily on performance, rather than time-in-grade.

- **Empowering Supervisors to Manage the Workforce**
  - Ensuring that DOD’s new performance management system focuses on continual employee feedback and avoids routine “check-the-box” employee evaluations;
  - Instituting a program to more systematically recognize high-performing civilian employees throughout the Department with non-monetary awards, including certificates, letters of appreciation, and time-off awards.
- **Making Employee Compensation More Responsive to Market Forces**
  - Authorizing targeted pay adjustments for specific career groups and occupations in response to market conditions that adversely affect the recruitment and retention of high-skill, high-demand employees;
  - Establishing congressionally authorized special pays for high-skill, high-demand civilian occupations, similar to the special pays already authorized for members of the military in such occupations.
- **Increasing the Retention of Top Performers**
  - Raising the pay cap and the cap on the bonus pool for employees in the GS to give the Department greater flexibility to use salary and bonuses to retain top performers with critical skill sets.
- **Identifying and Addressing Poor Performers**
  - Instituting a routine review, before the expiration of a new employee’s two-year probationary period, to determine whether the employee should be retained;
  - Establishing dedicated performance improvement managers in each component to relieve line supervisors of the burden of counseling unproductive employees.
- **Increasing the Agility of the Workforce**
  - Developing civilian workforce development plans for components and communities within the DOD, along the lines of the Air Force’s Civilian Strategic Leader Program and the Acquisition Workforce Strategic Plan;
  - Significantly increasing the number of civilian employees brought into the Department on a short-term basis through the Highly Qualified Expert (HQE) program, term appointment authority, Intergovernmental Personnel Act (IPA) authority, and other transfer and rotational programs.

These potential reforms provide a menu of options that would not have to be adopted as a package to bring about measurable improvements in the defense civilian personnel system – and could be implemented without imposing a massive one-size-fits-all solution that draws the kind of opposition that helped kill NSPS.



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# 1. Introduction

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On June 4, 2003, Secretary of Defense Donald H. Rumsfeld appeared before the Senate Governmental Affairs Committee (GAC), accompanied by the Chairman of the Joint Chiefs of Staff and other senior Department of Defense (DOD) officials, to launch a full-court legislative pitch for civilian personnel reform. Such reform, the Secretary argued, was an essential step in the war on terror. He testified:

[W]e are in a new security environment, an unprecedented global war on terror, and we need to be able to deal with the emerging new threats with a Department of Defense that is fashioned for the information age and the 21<sup>st</sup> century. ... In an age when terrorists move information at the speed of an E-mail or money at the speed of a wire transfer and fly around in commercial jetliners, we still have bureaucratic processes of the industrial age, as opposed to the information age. ...

We are simply asking that Congress extend the kinds of flexibilities they [have given] us in managing the men and women in uniform, also to manage the civilians. ... The lives of the men and women in uniform and, indeed, the American people depend on it.<sup>1</sup>

Five months later, President George W. Bush signed the National Defense Authorization Act for Fiscal Year 2004, authorizing the Secretary to establish a new DOD civilian human resources system, known as the National Security Personnel System (NSPS). Secretary Rumsfeld celebrated the legislation as “the most significant improvement to civilian personnel management since the [1978] Civil Service Reform Act.”<sup>2</sup>

DOD launched an intensive effort to implement the new authority, mobilizing a program office that reported directly to the Deputy Secretary. Final regulations were issued in late 2005, and the first 11,000 DOD civilian employees were trained and moved into the new system a few months later. Successive spirals of employees followed, with 211,000 making the switch by early 2009. Countless hours were spent reclassifying positions into the new system, developing written performance objectives and performance plans, and administering the new performance appraisal and pay-for-performance systems.

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<sup>1</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach: Hearing Before the Committee on Governmental Affairs*, S. Hrg. 108-185, 108<sup>th</sup> Cong. (June 4, 2003) (testimony of Hon. Donald H. Rumsfeld, Secretary of Defense), 17, 21–22, <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg88252/content-detail.html>.

<sup>2</sup> “Policy Debate Slows Defense Bill” (Washington, DC: Congressional Quarterly, 2004), <http://library.cqpress.com/cqalmanac/cqal03-835-24342-1084261>.

The NSPS effort was initiated at a time of consensus among current and former DOD officials and outside experts that the old civil service system was overly bureaucratic, inflexible, and in need of reform. It drew on the experience of a series of successful demonstration programs run by the Department. It benefited from political momentum generated by the attacks of September 11, 2001, and the successful march to Baghdad. It received an unprecedented level of resources, including staff assignments, training budgets, prompt funding for information technology (IT) systems and solutions, and senior-level attention and commitment.

NSPS, during the period that it was in effect, delivered on its promise in important ways. Managers devoted more time and attention to performance management than ever before. The new performance management system did a significantly better job of distinguishing among employees on the basis of their contribution to the Department's mission than the old system. Strong performers were rewarded with pay increases and new levels of recognition and responsibility, and significantly more employees were terminated or otherwise penalized for poor performance.

Despite these achievements, however, the reform effort failed. Just five years after its enactment, the NSPS legislation was repealed, and the Department began to convert NSPS employees back into the General Schedule (GS) system. The experience was so painful that even though the new legislation directed continued reform efforts, including new performance management and workforce incentive systems, this authority went largely unused.

This review will show that the failure was substantive and political. On the substantive side, the reform effort failed to clearly define the problem to be solved and tailor the solution to that problem.

First, the NSPS effort was based on demonstration programs that had worked in the defense laboratories but failed to recognize that a reform that addresses the problems of scientists and engineers in defense laboratories might not meet the needs of a workforce of receptionists, security guards, nurses, counsellors, and contract auditors. Even in the private sector, pay band systems like the one included in NSPS were rarely applied to non-managerial employees and hourly workers and almost never applied to union employees. Yet, NSPS sought to apply a single pay-for-performance system to the entire Department, lumping all DOD employees together into just four career fields and three pay bands. Such one-size-fits-all solutions are unlikely to meet the needs of an institution as large and diverse as the Department of Defense.

Second, rather than adopting targeted solutions for discrete problems, NSPS sought to replace—in their entirety—the hiring, classification, pay, performance management, employee discipline, dispute resolution, and labor relations systems of the Department. The scope of this effort not only created a massive workload that saturated the human resources

capacity of the Department, it also created multiple points of failure. The federal civil service system is incredibly complex. It has thousands of rules—not just because it is overly bureaucratic (which it is), but also because there are thousands of issues that human resource managers are unlikely to address successfully without guidance. NSPS threw out not only rules that needed to change, but also processes that served useful purposes—taking on the thankless task of rewriting the entire rulebook at the same time.

Despite these substantive challenges, NSPS would likely be the DOD civilian personnel system today if the Administration had not also failed to build effective coalitions and unnecessarily stoked opposition forces, leading to the political collapse of the reform effort just five years after it was initiated. The most successful defense reform efforts almost always have support from both political parties, from the Executive Branch and the Congress, and from a significant part of the affected population. The NSPS effort—although it successfully drew on national security concerns arising out of the attacks of September 11, 2001, and the global war on terrorism—failed on all three accounts.

At the time that the NSPS legislation was prepared, the Administration already knew—based on the prior experience of civilian personnel legislation for the Department of Homeland Security (DHS)—that the proposal was likely to draw determined opposition from the federal employee unions and their allies in Congress. Faced with this challenge, the Administration could have attempted to soften, co-opt, or split the opposition through compromise and conciliation. Instead, the Administration chose a hard-edged approach that strengthened the opposition and led to the eventual collapse of the reform effort.

The Bush Administration was offered a bipartisan approach to civilian personnel reform when Senator Susan Collins introduced a version of the NSPS authorizing legislation that was co-sponsored by three Republicans and two Democrats. The bill was reported out of the Senate GAC on a near-unanimous 10-1 vote. However, the Administration rejected the bipartisan approach, choosing instead a single-party strategy that relied on getting “the last Republican vote.” The absence of any Democratic support helped make NSPS unsustainable when Congress and the Presidency changed hands a few years later.

The single-party legislative approach made it possible to enact legislation that maximized the authority and flexibility of the Department to establish the new personnel system. Only the barest features of the new system were outlined in statute. Every aspect was left to be detailed in DOD regulations and issuances. The decision to minimize the role of Congress also appears to have been shortsighted. Because Congress was not a full partner in the design of NSPS, it had no investment in the new system. When questions of fairness and equity were raised, the Executive Branch found itself defending the system on its own. Reform with staying power needs support in the Executive Branch and the Legislative Branch.

Finally, successful personnel reform should be conscious of the interests and needs of affected constituencies, including the federal employee unions. The Administration helped strengthen opposition to the proposed reform by insisting on comprehensive changes to the collective bargaining and employee appeals systems that were largely unrelated to the reform's core purpose of linking pay to performance. Civilian personnel reform was never likely to get union support since the federal employee unions had long opposed pay-for-performance systems. However, the Administration turned this opposition into an all-out, life-and-death matter for the unions by seeking to undermine the labor relations system in a way that challenged the unions' very purpose of existence.

NSPS made changes to parts of the system that probably needed to be changed, but it also changed parts of the system that were working reasonably well. In the end, it failed because of the controversy generated by parts of the new system that may not have been necessary at all, and this failure dragged down the prospect of constructive reform—in areas where it remains very much needed—for at least another decade.

Today, as the NSPS experience fades in the memory of Congress and the DOD workforce, reform again seems possible. This review will conclude by suggesting a series of targeted reforms that might help address ongoing deficiencies in the Department's hiring, performance management, and pay systems. These reforms are designed to address the original objectives of NSPS but without triggering the substantive and political problems—including all-out opposition by the federal employee unions—that NSPS was unable to overcome. These potential reforms provide a menu of options that would not have to be adopted as a package to bring about measurable improvements in the defense civilian personnel system—and could do so without imposing a massive one-size-fits-all solution that draws the kind of opposition that helped kill NSPS.

## **2. The Need for Civilian Personnel Reform**

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The DOD civilian workforce is an essential pillar of the Department on which our military relies to perform its critical missions around the world every day.

DOD civilians administer highly complex and legislatively mandated personnel and pay systems. They run training and education programs, manage travel and change of duty stations, and provide security, support, and facilities sustainment on military bases. They help address problems like sexual assault, suicides, bullying and hazing, and drug abuse. They provide financial advice, voting assistance, and family life counseling to Service members around the world. They play key roles in running 664 hospitals and clinics, 172 schools, 1,880 retail stores, and 2,390 restaurants for our men and women in uniform and for their families.

DOD civilians also serve as operational enablers in the intelligence and cyber domains and are essential to warfighter training and combat system and equipment readiness. They help manage and oversee more than \$200 billion a year in acquisition spending and run the largest and most sophisticated research and development activity in the world. They operate depots and arsenals that maintain and recapitalize a huge inventory of the most complex and advanced fighting equipment in human history. They are also the lifeblood of a logistics system that works 24 hours a day, 365 days a year to ensure that military equipment and supplies are ready when and where needed, anywhere in the world, and often with little or no notice.

In many parts of the DOD, career civilians are the repository of essential institutional knowledge that members of the military lack, due to the rotation of military assignments. In 2000, the Defense Science Board (DSB) found that

The civilian workforce is essential to the DOD mission. Civilian personnel handle a substantial portion of the daily business of running the defense establishment, and civilian executives are indispensable in managing the Department's budgeting, legal, logistics, acquisition, information systems, research and development, and other programs. The "corporate memory" provided by career civilians is particularly important in DOD because of the

frequent rotation of military personnel and the short tenure of the average political appointee.<sup>3</sup>

Comptroller General David Walker said, “Federal employees represent an asset that needs to be valued, not a cost that needs to be cut.”<sup>4</sup>

Despite the value that civilian employees provide to the Department, the civilian workforce has been widely disparaged in recent years. This negative rhetoric, coupled with pay freezes and workforce reductions, threatens to undermine workforce morale and to make it more difficult for the Department to recruit the talent that it will need to fill civilian positions in years to come. As one former senior DOD official recently explained:

This workforce has been plagued by furloughs, pay freezes, and worst yet, systematic rhetoric that our civilian employees detract from DOD’s mission, rather than serving as a critical enabler. It is hard to believe that we will continue to attract top talent with this as a background vocal.<sup>5</sup>

Part of the problem is that the laws, rules, and practices governing the civil service system have become overly bureaucratic and stultified over the years. As a result, the reputation of the federal civilian workforce has been tarred by deficiencies in the system within which it is required to work.

The competitive civil service system was first established by the Pendleton Act of 1883 to replace the so-called “spoils system” that had been used by federal officials to place friends, family members, and political cronies into federal office for more than a hundred years. It was most recently overhauled by the Civil Service Reform Act of 1978 (CSRA), which established statutory merit principles as the basis of federal employment. The merit principles provide that federal hiring decisions will be made solely on the basis of ability, knowledge, and skills after fair and open competition that assures equal opportunity for all, that employees and applicants for employment will receive fair and equitable treatment in all aspects of employment, that equal pay will be provided for work of equal

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<sup>3</sup> Defense Science Board (DSB), *Report of the Defense Science Board Task Force on Human Resources Strategy* (Washington, DC: Defense Science Board, February 2000), 25, <http://www.dtic.mil/docs/citations/ADA374767>.

<sup>4</sup> *High Risk: Human Capital in the Federal Government: Hearing Before the Oversight of Government Management, Restructuring and the District of Columbia Subcommittee of the Committee on Governmental Affairs*, S. Hrg. 107-65, 107<sup>th</sup> Cong. (February 1, 2001) (statement of David Walker, Comptroller General of the United States), 14, <https://www.gpo.gov/fdsys/pkg/CHRG-107shrg70977/content-detail.html>.

<sup>5</sup> *Hearing to Receive Testimony on Department of Defense Civilian Personnel Reform: Before the Subcommittee on Personnel, Committee on Armed Services*, (March 2017) (statement of Hon. Laura J. Junor, former Principal Deputy Under Secretary of Defense for Personnel and Readiness), <https://www.armed-services.senate.gov/hearings/17-03-23-department-of-defense-civilian-personnel-reform>.



value, and that employees will be protected against arbitrary action, personal favoritism, or coercion for political purposes.

The system built around these principles is intended to ensure against a return to the patronage, political favoritism, and abuse that had characterized federal employment in the 19<sup>th</sup> century. In this regard, the system has been strikingly successful. Preserving equity across a system that employs more than 700,000 civilians in the DOD alone, with an array of positions that include virtually every profession in the U.S. economy, is no small achievement. In a time of heightened political partisanship in Washington, the federal civilian workforce has shown an ability to transition seamlessly from one Administration to the next, without regard to changes in party control. Also, while improprieties occur from time to time, the civil service system remains remarkably free of the favoritism, nepotism, and corruption that have marked many other public employment systems around the globe and across time.

Nonetheless, as the Clinton Administration's National Performance Review (NPR) pointed out in 1993, "Over time, the ideal of internal equity has emerged as the supreme goal of the system, instead of being viewed as a means to attaining the larger goals associated with effective government. Consistent with the focus on internal equity, system administrators have sought to achieve greater precision, even though the additional precision did not result in--and perhaps even worked against--more effective government."<sup>6</sup> In 2003, the second Volcker Commission on Public Service found that

[The civil service system] makes few distinctions between hard-working high-achievers and indifferent nonachievers. There are too few rewards for those who do their jobs well and too few penalties for those who perform poorly. ... This has added to the great discouragement among many federal employees with the performance of some of their colleagues. ... Such a system, of course, also discourages potential employees, especially the most talented and promising, who are reluctant to enter a field where there are so few financial rewards for their hard work, where mediocrity and excellence yield the same pay check.<sup>7</sup>

In short, it is more difficult than it should be to hire the talent that the Government needs, to remove workers who are not up to the job, and to advance capable employees into the positions in which they can contribute the most. Experienced military and civilian

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<sup>6</sup> "HRM02: Reform the General Schedule Classification and Basic Pay System," in *Reinventing Human Resource Management*, accompanying Report of the National Performance Review (Washington, DC: Office of the Vice President, September 1993), <https://govinfo.library.unt.edu/npr/library/reports/hrm02.html>.

<sup>7</sup> National Commission on Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21<sup>st</sup> Century: Report of the National Commission on Public Service* (Washington, DC: National Commission on Public Service, January 2003), 10, <https://www.brookings.edu/wp-content/uploads/2016/06/01governance.pdf>.

leaders in the DOD are generally able to work around the system to get the results that they need, but it can be frustrating and time-consuming for employees and managers.

Some inflexible requirements are fixed in statute. For example, title 5 of the United States Code (U.S.C.) not only establishes that the GS will include 15 pay grades with 10 rates of pay in each grade,<sup>8</sup> but it also establishes detailed rules on the classification of specific positions into pay grades<sup>9</sup> and prescribes a rigid schedule of seniority-based pay increases for any employee whose performance is at least “acceptable.”<sup>10</sup> Similarly detailed statutory requirements for employee suspensions, removals, and other adverse actions—and for appeals of such actions—limit the flexibility of federal agencies seeking to discipline employees for misconduct or poor performance.<sup>11</sup>

Other frustrating requirements appear to be largely self-imposed. For example, the complex hiring process, which requires up to six months to complete and has frustrated generations of managers, is established almost entirely in regulation rather than statute.<sup>12</sup> Relatively simple statutory rules are implemented through regulations that spell out requirements in excruciating detail. With regard to job classification, for example, the Office of Personnel Management (OPM) website includes a 200-page “Handbook of Occupational Groups & Families,” a 75-page “Introduction to the Position Classification Standards,” and a 45-page “Classifier’s Handbook,” in addition to detailed classification standards and functional guides for specific occupations and positions. In 2001, the Hart-Rudman Commission on National Security in the 21<sup>st</sup> Century reviewed shortcomings in the civilian workforce of national security agencies and found it striking “how many of these problems are self-inflicted to the extent that departmental authority already provides some remedy if only the institutional will and budgetary resources were also available.”<sup>13</sup>

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<sup>8</sup> The General Schedule, 5 U.S.C. § 5332 (2017).

<sup>9</sup> Basis for Grading Positions, 5 U.S.C. § 5104 (2017).

<sup>10</sup> Periodic Step-Increases, 5 U.S.C. § 5335 (2017).

<sup>11</sup> Adverse Actions, 5 U.S.C. § 75 (2017); Appeals, 5 U.S.C. § 77 (2017).

<sup>12</sup> Recruitment, Selection, and Placement (General), 5 C.F.R., Pt. 330 (2017); Recruitment and Selection through Competitive Examination, 5 C.F.R., Pt. 332 (2017); Promotion and Internal Placement, 5 C.F.R., Pt. 335 (2017); Examining System, 5 C.F.R., Pt. 337 (2017); Qualification Requirements (General), 5 C.F.R., Pt. 338 (2017).

<sup>13</sup> The United States Commission on National Security/21<sup>st</sup> Century, “Road Map for National Security: Imperative for Change, Phase III Report of the United States Commission on National Security/21<sup>st</sup> Century” (Washington, DC: Office of the Secretary of Defense, February 15, 2001), 96, <https://govinfo.library.unt.edu/nssg/PhaseIIIFR.pdf>. See also *Expanding Flexible Personnel Systems Governmentwide: S. Hrg. 107-151, Before the Oversight of Government Management, Restructuring, and the District of Columbia Subcommittee of the Committee on Governmental Affairs, 107<sup>th</sup> Cong.* (July 17, 2001) (colloquy between Senator George Voinovich, Comptroller General David Walker, and Office of Management and Budget (OMB) Director Sean O’Keefe), 16–17: “Many of the apparent restrictions that exist within the Executive Branch are the result of rules and regulations imposed by the Office of Personnel Management and the simple failure of individual human resource bureaus to use the authorities that they have.”

Some problems are not the result of either statute or regulation, but of a dysfunctional organizational culture. For example, the persistent grade inflation that has undermined DOD performance appraisal systems for years appears to be the product of a culture in which it is easier and more comfortable for managers to avoid confrontation than to make meaningful distinctions among their employees. The statute establishes a one-year “performance improvement period” preceding employee separation,<sup>14</sup> but the reluctance of supervisors to undergo that process is due, in significant part, to the fact that DOD managers tend to be selected for technical expertise rather than management skills and would rather spend their time on substantive work than dealing with problem employees.<sup>15</sup>

The interconnected nature of law, regulation, practice, and culture create a complex ecosystem that has been resistant to change. It is not quite accurate to say that the government-wide civil service system has remained frozen in place since the enactment of CSRA in 1978. Numerous adjustments, statutory and regulatory, have been made to the civil service system over the last forty years. With regard to hiring, for example, the centralized examination system established by CSRA—which was generally viewed as cumbersome and unresponsive—has been all but eliminated by successive rounds of regulatory reform.<sup>16</sup>

Nonetheless, frustration with the lack of progress has led many advocates of reform to throw up their hands at the possibility of working within the existing civil service system and, instead, seek a comprehensive replacement. This “big bang” approach to reform has had some success in smaller federal agencies and in discrete components of DOD. It has also led at times to a lack of analytic rigor and a failure to identify particular problems with the system that need to be solved and to ensure that proposed solutions actually address those problems.

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[https://www.gpo.gov/fdsys/search/pagedetails.action?sr=18&originalSearch=&st=An+Overview+of+Idea+Management+Systems&ps=10&na=&se=&sb=re&timeFrame=&dateBrowse=&govAuthBrowse=&collection=&historical=false&granuleId=CHRG-107shrg75472&packageId=CHRG-107shrg75472&fromState=.](https://www.gpo.gov/fdsys/search/pagedetails.action?sr=18&originalSearch=&st=An+Overview+of+Idea+Management+Systems&ps=10&na=&se=&sb=re&timeFrame=&dateBrowse=&govAuthBrowse=&collection=&historical=false&granuleId=CHRG-107shrg75472&packageId=CHRG-107shrg75472&fromState=)

<sup>14</sup> Actions Based on Unacceptable Performance, 5 U.S.C. § 4303 (2017).

<sup>15</sup> *Hearing to Receive Testimony on Department of Defense Civilian Personnel Reform*, (March 2017) (statement of Hon. Laura J. Junor): [I]t takes years of copious record keeping and evidence gathering to even begin holding an employee accountable. . . . It is simply easier for supervisors to give a satisfactory rating. There is little justification required and it preserves peace in the organization.” Two researchers found that “[s]upervisors who had tackled poor performance successfully described the experience as intensely emotional and even ‘heroic’” (see Silvia Montoya and John D. Graham, *Modernizing the Federal Government: Paying for Performance*. Occasional Paper (Santa Monica, CA: RAND Corporation, 2007), 22, [https://www.rand.org/pubs/occasional\\_papers/OP213.readonline.html](https://www.rand.org/pubs/occasional_papers/OP213.readonline.html)).

<sup>16</sup> First, OPM delegated examinations to federal agencies. Next, OPM allowed agencies to substitute an assessment of “Knowledge, Skills, and Abilities” (KSA) for written tests. Finally, the system was revised to permit the use of résumés in lieu of the specially formatted documents previously used to identify KSA. As problematic as the hiring system is today, it is far more workable than it would be without these modifications.

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### **3. The Civil Service Demonstration Projects**

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Section 601 of CSRA authorized the OPM to establish “demonstration projects” under which the application of the civil service laws and regulations to an agency could be waived or modified. This provision was intended to provide a testbed for the purpose of determining “whether a specified change in personnel policies or procedures would result in improved Federal personnel management.”<sup>17</sup>

The seminal demonstration project was established in 1980 at the Naval Weapons Center, China Lake, and the Naval Oceans Systems Center, San Diego. The China Lake project was designed to address the concern that inflexible civil service requirements were making it difficult for Navy laboratories to attract and retain the highly skilled scientists and engineers that they needed to remain at the cutting edge of technology. In particular, the rigid classification system and statutory pay tables that binned all civil service positions into fifteen grades with ten step increases based on tenure made it difficult to offer salaries sufficient to attract new hires or to reward star performers with pay increases necessary to keep them.

The China Lake project replaced the existing job classification system with a limited number of career paths and pay bands that empowered line managers to offer higher than usual starting salaries and recruiting bonuses to new hires. It replaced the tenure-driven GS pay tables with a pay-for-performance system and added new rigor to the performance appraisal system that made it possible to reward top performers with higher pay. The solution was designed specifically to address the identified problem. Employee rights, hiring processes, leave policies, disciplinary mechanisms, dispute resolution processes, labor relations systems, and retirement systems were left untouched by the demonstration program.

The China Lake project was widely judged to have been a success. The Packard Commission concluded that the project had resulted in an improved ability to attract high-quality personnel to entry-level positions, reduced separation rates for scientists and engineers, improved employee morale, and lowered management costs.<sup>18</sup> The General Accounting

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<sup>17</sup> Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1184 (October 1978) (codified in Definitions, 5 U.S.C. § 4701; Research Programs, 5 U.S.C. § 4702; Demonstration Projects, 5 U.S.C. § 4703).

<sup>18</sup> President’s Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report by the President’s Blue Ribbon Commission on Defense Management, Appendix* (Washington, DC: The Commission, June 1986, 158 (Appendix J), <https://assets.documentcloud.org/documents/2695411/>

Office (GAO)<sup>19</sup> confirmed that turnover among scientists was significantly lower at China Lake than at other defense laboratories, retention was strong among highly rated employees, and managers and employees gave the system high ratings.<sup>20</sup> The Merit Systems Protection Board (MSPB) reported that the classification system was simpler and less time-consuming, that managers felt more empowered to make personnel decisions, that starting salaries for scientists had increased substantially, that larger pay increases were available for good performance, and that turnover among top performers decreased.<sup>21</sup> Employee approval of the system grew from 29 percent at the outset to 70 percent by year fourteen.<sup>22</sup>

GAO did note that insufficient data were available to demonstrate that the project resulted in improved laboratory effectiveness or more highly qualified recruits.<sup>23</sup> Further, the demonstration project was not budget neutral—higher starting salaries and larger salary increases in the early years of the project meant that China Lake employees were paid, on average, 6 percent more than their counterparts in other laboratories. GAO concluded that while the project showed that pay-for-performance could be implemented to the satisfaction of managers and employees, it was not possible to determine whether a budget-neutral

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Packard-Commission.pdf (main body), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015018611981;view=1up;seq=1> (appendices). The Packard Commission recommended that the China Lake authorities be extended to the entire acquisition workforce (p. 68). See also *The Acquisition Findings in the Report of the President's Blue Ribbon Commission on Defense Management: Hearing Before the Subcommittee on Defense Acquisition Policy*, S. Hrg. 99-805, 99<sup>th</sup> Cong. (April 1986) (testimony of former Deputy Secretary of Defense David Packard), 41–42, 50–51.

<sup>19</sup> In this paper, GAO refers to the General Accounting Office and the Government Accountability Office. The General Accounting Office was renamed the Government Accountability Office on July 7, 2004.

<sup>20</sup> United States General Accounting Office (GAO), *Federal Personnel: Observations on the Navy's Personnel Management Demonstration Project*, GAO/GGD-88-79 (Washington, DC: United States General Government Division, May 1988), 17–18, <http://www.gao.gov/assets/220/210118.pdf>.

<sup>21</sup> U.S. Merit Systems Protection Board, *Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change* (Washington, DC: Office of Policy and Evaluation, December 1992), 36, <http://www.dtic.mil/dtic/tr/fulltext/u2/a259037.pdf>.

<sup>22</sup> James R. Thompson, *Designing and Implementing Performance-Oriented Payband Systems* (Washington, DC: IBM Center for the Business of Government, 2007), 21, <http://www.businessofgovernment.org/sites/default/files/ThompsonPaybandReport.pdf>. In addition, a survey conducted for a Naval Postgraduate School thesis showed that 76 percent of China Lake managers felt that the demonstration project was an improvement over the GS system (see Yvonne E. Williams, “The Impact of the Demonstration Project on Managers at the Naval Weapons Center, China Lake,” (master’s thesis, Naval Post Graduate School, June 1983), 42, <http://calhoun.nps.edu/bitstream/handle/10945/19836/impactofdemonstr00will.pdf?sequence=1>).

<sup>23</sup> United States General Accounting Office (GAO), *Federal Personnel: Observations on the Navy's Personnel Management Demonstration Project*, 13, 16. A RAND review also found “little evidence” that the China Lake project “resulted in changes for the better or worse in the quality of scientific and engineering personnel” (see Michael Gibbs, *Pay Competitiveness and Quality of Department of Defense Scientists and Engineers* (Santa Monica, CA: RAND National Defense Research Institute, 2001), xii, [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2007/MR1312.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR1312.pdf)).

system would have a positive effect on recruiting and retention<sup>24</sup> or whether the China Lake approach could be successfully transferred to other, larger organizations.<sup>25</sup>

Concerns about the ability of DOD to attract and retain highly skilled scientists and engineers continued to build. In response to a GAO survey in 1987, the Army reported difficulty hiring electronic engineers, general physicists, and computer scientists; the Navy indicated that lower salary levels for federal scientists and engineers were an impediment to recruiting efforts; and the Air Force indicated that it was having difficulty competing for the graduates of the best schools—even with special pay rates.<sup>26</sup> A DSB study on technology base management concluded that “[w]ith a few exceptions, DOD laboratories cannot compete for top technical people and the laboratories lose good people quickly.”<sup>27</sup> This inability to attract and retain skilled technical people was a critical failure, the DSB concluded because “[t]he dominant factor in the quality of the in-house laboratories is the quality of their personnel, especially their scientists and engineers.” As a result, “[m]any DOD laboratories do not have the needed critical mass of first rate technical leaders.”<sup>28</sup>

For years, OPM resisted requests to extend the China Lake demonstration program to other defense laboratories. By 1987, twenty-six federal agencies had contacted OPM to inquire about demonstration projects, but only two projects had been approved and implemented.<sup>29</sup> OPM reportedly believed that demonstration projects like China Lake “were of little potential value from a research point of view and discouraged agencies from pursuing the proposals or disapproved them.”<sup>30</sup> The Naval Research Advisory Committee explained:

Despite lengthy discussions, OPM remained unwilling ... to establish any additional personnel demonstrations for Defense laboratories under Title 5. OPM did not want duplication of features tested in “China Lake” or other

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<sup>24</sup> United States General Accounting Office (GAO), *Federal Personnel: Observations on the Navy’s Personnel Management Demonstration Project*, 19.

<sup>25</sup> *Ibid.*, 2.

<sup>26</sup> United States General Accounting Office (GAO), *Federal Workforce: Pay, Recruitment, and Retention of Federal Employees*, GGD-87-37 (Washington, DC: GAO, February 1987), 7–8, <http://www.gao.gov/assets/210/209058.pdf>.

<sup>27</sup> Defense Science Board, *Report of the Defense Science Board 1987 Summer Study on Technology Base Management* (Washington, DC: Defense Science Board, December 1987), 9, <http://www.dtic.mil/get-tr-doc/pdf?AD=ADA196469>.

<sup>28</sup> *Ibid.*

<sup>29</sup> United States General Accounting Office (GAO), *Federal Personnel: Status of Personnel Research and Demonstration Projects*, GAO/GGD-87-116BR (Washington, DC: General Government Division, September 1987), <http://www.gao.gov/assets/80/76718.pdf>.

<sup>30</sup> U.S. Merit Systems Protection Board, *Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change*, x.

demos. ... OPM ... wanted extensive justification for why any variation from Title 5 was needed for the laboratories.<sup>31</sup>

In 1994, Congress responded to continuing concerns about the personnel shortfalls in the science and technology (S&T) community and to positive reviews of the China Lake project by making the project permanent and authorizing other defense laboratories to undertake similar demonstration projects.<sup>32</sup> Over the next ten years, laboratory demonstration (Lab Demo) projects were established in all of the major defense laboratories. This action was consistent with the original intent of CSRA: the purpose of a demonstration project was to test new approaches that, if successful, could be extended to other similar entities.

The Lab Demo provision authorized the laboratories to institute policies that were “generally similar in nature to the China Lake demonstration project,” so each of them mimicked the China Lake pay-banding system, converging on a single approach to pay-for-performance.<sup>33</sup> However, each of the laboratory demonstration programs developed its own tailored performance management system, method for translating employee performance ratings into pay increases and awards, approach to managing pay costs, and transparency mechanisms for performance and pay decisions.<sup>34</sup> The laboratory directors, who treasured their independence, came to resent any outside interference with this authority—regardless whether it came from OPM or from elsewhere in the Department.<sup>35</sup>

Like the China Lake project, the Lab Demo programs were judged to have worked well. OPM conducted multiple evaluations of the Lab Demo programs and found that the

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<sup>31</sup> Naval Research Advisory Committee, *Science & Technology: Community in Crisis*, NRAC 02-03 (Arlington, VA: Naval Research Advisory Committee, May 2002), 19, <http://www.dtic.mil/docs/citations/ADA423395>. Legislative limitations on the number and scope of OPM demonstration programs may also have been a factor in the OPM rejection of agency requests (see MSPB, *Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change*, xi).

<sup>32</sup> National Defense Authorization Act (NDAA) for Fiscal Year 1995, S. 2182, 103<sup>rd</sup> Cong. (1994), SEC. 342, <https://www.congress.gov/bill/103rd-congress/senate-bill/2182/text>.

<sup>33</sup> *Expanding Flexible Personnel Systems Governmentwide*, S. Hrg. 107-151 (statement of Assistant Secretary of Defense Charles S. Abell), 97. Many different pay-for-performance approaches were available and had been tried by other government entities (see United States General Accounting Office (GAO), *Pay for Performance: State and International Public Sector Pay-for-Performance Systems*, GAO/GGD-91-1 (Washington, DC: General Government Division, October 1990), <http://www.gao.gov/assets/150/149835.pdf>).

<sup>34</sup> United States General Accounting Office (GAO), *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*, GAO-04-83 (Washington, DC: United States General Accounting Office (GAO), January 2004), <http://www.gao.gov/new.items/d0483.pdf>; Montoya and Graham, *Modernizing the Federal Government: Paying for Performance*, 26–27.

<sup>35</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Diane T. Putney and Alfred Beck, March 25, 2009, 38–39, [http://history.defense.gov/Portals/70/Documents/oral\\_history/OH\\_Trans\\_CHUDavid3-25-2009.pdf](http://history.defense.gov/Portals/70/Documents/oral_history/OH_Trans_CHUDavid3-25-2009.pdf).



programs were successfully achieving their goals and that managers and employees were generally satisfied with the programs.<sup>36</sup> OPM reported the following:

- Overall support for the projects increased gradually in all but one of the Lab Demos.
- Implementation of pay for performance systems increased job satisfaction in most of the Lab Demos and was impact-neutral in the rest.
- Increases in individual effort and motivation were found.
- The flexibility to pay higher starting salaries and reward high performers were helpful in attracting and retaining talent.
- There was no overall negative impact on perceived fairness of pay administration.
- Perceived accuracy and fairness of ratings tended to drop following implementation but gradually rose after that.
- The perception that managers addressed poor performers effectively increased.
- Pay satisfaction increased for all of the Lab Demos.<sup>37</sup>

In addition, annual turnover rates for top performers dropped dramatically after the Lab Demo programs were introduced.<sup>38</sup>

While the Lab Demo programs were “certainly an improvement over the previous system,”<sup>39</sup> they were unable to achieve the underlying objective of enabling the labs to

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<sup>36</sup> National Academy of Public Administration, *Broadband Pay Experience in the Public Sector*, A Report by the Human Resources Management Panel (Washington, DC: Center for Human Resources Management, August 2003), 15, 17, [http://www.napawash.org/images/reports/2003/03\\_07BroadbandPay%20ExperiencePublicSector.pdf](http://www.napawash.org/images/reports/2003/03_07BroadbandPay%20ExperiencePublicSector.pdf).

<sup>37</sup> United States Office of Personnel Management, *Alternative Personnel Systems in the Federal Government: A Status Report on Demonstration Projects and Other Performance-Based Pay Systems* (Washington, DC: United States Office of Personnel Management, December 2007), 14–15, <http://www.dtic.mil/dtic/tr/fulltext/u2/a476623.pdf>. At the Air Force Research Laboratory (AFRL), employees in favor of the demonstration project increased from 29 percent in 1996 to 80 percent in 2005 (see Thompson, *Designing and Implementing Performance-Oriented Payband Systems*, 25).

<sup>38</sup> United States Office of Personnel Management, *Alternative Personnel Systems in the Federal Government: A Status Report on Demonstration Projects and Other Performance-Based Pay Systems*, 38. See also James Thompson and Beth Asch, “Compensating the Civilian Workforce,” in Institute for Defense Analyses, *2010 Defense Economics Conference: Managing the DoD Civilian Workforce*, NS D-4315 (Alexandria, VA: Institute for Defense Analyses, 2010), 42–44 (comments of James Thompson, Associate Professor of Public Administration, University of Illinois at Chicago), [http://ensa.us.com/conferences/IDA%20NS%20D-4315\\_FINAL%202010.pdf](http://ensa.us.com/conferences/IDA%20NS%20D-4315_FINAL%202010.pdf). Over time, more and more employees agreed that China Lake and Lab Demo programs appropriately link pay to performance (p. 45).

<sup>39</sup> Defense Science Board, *Report of the DSB Task Force on Defense Science and Technology Base for the 21st Century* (Washington, DC: Defense Science Board, 30 June 1998), 39, <http://www.acq.osd.mil/dsb/reports/1990s/DefenseScienceandTechnologyBaseforthe21stCentury.pdf>.

attract and retain the personnel that they needed. In 1998, the DSB found that the program was “simply not sufficient to solve the problem of providing adequate numbers of capable scientists and engineers to the DOD and the Services.”<sup>40</sup> The DSB identified the cap on federal employee pay as the source of the problem. Even with the new flexibility provided by the Lab Demo program, the DSB found, the salaries that the DOD laboratories could offer were “still not competitive with those offered by industry.”<sup>41</sup> For this reason, the DSB recommended an entirely new model for the defense laboratories, with extensive use of private sector scientists and engineers on a rotational basis.<sup>42</sup> The lab directors generally agreed with the DSB findings.<sup>43</sup>

In 1995, Congress extended Lab Demo authority beyond the S&T community for the first time, establishing the acquisition demonstration (Acq Demo) program. The Acq Demo program authorized the Department to test the “feasibility or desirability of one or more proposals for improving the personnel management policies or procedures”<sup>44</sup> applicable to the defense acquisition workforce. While the statutory authority was open-ended, the provision was widely understood as an authorization to extend the China Lake pay-banding approach to the acquisition workforce.<sup>45</sup> When the Acq Demo program was finally implemented in February 1999, its key feature was a pay-for-performance approach that replaced the fifteen GS grades with four new pay bands.<sup>46</sup>

The Acq Demo program had the potential to cover a workforce that was much larger and more diverse than the Lab Demo program. In practice, however, the Acq Demo program was largely limited to employees in headquarters organizations, covering only about 5 percent of the defense civilian acquisition workforce. The problem was union opposition.

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid., 39–40. See also Montoya and Graham, *Modernizing the Federal Government: Paying for Performance*, 27 (demonstration projects did not lead to demonstratively improved outcomes).

<sup>43</sup> “Leap Ahead” *Technologies and Transformation Initiatives within the Defense Science and Technology Program: Hearing Before the Subcommittee on Emerging Threats and Capabilities*, S. Hrg. 107-340, 107<sup>th</sup> Cong. (June 2001) (testimony of Dr. A. Michael Andrews, II, Deputy Assistant Secretary of the Army for Research and Technology and Chief Scientist), 132: “We need the ability to offer the salaries to attract quality scientists and engineers, and keep them,” and (testimony of Admiral Cohen), 131–132: calling for “establishing one or more of the military research laboratories as special Government corporations.”

<sup>44</sup> National Defense Authorization Act (NDAA) for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186 (1996), SEC. 4308, <https://www.congress.gov/bill/104th-congress/senate-bill/1124/text?overview=closed>.

<sup>45</sup> The Packard Commission recommended such an extension of the China Lake demonstration authority in 1986. See President’s Blue Ribbon Commission on Defense Management, *A Quest for Excellence: Final Report by the President’s Blue Ribbon Commission on Defense Management*, 167 (Appendix K).

<sup>46</sup> Office of Personnel Management, “Civilian Acquisition Workforce Personnel Demonstration Project; Department of Defense (DoD),” *Federal Register* 64, no. 5 (January 8, 1999): 1453–1454, <https://www.gpo.gov/fdsys/pkg/FR-1999-01-08/pdf/FR-1999-01-08.pdf>.

Under Secretary of Defense for Acquisition, Technology, and Logistics Jacques Gansler later explained: “The law allowed me to have a much larger experiment, but because of union opposition it ended up being a much smaller number. ... They lobbied very strongly against even the experiment and lobbied their people against joining the experiment.”<sup>47</sup>

A 2006 evaluation of the Acq Demo program concluded that the new performance management system resulted in higher retention levels for “high contributors” and increasing separation rates for “low contributors.”<sup>48</sup> A comprehensive employee survey confirmed that Acq Demo employees believed that the program resulted in a much stronger connection between pay and performance than employees in a control group.<sup>49</sup> Moreover, employees reported that a streamlined classification system substantially reduced paper-work in the new system.<sup>50</sup> On the other hand, employees in the control group felt that they were treated more fairly than Acq Demo employees,<sup>51</sup> and the Acq Demo program appears to have had no effect at all on customer satisfaction or the perceived effectiveness of Acq Demo organizations.<sup>52</sup>

The Lab Demo and Acq Demo programs were commonly viewed as successful models for future reform in civilian personnel systems. Senior DOD officials saw these programs as a tool to improve organizational performance by developing a performance-based culture to replace the seniority approach of the existing civil service system. DOD officials were particularly enthusiastic about the potential shown by the Lab Demo and Acq Demo programs for rapidly advancing top performers to positions of responsibility.

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<sup>47</sup> Tim Kauffman, “Union-Busting, DoD Style,” *Federal Times*, February 16, 2004, 1; The regulations implementing the Acq Demo program provided that “Employees within a unit to which a labor organization is accorded exclusive recognition under Chapter 71 of title 5, United States Code, shall not be included as part of the demonstration project unless the exclusive representative and the agency have entered into a written agreement covering participation in and implementation of this project” (see Office of Personnel Management, “Civilian Acquisition Workforce Personnel Demonstration Project; Department of Defense (DoD), 1438).

<sup>48</sup> Cubic Applications, Inc., *DOD Civilian Acquisition Workforce Personnel Demonstration Project*, vol. I, *Management Report*, Interim Evaluation Report (Alexandria, VA: Cubic Applications, Inc., July 2003), [http://acqdemo.hci.mil/docs/Interim\\_Report\\_Vol1\\_FINAL.pdf](http://acqdemo.hci.mil/docs/Interim_Report_Vol1_FINAL.pdf); SRA International, Inc., *Department of Defense (DoD) Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo)*, Summative Evaluation Report (Fairfax, VA: SRA International, Inc., June 2006), 19, [http://acqdemo.hci.mil/docs/Summative\\_Evaluation.pdf](http://acqdemo.hci.mil/docs/Summative_Evaluation.pdf).

<sup>49</sup> Cubic Applications, Inc., *DOD Civilian Acquisition Workforce Personnel Demonstration Project: Interim Evaluation Report*, vol. II, *Technical Report*, Interim Evaluation Report (Alexandria, VA: Cubic Applications, Inc., July 2003, II-11–II-12 (responses to questions 20, 27, 34, 35, and 36), [http://acqdemo.hci.mil/docs/Interim%20Report%20Vol2\\_FINAL.pdf](http://acqdemo.hci.mil/docs/Interim%20Report%20Vol2_FINAL.pdf).

<sup>50</sup> *Ibid.*, II-12 (responses to questions 52 and 52).

<sup>51</sup> *Ibid.*, II-11–II-13 (responses to questions 17, 19, 38, 39, and 64).

<sup>52</sup> SRA International, Inc. *Department of Defense (DoD) Civilian Acquisition Workforce Personnel Demonstration Project (AcqDemo)*, 20.

GAO and the National Academy of Public Administration endorsed the expansion of pay for performance throughout the federal government.<sup>53</sup> The DSB concluded: “It is time for the Department ... to start extending successful reforms across DoD and converting them into personnel policies and programs.”<sup>54</sup> Although limitations on the scope of the Lab Demo and Acq Demo programs raised questions about their scalability,<sup>55</sup> the consensus seemed to be that such problems could be addressed by gradually phasing in new authorities.<sup>56</sup>

There was considerable resistance. Union officials contended that existing law, which authorized performance-based bonuses and retention allowances as supplements to existing salary, provided federal agencies all the authority they needed. The only problem was inadequate funding.<sup>57</sup> These officials vehemently opposed a “zero sum model” of pay-for-performance that would “take from one person or group in order to fund an increase for another.”<sup>58</sup> The President of DOD’s largest union stated

The ... problem with individual-specific incentives is favoritism. Favoritism and the suspicion of corruption have bedeviled the majority of performance-based award systems that focus exclusively on individual contributions. ... [T]he temptation of managers to overestimate the contributions of favored employees and underestimate the contributions of others may be overwhelming.<sup>59</sup>

If the federal government did adopt a system under which pay was going to be established by management decisions rather than by statute, the union officials insisted, there would have to be collective bargaining over pay decisions to protect workers from arbitrary

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<sup>53</sup> United States General Accounting Office, *Human Capital: Implementing Pay for Performance at Selected Personnel Demonstration Projects*; National Academy of Public Administration, *Recommending Performance-Based Federal Pay* (Washington, DC: Human Resources Management Panel, May 2004), [http://www.napawash.org/images/reports/2004/04\\_08RecommendingPerformanceBasedFederalPay.pdf](http://www.napawash.org/images/reports/2004/04_08RecommendingPerformanceBasedFederalPay.pdf).

<sup>54</sup> Defense Science Board, *Report of the Defense Science Board Task Force on Human Resources Strategy*, 40.

<sup>55</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach*, S. Hrg. 108-185 (testimony of Paul Light, Professor of Public Service, New York University), 47.

<sup>56</sup> *An Overlooked Asset: The Defense Civilian Workforce: Hearing Before the Oversight of Government Management, the Federal Workforce and the District of Columbia Subcommittee*, S. Hrg. 108-100, 108<sup>th</sup> Cong. (May 12, 2003) (testimony of Hon. David M. Walker, Comptroller General of the United States, U.S. General Accounting Office), 76.

<sup>57</sup> *Expanding Flexible Personnel Systems Governmentwide*, S. Hrg. 107-151 (statement of Bobby L. Harnage, Sr., National President, American Federation of Government Employees, AFL-CIO (AFGE)), 116-119 and (statement of Colleen Kelley, National President, National Treasury Employees Union (NTEU)), 131-132.

<sup>58</sup> *Ibid.*, (statement of Bobby L. Harnage, Sr.), 116.

<sup>59</sup> *Ibid.*, (statement of Bobby L. Harnage, Sr.), 118.

pay decisions.<sup>60</sup> This proposition was seen by DOD and other federal agencies as unworkable.

Members of Congress were skeptical as well. At a Joint Hearing of the Senate Committee on Governmental Affairs and the House Committee on Government Reform, virtually every Member of Congress who had been involved in civil service issues expressed the need for caution in moving ahead with pay-for-performance systems. The skepticism was bipartisan: One Member expressed concern about “pay parity issues”; another said that “some smaller version or pilot program” was needed to discover mistakes before moving forward; a third called for getting a performance management system in place before trying to tie in pay; a fourth warned that “‘flexibility’ should not mean undermining basic civil service job protections”; a fifth stated that “there is no infrastructure in place to really do pay for performance”; and a sixth agreed that “we are getting the cart before the horse.”<sup>61</sup>

As DOD entered a new century, a growing call for Department-wide civilian personnel reform based on the successful demonstration programs was frustrated by opposition from federal employee unions and institutional resistance to change. Then the balance was changed by the events of September 11, 2001, and the beginning of the Global War on Terrorism.

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<sup>60</sup> Ibid., (statement of Bobby L. Harnage, Sr.), 112–114; (statement of Colleen Kelley), 135–136.

<sup>61</sup> *The Human Capital Challenge: Offering Solutions and Delivering Results: Joint Hearing, Before the Oversight of Government Management, The Federal Workforce and the District of Columbia Subcommittee and Subcommittee on Civil Service and Agency Organization*, S. Hrg. 108-91, 108<sup>th</sup> Cong. (April 2003) (statement of Representative Tom Davis from the State of Virginia and Chairman of the House Committee on Government Reform: “pay parity issues”), 10; (statement of Eleanor Holmes Norton, a Delegate in Congress from the District of Columbia: “some smaller version or pilot program”), 15; (statement of Chris Van Hollen, a Representative in Congress from the State of Maryland: getting a performance management system in place), 18; (prepared statement of Senator Frank Lautenberg: “‘flexibility’ should not mean undermining basic civil service job protections”), 20; (statement of Senator George Voinovich: “there is no infrastructure in place to really do pay for performance”), 23; and (statement of Representative Jo Ann Davis from the State of Virginia: “we are getting the cart before the horse”), 24, <https://www.gpo.gov/fdsys/pkg/CHRG-108jhr87717/html/CHRG-108jhr87717.htm>.

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## 4. The Enactment of NSPS Legislation

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The September 11, 2001, attacks on the World Trade Center and the Pentagon shook the American political system. Within little more than a month, the President announced the creation a new Office of Homeland Security, an Office of Combating Terrorism, a Critical Infrastructure Protection Board, and a Homeland Security Council. On September 18, an Authorization for Use of Military Force against the perpetrators of the attacks was signed into law. Five weeks later, the USA Patriot Act was enacted.

A year later, Congress enacted the most extensive reorganization of the federal government in the last 50 years—the integration of parts of 22 different federal agencies into a single new entity, the Department of Homeland Security (DHS). The most controversial provision in the Homeland Security Act of 2002 was a provision authorizing the Secretary of Homeland Security to waive large parts of the civil service laws for the purpose of establishing a “flexible” and “contemporary” new human resources management system in the Department.<sup>62</sup>

At the time, the argument was made that the new authority was needed to enable the Secretary to bring together the employees of 22 disparate federal agencies into a single workforce with a single set of rules. Lurking under the surface was an additional agenda: the national security arguments for the creation of DHS created political momentum that could be used to put into motion a personnel reform agenda that had long been stymied by institutional resistance.<sup>63</sup>

As DOD began the next legislative cycle, Secretary of Defense Donald Rumsfeld directed his staff to come up with transformation initiatives that were as bold and strategic as possible. The Under Secretary for Personnel and Readiness, Dr. David Chu, proposed DOD-wide civilian personnel reform using the pay-banding approach of the demonstration

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<sup>62</sup> Establishment of Human Resources Management System, 5 U.S.C. § 9701 (2002) (as codified by the Homeland Security Act of 2002, Pub. L. 107-926, 116 Stat. 2135 (2002)).

<sup>63</sup> The political aspect of the reform effort was hammered home by a television ad in the fall campaign that pictured the image of Democratic Senator Max Cleland of Georgia with Saddam Hussein and Osama bin Laden to make the point that Cleland was “soft on national security” because he sought to protect civil service protections in the Homeland Security bill (see Andrea Stone, “Cleland Defeated by Conservative,” *USA Today*, November 6, 2002, [http://usatoday30.usatoday.com/news/politicselections/2002-11-06-chambliss\\_x.htm](http://usatoday30.usatoday.com/news/politicselections/2002-11-06-chambliss_x.htm)). As a result of the 2002 elections, Republicans regained majority control in the Senate.

programs.<sup>64</sup> Secretary Rumsfeld embraced the concept and pushed for a legislative approach that was as radical and far-reaching as possible. One former DOD official remembers the Secretary reacting to the initial proposal for a new pay banding system by saying, “Is that all there is? Are you kidding me? Is this all you guys want to change?” Dr. Chu recalls the Secretary instructing him to “go for everything you can.”<sup>65</sup>

DOD’s effort to create an aggressive proposal led to some controversy within the Administration. The Department initially sought unilateral authority for the Secretary of Defense to act on his own in developing a new human resources system, without any role for OPM.<sup>66</sup> Senior DOD officials thought that OPM was resistant to change, but OPM thought that outside oversight was needed to ensure that DOD’s actions were consistent with the merit principles. The conflict became so intense that it had to be resolved by the White House Chief of Staff. Office of Management and Budget (OMB) officials helped negotiate the final language of the legislative proposal.<sup>67</sup>

At the same time, the DOD proposal quickly encountered opposition from the federal employee unions. In January 2003, DOD officials met with union representatives about the forthcoming legislation. Dr. Chu made an effort to convince the union leadership that a

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<sup>64</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by the author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 5–6, 24.

<sup>65</sup> Anthony R. Crain, “The Brief, Eventful History of the National Security Personnel System,” Occasional Papers, Number 1 (Washington, DC: Historical Office of the Secretary of Defense, February 2017), 12, [http://history.defense.gov/Portals/70/Documents/occasional\\_papers/NSPSBOOK-FEB9WEB.PDF?ver=2017-04-17-134923-437](http://history.defense.gov/Portals/70/Documents/occasional_papers/NSPSBOOK-FEB9WEB.PDF?ver=2017-04-17-134923-437); Douglas A. Brook and Cynthia L. King, “Enactment and Implementation of the National Security Personnel System: Policy Made and Policy Unmade,” *Public Administration Review* 71, no. 6 (November/December 2011): 900, <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6210.2011.02438.x/pdf>; Shane Prater and Eric Timmerman, “National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment” (master’s thesis, Naval Postgraduate School, March 2008), 38, <http://www.dtic.mil/dtic/tr/fulltext/u2/a479920.pdf>.

<sup>66</sup> Charles Abell (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, August 9, 2017. Mr. Abell, who was charged with developing the legislation, says that his working group initially developed a draft that was “probably 150 pages long.” He rejected this draft in favor of a more streamlined approach that authorized the Department to adopt a new civilian personnel system without providing any specifics. This new approach was intended as a starting point for negotiations. Mr. Abell did not expect Congress to grant such broad authority.

<sup>67</sup> Dr. Ronald P. Sanders (Associate Director of National Intelligence for Human Capital), interview by Diane T. Putney, July 14, 2008, [http://history.defense.gov/Portals/70/Documents/oral\\_history/OH\\_Trans\\_SANDERSRonald7-14-2008.pdf](http://history.defense.gov/Portals/70/Documents/oral_history/OH_Trans_SANDERSRonald7-14-2008.pdf); David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 7–9; Crain, “The Brief, Eventful History of the National Security Personnel System,” 15, 16–17; Brook and King, “Enactment and Implementation of the National Security Personnel System: Policy Made and Policy Unmade,” 901; Prater and Timmerman, “National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment,” 41–53.



new personnel system was in the best interest of federal employees and, by extension, in the interest of the unions themselves:

In our judgment, we said, the strategic problem is this: If we don't change this system, the civilian workforce of this Department is slowly going out of business because the rules are so cumbersome. When a new function arises, no one wants to turn to civil servants. It's too hard to hire. It's too hard to pay competitively. It's too hard to manage.<sup>68</sup>

Union officials, who were suspicious of DOD's motives and resentful of earlier actions taken by the Bush Administration, were not convinced.

Both sides saw the meeting as unproductive. DOD officials felt that "there was not much to discuss with union officials," because there was no common ground. The union representatives believed that DOD had no real intention in engaging but wanted to be able to tell Congress that the unions had been consulted.<sup>69</sup> OPM representatives remember that there was "'no real effort' on the part of DOD" to work with the unions:

[A]dministration officials had learned during their struggle with unions over the [Homeland Security Act] that "collaboration didn't pay dividends." ... DOD and Administration officials didn't think there was much [the unions] could do to prevent the enactment of NSPS because Republicans held the majority in both houses of Congress at the time. Therefore, courting their support was not essential to its enactment.<sup>70</sup>

Comptroller General David Walker told the Senate GAC: "There was basically no consultation—of unions, of employees, of their executives. ... [T]he track record that they employed in coming up with this proposal, that doesn't give me great comfort."<sup>71</sup>

On April 10, 2003, the Administration submitted the Defense Transformation for the 21<sup>st</sup> Century Act to Congress.<sup>72</sup> At OMB's insistence, the civilian personnel provisions

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<sup>68</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 12.

<sup>69</sup> Crain, "The Brief, Eventful History of the National Security Personnel System," 15; Prater and Timmerman, "National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment," 53–54. Dr. Chu has attributed the failure of the DoD outreach effort to the fact that the then-President of AFGE, Bobby Harnage, was being challenged for reelection (see David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 12–13).

<sup>70</sup> Prater and Timmerman, "National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment," 54–55.

<sup>71</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach*, S. Hrg. 108 185 (testimony of Hon. David M. Walker, Comptroller General, U.S. General Accounting Office), 39.

<sup>72</sup> William J. Haynes III, General Counsel, DOD, letter to Speaker of the House Hastert for DOD's Proposal (April 10, 2003).

were similar to the language of the Homeland Security Act.<sup>73</sup> The DOD proposal, like the Homeland Security Act, authorized the establishment of a new human relations system that would be “flexible” and “contemporary,” without defining the salient features of the proposed system.<sup>74</sup> Both bills authorized the waiver of existing provisions of law addressing the classification of jobs, performance management, and employee pay.<sup>75</sup> Both bills also authorized the development of alternative systems for labor relations and employee appeals.<sup>76</sup>

Unlike the Homeland Security Act, the DOD draft included the authority to waive provisions of law addressing hiring, training, pay administration, and allowances.<sup>77</sup> It authorized the Secretary of Defense to exclude OPM from the decision-making process and act on his own when he determined that it was in the interest of national security.<sup>78</sup> It also provided that the implementation of the new authority would be exercised in the “sole, exclusive, and unreviewable discretion” of the Secretary.<sup>79</sup>

Other provisions in the bill sought broad authorities unrelated to civilian personnel. The bill proposed to give the Secretary power to override legislative limitations on the use of personal services contracts,<sup>80</sup> extend the terms of the Service Chiefs “as he deems necessary,”<sup>81</sup> and reassign senior General and Flag Officers without the need for Senate confirmation.<sup>82</sup> The bill proposed to repeal congressional reporting requirements for Major Defense Acquisition Programs<sup>83</sup> and Major Automated Information System programs.<sup>84</sup> It authorized the Secretary to waive requirements of the Endangered Species Act, the Clean Air Act, the Solid Waste Disposal Act, and the Comprehensive Environmental Response,

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<sup>73</sup> Prater and Timmerman, “National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment,” 47.

<sup>74</sup> 5 U.S.C. § 9902b (2003) (as proposed to be codified by the Defense Transformation for the 21<sup>st</sup> Century, S. 927 § 101, 108<sup>th</sup> Cong. (2003)). See also Robert L. Goldich et al., *Defense Department Original Transformation Proposal: Compared to Existing Law*, RL31916 (Washington, DC: Congressional Research Service, updated May 19, 2003), <http://www.au.af.mil/au/awc/awcgate/crs/rl31916.pdf>.

<sup>75</sup> *Ibid.*, § 9902c (2003) (proposed).

<sup>76</sup> *Ibid.*, § 9902(b), §9902(f), and §9902(g) (2003) (proposed).

<sup>77</sup> *Ibid.*, § 9902(b) (2003) (proposed); Goldich et al., *Defense Department Original Transformation Proposal: Compared to Existing Law*.

<sup>78</sup> *Ibid.*, § 9902(a) (2003) (proposed); Goldich et al., *Defense Department Original Transformation Proposal: Compared to Existing Law*.

<sup>79</sup> *Ibid.*, § 9903(d) (2003) (proposed).

<sup>80</sup> *Ibid.*, § 9903 (2003) (proposed).

<sup>81</sup> Defense Transformation for the 21<sup>st</sup> Century, S. 927 § 112, 108<sup>th</sup> Cong. (2003) (proposed).

<sup>82</sup> *Ibid.*, § 116 (proposed).

<sup>83</sup> *Ibid.*, § 201 (proposed).

<sup>84</sup> *Ibid.*, § 202 (proposed).

Compensation, and Liability Act (CERCLA).<sup>85</sup> It provided the Secretary carte blanche to reorganize the Department,<sup>86</sup> and it authorized the Secretary to transfer billions of dollars from one program to another without the approval of Congress.<sup>87</sup>

This proposal was a bold assertion of the Secretary's desire for unfettered authority over his own Department. Senior DOD officials had long chafed at Congress' "micromanagement" of the Department. With this bill, Secretary Rumsfeld openly challenged legislative branch authority. Most of the bill hit the cutting room floor as soon as it arrived on Capitol Hill. The civilian personnel provisions, by contrast, were put on a fast track toward enactment.

The proposed civilian personnel reforms found strong support among House Republicans, including Reps. Duncan Hunter and Tom Davis, the new Chairmen of the Armed Services Committee and the Government Reform Committee. "I was knocking on an open door from their perspective," Dr. Chu recalled.<sup>88</sup> On April 29, 2003, the two Chairmen made their endorsement public, introducing the NSPS proposal as a House bill, without any modification to the Administration language.<sup>89</sup> The proposal was also introduced in the Senate by Senators John Warner and Carl Levin, the Chairman and Ranking Member of the Armed Services Committee, but the Senate bill was introduced "by request," indicating that the Senators did not endorse the proposal by introducing it.<sup>90</sup>

The two House committees acted quickly, holding hearings and voting favorably on the bill just a month after it was submitted. The critical action took place in the Government Reform Committee, where Chairman Davis was able to hold together the Republicans to approve the bill.<sup>91</sup> A Democratic amendment to require the Department to submit a legislative proposal detailing the new personnel system before any authorities being granted

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<sup>85</sup> *Ibid.*, Title III (proposed).

<sup>86</sup> *Ibid.*, § 401 (proposed).

<sup>87</sup> *Ibid.*, § 411 (proposed).

<sup>88</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 10–12. Mr. Abell recalls that Rep. Davis helped "sell" the provision to Rep. Hunter and his committee, who had less expertise and were willing to defer to the committee of jurisdiction (Charles Abell (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, August 9, 2017).

<sup>89</sup> Civil Service and National Security Personnel Improvement Act, H.R. 1836, 108<sup>th</sup> Cong. (2003), <https://www.congress.gov/congressional-report/108th-congress/house-report/116/1>.

<sup>90</sup> Defense Transformation for the 21<sup>st</sup> Century, S. 927, 108<sup>th</sup> Cong. (2003).

<sup>91</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 16.

was defeated on a party-line vote of 28-32.<sup>92</sup> Additional amendments to build protections into the new personnel system and restore collective bargaining rights were also rejected on party-line votes. It helped that the NSPS proposal had been briefed to Vice President Cheney, who supported the effort, and that the White House lobbying team was present for the markup.<sup>93</sup>

The Committee made minor changes to the bill, removing the provision that made the Secretary's authority unreviewable, requiring DOD to establish an independent appeals board to hear employee grievances, establishing governing principles for the new performance management system, and denying the DOD request for authority to waive civilian hiring and training provisions that had not been waived in the Homeland Security Act.<sup>94</sup> Overall, the Department felt that the markup was an extraordinary success. They had not gotten everything they asked for, but all of the key elements of the legislation were intact.

This success came at a price. Twenty Democratic Members of the Committee signed Minority views expressing the depth of their disagreement with the bill:

Over the past century, Congress has developed a comprehensive set of laws to prevent the [return of the] patronage system that ruled the federal government during the first 100 years of the country's existence. Until the Civil Service Act of 1883, federal jobs were often awarded through the spoils system. Civil service jobs went to supporters of elected officials and loyal party members, which often led to incompetence and corruption.

With the passage of H.R. 1836, this Committee has embarked on the path of reversing many of the legislative reforms of the last century. The bill strips away fundamental rights from almost 700,000 civilian employees at the Department of Defense (DOD) – approximately one-third of all federal civilian employees. The bill also opens the door for the rest of the federal workforce to have their rights taken away as well.<sup>95</sup>

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<sup>92</sup> "Policy Debate Slows Defense Bill," <https://library.cqpress.com/cqalmanac/document.php?id=cqal03-835-24342-1084261>; Civil Service and National Security Personnel Improvement Act, H. Rep. 108-116, 108<sup>th</sup> Cong. (2003), 106.

<sup>93</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by the author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 15, 17–18. See also Prater and Timmerman, "National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment," 79 (quoting the former Deputy Legislative Director of the House Government Reform Committee (GRC): "They [White House representatives] were actively involved. This was a top priority for them at the time. The White House legislative affairs guy was at the markup, which is significant for a House markup ... that carries some weight when members see the White House point person...standing there and watching them.")

<sup>94</sup> 5 U.S.C. § 9902 (2003) (as proposed to be codified by the Civil Service and National Security Personnel Improvement Act, H.R. 1836 § 102, 108<sup>th</sup> Cong. (2003)).

<sup>95</sup> Civil Service and National Security Personnel Improvement Act, H. Rep. 108-116, 108<sup>th</sup> Cong. (2003) (Minority Views).

When the legislation came to the House floor as part of the National Defense Authorization Act for Fiscal Year 2004 (FY 2004 NDAA), Democrats were blocked by rule from offering amendments to modify the civilian personnel provisions. As a result, the only House vote on the issue came on a procedural motion, which was defeated on a near party-line vote of 204-224.<sup>96</sup> On May 22, just six weeks after the legislation was first received in Congress, it was approved by the full House.

As is often the case, the Senate took a slower and more bipartisan approach. The Senate Armed Services Committee (SASC), which marked up its version of the FY 2004 NDAA on May 9, excluded the NSPS proposal on the grounds that Senators had not yet had time to review the legislation.<sup>97</sup> A bipartisan group of Senators then began to meet in an effort to come up with a consensus approach. The SASC staff also insisted that the Department meet with representatives of the federal employee union to try to resolve their differences before the bill would be considered.<sup>98</sup>

On June 2, 2003, Senator Susan Collins introduced a version of the legislation that was co-sponsored by three Republicans and two Democrats.<sup>99</sup> Like the Administration proposal and the House bill, the Collins bill authorized DOD to waive existing civil service statutes to establish a flexible and contemporary new personnel system. Like the Administration proposal and the House bill, it authorized new classification, performance management, and pay-for-performance systems, new employee appeals processes, and national level collective bargaining. Moreover, the Collins bill, like the Administration proposal and the House bill, would have authorized the Secretary to implement the new personnel system across the Department after consultation with employee unions but without collective bargaining.<sup>100</sup> Senator Collins stated:

Our bill would ... provide the Secretary of Defense with the three pillars of his personnel proposal and thus would allow for a much-needed overhaul

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<sup>96</sup> “Policy Debate Slows Defense Bill,” <https://library.cqpress.com/cqalmanac/document.php?id=cqal03-835-24342-1084261>.

<sup>97</sup> Ibid.

<sup>98</sup> Charles Abell (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, August 9, 2017. Mr. Abell’s goal was civilian personnel reform (pay for performance, ability for the job to evolve over time, faster hiring, incentives for employees to perform as directed), and he was willing to work with the unions if it helped achieve these objectives. Some Administration officials thought he was “nuts” to meet with the unions and saw union opposition as a “badge of honor.”

<sup>99</sup> National Security Personnel System Act, S. 1166, 108<sup>th</sup> Cong. (2003). The Democratic co-sponsors were Senator Carl Levin, the Ranking Democrat on the SASC, and Senator Daniel Akaka, the Ranking Democrat on the Governmental Affairs Subcommittee with jurisdiction over the civil service system.

<sup>100</sup> 5 U.S.C. § 9903(e) (as proposed to be codified by the National Security Personnel System Act, S. 1166 § 2, 108<sup>th</sup> Cong. (2003)).

of a cumbersome, unresponsive system. Our bill would grant the administration's request for a new pay system, on-the-spot hiring authority, and collective bargaining at the national level.<sup>101</sup>

However, the Collins bill differed from the other drafts in several respects. It eliminated language authorizing the Secretary of Defense to exclude OPM from the decision-making process;<sup>102</sup> it expressly required the establishment of a pay-for-performance system and established governing principles for its implementation;<sup>103</sup> it required a phase-in of the new system over several years;<sup>104</sup> and it required that overall funding for civilian pay under the new system keep pace with funding under the old system.<sup>105</sup>

Most significantly, the Collins bill differed from the Administration proposal and the House bill in the way that it addressed employee due process protections and labor relations. With regard to due process protections, the bill authorized DOD to establish its own dispute resolution process but maintained an appellate role for the independent MSPB and provided that MSPB precedents would remain in place except to the extent that the Secretary established new and different standards.<sup>106</sup> With regard to labor relations, the bill omitted language authorizing the waiver of Chapter 71 of title 5, which governs the collective bargaining rights of federal employees.<sup>107</sup> The bill provided for bargaining to be conducted at the national level as requested by the Administration and placed time limits on the dispute resolution process<sup>108</sup> but otherwise left collective bargaining rights unchanged.

Some DOD officials saw merit in the Collins bill. When the proposal was presented to Secretary Rumsfeld, however, he rejected it on the spot. Principal Deputy Under Secretary of Defense Charles Abell, who made the presentation, reports that the Secretary did not see Senator Collins as a friend of the Administration and believed that if Democrats supported her bill, it could not be a very strong bill. From his point of view, bipartisanship was a weakness, not a strength. Bipartisanship required compromise, and the Secretary was more interested in retaining his original proposal.<sup>109</sup>

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<sup>101</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach*, S. Hrg. 108-185 (opening statement of Chairman Collins), 2.

<sup>102</sup> 5 U.S.C. § 9902(a) (2002) (as proposed to be codified by the National Security Personnel System Act, S. 1166 § 2, 108<sup>th</sup> Cong. (2003), 2.

<sup>103</sup> *Ibid.*, § 9902(f)(1) and (2) (proposed).

<sup>104</sup> *Ibid.*, §9902(j) (proposed).

<sup>105</sup> *Ibid.*, § 9902(f)(3), (4), and (5) (proposed).

<sup>106</sup> *Ibid.*, § 9902(i) (proposed).

<sup>107</sup> *Ibid.*, § 9902(c)(2) (proposed).

<sup>108</sup> *Ibid.*, § 9902(h) (proposed).

<sup>109</sup> Charles Abell (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, August 9, 2017.

At a Senate GAC hearing on the bill, the Administration showed little interest in the Collins bill. With regard to collective bargaining, Secretary Rumsfeld testified that the purpose of the Administration language was to bring collective bargaining to the national level:

It will not end collective bargaining, as has been suggested. To the contrary, the right of defense employees to bargain collectively would be continued. What it would do is bring collective bargaining to the national level so that the Department could negotiate with national unions instead of dealing with more than 1,300 different union locals, a process that is inefficient. It is simply grossly inefficient.<sup>110</sup>

The Secretary failed to explain why the Collins bill—which expressly authorized collective bargaining at the national level—was inadequate to achieve this purpose. Asked why the Department needed the broader authority to waive all of the labor relations provisions in Chapter 71, Dr. Chu responded: “[T]his is a power, the waiver of Chapter 71, already granted to Homeland Security.”<sup>111</sup>

On June 17, 2003, the Collins bill was reported out of the Senate GAC on a near-unanimous 10-1 vote. The only significant change was the adoption of an amendment by Senator George Voinovich to exclude the defense laboratories from the new personnel system.<sup>112</sup>

With this action, a strong bipartisan coalition had lined up behind the comprehensive reform of the DOD personnel system, endorsing the waiver of civil service statutes governing classification, pay, performance management, and employee appeals, making a significant change to labor relations requirements in the form of the authorization of national-level collective bargaining, and providing for the implementation of the new system without collective bargaining. Such bipartisan Legislative Branch support for comprehensive civilian personnel reform would have been unthinkable even six months earlier.

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<sup>110</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach*, S. Hrg. 108-185 (testimony of Hon. Donald H. Rumsfeld, Secretary of Defense), 21. Secretary Rumsfeld also testified that DoD had been negotiating with union locals for more than two years for the right to garnish wages in the event of fraud in the use of purchasing cards “and we still have 30 more unions to go” (p. 18).

<sup>111</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach: S. Hrg. 108-185, Before the Committee on Governmental Affairs*. 108<sup>th</sup> Cong. (June 4, 2003) (statement of David S.C. Chu, Ph.D., Under Secretary of Defense for Personnel and Readiness), 27. The Under Secretary also testified that the Department needed to be able to bring the collective bargaining to a conclusion, which was extremely difficult under existing law. However, Senator Collins had pointed out that her bill included a provision putting a 180-day time limit on disputes before the Federal Labor Relations Authority (p. 3).

<sup>112</sup> The laboratory directors, who had already implemented comparable authorities under the Lab Demo program, prized their autonomy and did not want to want their successful personnel projects absorbed into a DoD-wide system that would be beyond their control (see Crain, “The Brief, Eventful History of the National Security Personnel System,” 14).

Far from accepting the bipartisan Senate approach and claiming victory, the Administration dug in to fight for the House legislation, endeavoring to make the House approach a matter of party loyalty for Republicans.<sup>113</sup> For DOD officials, the fundamental issue was the authority of the Department to manage its civilian workforce. This authority was undermined by outside entities that could challenge or overrule DOD positions: OPM, the MSPB, the Federal Labor Relations Authority, and the federal employee unions. Negotiation with these outside parties would slow the implementation of a new personnel management system and undermine its purpose. A senior DOD official later explained:

[W]e had to redesign a system of relating to organized labor in a way that matched the enormous degree of flexibility that was included in the human resource management system, and that would subordinate itself to achievement of the national security mission. ... [Y]ou have enormous flexibilities to align ... your personnel management decisions with the organizational mission because of the national security imperative. ... So then you had to design a labor relations system that also could be held subordinate.<sup>114</sup>

From the union perspective, the proposed waiver of Chapter 71 posed an existential threat. These provisions were the basic charter for their existence, giving them a position in the federal system as a protector of employee rights. If the provisions were waived, not only would employee protections be removed, but it is not clear that the unions would continue to serve any purpose at all.<sup>115</sup> To the DOD leadership, outside guarantors of employee rights impeded effective management of the workforce with burdensome procedures and misguided precedents. To employee representatives, the absence of outside guarantors meant the absence of employee rights.

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<sup>113</sup> The Collins bill was not incorporated into the Senate version of the FY 2004 NDAA because the proposed amendment was ruled out of order by the Senate parliamentarian (see *Transforming the Department of Defense Personnel System: Finding the Right Approach*, S. Hrg. 08-185 (opening statement of Chairman Collins), 2. In keeping with the practice of defense authorization conferences, however, the SASC took the position of the committee of jurisdiction as its own. Senator Collins was a member of the Armed Services Committee, giving advocates of the Collins bill a majority among Senate conferees.

<sup>114</sup> Mr. Michael Dominguez (former Principal Deputy Under Secretary of Defense), interview by Randy Richardson, August 1, 2008, [http://history.defense.gov/Portals/70/Documents/oral\\_history/OH\\_Trans\\_DOMINGUEZMichae%208-1-2008.pdf](http://history.defense.gov/Portals/70/Documents/oral_history/OH_Trans_DOMINGUEZMichae%208-1-2008.pdf). Senior DoD officials also felt that the employee unions focused too much of their energy on the grievance process, acting as advocates for their least meritorious employees (Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 50).

<sup>115</sup> One union official (Randy Erwin, legislative director of National Federation of Federal Employees (NFFE)) commented in 2009: “Had NSPS been implemented as first proposed, federal employee unions probably would not even exist today. ... DoD would have stripped our right to collectively bargain and we would have disappeared” (see Alyssa Rosenberg, “Senate Sends Bill Ending Pentagon Pay System to President’s Desk,” *GovExec.com*, October 22, 2009, <http://www.govexec.com/defense/2009/10/senate-sends-bill-ending-pentagon-pay-system-to-presidents-desk/30185/>).



The Administration strategy was to build a Republican-only majority among the Senate conferees by persuading Senator Collins to support the DOD position.<sup>116</sup> As a result, the real negotiations over the civilian personnel provisions took place between Senator Collins and Administration officials in a series of meetings at the White House.<sup>117</sup>

The issues of phase-in and pay comparability were addressed first. In lieu of the Senate provision limiting the new system to 240,000 employees in the first two years, the conferees agreed that no more than 300,000 employees could be included until the Department had an effective performance management system in place.<sup>118</sup> The Senate provisions designed to ensure that overall funding for civilian pay kept pace with funding levels under the GS system were modified by adding the words “to the maximum extent practicable”—making them a statement of aspiration rather than a legal requirement.<sup>119</sup>

With regard to employee appeals, the conference report included language from the Collins bill that applied existing MSPB standards and precedents except to the extent specifically overruled in DOD implementing regulations.<sup>120</sup> It provided for review of DOD decisions by the MSPB and in the courts, but only in the case of employee dismissals and

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<sup>116</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 19–20. The Administration took the same approach three years later, after Senator John Warner led the SASC in the development of a bipartisan alternative to the proposed Military Commissions Act.

<sup>117</sup> On issues that were not discussed in the White House meetings, the House staff took the position that the House bill must prevail. If the Senate language was not a condition for Senator Collins’ approval, it would not be included in the conference report. This is the basis on which Senate language establishing parameters for the pay-for-performance system (S. 1166, proposed § 9902(f) was rejected). On the other hand, the Senate provision carving out the defense laboratories from coverage was supported on the House side and was incorporated into the conference report without debate (5 U.S.C. § 9902(c)(2) (2002) (as codified National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392 (2003), SEC. 102).

<sup>118</sup> 5 U.S.C. § 9902(l) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102). In practice, the first 11,000 employees were not moved into NSPS until more than two years after enactment, and, by the time NSPS was disbanded five years after enactment, it still did not apply to 300,000 employees.

<sup>119</sup> 5 U.S.C. § 9902(e) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102). Language requiring a reprogramming request before funds available for civilian pay could be used for any other purpose (5 U.S.C. § 9902(f)(5) (as proposed to be added by National Security Personnel System Act, S. 1166 § 2, 108<sup>th</sup> Cong. (2003)) was not included in the conference report. In practice, funding levels for civilian pay in NSPS were higher than funding levels would have been under the GS system.

<sup>120</sup> 5 U.S.C. § 9902(h)(3) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102).

reductions in pay.<sup>121</sup> It also provided that the requirement for MSPB review would sunset after seven years unless renewed by Congress.<sup>122</sup>

There is a good chance that these compromises would have held bipartisan support among Senate conferees. However, the most difficult issue—collective bargaining—was still outstanding. Senator Collins had indicated that she was not going to give in on this issue, and she knew that if she did so she would lose Democratic support for the entire package. The Administration and the House conferees were equally locked in to their insistence on a completely new labor relations system for the Department. Collective bargaining became the last issue—not only on the NSPS legislation, but in the entire defense authorization conference.

In the end, an agreement was reached that included *both* the Administration position *and* the Collins position in the conference agreement. The agreement included the provision upon which Senator Collins had insisted, making the existing labor relations laws “non-waivable.”<sup>123</sup> However, it also included a second section, providing that “notwithstanding” the first provision, the Secretary was authorized to establish “a labor relations system to address the unique role that the Department’s civilian workforce plays in supporting the Department’s national security mission.”<sup>124</sup> The compromise also included a six-year sunset—an aspect of the provision that senior DOD officials viewed as a “poison pill,” requiring them to race toward implementation.<sup>125</sup>

It was never clear what the two provisions meant. Was the new labor relations system supposed to be consistent with the requirements of Chapter 71, or did it override that law? If it had to be consistent with Chapter 71, what did the new authority accomplish? If it did override Chapter 71, what was the meaning of the statement that the law was “non-waivable”? This ambiguity may have been the worst of both worlds for the Department. The language was sufficiently threatening to collective bargaining rights that it lost all bipartisan support for the NSPS legislation. At the same time, it was sufficiently vague that it placed Administration efforts to address the issue of collective bargaining under a legal cloud.

DOD had captured a political moment of opportunity and pushed hard for as much authority as it could get. This strategy looked like a political success story: a deal had been

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<sup>121</sup> *Ibid.*, § 9902(h)(4) and § 9902(h)(5) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102).

<sup>122</sup> *Ibid.*, § 9902(h)(8) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102).

<sup>123</sup> *Ibid.*, § 9902(d)(2) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102).

<sup>124</sup> *Ibid.*, § 9902(m) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1102).

<sup>125</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by author, April 12, 2017.

struck, and the legislation was enacted. However, the Department had missed the opportunity to build a broad base of support through its unwillingness to give ground, and, as a result, the legislation carried the seeds of its own destruction.

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## 5. The Implementation of NSPS

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During the congressional hearings on the NSPS legislation, Comptroller General David Walker laid out his vision for the successful implementation of pay-for-performance systems in the federal government. The likelihood of success would be greatly enhanced, the Comptroller General said, if the reform effort involved employees, their representatives, and other stakeholders in the design of the system.<sup>126</sup> Since direct employee involvement in the legislative process was limited, the “active involvement of employees” in the implementation phase would be “critical to the success of NSPS.”<sup>127</sup> Above all, the Department should take however much time was needed to get it right:

[M]oving too quickly or prematurely at DOD or elsewhere can significantly raise the risk of doing it wrong. This could also serve to severely set back the legitimate need to move to a more performance- and results-based system for the federal government as a whole. Thus, while it is imperative that we take steps to better link employee pay and other personnel decisions to performance across the federal government, how it is done, when it is done, and the basis on which it is done can make all the difference in whether or not such efforts are successful.<sup>128</sup>

No matter what DOD might want to do, Mr. Walker concluded, from a practical standpoint, that the Department would not be able to adopt the new system with anything other than a phased approach.<sup>129</sup> DOD chose to ignore the Comptroller General’s advice.

After President Bush signed the bill into law on November 24, 2003, the Department moved to implement the new authority as quickly as possible. Dr. Chu announced an intent to bring the first 300,000 DOD employees—about half of the civilian workforce—into NSPS before the beginning of the next fiscal year on October 1, 2004. “We are counting on the powers in this act to be effective immediately. These are authorities for the here and now,” he stated.<sup>130</sup> This decision to act fast was a conscious choice. Chairman Davis had

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<sup>126</sup> *Transforming the Department of Defense Personnel System: Finding the Right Approach*: S. Hrg. 108-185 (testimony of Hon. David M. Walker, Comptroller General, U.S. General Accounting Office), 5.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> “DoD Welcomes Union Input, Chu Says,” *Federal Times*, February 16, 2004, 6.

advised that it would be a good idea to have as much of the system as possible in place before the 2004 elections to make it difficult for a new Congress or a new Administration to change it.<sup>131</sup>

Senior DOD officials believed that the major design work for NSPS had already been essentially completed. A DOD Human Resources Best Practices Task Force established in March 2002 had conducted a comprehensive review of the Lab Demo and Acq Demo programs and compiled comprehensive findings and recommendations on best practices for compensation, recruitment, and performance management systems.<sup>132</sup> A model regulation bringing together those best practices, published in an April 2, 2003, *Federal Register* notice,<sup>133</sup> was expected to serve as the basis for the new NSPS system. For this reason, the initial NSPS organization expected its efforts to focus largely on implementation, rather than policy.<sup>134</sup>

On December 1, 2003, the Department established an NSPS Implementation Office. On December 19, the implementation team held its first meeting and agreed to pursue the objective of moving all DOD civilians into NSPS within a two-year period. After the Christmas holidays, DOD working groups began to meet about key aspects of implementation. The DOD timeline called for developing proposals, meeting with the unions, and notifying Congress of final NSPS plans by August 6. Implementation would commence with the beginning of the new fiscal year on October 1, 2004.<sup>135</sup> The Department, in its effort to move as quickly as possible, did not intend to publish regulations for public notice and comment in the *Federal Register*, even though that would make them more vulnerable to legal challenge.<sup>136</sup> On January 16, 2004, DOD invited the unions to a preliminary

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<sup>131</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by the author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 37–38.

<sup>132</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by the author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 4–5; Brad Bunn (former NSPS PEO), interview by Diane T. Putney, August 14, 2008, [http://history.defense.gov/Portals/70/Documents/oral\\_history/OH\\_Trans\\_BUNNBradley8-14-2008.pdf](http://history.defense.gov/Portals/70/Documents/oral_history/OH_Trans_BUNNBradley8-14-2008.pdf).

<sup>133</sup> Department of Defense, “Science and Technology (S&T) Reinvention Laboratory Personnel Management Demonstration Program,” *Federal Register* 68, no. 63 (April 2, 2003): 16121, <https://www.gpo.gov/fdsys/pkg/FR-2003-04-02/pdf/FR-2003-04-02.pdf>; Prater and Timmerman, “National Security Personnel System (NSPS): A History of Creation and Enactment of the Legislation Authorizing Its Establishment,” 26–29.

<sup>134</sup> Brad Bunn (former NSPS PEO), interview by Putney, 3, 13, 14.

<sup>135</sup> Douglas A. Brook, Nicholas M. Schroeder, and Cynthia L. King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)* (Monterey, CA: Center for Defense Management Research, January 23, 2010), [http://edocs.nps.edu/npspubs/institutional/newsletters/CDMR/NSPS\\_Implementation\\_Report.pdf](http://edocs.nps.edu/npspubs/institutional/newsletters/CDMR/NSPS_Implementation_Report.pdf).

<sup>136</sup> Brad Bunn (former NSPS PEO), interview by Putney, 17–19.

meeting on January 22. At that meeting, the unions requested that DOD provide them a written outline to which they could react.<sup>137</sup>

On February 6, 2004, the Department began its first substantive public engagement of the implementation phase by providing the federal employee unions a set of papers that included a comprehensive outline of a new labor relations system.<sup>138</sup> This area was the one in which support was weakest. Democrats were united against the Department's position, and critical Republicans had been brought along only with promises that the Department did not plan significant change. The Department had promised that it would protect collective bargaining rights and had not asserted publicly the need for any changes beyond the use of national-level bargaining. Moreover, the Department does not appear to have done any significant internal work—like the best practices work on the Lab Demos and Acq Demos—to consider what a new collective bargaining system might look like.<sup>139</sup>

The February 6, 2004, labor relations paper outlined fundamental changes not only to what collective bargaining was and what it would cover, but also to what a federal employee union was and who it could represent. For example, the paper suggested

- changing unions into fee-for-service organizations, with an obligation to provide services to employees who chose not to become dues paying members;
- providing that unions would be recognized only if a majority of the bargaining unit members (not just those who choose to vote) supported union representation;
- excluding significant new categories of employees from union representation;
- giving DOD unilateral authority to decide what issues were “significant” enough to merit collective bargaining;
- providing that DOD-wide and component-wide “issuances” would automatically override collective bargaining agreements; and

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<sup>137</sup> Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 35.

<sup>138</sup> The NSPS team had decided that it would be easier to implement the human resources parts of NSPS if the new labor relations systems were in place first: “We had to have those in place before we could begin to implement to bargaining unit employees” (see Brad Bunn (former NSPS PEO), interview by Putney, 28).

<sup>139</sup> DoD did not have anybody working on the labor relations issue until December 2003 (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 7). Labor relations flexibilities were not part of the Department's best practices work (see Brad Bunn (former NSPS PEO), interview by Putney, 11, 15). DoD left the position of Executive Director for Labor Relations unfilled for five years, filling it only in late 2007 when it was apparent that the NSPS collective bargaining provisions would be repealed (see Brittany Ballenstedt, “Pentagon Revives Labor Post,” *National Journal*, September 29, 2007).

- redefining collective bargaining as a 60-day “consultation,” after which management could implement any proposed changes.<sup>140</sup>

None of these proposals had been publicly discussed in any phase of the hearings or discussions leading up to the enactment of the NSPS legislation.

The union reaction was predictably swift and outraged. Within a week, the unions had initiated a campaign of demonstrations and grass roots lobbying efforts beginning with a rally at the Capitol and the circulation of a pledge to fight against the DOD proposal.<sup>141</sup> On February 11, 2004, the new President of the American Federation of Government Employees (AFGE), testifying at a hearing on unrelated legislative proposals, launched an all-out attack on the proposal:

During the debate over the legislation, AFGE repeatedly warned that if Congress gave Secretary Rumsfeld the authority sought that he would abuse that power, and indeed he has. ... Mr. Rumsfeld would replace ... collective bargaining agreements with regulations that he issues unilaterally. In his blueprint, he decrees that management issuances, whatever that is, will supersede contracts. ... The pillars of this system outlined by DOD will be management by fear, intimidation, and coercion, and the resulting loss to the public’s interest will be discrimination, cronyism, favoritism, and patronage.<sup>142</sup>

A two-day meeting between DOD and the federal employee unions in late February was equally confrontational. Union notes from the meeting assert that DOD officials refused to explain how the proposed labor relations provisions were related to national security, why they were consistent with the NSPS statute, or what problems they were intended to address. The notes continue:

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<sup>140</sup> Department of Defense, “National Security Personnel System: Pre-Collaboration Labor Relations System Options” (Arlington, VA: NSPS Program Office, February 6, 2004).

<sup>141</sup> American Federation of Government Employees, AFL-CIO, “Statement of AFGE President John Gage Before the Defense Business Board Task Group on the National Security Personnel System” (Washington, DC: American Federation of Government Employees, AFL-CIO June 25, 2009), 3–4, <http://studylib.net/doc/7337436/final-version-of-doc-264815-np-gage-statement-on-nsps>.

<sup>142</sup> *Esprit de Corps: Recruiting and Retaining America’s Best for the Federal Civil Service H.R. 1601, S. 129, and H.R. 3737: Hearing Before the Subcommittee on Civil Service and Agency Organization of the Committee on Government Reform*, Serial No. 108-163, 108<sup>th</sup> Cong. (2004) (testimony of John Gage, national president, American Federation of Government Employees), 129–130, <https://www.gpo.gov/fdsys/pkg/CHRG-108hhrg94772/content-detail.html>. The union outrage was not limited to federal employee unions. On April 5, 2004, AFL-CIO President John Sweeney sent a memorandum to the principal officers of State Federations and Central Labor Councils, warning that the NSPS regulations were “an affront to the democratic principles of free trade unions” and enlisting their help in fighting the proposal (see John Sweeney, “Increased Political Attacks on Federal Employees and Civilian Workers in the Defense Department,” memorandum (Washington, DC: American Federation of Labor and Congress of Industrial Organizations, April 5, 2004), <http://www.afge171.org/DEFCON/Docs/20040405Sweeney.pdf>).



Union: We take that as non-answers, that you are unwilling to discuss the point.

Mgmt: We are here only to address how labor relations will be conducted in the future.

Union: How can we substantially ask questions or give input when we cannot understand the why or how of this concept?

Mgmt: We are not going there.<sup>143</sup>

By the end of that meeting, DOD officials reported, the unions “were downright hostile and inflammatory.”<sup>144</sup>

Congressional Democrats, many of whom had opposed the NSPS labor relations provisions from the outset, were quick to join the criticism. On February 25, the top Democrats on the key House and Senate committees sent a joint letter to the Secretary of Defense complaining that the February 6 outline contained “wholesale changes to the current federal employee labor relations system, including changes to internal union procedures, which have no relation to the Department’s national security mission” and urging that the proposal be immediately withdrawn.<sup>145</sup> This letter was followed by a letter signed by 145 Members of the House<sup>146</sup> and another signed by 17 Senators,<sup>147</sup> both urging the withdrawal of the proposal.

Senator Carl Levin, who had worked with Senator Collins in an effort to negotiate a bipartisan approach to civilian personnel reform in the previous Congress, confronted Dr. Chu with his concerns at a hearing of the SASC:

[T]he law requires the DOD to ensure that employees have the right to collective bargaining. The DOD’s initial proposal is that it will talk to the

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<sup>143</sup> American Federation of Government Employees, “DoD NSPS Meeting,” memorandum (February 26, 2004), <http://www.afge171.org/DEFCON/Docs/NSPS/20040226DoDNSPSMeeting.htm>.

<sup>144</sup> Brad Bunn (former NSPS PEO), interview by Putney, 37–38; Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 10; Crain, “The Brief, Eventful History of the National Security Personnel System,” 21. The AFGE notes relate that the meeting concluded with the statement by a union representative: “I have sat here for the last two days listening to your (expletive). I represent over 600,000 DoD employees. We are not going to be a part of this dog and pony show anymore” (see American Federation of Government Employees, “DoD NSPS Meeting”).

<sup>145</sup> Letter from Senators Lieberman, Levin, Durbin and Akaka, and Representatives Waxman, Skelton, and Davis to Secretary Rumsfeld (February 25, 2004) (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 80–82).

<sup>146</sup> Letter from Reps. Van Hollen, Wolf, et al. to Secretary Rumsfeld (March 29, 2004) (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 83–93).

<sup>147</sup> Letter from Sens. Lautenberg, Biden, et al. to Secretary Rumsfeld (April 20, 2004) (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 94–96).

unions if it wants to, but doesn't have to listen to what the unions have to say, and it won't be bound by any agreement that may be reached. That is not my definition of collective bargaining. ...

The DOD's approach, so far, is needlessly confrontational, and risks seriously undermining labor-management relations in the DOD. If the leadership of the DOD has a serious interest in fostering a constructive relationship with its civilian employees, they're going to need to start over and pursue a more constructive solution to these issues.<sup>148</sup>

The Under Secretary replied by emphasizing that the DOD proposal was intended as the start of the process, and that meetings with the unions would follow: “[T]hese are concepts. This is not an answer, not a solution, not a decision.”<sup>149</sup>

Soon, however, the negative reaction was not limited to Democrats. On March 2, Senators Warner and Collins, the Chairs of the SASC and GAC, told DOD that they would be providing “constant oversight”<sup>150</sup> of DOD's efforts to implement the legislation and that it was very important that the Department engage in a collaborative process with the federal employee unions. The next day, four Republican members of the GAC joined with Senator Levin in a letter to DOD stating that the involvement of the civilian workforce in the design of NSPS was “critical to its ultimate acceptance and successful implementation” and urging the Department to ensure “[f]ull collaboration with the Office of Personnel Management and the federal employee unions.”<sup>151</sup> Senator George Voinovich, a long-time advocate of

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<sup>148</sup> *Department of Defense Authorization for Appropriations for Fiscal Year 2005: Hearing Before the Committee on Armed Services*, S. Hrg. 108-440, Pt. 6, 108<sup>th</sup> Cong. (March 2004) (statement of Senator Carl Levin), 55, <https://www.gpo.gov/fdsys/search/search.action?sr=4&originalSearch=&st=Leadership+%26amp%3B+Management+for+Women&ps=10&na=&se=&sb=re&timeFrame=&dateBrowse=&govAuthBrowse=&collection=&historical=false>.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Department of Defense Authorization for Appropriations for Fiscal Year 2005: Hearing Before the Committee on Armed Services*, S. Hrg. 108-440, Pt. 1, 108<sup>th</sup> Cong. (March 2004) (statement of Senator Warner), 955, <https://www.gpo.gov/fdsys/search/pagedetails.action?sr=4&originalSearch=&st=Computer+Aids+for+Chemical+Engineering+%28CAC+HE%29&ps=10&na=&se=&sb=re&timeFrame=&dateBrowse=&govAuthBrowse=&collection=&historical=false&bread=true&packageId=CHRG-108shrg93571&fromState=&granuleId=CHRG-108shrg93571>.

<sup>151</sup> Letter from Senators Collins, Levin, Stevens, Voinovich, and Sununu to Secretary of the Navy Gordon England (March 3, 2004) (see Barbara L. Schwemle, *DOD's National Security Personnel System: Provisions of Law and Implementation Plans*, RL31954 (Washington, DC: Congressional Research Service, updated March 11, 2005), CRS-6, <https://fas.org/sgp/crs/natsec/RL31954.pdf>). See also David McGlinchey, “Senators Urge Pentagon to Increase Dialogue on Personnel Reform,” *Government Executive*, March 3, 2004, <http://www.govexec.com/pay-benefits/2004/03/senators-urge-pentagon-to-increase-dialogue-on-personnel-reform/16154/>; Stephen Barr, “Pentagon Scales Down, Pushes Back Introduction of Performance-Based Pay System,” *Washington Post*, January 18, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/17/AR2006011701580.html?referrer=email>; Stephen Barr, “Senators Prod Navy Secretary on Creation of Pay Systems for Civil Defense Workers,” *Washington Post*, March 15, 2004.

civilian personnel reform in the federal government, went to the Pentagon to personally express his concerns about the “hasty” and “unrealistic” manner in which the Department proposed to move forward.<sup>152</sup>

At the same time, there was dissent within the Administration itself. The implementation team, in its haste to roll out NSPS proposals and begin the implementation process, had not consulted with OPM despite the statutory requirement to do so. DOD officials felt that they had a depth of personnel expertise and knew what to do, without the need for OPM’s assistance.<sup>153</sup> Beyond that, Secretary Rumsfeld resented the role of OPM, believing that it undermined his authority over his own Department.<sup>154</sup> Now, however, congressional concerns about the Department’s implementation approach were heightened by reports that OPM had been cut out of the process.<sup>155</sup>

On March 9, 2004, OPM Director Kay Cole James wrote to Secretary Rumsfeld, urging the Department to reconsider its implementation approach. Director James identified a series of critical legal, policy, and technical issues that “have profound tactical and strategic implications” for DOD, OMB, and the Administration. She was most critical of the labor relations proposals:

[The] proposal was distributed to the Department’s unions ... amid much controversy and criticism; it too was developed without any prior OPM involvement or union input, and the unions’ negative reaction was both predictable and public. We strongly support the objective of assuring DOD’s discretion to act without being burdened by collective bargaining obligations. ... However, we believe the proposal may be contrary to law, insofar

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<sup>152</sup> *Critical Mission: Ensuring the Success of the National Security Personnel System: Hearing Before the Oversight of Government Management, the Federal Workforce and the District of Columbia Subcommittee of the Committee on Homeland Security and Governmental Affairs*, S. Hrg. 109-85, 109<sup>th</sup> Cong. (March 2005) (statement of Sen. Voinovich), 3. Secretary England understood that if the Department did not change course, Congress was likely to repeal the authority for NSPS (see Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Diane T. Putney and Alfred Beck, June 4, 2009, 15, 18, [http://history.defense.gov/Portals/70/Documents/oral\\_history/OH\\_Trans\\_ENGLANDGordon%20and%20RobertEARL6-4-2009.pdf](http://history.defense.gov/Portals/70/Documents/oral_history/OH_Trans_ENGLANDGordon%20and%20RobertEARL6-4-2009.pdf)).

<sup>153</sup> Brad Bunn (former NSPS PEO), interview by Putney, 39.

<sup>154</sup> Dr. Chu remembers the Secretary telling one congressional committee: “I don’t manage the federal civilian workforce in the Department of Defense, OPM does” (see David S. Chu, “Closing Remarks,” in Institute for Defense Analyses, *2010 Defense Economics Conference: Managing the DoD Civilian Workforce*, NS D-4315 (Alexandria, VA: Institute for Defense Analyses, 2010), 129, [http://ensa.us.com/conferences/IDA%20NS%20D-4315\\_FINAL%202010.pdf](http://ensa.us.com/conferences/IDA%20NS%20D-4315_FINAL%202010.pdf)). In the winter of 2001, OPM told government employees not to show up for work because of a snowstorm. Secretary Rumsfeld was outraged that an outside official could shut down his office (Michael Dominguez (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, April 19, 2017).

<sup>155</sup> *Esprit de Corps: Recruiting and Retaining America’s Best for the Federal Civil Service H.R. 1601, S. 129, and H.R. 3737*, House Serial No. 108-163 (colloquy between Rep. Eleanor Holmes Norton and Ronald Sanders, Associate Director of OPM for Strategic Human Resources Policy), 112–113. See also Dr. Ronald P. Sanders (Associate Director of National Intelligence for Human Capital), interview by Putney, 15: OPM had been “locked out of the room” by DoD.

as it attempts to replace collective bargaining with ‘consultation’ and eliminate collective bargaining agreements altogether. In addition, other elements of the proposal – for example, those dealing with union elections and dues withholding – lack a clear and defensible national security nexus and jeopardize those parts that do.<sup>156</sup>

Failure to correct these problems, the Director concluded, “could undermine everything we are trying to achieve with NSPS.”<sup>157</sup>

Worse still, opposition was building within DOD itself. Dr. Chu believed that the opportunity for reform would be fleeting and that swift action was the key to success.<sup>158</sup> Accordingly, he developed a strategy of “race across the bridge and burn it behind you,” hoping to get the new system developed before institutional resistance could build up.<sup>159</sup> In line with this view, the director of the NSPS Implementation Office determined that extensive coordination within the Department would take too much time, undermining the prospects of success.<sup>160</sup> A paper prepared for the DOD historian reports that the director believed that “too much cooperation, at too early a stage, would blunt the system’s transformative edge and delay its rollout.”<sup>161</sup> Her preferred plan was “to present a fait accompli quickly, then persuade or pressure others to accept the system.”<sup>162</sup>

The senior managers in the military departments who would be responsible for implementing NSPS rebelled, complaining that there was no way that they could successfully implement a new personnel system on the proposed schedule.<sup>163</sup> One DOD official

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<sup>156</sup> Letter from OPM Director Kay Cole James to Secretary Rumsfeld (March 9, 2004) (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 53–56).

<sup>157</sup> *Ibid.*, 12. See also Christopher Lee, “OPM Chief Faults Rumsfeld Plan: Defense Reconsiders Approach to Revamping Work Rules,” *Washington Post*, May 17, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A31615-2004May16.html>.

<sup>158</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 37: “... we really were only going to have any chance of succeeding by employing what you might call a Big Bang Theory. ... Given the antibodies to change, and they are significant, we had to move fast.”

<sup>159</sup> Michael Dominguez (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, April 19, 2017.

<sup>160</sup> Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 13–14; Crain, “The Brief, Eventful History of the National Security Personnel System,” 23; Rebecca Davies, “Department of Defense National Security Personnel System: The Transition to Pay for Performance” (master’s thesis, Massachusetts Institute of Technology, 2004), 53, <https://dspace.mit.edu/bitstream/handle/1721.1/17849/56606018-MIT.pdf?sequence=2>.

<sup>161</sup> Crain, “The Brief, Eventful History of the National Security Personnel System,” 20 (citing interview of Sharon Seymour, former associate director, personnel plans and programs for NSPS).

<sup>162</sup> *Ibid.*

<sup>163</sup> Michael Dominguez, “Keynote Address,” in Institute for Defense Analyses, *2010 Defense Economics Conference: Managing the DoD Civilian Workforce*, NS D-4315 (Alexandria, VA: Institute for Defense Analyses, 2010), 16, [http://ensa.us.com/conferences/IDA%20NS%20D-4315\\_FINAL%202010.pdf](http://ensa.us.com/conferences/IDA%20NS%20D-4315_FINAL%202010.pdf);

remembers: “[I]t was like a small nuclear device went off”—the military departments “saw that this was going to just blow up in our face, and we were all going to lose something that had good in it.”<sup>164</sup> Another explained that

NSPS almost died in its first months after birth [because] it was an OSD-run enterprise, so the people here at corporate headquarters were going to design it and issue it and the military services were going to just implement it. No partnership, no teamwork, no deep understanding of the complexity of this, no real appreciation for the nature of the transformational change involved. ... Big, big change like that can be conceived by a small group that are at corporate headquarters. It cannot be implemented without a serious effort at building a partnership and giving equity stake and a sense of control to the organizations that will have to live with the system that’s developed and deployed.<sup>165</sup>

Secretary of the Navy Gordon England took the lead in raising the issue with Secretary Rumsfeld, but he had support from the other military departments.<sup>166</sup>

In March 2004, the Secretary of Defense asked Secretary England to work with the unions to make sure that the transition to NSPS was handled in a fair and transparent manner.<sup>167</sup> Secretary Rumsfeld then directed a freeze in NSPS development, while the Department conducted a strategic review of the effort.<sup>168</sup> Five working groups were established to conduct the review, with OPM and the military Services as full partners. Dr. Chu and Secretary England jointly published an open letter assuring DOD employees that the Department understood the need to treat workers fairly and protect their rights and that the process for developing NSPS would be “inclusive and comprehensive.”<sup>169</sup>

On April 13, the recommendations of the strategic review were presented to the senior leaders of the Department, including Secretary Rumsfeld. The recommendations called for abandoning earlier implementation plans and undertaking a slower, more inclusive process

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David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 42.

<sup>164</sup> Pete Brown (former Executive Director, Naval Sea Systems Command), interview by John Darrell Sherwood, August 12, 2008, [http://history.defense.gov/Portals/70/Documents/oral\\_history/OH\\_Trans\\_BROWNPeter8-12-2008.pdf](http://history.defense.gov/Portals/70/Documents/oral_history/OH_Trans_BROWNPeter8-12-2008.pdf).

<sup>165</sup> Mr. Michael Dominguez (former Principal Deputy Under Secretary of Defense), interview by Richardson, 19–20.

<sup>166</sup> Michael Dominguez (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, April 19, 2017.

<sup>167</sup> *Esprit de Corps: Recruiting and Retaining America’s Best for the Federal Civil Service H.R. 1601, S. 129, and H.R. 3737*, House Serial No. 108-163 (statement of Rep. Davis of Virginia), 116–117.

<sup>168</sup> Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 13.

<sup>169</sup> David Chu and Gordon England, “An Open Letter to DoD’s Civilian Employees” (Washington, DC: Department of Defense, April 6, 2004), <http://www.afge171.org/news/2004/20040406DoDLetter.pdf>.

that would be driven by the achievement of milestones rather than arbitrary timelines.<sup>170</sup> As Secretary England later explained, “There was no possible way of implementing this in the Department the way it was being approached, and ... Congress wasn’t going to let us do it anyway, and therefore, you’d better stop what’s doing and recreate a whole new process of the National Security Personnel System.”<sup>171</sup>

The Department’s initial attempt at implementation was officially dead, but serious damage had been done. Key Members of Congress—Democrats and Republicans—were now skeptical of the Department’s ability to implement the new system in a fair and efficient manner. Federal employee unions were emboldened by their success.<sup>172</sup> As a DOD labor relations official later recalled, “we united [the] unions.”<sup>173</sup> Having never liked the idea of pay-for-performance in the first place, the unions were now on an all-out war footing, believing that they had been confirmed in their view that the primary goal of NSPS was “to destroy collective bargaining, marginalize the unions, and weaken employee protections, not to create a better personnel system for civilian employees and improve the Department’s ability to protect national security.”<sup>174</sup>

Given a second chance, the Department took a completely different approach. Secretary England was designated the Senior Executive in charge of the NSPS effort, ensuring that the NSPS effort would have hands-on leadership from the most senior levels of the Department.<sup>175</sup> Secretary England took the view that process was as important as substance:

He basically said, “Look, you know, this thing that you want to implement might be the best thing since sliced bread. But in this town, the process for

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<sup>170</sup> Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 15; Brook and King, “Enactment and Implementation of the National Security Personnel System: Policy Made and Policy Unmade,” 904; Crain, “The Brief, Eventful History of the National Security Personnel System,” 22–23.

<sup>171</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 16.

<sup>172</sup> An April 2, 2004, AFGE press release stated: “Let us not forget, downplay, or even take for granted the fact that DoD’s recent turn of direction is the result of the continuous and thunderous outpouring of outrage by federal employees ... since DoD announced its concepts paper on February 6<sup>th</sup>” (see Crain, “The Brief, Eventful History of the National Security Personnel System,” 27).

<sup>173</sup> Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 16 (quoting Timothy Curry, DoD Executive Director for Labor-Management Relations).

<sup>174</sup> American Federation of Government Employees, AFL-CIO, “Statement of AFGE President John Gage Before the Defense Business Board Task Group on the National Security Personnel System,” 4.

<sup>175</sup> Secretary England later explained the importance of his personal involvement: “People know when a deputy spends a lot of time. ... If leadership spends time, it’s important; if they don’t it’s not important” (see Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 61).

implementing it is as important, if not more important, than the end product.” In other words, if it’s not seen as inclusive, if we’re not seen as being thoughtful about people’s input, reaching out and talking to stakeholders, hearing what people’s concerns are, hearing what people have to say, then it doesn’t matter how good the system is, you’ll lose people.<sup>176</sup>

The Department took a “strategic pause” in the development of NSPS and set up a series of high-level working groups to make recommendations to Secretary England and Dr. Chu on a new way forward.

The new implementation model was based on the Department’s experience with implementing major acquisition programs. As Secretary England explained, designing and implementing NSPS was “far more complex than an aircraft carrier. With a lot more people involved.”<sup>177</sup> The Department established a Program Executive Office (PEO) based on the acquisition model and named Mary Lacey, a veteran Navy acquisition program manager, to the head the office.<sup>178</sup> The new office established Key Performance Parameters (KPPs)—a basic requirements document well-established in the acquisition system—for NSPS.

The process for developing the new KPPs was no longer limited to “a bunch of personnelists ... who were out to establish [a] decree.” Instead, Secretary England brought in managers from large organizations who “actually owned the civilian[s]” and understood the practical management problems involved in building a new personnel system from the ground up.<sup>179</sup> OPM and the military departments were made full partners in the effort, co-leading meetings and helping to staff the working groups and an Overarching Integrated Product Team (OIPT).<sup>180</sup>

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<sup>176</sup> Brad Bunn (former NSPS PEO), interview by Putney, 32–33.

<sup>177</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 29; Michael Dominguez, “Keynote Address,” 16.

<sup>178</sup> Stephen Barr, “Career Federal Worker Tapped to Oversee Pay, Personnel Overhaul at Defense,” *Washington Post*, May 25, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A53189-2004May24.html>; *Implementation by the Department of Defense of the National Security System: Hearing Before the Committee on Armed Services*, S. Hrg. 109-415, 109<sup>th</sup> Cong. (April 2005) (statement of Hon. Gordon R. England, Secretary of the Navy), 14, <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg28031/content-detail.html>.

<sup>179</sup> Pete Brown (former Executive Director, Naval Sea Systems Command), interview by Sherwood, 33, 36.

<sup>180</sup> *Implementation by the Department of Defense of the National Security System: Hearing Before the Committee on Armed Services*, S. Hrg. 109-415 (statement of Hon. Gordon R. England, Secretary of the Navy), 18 and (statement of Dan G. Blair, Acting Director, Office of Personnel Management), 21; *Critical Mission: Assessing Spiral 1.1 of the National Security Personnel System: Hearing Before the Committee on Homeland Security and Governmental Affairs*, S. Hrg. 109-927, 109<sup>th</sup> Cong. (September 2006) (testimony of the Hon. Linda M. Springer, Director, U.S. Office of Personnel Management), 7, 28–30, <http://frwebgate.access.gpo.gov/cgi->

While the previous implementation program had called for developing final regulations by August 2004 and beginning implementation for half the DOD workforce in October, the Department's new approach was "event-driven" rather than "calendar-driven."<sup>181</sup> The political drive to implement as soon as possible was replaced by a determination not to put NSPS into place before it was ready—"meaning all stakeholders have been adequately trained, the IT systems and policies and procedures have been developed and tested, and organizations are ready to make the cultural change to NSPS."<sup>182</sup>

DOD made new efforts to involve the workforce, as GAO had recommended. A new NSPS website that was established to provide key information about the effort received more than 100 million visits. DOD convened 106 focus groups and held more than 50 town hall meetings to share information with employees and gain information and insight for the deployment of the new system.<sup>183</sup> The Department conducted a series of leadership conferences to share lessons learned and identify needed changes.<sup>184</sup> This outreach process helped NSPS officials develop clear lines of communication inside and outside the Department, respond to concerns, and consider comments before developing implementing regulations.<sup>185</sup>

The new approach also allowed the Department to take the time needed to prepare a comprehensive training program to educate and prepare managers, human resources specialists, and the workforce for the new system. Michael Dominguez, the Principal Deputy

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bin/getdoc.cgi?dbname=109\_senate\_hearings&docid=f:30599.pdf; Department of Defense, "Department of Defense Human Resources Management and Labor Relations Systems; Final Rule," *Federal Register* 70, no. 210 (November 1, 2005): 66121, <https://www.gpo.gov/fdsys/pkg/FR-2005-11-01/pdf/FR-2005-11-01.pdf> (more than 120 representatives of the military Departments, DoD components, and OPM were included in working groups).

<sup>181</sup> *Critical Mission: Assessing Spiral 1.1 of the National Security Personnel System: Hearing Before the Committee on Homeland Security and Governmental Affairs*, S. Hrg. 109-927, (testimony of Secretary England), 16–17; Bunn, interview by Putney and Beck, August 14, 2008, 55–56.

<sup>182</sup> *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of Hon. Gordon R. England, Secretary of the Navy), 98.

<sup>183</sup> Department of Defense, "Department of Defense Human Resources Management and Labor Relations Systems; Final Rule," 66121; *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of Hon. Gordon R. England, Secretary of the Navy), 14, and (statement of Dan G. Blair, Acting Director, Office of Personnel Management), 20; Brad Bunn (former NSPS PEO), interview by Putney, 61–62.

<sup>184</sup> *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government: Hearing Before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee of the Committee on Homeland Security and Governmental Affairs*. S. Hrg. 110-814. 110<sup>th</sup> Cong. (July 2008) (statement of Mr. Bradley Bunn, Program Executive Officer, National Security Personnel System, Department of Defense), 86.

<sup>185</sup> *The National Security Personnel System—Is It Really Working?: Hearing Before the Readiness Subcommittee of the Committee on Armed Services*, H.A.S.C. No. 110-26, 110<sup>th</sup> Cong. (March 2007) (statements of Hon. Michael Dominguez, Principal Deputy Under Secretary of Defense for Personnel and Readiness, and Mary Lacey, NSPS Program Executive Officer), 11–12, <https://www.govinfo.gov/app/details/CHRG-110hrg37887/context>.



Under Secretary of Defense for Personnel and Readiness who headed the NSPS OIPT, testified at a 2007 hearing:

The training component of NSPS deployment is one of the most extensive civilian-focused training initiatives ever undertaken in DOD. As of February 2007, about half a million training events have taken place. In addition to training on NSPS mechanics, supervisors were trained in soft skills, how to coach, monitor, and build a team. Employees also were offered soft-skill training, how to communicate, improve writing skills, and interact with their supervisor. Importantly, training was not and is not now a one-time event. Employees raise follow-up questions and concerns, and we respond.<sup>186</sup>

DOD took a spiral approach to implementation—again, an approach proven in the acquisition system—that allowed time to correct mistakes before they undermined the system with the entire workforce. For example, the Department delayed the rollout of the first spiral of NSPS and reduced the number of employees included from 65,000 to 11,000 when it appeared that more training was needed before implementation.<sup>187</sup> NSPS PEO Mary Lacey explained:

I called for a delay ... because of my dissatisfaction with the performance management system. ... We need more time to focus on simplifying the performance management design, getting performance objectives right, and ensuring the system is simple, clear and understandable. ... Taking an approach like this leads to delays. As we learn, we stop and fix along the way. That's what we're doing right now.<sup>188</sup>

The Department subsequently made changes to training, information systems, and guidance materials in response to problems experienced in the first spiral.<sup>189</sup> Secretary England explained: “We piloted, launched it, learned from that spiral, the next spiral,

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<sup>186</sup> Ibid., (statement of Hon. Michael Dominguez, Principal Deputy Under Secretary of Defense for Personnel and Readiness), 4. See also Mr. Michael Dominguez (former Principal Deputy Under Secretary of Defense), interview by Richardson, 15: “there had to be lots and lots of training about how the system would work and how it would affect you, and then how you align your goals to this, and how you set goals that are appropriate to how much you’re being paid and therefore what you ought to be able to achieve, how you deal with those contributing factors in and around the mission. ... So a lot of training, a lot of command involvement of leaders to help people get through the scariness of this kind of a transformation.”

<sup>187</sup> Stephen Barr, “Pentagon Scales Down, Pushes Back Introduction of Performance-Based Pay System.”

<sup>188</sup> Karen Rutzick, “Pentagon to Finish Personnel System Tweaks Friday,” *GovExe.com*, February 9, 2006.

<sup>189</sup> *The National Security Personnel System—Is It Really Working?: Hearing Before the Readiness Subcommittee of the Committee on Armed Services*, H.A.S.C. No. 110-26 (statement of Hon. Michael Dominguez, Principal Deputy Under Secretary of Defense for Personnel and Readiness), 4, 13.

incorporated the improvements. ... Like you would turn a weapon system to the warriors, we would turn a new personnel system to the personnel community.”<sup>190</sup>

The Department also initiated a comprehensive communication program directed at the unions and Congress. Secretary England, who had a long and generally positive track record with the unions, reached out to key Members of Congress of both parties and held a series of lunches, dinners, and other meetings with labor leaders.<sup>191</sup> Mary Lacey, the NSPS PEO, did the same.<sup>192</sup> While Secretary England was unable to breach the unions’ opposition to NSPS, his outreach efforts lowered the temperature substantially. Meetings with the unions were still contentious, but the openness of the new leadership “had a calming effect on the unions, particularly during [the] early meetings.”<sup>193</sup>

The more deliberative process adopted by Secretary England was time-consuming. Draft regulations were not published until February 2005, final regulations were not issued until November 2005, and the initial spiral of 11,000 DOD employees did not enter NSPS until May 2006. By the end of 2008, NSPS was fully launched, with more than 200,000 DOD employees in the new system, but five years had already passed since the enactment of the statute. The Department had developed a model system for the implementation of major reform in the Department, but the Bush Administration was coming to an end without having built the support necessary to ensure that NSPS would survive without it.

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<sup>190</sup> Crain, “The Brief, Eventful History of the National Security Personnel System,” 26 (quoting Secretary England). The first spiral was “a handpicked group of people” chosen for greatest likelihood of success because “they had leaders who were passionate about the change, eager for the challenge, and ready to pioneer a new way of thinking and a new way of managing in the Department of Defense” (see Mr. Michael Dominguez (former Principal Deputy Under Secretary of Defense), interview by Richardson, 5, 13).

<sup>191</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 19.

<sup>192</sup> The Department held ten meetings to discuss system design with union representatives over a six-month period in 2004 (see Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66120; *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of Hon. Gordon R. England, Secretary of the Navy), 14. An additional 19 days of meetings took place during the formal “meet and confer” process established by the NSPS statute (see Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66122).

<sup>193</sup> Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 21 (quoting Timothy Curry, DoD Executive Director for Labor-Management Relations); Crain, “The Brief, Eventful History of the National Security Personnel System,” 27.

## 6. The NSPS Pay-for-Performance System

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The benefits of pay-for-performance systems are often assumed. For example, a widely available private sector compensation guide reports: “Everyone seems to agree that linking employee pay to performance is the most effective compensation structure to encourage organizational improvement efforts.”<sup>194</sup> One business school professor told Senators in 2008 that pay-for-performance systems “can and do increase employee understanding of what is required of them and increase both their performance and organizational outcomes”<sup>195</sup> A second professor told House Members that research supports the conclusions “that pay can be a motivating factor and that financial incentives may work more strongly in the public sector.”<sup>196</sup> He concluded: “If you are in the private sector and don’t use pay for performance, they will look at you like you are crazy.”<sup>197</sup>

A 2004 report sponsored by the IBM Center for the Business of Government contends that “money is a motivator,” and that “[r]esearch over the years confirms that people—and ultimately the organizations themselves—perform better when they are rewarded for performance.”<sup>198</sup> The report offers several possible explanation as to why monetary rewards may serve as an effective incentive for employee performance:

**Equity Theory**—Employee work efforts are affected by their view of how others are compensated. They want to be paid fairly for their contribution.

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<sup>194</sup> Rose Marie Orens and Vicki J. Elliot, “Variable Pay Programs: Pay for Results,” in *Paying for Performance: A Guide to Compensation Management*, 2<sup>nd</sup> ed., ed. Peter Chingos (New York, NY: John Wiley & Sons, 2002), 20.

<sup>195</sup> *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (testimony of Charles H. Fay, Professor, School of Management and Labor Relations, Rutgers University), 36.

<sup>196</sup> *The National Security Personnel System—Is It Really Working?: Hearing Before the Readiness Subcommittee of the Committee on Armed Services*, H.A.S.C. No. 110-26 (statement by Dr. Marick Masters, University of Pittsburgh Business School), 68.

<sup>197</sup> *Ibid.*, 10.

<sup>198</sup> Howard Risher, *Pay for Performance: A Guide for Federal Managers* (Washington, DC: IBM Center for the Business of Government, November 2004), 4, <http://www.businessofgovernment.org/sites/default/files/Pay%20for%20Performance.pdf>. However, the report noted that “There has actually been little research on the impact of pay in recent years” and that conclusions about the effectiveness of pay-for-performance practices were based on “studies that are now a couple of decades old” (p. 14).

**Expectancy Theory**—Employee work efforts depend on how they expect to be compensated. They have choices and will work hard if they expect to be adequately compensated.

**Reinforcement Theory**—The pay system needs to establish linkages between work efforts and rewards. Behaviors are more likely to be repeated if they are reinforced.

**Goal-Setting Theory**—Employees perform at higher levels when they have high, specific goals. Working to achieve them triggers intrinsic satisfaction. Rewards should reinforce goal attainment.<sup>199</sup>

However, substantial questions have been raised about the extent to which pay is an effective motivator for public sector employees. As one article notes, basic assumptions about financial incentives “are just that – assumptions. They are usually taken on faith rather than based on evidence.”<sup>200</sup> In 2004, a study by two professors from Harvard’s Kennedy School of Government concluded that pay is likely to work as an effective motivator only in circumstances where organizational goals are clear, employees work on a few well-defined tasks, results can easily be measured and attributed to one person’s effort, and employees are motivated primarily by money rather than other goals and values.<sup>201</sup> These conditions for success, the study concludes “are generally not met in the private sector, even less so in the public sector”.<sup>202</sup> In fact, the study concluded, performance pay can even

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<sup>199</sup> Ibid., 18. See also James Thompson and Beth Asch, “Compensating the Civilian Workforce,” 40 (comments of James Thompson, Associate Professor of Public Administration, University of Illinois at Chicago); National Research Council (NRC), *Pay for Performance: Evaluating Performance Appraisal and Merit Pay* (Washington, DC: The National Academy Press, 1991), 80–81, <https://www.nap.edu/read/1751/chapter/1#v>: describing expectancy theory and goal-setting theory as “well-tested” and “convincing” rationales for employee motivation.

<sup>200</sup> Jeffrey Pfeffer and Robert I. Sutton, “What’s Wrong with Pay-for-Performance,” *Industrial Management* 48, no. 2 (March/April 2006): 13.

<sup>201</sup> Iris Bohnet and Susan Eaton, “Does Performance Pay Perform? Conditions for Success in the Public Sector,” in *For the People: Can We Fix Public Service?*, ed. John Donahue and Joseph Nye, (Washington, DC: Brookings Institution Press, May 2004), 241–250. See also Janet Wiscombe, “Can Pay for Performance Really Work?” *Workforce*, August 2001, 28, <http://www.workforce.com/2001/07/29/can-pay-for-performance-really-work-live-copy/>: Pay for performance can work when it is measurable and objective and based on clear expectations. It is not likely to work when it pits employees against each other, pushes one outcome to the detriment of others or is too subjective; National Research Council (NRC), *Pay for Performance: Evaluating Performance Appraisal and Merit Pay*, 82–83: Individual incentive pay most likely to work when employees have relatively simple, structured jobs, performance goals are under the control of the employees, and performance goals are quantitative and relatively unambiguous.

<sup>202</sup> Bohnet and Eaton, “Does Performance Pay Perform? Conditions for Success in the Public Sector,” 241. See also James S. Bowman, “The Success of Failure: The Paradox of Performance Pay,” *Review of Public Personnel Administration* 30, no. 1 (2010): 70–88, <http://journals.sagepub.com/doi/pdf/10.1177/0734371X09351824>: Bowman argues that successful public sector pay-for-performance plans are an “urban legend” (p. 81).

decrease employee performance in cases where it undercuts employees' "intrinsic motivation" based on "factors like the meaning of the job, a sense of satisfaction at the accomplishment of valued tasks, and the engagement with one's values."<sup>203</sup>

Others have also warned that federal employees tend to be motivated primarily by factors other than pay,<sup>204</sup> a point that has been repeatedly documented in employee surveys conducted by MSPB.<sup>205</sup> Comptroller General David Walker explained:

I think we have to keep in mind that most of the people who come to work for the Federal Government come to work for reasons other than to maximize their net worth. They come ... because of the nature of the work, the challenge, the opportunity to make a difference, and the ability to try to achieve a better balance between work and family.<sup>206</sup>

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<sup>203</sup> Bohnet and Eaton, "Does Performance Pay Perform? Conditions for Success in the Public Sector," 246. See also Steven Kelman, "The Right Pay," *Government Executive*, May 2003, <http://www.govexec.com/advice-and-comment/viewpoint/2003/05/the-right-pay/14070/>; Sungjoo Choi and Andrew B. Whitford, "Merit-Based Pay and Employee Motivation in Federal Agencies," *Issues in Governance Studies* 63 (November 2013): 3–4, [https://www.brookings.edu/wp-content/uploads/2016/06/Choi-and-Whitford\\_Merit-based-pay\\_v11.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Choi-and-Whitford_Merit-based-pay_v11.pdf) (reaching the same conclusion).

<sup>204</sup> *The Status of Federal Personnel Reform: Hearing Before the Subcommittee on Federal Workforce, Postal Service, and the District of Columbia of the Committee on Oversight and Government Reforms*, Serial No. 110-12, 110<sup>th</sup> Cong. (March 2007) (testimony of Robert M. Tobias, Director, Public Sector Executive Education, American University), 46–47, <https://archive.org/details/gov.gpo.fdsys.CHRG-110hrg36547>. Studies show that the use of financial incentives is ineffective in the public sector, because of lack of funding (see also Robert Lavigna, "Why Government Workers are Harder to Motivate," *Harvard Business Review*, November 28, 2014, <https://hbr.org/2014/11/why-government-workers-are-harder-to-motivate>: "Research has shown that public servants find meaning in their work by making a positive difference in the lives of the citizens they serve.")

<sup>205</sup> U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement* (Washington, DC: Office of Policy and Evaluation, September 2008), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=379024&version=379721&application=ACROBAT>: The most motivated employees are those who "derive pride, inspiration, and enjoyment from their job and organization" (p. 2); "pride in one's work or workplace" is key to employee motivation (pp. ii, 7, 8). See also U.S. Merit Systems Protection Board, *Federal Employee Engagement: The Motivating Potential of Job Characteristics and Rewards* (Washington, DC: Office of Policy Evaluation, December 2012), <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=780015&version=782964&application=ACROBAT>: Tasks with "greater perceived significance" and clearer connection to organizational goals generate more effort (p. 9). Link between job and mission accomplishment is "key to motivation" (p. 15). In federal employee survey, "eight non-monetary rewards were rated as important by more Federal employees than awards and bonuses" (p. 21).

<sup>206</sup> *Expanding Flexible Personnel Systems Governmentwide*, S. Hrg. 107-151 (statement of Comptroller General David Walker), 20. See also *High Risk: Human Capital in the Federal Governments*, S. Hrg. 107-65 (testimony of Hon. David M. Walker, Comptroller General of the United States and Chief Executive Officer, U.S. General Accounting Office, Washington, DC), 13: "We will never be able to pay people in the government what they could potentially earn in the private sector, but we can offer them other things that the private sector cannot. We can offer them the ability to make a difference in people's lives. We can offer them challenging work. We can offer them a learning environment where they are learning on a continuing basis. ... We need to sell what we have to sell."

Perhaps for this reason, the architects of NSPS avoided narrow reliance on employee motivation as a justification for the new pay for performance system. The Preamble to the Final Rule implementing NSPS states: “This system does not assume that individuals are motivated by pay, but rather that we have an obligation as an employer to reward the highest performers with additional compensation—however they may be motivated to achieve excellence.”<sup>207</sup>

The Operational Requirements Document for NSPS established five KPPs for the new system: (1) develop a high-performing workforce for the Department; (2) provide for agile and responsive workforce and management; (3) ensure a credible and trusted system; (4) operate on a fiscally sound basis; and (5) include effective information technology and infrastructure support.<sup>208</sup> The new pay and performance management systems, in particular, were intended to achieve multiple objectives:

- Reduce paperwork by simplifying the job classification system;<sup>209</sup>
- Bring in new talent by providing more flexibility on starting salaries;<sup>210</sup>
- Motivate employees to achieve mission objectives by better linking pay to performance;<sup>211</sup>

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<sup>207</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66124.

<sup>208</sup> *Ibid.*, 66120. See also SRA International, Inc., *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report* (Arlington, VA: SRA International, Inc., May 15, 2009), ES-1, <http://www.dtic.mil/dtic/tr/fulltext/u2/a503182.pdf>.

<sup>209</sup> *Critical Mission: Assessing Spiral 1.1 of the National Security Personnel System*, S. Hrg. 109-927 (testimony of Hon. Linda M. Springer, Director, U.S. Office Of Personnel Management), 7: “Our classification experts reviewed procedures for classifying positions to ensure that the system was streamlined and simplified.” See also Thompson, *Designing and Implementing Performance-Oriented Payband Systems*, 21: “One problem with a grade system such as the GS is that ... a lot of time and effort is spent determining what grade a job belongs to.”

<sup>210</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66119: NSPS pay and classification system will “help attract skilled, talented workers.”

<sup>211</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 22–23: “There was very little motivation for people to excel in their jobs. ... This was about encouraging people to better performance”; *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of Hon. Gordon R. England, Secretary of the Navy), 15: Performance management proposals are “designed to foster high levels of performance”; Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66124: “We believe it [the NSPS pay-for-performance system] will inspire DoD employees to perform at their best.”

- Empower supervisors to manage their own workforces by establishing goals and rewarding employees who achieve them;<sup>212</sup>
- Enhance efficiency by making employee compensation more sensitive to market forces;<sup>213</sup>
- Increase retention of top performers by rewarding excellence and removing artificial barriers on upward pay mobility;<sup>214</sup>
- Identify poor performers to encourage them to leave the workforce by denying them automatic pay raises;<sup>215</sup> and
- Increase workforce agility by simplifying the process for reassignment, deployment, and new duties.<sup>216</sup>

## A. Performance Management

An effective pay-for-performance system requires mechanisms for performance measurement that effectively differentiate between successful and unsuccessful employees. Until an agency has “modern, effective, credible, and, as appropriate, validated performance management systems in place with adequate safeguards, including reasonable transparency and appropriate accountability mechanisms, to ensure fairness and prevent politicization and abuse,”<sup>217</sup> Comptroller General David Walker explained, it is not ready

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<sup>212</sup> *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of Hon. Gordon R. England, Secretary of the Navy), 15: NSPS performance management system “requires supervisors to set clear expectations and employees to be accountable.”

<sup>213</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule”: “Labor market conditions will also be considered when making pay-setting decisions” (p. 66119); “... the proposed pay system would be far more market-sensitive than the current pay system” (p. 66124); under the current system, “we inevitably end up underpaying employees in some occupations and overpaying others” (p. 66125).

<sup>214</sup> *Ibid*, 66119: NSPS pay system will help “retain and appropriately reward current employees.”

<sup>215</sup> SRA International, Inc., *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report: stronger link between retention/separation and performance* (p. ES-2).

<sup>216</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66119: “With broad pay bands, the Department will be able to move employees more freely across a range of work opportunities without being bound by narrowly described work definitions.”

<sup>217</sup> United States General Accounting Office, *Defense Transformation: DoD’s Proposed Civilian Personnel System and Governmentwide Human Capital Reform*, GAO-03-741T (Washington, DC: United States General Accounting Office, May 1, 2003), 4, <http://www.gao.gov/assets/110/109912.pdf>. See also *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (testimony of Charles H. Fay, Rutgers School of Management and Labor Relations, 170–171: “For any pay-for-performance to work there must be a performance management system in place with performance measures that are accepted by employees as valid and managers making ratings who are trusted by their direct reports. A valid, reliable, unbiased performance management system is a necessary (but not sufficient) condition for an effective pay-for-performance program.”

to institute pay-for-performance. Following this advice, Secretary England made the establishment of a new performance management system the centerpiece of NSPS implementation, saying: “Get the performance management system right, and everything else would follow.”<sup>218</sup>

The Civil Service Reform Act already required federal agencies to maintain performance appraisal systems to serve “as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.”<sup>219</sup> However, these systems were not working as intended. The Clinton Administration’s NPR identified a long series of factors contributing to this failure, including the following:

- Performance management systems were designed to meet multiple, sometimes conflicting purposes (performance, pay, retention, development) and, as a result, met none of them.
- Systems were government-wide, inflexible, and not responsive to the varying needs and cultures of diverse federal agencies.
- Employees reported that too frequently there was inadequate communication of performance expectations and feedback on performance.
- There were perceived inaccuracies in performance ratings, perceived rating quotas, and negative perceptions of the fully satisfactory rating.
- The performance appraisal was often threatening to employee and supervisor alike, inhibiting the opportunities for meaningful communication.<sup>220</sup>

These problems were exacerbated by a common view that performance ratings were inflated almost to the point of being meaningless. The MSPB reported in 2003 that “an increasingly large percentage of employees receive very high ratings. For example, 32 percent of GS13-15 employees received ratings of ‘Outstanding’ in FY 1991. By FY 1996, this proportion had risen to 49 percent.”<sup>221</sup> Such grade inflation has been persistent over time. A 2016 GAO report found that 74 percent of federal employees in the standard 5-

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<sup>218</sup> Crain, “The Brief, Eventful History of the National Security Personnel System,” 24 (quoting Principal Deputy Under Secretary of Defense Charles Abell).

<sup>219</sup> Establishment of Performance Appraisal Systems, 5 U.S.C. § 4302.

<sup>220</sup> “HRM03: Authorize Agencies to Develop Programs for Improvement of Individual and Organizational Performance,” in *Reinventing Human Resource Management*, Accompanying Report of the National Performance Review (Washington, DC: Office of the Vice President, September 1993), <https://govinfo.library.unt.edu/npr/library/reports/hrm03.html>.

<sup>221</sup> U. S. Merit Systems Protection Board, *The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000* (Washington, DC: Office of Policy Evaluation, September 2003), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=253631&version=253918&application=ACROBAT>.



level rating system were rated in the top two categories, “outstanding” and “exceeds fully successful.”<sup>222</sup>

As a result, federal employees and managers had little confidence in existing performance appraisal systems. In 1993, GAO reported that 20 of 21 supervisors whom they surveyed said that systems did not improve performance, and, in 1992, OPM found that only 19 percent of 31,000 employees surveyed believed that the performance appraisal system motivated employees to perform well.<sup>223</sup> Ten years later, MSPB found the situation essentially unchanged: only 20 percent of employees surveyed reported that the performance appraisal system motivated them to do a good job.<sup>224</sup>

The NSPS team set out to develop a new system that would address these problems. The NSPS system required the establishment of an annual performance plan for every employee.<sup>225</sup> The performance plans would identify specific job objectives that would be linked to organizational objectives and to DOD’s overall mission and strategic goals.<sup>226</sup> Employees would be rated on a five-point scale, based on the manner and extent to which they achieved these objectives.<sup>227</sup> In addition, a performance plan would identify “contributing factors”—such as technical proficiency, critical thinking, cooperation and teamwork, leadership, consumer focus, resource management, and communication—that could raise or lower an employee’s score.<sup>228</sup>

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<sup>222</sup> U.S. Government Accountability Office, *Federal Workforce: Distribution of Performance Ratings Across the Federal Government, 2013*, GAO-16-520R (Washington, DC: U.S. Government Accountability Office, May 9, 2016), <https://www.gao.gov/assets/680/676998.pdf>. Federal agencies have had particular difficulty identifying poor performers. GAO reported that only 0.1 percent of federal employees received “unacceptable” ratings. In some components, ratings are even higher. From 2013 through 2015, no employees in the Office of the Secretary of Defense (OSD) received an “unacceptable” rating.

<sup>223</sup> United States General Accounting Office, *Federal Performance Management: Agencies Need Greater Flexibility in Designing Their Systems*, GAO/GGD-93-57 (Washington, DC: General Government Division, February 1993), 6, <http://www.gao.gov/assets/220/217619.pdf>.

<sup>224</sup> U. S Merit Systems Protection Board, *The Federal Workforce for the 21st Century: Results of the Merit Principles Survey 2000*, 26.

<sup>225</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1940. Subchapter 1940, “Performance Management,” paragraph SC1940.5.5 (Washington, DC: Office of the Under Secretary of Defense for Personnel and Readiness, December 1, 2008), <http://cpol.army.mil/library/general/nsps-archives/docs-regs/1940DEPSEC.pdf>.

<sup>226</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66200; Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 28; Mr. Michael Dominguez (former Principal Deputy Under Secretary of Defense), interview by Richardson, 8–9.

<sup>227</sup> National Security Personnel System (NSPS), *Employee and Supervisor Guide for Performance Plans*, <http://www.armycounselingonline.com/download/NSPS%20Supervisor%20Guide%20to%20Performance%20Plans.pdf>.

<sup>228</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1940. Subchapter 1940, “Performance Management,” paragraph SC1940.5.6.

This rating system, by itself, was not necessarily better or worse than other performance appraisal systems used in the federal government. DOD's mission of providing for the national defense today and into the future is not easily quantified. Not surprisingly, the program and policy objectives of its organizational components and the job objectives of individual DOD employees are often difficult to measure as well.<sup>229</sup> Moreover, any performance measurement system must balance individual achievements against organizational achievements, short-term goals against long-term goals, and best efforts against actual outcomes achieved. For this reason, the success or failure of any performance evaluation system in the Department depends almost entirely on the work of those who are charged with implementing it. Managers have to manage.

What distinguished the NSPS system from its predecessors was the degree of effort that went into ensuring the full engagement of DOD managers and employees. DOD consciously set out to establish a performance management system<sup>230</sup> founded on continual engagement between supervisors and employees.<sup>231</sup> The engagement process began with a dialog over performance objectives and expectations<sup>232</sup> and continued through periodic

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<sup>229</sup> Congressional Budget Office, "A Review of the Department of Defense's National Security Personnel System" (Washington, DC: Congressional Budget Office, November 2008), 22, <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/11-26-nsps.pdf>: Measuring output is more difficult in the public sector because performance cannot always be gauged by financial outcomes such as net revenues or sales. See also Department of Defense, "Department of Defense Human Resources Management and Labor Relations Systems; Final Rule," 66155: Performance criteria should be objective and measurable, but, "due to the breadth of missions and types of work performed in DoD," this "may not always be" possible; *The Status of Federal Personnel Reform*, Serial No. 110-12 (testimony of Robert M. Tobias, Director, Public Sector Executive Education, American University), 40: "Agencies and agency leaders find it difficult to reduce their mission achievement or outcome to clear and measurable standards."

<sup>230</sup> Unlike a traditional performance appraisal system, a performance management system does not treat employee appraisals as a one-time, backward-looking event. Instead, this system seeks to establish a comprehensive process in which managers engage with employees on a continuous basis to establish work objectives that are linked to organizational goals and manage performance through real-time coaching and feedback (see Howard Risher and Charles Fay, *Managing for Better Performance: Enhancing Federal Performance Management Practices* (Washington, DC: IBM Center for the Business of Government, 2007), 12–18, <http://www.businessofgovernment.org/sites/default/files/RisherFayReport.pdf>). See also Office of Personnel Management, *2016 Federal Employment Viewpoint Survey: Governmentwide Management Report* (Washington, DC: Office of Personnel Management, 2016), 18, [https://www.fedview.opm.gov/2016FILES/2016\\_FEVS\\_Gwide\\_Final\\_Report.PDF](https://www.fedview.opm.gov/2016FILES/2016_FEVS_Gwide_Final_Report.PDF): "As a rule, meaningful performance feedback can never be a 'check-the-box' activity."); U.S. Merit Systems Protection Board, *The Power of Federal Employee Engagement*, 42: "An organization's performance management program can be an effective communication tool that is also important for engagement to flourish."

<sup>231</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 55–56, 61–62.

<sup>232</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1940. Subchapter 1940, "Performance Management," paragraph SC1940.5.3.

feedback and interim reviews of employee performance,<sup>233</sup> employee self-assessments,<sup>234</sup> supervisory assessments,<sup>235</sup> communication of ratings results,<sup>236</sup> and ratings appeals.<sup>237</sup> NSPS required managers “to do the hard work of coaching, mentoring, performance feedback and importantly, setting goals and objectives that are clear, understandable, compelling to people.”<sup>238</sup> The NSPS PEO explained: “They are talking about performance, results, and mission alignments.”<sup>239</sup>

In fact, the NSPS performance management system was so labor intensive that managers and employees complained that the effort detracted from mission productivity and impinged on personal time:

In the GS system, my involvement in appraisal was about an hour per year. My shop is undermanned now. Now, I have to put in 40–50 hours per year on (my) appraisal and my boss is putting in 40–60 hours per year on me. And because of NSPS, I can’t meet my objectives.

Under NSPS, you have a minimum of 13 pages. That is a metric on how time-consuming this is for everybody involved. One of the challenges is how to master that and keep up with the high ops tempo in headquarters.

I’ve spent more overtime on NSPS than any other project. My worry is finding time to really focus on NSPS.

Pay for performance requires you to spend time with employees, and there are not enough hours in a day.<sup>240</sup>

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<sup>233</sup> Ibid., paragraph SC1940.6.3.

<sup>234</sup> Ibid., paragraph SC1940.9.2.

<sup>235</sup> Ibid., paragraph SC1940.9.3.

<sup>236</sup> Ibid., paragraph SC1940.11.3.3.

<sup>237</sup> Ibid., paragraph SC1940.13.

<sup>238</sup> *The National Security Personnel System—Is It Really Working?*, H.A.S.C. No. 110-26 (statement of Secretary Dominguez), 21.

<sup>239</sup> *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814, (testimony of Bradley Bunn, Program Executive Officer, National Security Personnel System, U.S. Department of Defense), 10.

<sup>240</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-31–3-32. See also Brittany Ballenstedt, “Freedom to Manage: Under New Defense Personnel System, the Cost of Liberty Is High,” *Government Executive*, January 1, 2008, <http://www.govexec.com/magazine/features/2008/01/freedom-to-manage/26021/>: A Navy senior executive “was telling first-line supervisors to anticipate spending 40 to 60 hours per employee in the first year of NSPS” and noting that “the amount of time devoted to managerial duties won’t necessarily taper off” after that, because if managers “are engaging in effective conversations with employees at least four times per year ... 40 to 60 hours is not unrealistic”; Wendy Ginsburg, *Pay-for-Performance: The National Security Personnel System*, RL34673 (Washington, DC: Congressional Research Service, September 17, 2008), CRS-13, <https://fas.org/sgp/crs/natsec/RL34673.pdf>13 (citing reports that DoD supervisors and managers would need to spend 40 to 60 hours per employee per year on performance evaluations and ratings, including at least four conversations with each employee annually); *Improving*

Despite these demands, a plurality of NSPS supervisors believed that the time required to develop good performance plans, discuss and assess performance, and give feedback to employees was worthwhile.<sup>241</sup>

This managerial focus resulted in a more credible distribution of employee ratings. In contrast to the grade inflation in prior performance evaluation systems, only 5 percent of NSPS employees received “outstanding” ratings, while 57 percent received the median rating of 3 for “valued performers.”<sup>242</sup> The reduction in grade inflation did not come without pain, however, since employees who had routinely received ratings of 4 or 5 under the previous system did not react well to the lower ratings. In 2008, the NSPS PEO reported that employees who received lower ratings under NSPS worried about the consequences of the rating if they tried to move to a non-NSPS organization.<sup>243</sup> The overall effect of the change was “a decrease in morale” and a threat to the “self-esteem and identity as professionals” of previous high-mark performers.<sup>244</sup>

## B. Pay Banding

In line with the successful China Lake, Lab Demo, and Acq Demo programs, NSPS adopted a pay banding approach to employee pay decisions. Some experts warned that successful pay banding experiments were all “relatively small in scale”<sup>245</sup> and applied to “homogeneous workforces”<sup>246</sup> and that scaling the system up to cover all of DOD’s diverse 700,000 employee civilian workforce would be difficult.<sup>247</sup> With the success of the Lab

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*Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (statement submitted for the record by The Federal Managers Association), 193–194: “It is not uncommon for the rating cycles to take upwards of ... fifty percent of a manager’s time. ... We have heard that there are simply not enough hours in the day to accomplish one’s day-to-day job duties as well as the performance evaluations.”

<sup>241</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 4-34: 40–44 percent agree or strongly agree that time is worthwhile; 29–33 percent disagree or strongly disagree.

<sup>242</sup> *Ibid.*, 2-5.

<sup>243</sup> *Ibid.*, 3-9.

<sup>244</sup> *Ibid.*, 3-9.

<sup>245</sup> Risher and Fay, *Managing for Better Performance: Enhancing Federal Performance Management Practices*, 7.

<sup>246</sup> Thompson, *Designing and Implementing Performance-Oriented Payband Systems*, 7.

<sup>247</sup> *An Overlooked Asset: The Defense Civilian Workforce*, S. Hrg. 108-100 (opening statement of Senator Voinovich), 2. See also *An Overlooked Asset: The Defense Civilian Workforce*, S. Hrg. 108-100 (statement of Mr. Walker), 23: “At the same point in time I think we have to recognize there is a scale issue. Less than 5 percent of DOD’s workforce has been involved in these demonstration projects, so you’re going from 5 percent to a 100 percent, and obviously that’s not something that’s going to happen in one fell swoop or overnight”; *Transforming the Department of Defense Personnel System*, S. Hrg. 108-185 (testimony of Paul C. Light, Professor of Public Service, New York University), 47: (It [China Lake] is an unusual place filled with very talented and creative people. ... You can’t really imagine going from

Demo and Acq Demo programs, however, pay banding had come to be seen as *the* approach to pay reform for federal civilians.

In August 2003, the National Academy for Public Administration (NAPA) published a report entitled *Broadband Pay Experience in the Public Sector*. The report identified 15 federal and state government entities that had initiated broadband pay systems and pronounced that “broadbanding and pay-for-performance currently are in the forefront of federal compensation discussions.”<sup>248</sup> The report did not identify or discuss any approach to pay-for-performance other than pay banding.<sup>249</sup>

Advocates for federal pay-for-performance systems argued that pay banding was the wave of the future in the private sector as well. For example, a pay-for-performance guide published by the IBM Center for the Business of Government in 2003 contended that major corporations were abandoning traditional pay-for-performance models in favor of pay bands because more traditional pay-for-performance systems (which used narrower job classifications and pay ranges) had failed to provide sufficient flexibility to respond market pressures and reward individual skills and contributions. The report concluded, “It seems at this point that the trend to adopt banded salary systems will continue.”<sup>250</sup>

As is too often the case, the federal government appears to have jumped onto a bandwagon just as it began to lose momentum and remained on the same course a decade later when other organizations had already begun to move on. According to NAPA, General Electric became the first large private sector company to experiment with broadbanding in 1989. Other prominent companies followed, including AT&T and IBM, and, within a decade, roughly 30 percent of Fortune 500 companies reported having banded salary systems.<sup>251</sup>

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China Lake to 750,000 employees overnight, nor from the 3,500 employees at GAO, who are all knowledge workers of a kind, to going to the full DoD workforce overnight.”)

<sup>248</sup> National Academy of Public Administration, *Broadband Pay Experience in the Public Sector*, ii, 1.

<sup>249</sup> Ibid. Private sector alternatives include pay ranges for specific positions, pay ranges for groups of jobs (i.e., grades), and a mixture of grades and ranges-by-position. See also PayScale, *2017 Compensation Best Practices Report* (Seattle, WA: Payscale, 2017), [https://www.payscale.com/content/report/2017-compensation-best-practices-report.pdf?\\_ga=2.191818090.1702190470.1506608328-1789973257.1506608328](https://www.payscale.com/content/report/2017-compensation-best-practices-report.pdf?_ga=2.191818090.1702190470.1506608328-1789973257.1506608328).

<sup>250</sup> Risher, *Pay for Performance: A Guide for Federal Managers*, 21. See also James E. Colvard et al., *Civilian Workforce 2020: Strategies for Modernizing Human Resources Management in the Department of the Navy* (Washington, DC: National Academy of Public Administration, August 18, 2000), 41, <http://www.dtic.mil/get-tr-doc/pdf?AD=AD100955540>: advocating broadbanding and performance-based pay interchangeably as “well-known compensation tools, used broadly by the private sector”.

<sup>251</sup> National Academy of Public Administration, *Broadband Pay Experience in the Private Sector* (Washington, DC: Center for Human Resources Management, July 2003), 2, [http://www.napawash.org/images/reports/2003/03\\_06BroadbandPayExperiencePrivateSector.pdf](http://www.napawash.org/images/reports/2003/03_06BroadbandPayExperiencePrivateSector.pdf).

By the time that NSPS was under consideration in 2003, however, problems had begun to surface, and private sector interest in broadbanding had leveled off. In July 2003, NAPA reported that

Companies that were among the first to switch to broadbanding now realize that they have, to use a word from one conversation, a ‘hodge-podge’ of jobs in each band. Managers and employees have trouble understanding why jobs are grouped in the same band. They also have realized that managers do not find upper and lower band limits (which typically are not referred to as maximums and minimums) useful when making salary decisions. The problems have diminished the initial enthusiasm for broadbanding and prompted companies to refine the way they design and manage banded systems.<sup>252</sup>

By 2017, a survey of the compensation practices of 7,700 private sector companies revealed that only 3 percent still used broadband systems. The survey characterized broadband pay structures as a “remnant of early compensation structures” and “a dying breed.” For companies “wondering how to be more nimble,” the survey concluded, “the message is simple: ditch the broadbands.”<sup>253</sup>

When pay bands were used by private sector companies, the bands were carefully tailored to the needs of the company and its workforce. The trend over time was toward more, narrower pay bands, with large companies using about 10 pay bands.<sup>254</sup> Most private sector systems also focused on managing employees within “job families,” which could be used to focus career growth and competency development.<sup>255</sup> Private sector pay banding systems focused predominantly on executives and officer workers. Only 20–40 percent of pay banding systems covered “nonexempt” hourly workers, and virtually none covered union employees.<sup>256</sup>

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<sup>252</sup> Ibid. See also Montoya and Graham, *Modernizing the Federal Government: Paying for Performance: Broadbanding most likely to work in organizations that have specific characteristics, including “flattening structure and/or declining functional boundaries; having a strong performance-based culture and an effective performance management system; ... and having a well-designed, accurate budgeting and allocation system”* (p. 26).

<sup>253</sup> PayScale, *2017 Compensation Best Practices Report*, 26. See also Mykkah Herner, “Which Compensation Structure is Right for Your Company?,” *PayScale*, May 8, 2017, <http://www.payscale.com/compensation-today/2017/05/compensation-structure-right-company>: “Broadbands: the structure of yesteryear.”

<sup>254</sup> National Academy of Public Administration, *Broadband Pay Experience in the Private Sector*: For example, American Express used 9 pay bands for 90,000 to 100,000 employees; Daimler Chrysler used 10 pay bands for 15,000 employees; Harley Davidson used 8 pay bands for 2,500 employees, IBM used 10 pay bands for 320,000 employees, and Johnson & Johnson used 10 pay bands for 50,000 employees (pp. 23–26).

<sup>255</sup> Ibid. American Express, AT&T, IBM, and Nortel Networks all built their systems around job families (pp. 23, 25, 27).

<sup>256</sup> Ibid., 17.

DOD, by contrast, designed a system that lumped the entire GS workforce of the Department into just four career groups: standard, scientific and engineering, medical, and investigative and protective services. Each career group was subdivided into three or four pay schedules (reflecting career stages) and three or four overlapping pay bands. In practice, the vast majority of DOD employees fell into just a few categories: 72 percent were in the “standard” career group;<sup>257</sup> 60 percent were in the “professional” pay schedule;<sup>258</sup> and 69 percent were in pay band 2.<sup>259</sup>

Collapsing so many employees into just a handful of pay categories was intended to ensure the greatest flexibility possible for DOD managers. However, this approach put DOD at risk of having an incoherent “hodge-podge” of jobs grouped together without a hierarchical structure to guide career and compensation decisions. In contrast to the private sector experience, the Department intended eventually to include even wage-grade employees—whose hourly rates were set on the basis of market surveys—in the new system. One advocate of pay-for-performance in the federal government later lamented this approach:

Few companies have workforces the size of the Defense Department’s, but they cannot match the number, diversity, and geographic dispersion of DOD’s units. DOD is a unique conglomerate; its many units have different missions, cultures, and management styles. No large, highly diversified company would try to force-fit a uniform, rigid salary system in every business unit.<sup>260</sup>

The Department attempted to address the issue of overly broad pay bands by authorizing its components and subcomponents to develop “business rules” to manage groups of occupations and positions differently within the same pay band, taking into account factors such as existing internal salary levels, complexity of work, scope and duties of positions, mission criticality, difficulty filling positions, and external market salary levels.<sup>261</sup> These internal business rules could establish unique pay schedules, including pay ceilings and

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<sup>257</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 1-6; Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 17.

<sup>258</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 2-2.

<sup>259</sup> *Ibid.* See also Defense Business Board, *Review of National Security Personnel System*, Report to the Secretary of Defense (Washington, DC: Department of Defense, July 2009), [http://dbb.defense.gov/Portals/35/Documents/Reports/2009/FY09-6\\_Review\\_Of\\_The\\_National\\_Security\\_Personnel\\_System\\_2009-7.pdf](http://dbb.defense.gov/Portals/35/Documents/Reports/2009/FY09-6_Review_Of_The_National_Security_Personnel_System_2009-7.pdf).

<sup>260</sup> Howard Risher, “Learning from NSPS Failure: Pay Pools Doomed DoD’s Personnel System,” *Federal Times*, May 24, 2010, 23.

<sup>261</sup> National Security Personnel System, *Managing Compensation under NSPS: A Guide for Managers and Supervisors* (Washington, DC: Department of Defense, March 2007), 11, <http://cpol.army.mil/library/general/nsps-archives/docdir/Final-Comp-Guide-for-Production.pdf>.

floors (known as “control points”) for a set of occupations or positions within a pay band.<sup>262</sup> They could also establish criteria for new-hire salaries, promotions, reassignments, and reductions in force (RIFs) for such occupations or positions.<sup>263</sup>

The use of business rules to address these issues preserved maximum flexibility for local managers to make decisions about compensation and rewards that were best suited for their own workforces but could be frustrating to employees, some of whom felt that key elements of the process were hidden from them. The preamble to the final rule implementing NSPS noted the problem: “A commenter likened control points to ‘invisible barriers that prevent most employees from ever reaching the top of their band.’ ... A number of other commenters also expressed similar concerns about control points.”<sup>264</sup>

### C. Pay Pools

The use of broad pay bands in an organization the size of DOD, even with internal business rules and control points, raised potential equity and affordability problems. Individual supervisors were likely to have different standards, leading to inequitable treatment of similarly situated employees across the Department. Some supervisors might abuse the flexibility afforded by the system and give in to personal and cultural biases in favor of friends or people who were more like them. Moreover, the inclination of federal managers toward inflated ratings, if left unchecked, could push a large number of employees toward the top of pay bands, raising the overall cost of civilian personnel compensation to the Department.<sup>265</sup>

The Department sought to address these concerns by establishing calibration committees, known as “pay pools,” to ensure the fairness and consistency of employee ratings and translate those ratings into pay decisions. Pay pools grouped employees together based on organizational structure, with an average size of 112 employees and a median size of 85 employees.<sup>266</sup> Each pay pool was run by a “pay pool panel”—a board of management

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<sup>262</sup> Ibid., 11–15.

<sup>263</sup> Ibid., Appendix G (Compensation Rules and Business Rules Template). See also Appendices C (Determining Salaries), D (Salary Setting Approval Matrix), E (Recruitment and Relocation Incentives Checklist, and F (Promotions and Reassignments), which provide guidance on business rules for determining salaries, recruiting and relocation, promotions and reassignments.

<sup>264</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66147. During site visits by NSPS evaluation teams, DoD employees expressed uncertainty and confusion about how to advance within the wide bands of the NSPS system (see SRA International, SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-2).

<sup>265</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 47.

<sup>266</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 2-1: The largest pay pool, in the Navy, covered 2,465 employees.



officials with responsibility for the organizations and functions in the pay pool—under the oversight of a more senior “pay pool manager.”<sup>267</sup> Higher level “Performance Review Authorities” were established to ensure consistency among multiple pay pools within a DOD component, command, or field activity.<sup>268</sup>

Each pay pool received a set amount of money to allocate for performance-based pay raises and bonuses. Pay pool funds came from three sources: (1) the amount historically spent in the GS system for within-grade increases, step increases, and promotions between grades, (2) the amount that would have been available for an annual adjustment under the GS system, less the amount of any across-the-board pay increase approved by the Secretary, and (3) the amount historically spent for performance-based cash awards. Because amounts spent for GS pay raises covered by the first element varied from year to year and unit to unit, based on the demographics of the workforce, the Secretary established annual minimums for such funding.<sup>269</sup>

The use of GS funding levels as a reference point for NSPS funding was consistent with the NSPS authorizing statute, which sought to protect NSPS employees from budget cuts by requiring the Department to ensure that the overall amount allocated for the compensation of NSPS employees would no less than the amount that would have been available under the GS system.<sup>270</sup> In 2005, Secretary England told the SASC that the Department took it as a “basic covenant issue with its employees”<sup>271</sup> that budget pressures could not be allowed to reduce pay levels. It was never entirely clear, however, how the Department would be able to maintain this commitment over the long-term if—as advocates of pay-for-performance hoped—pay banding systems completely displaced GS system, leaving no external point of reference on funding issues.

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<sup>267</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1940. Subchapter 1940, “Performance Management,” paragraphs SC1940.4.2 and SC1940.4.3.

<sup>268</sup> *Ibid.*, paragraph SC1940.4.1.

<sup>269</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1930. Subchapter 1930, “Compensation Architecture Pay Policy” (Washington, DC: Office of the Under Secretary of Defense for Personnel and Readiness, December 1, 2008), paragraphs SC1930.9.2.1, SC1930.9.2.1.1, SC1930.9.2.2., and SC1930.9.2.1.3, <http://cpol.army.mil/library/general/nsps-archives/docs-regs/1930DEPSEC.pdf>. Despite these minimums, NSPS employees in the OSD and the defense agencies received payouts that were significantly higher than those received by their counterparts in the military departments (see Stephen Losey, “Is DoD’s New Pay System Fair? Early Data Shows Gaps by Race, Age, Agency,” *Federal Times*, August 11, 2008, 11; Stephen Losey, “Race Still a Factor in DoD Pay Raises,” *Federal Times*, June 8, 2009, 1.)

<sup>270</sup> 5 U.S.C. § 9902(e)(4) (2002) (as codified by the National Defense Authorization Act for Fiscal Year 2004, SEC. 1102).

<sup>271</sup> *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of Secretary England to a question by Senator Lieberman), 87. See also Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66125.

The inclusion of annual pay adjustments in pay pool funding was particularly controversial because it meant that NSPS employees would not necessarily receive the across-the-board pay raises—often thought of as cost of living increases (COLAs)—that were approved by the President and Congress for other federal employees. One expert on pay-for-performance systems explained in Senate testimony, “Employees expect their salary to be held at least constant against market as long as they meet standards. When pay-for-performance is used in lieu of market adjustments employees feel management is trying to put one over on them.”<sup>272</sup>

The funds available in a pay pool were allocated to employees largely on the basis of their performance ratings. Employees with a rating of 3 (“valued performers”) were eligible for one or two shares; employees with a rating of 4 (“exceeds expectations”) were eligible for three or four shares; and employees with a rating of 5 (“role model”) were eligible for five or six shares. However, this system provided no consistent value associated with a job rating. Highly rated employees in a pay pool with many poor performers could expect larger pay raises than similar employees working in a strong pay pool.<sup>273</sup> There was no need for a forced distribution under the pay pool system. The share process self-corrected against rating inflation because as the number of high ratings in a pool increased, the value of each share would decrease.<sup>274</sup>

Employees in the upper half of the evaluation range (e.g., “high 4s”) usually received the higher number of shares, and employees in the lower half of the range (“low 4s”) generally received the lower number of shares.<sup>275</sup> However, this was not always the case,

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<sup>272</sup> *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (testimony of Charles H. Fay, Rutgers School of Management and Labor Relations), 171.

<sup>273</sup> Congressional Budget Office, “A Review of the Department of Defense’s National Security Personnel System,” 22.

<sup>274</sup> National Security Personnel System, *Managing Compensation under NSPS: A Guide for Managers and Supervisors*, 28. See also Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66146: “A share-based system does not result in forced distribution of ratings, since a share-based system does not rely on the distribution of ratings to control costs.” The unions and some employees believed that NSPS used a forced distribution of ratings to ensure against grade inflation (see *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (statement of Mr. Gage to a question posed by Senator Akaka), 39). See also SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-6, 3-16 (employee perceptions of forced distribution). However, the NSPS rules expressly prohibited the use of a forced distribution (see Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1940. Subchapter 1940, “Performance Management,” paragraph SC1940.10.2) and the wide range of average ratings across pay pools demonstrates the absence of any standard ratings distribution (see SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 2-20 (histogram showing average pay pool ratings distribution)).

<sup>275</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 2-5–2-6.

because non-performance factors could be considered in allocating shares. These factors could include the employee's position in the rate range, the level and complexity of work performed, other compensation received during the period, market-based salary levels, attrition and retention rates for critical personnel, and overall contribution to the mission of the organization.<sup>276</sup> For this reason, a lower rated employee could receive a greater pay increase than a higher rated employee, even within the same pay pool.<sup>277</sup>

After determining the number of shares to be awarded, the pay pool manager would determine the value of each share, as a percentage of employee pay, based on the amount of funding available in the pay pool.<sup>278</sup> Shares could be paid out either as pay increases or as one-time bonuses.<sup>279</sup> Internal business rules established by individual pay pools addressed the mechanics of pay decisions, including pay pool funding, share assignment, payout distribution, and the division of payouts between pay raises and bonuses.<sup>280</sup>

Because these business rules varied from organization to organization and were not widely published, employees felt that they lacked basic information about the way the pay pools worked, contributing to the impression that NSPS was a "black box."<sup>281</sup> Employees could see inconsistencies between pay pools on ratings and payout distributions and did not understand: "All organizations are doing it differently. Different criteria for the payout process and the input and who has the say on what."<sup>282</sup> This lack of understanding led to concerns about "unfair advantage and reward" and instilled a "sense of mistrust and doubt among many employees." A focus group convened by the NSPS PEO complained: "It is unclear how the payout decisions are made – how do they decide what percentage goes to salary and what percentage go to bonuses? This is very important. There are long-term impacts for these decisions.' [Much agreement]"<sup>283</sup>

Employee transparency concerns were heightened by the fact that pay pools could and often did overrule the rating recommendations of line supervisors and managers.

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<sup>276</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1940. Subchapter 1940, "Performance Management," SC1940AP1. Appendix 1 to Subchapter 1940, 25.

<sup>277</sup> See National Security Personnel System, *Managing Compensation under NSPS: A Guide for Managers and Supervisors*, 29 (lower-rated employee assigned more shares due to relative positions in salary range).

<sup>278</sup> Department of Defense, "Department of Defense Human Resources Management and Labor Relations Systems; Final Rule," 66145 (section 9901.342).

<sup>279</sup> *Ibid.*, section 9901.342(b)(2).

<sup>280</sup> National Security Personnel System, *Managing Compensation under NSPS: A Guide for Managers and Supervisors*, Appendix G.

<sup>281</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-17.

<sup>282</sup> *Ibid.*, 3-18.

<sup>283</sup> *Ibid.*, 3-16.

Employee ratings were not finalized until approved by the pay pool manager—leading to circumstances in which line managers were required to sign employee ratings that did not reflect their own assessments of employee performance. Employers and supervisors were dissatisfied with this process:

Employees by and large wanted to know how their direct supervisors rated their work and were not satisfied by either the lack of explanation or the prohibition placed upon supervisors to not share their recommended ratings. Some supervisors and employees saw supervisors' authority diluted by the pay pool panel process ...

[A] number of supervisors were resentful of the pay pool panel process. They indicated they felt they had lost their authority over their employees as they had to justify ratings to a body of assessors, as well as accept this body's final judgment by signing their own name to the changes made.<sup>284</sup>

Moreover, pay pool members were prohibited from disclosing any information related to pay pool discussions and deliberations, to recommended and final ratings, or to salary and bonus decisions.<sup>285</sup>

Pay pools were intended to enhance confidence in the pay-for-performance system by ensuring against abuses and providing fairness and consistency in ratings across the Department. Because of the lack of transparency, however, they played into the hands of opponents of pay-for-performance systems. An AFGE flyer, distributed to union members in 2008, claimed that the pay pool process was secretive and unfair:

**NSPS is not transparent.** ... NSPS is very complicated with most key decisions made in the dark and kept secret. For example, how much money other pay pools receive, how much you receive in salary versus cash bonus ... the decision on your rating -- are all decisions that will be made behind closed doors under NSPS.

**Who is rating your performance?** Not your supervisor. ... Even though the supervisor has prepared your performance rating, the supervisor is not allowed to reveal it to you ever. Not then – not later. Instead, the recommendation goes to a group of pay pool managers who don't work with you and don't know your performance but can change your rating for their own reasons, including if there are too many high ratings.<sup>286</sup>

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<sup>284</sup> Ibid., 3-16, 3-20.

<sup>285</sup> National Security Personnel System, "Pay Pool Management Products and Tools: Pay Pool Nondisclosure Statement," <http://cpol.army.mil/library/general/nsps-archives/paypool.html>. In December 2008, the NSPS PEO issued guidance stating that employees have a legal entitlement to receive the recommended ratings of their first-level supervisors; however, this information was only required to be provided upon employee request (see Defense Business Board, *Review of National Security Personnel System*, 12.)

<sup>286</sup> American Federation of Government Employees, *AFGE News for DoD Employees*, September 19, 2008, 2, [http://www.afge171.org/DEFCON/Docs/NSPS/200809019-NSPS\\_fall08\\_tabloid.pdf](http://www.afge171.org/DEFCON/Docs/NSPS/200809019-NSPS_fall08_tabloid.pdf).

AFGE President John Gage told Senators that the pay pools “do whatever they want” on ratings and salary decisions without providing any information to the supervisor or the employee. He added: “If this is transparent—employees are not fools, Senator. They understand that the supervisor’s rating, which should be the employee’s performance matched to that performance plan, has nothing to do with the real rating he is going to get or the money he is going to receive.”<sup>287</sup>

In the absence of clear information about the basis for pay pool decisions, many employees concluded that their final ratings were more closely linked to the quality of their supervisors’ writing than to the quality of their own performance.<sup>288</sup> One employee told an NSPS PEO evaluation team: “Our boss was not allowed to tell us why our rating was changed. They weren’t told why. They weren’t allowed to tell us. The word transparency has taken us in the opposite direction.”<sup>289</sup> After NSPS fell apart, at least one expert traced the failure back to the pay pool system:

The fatal flaw was the untested notion of pay pools. In every other sector, the policies associated with budgeting and deciding increases conform to the text books. . . . The pay pools violated one of the primary tenets of salary management – employees need to know what they can expect.<sup>290</sup>

## D. Other Pay Mechanisms

The NSPS performance management, pay banding, and pay pool mechanisms were designed to link pay to performance, ensuring that those who made the greatest contribution to the Department’s mission would receive the greatest reward. The architects of the NSPS pay system also hoped to enhance DOD’s ability to respond to market pressures by paying more to recruit and retain workers whose services were in greater demand outside

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<sup>287</sup> *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (statement of Mr. Gage to a question posed by Senator Akaka), 39. See also statement submitted for the record of Federal Managers Association, arguing that the lack of transparency on pay pool decisions “creates a difficult environment” by undermining communication and trust between managers and employees (p. 194).

<sup>288</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-7–3-8. See also *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (testimony of Charles H. Fay, Professor, School of Management and Labor Relations, Rutgers University), 37–38: “Calibration committees should not be negotiating ratings or awards. When bonuses appear to employees to be a function of the negotiating skill of their manager . . . the whole system loses any value in motivating those employees.”

<sup>289</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-18. See also Peter Levine, “Civilian Compensation Reform: NSPS,” in Institute for Defense Analyses, *2010 Defense Economics Conference: Managing the DoD Civilian Workforce*, NS D-4315 (Alexandria, VA: Institute for Defense Analyses, 2010), 30, [http://ensa.us.com/conferences/IDA%20NS%20D-4315\\_FINAL%202010.pdf](http://ensa.us.com/conferences/IDA%20NS%20D-4315_FINAL%202010.pdf): comments of DoD manager Gary Bliss: the net effect of the pay pool approach was to “completely obfuscate the relationship between an individual’s performance as judged by their supervisor and the rating that they finally got.”

<sup>290</sup> Risher, “Learning from NSPS Failure: Pay Pools Doomed DoD’s Personnel System,” 23.

the Department and paying less to workers whose skills were not in demand.<sup>291</sup> The implementing issuance establishing the NSPS pay system states that it is DOD policy not only to link pay to performance, but also to ensure “appropriate consideration of both national and local rates paid by employers in the private sector.”<sup>292</sup>

The goals of pay-for-performance and pay-to-market are not necessarily mutually consistent. Career fields that are in high demand outside the Department—such as information technology and medicine—can be expected to include a mix of high and low performers. On the other hand, some of the Department’s hardest working and best performing employees are likely to be in DOD-unique career fields that are not in high demand outside the Department. For this reason, a system that focuses exclusively on pay-for-performance may not be successful in responding to market pressures and vice versa.<sup>293</sup>

The Department addressed the potential conflict between performance-based pay and market-based pay with a series of mechanisms intended to provide flexibility to respond to market pressures.

- First, instead of providing for the single, government-wide annual increase (COLA) required for other federal employees, NSPS anticipated that the Secretary would make separate “rate range adjustments” for different pay bands and career groups, based on market conditions.<sup>294</sup>
- Second, instead of providing the same locality pay to all employees in a region, like the GS system, NSPS authorized the Secretary to provide “targeted local market supplements,” based on occupation or other factors, to address recruitment or retention issues unique to a particular region.<sup>295</sup>

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<sup>291</sup> Dr. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by the author, April 12, 2017; David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 44–45. The final rule implementing NSPS explained: “The current practice under the General Schedule of increasing pay for all employees by the same amount results in the overpaying of employees in some occupations and the underpaying of employees in other occupations” (see Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66142.)

<sup>292</sup> Department of Defense, *Department of Defense Civilian Personnel Manual*, DoD 1400.25-M, SC1930. Subchapter 1930, “Compensation Architecture Pay Policy,” paragraph SC1930.3.1.

<sup>293</sup> See Thompson, *Designing and Implementing Performance-Oriented Payband Systems*, 15: Pay systems must balance internal, external, and contribution equity goals.

<sup>294</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66141 (section 9901.322).

<sup>295</sup> *Ibid.*, 66140 (section 9901.304 (definition of “targeted local market supplement”)) and 66144 (section 9901.333).

- Third, NSPS authorized DOD to set the starting rate of pay for new hires “anywhere within the assigned pay band,”<sup>296</sup> after giving consideration to market factors including salaries offered by other employers and the “desired competitive position” of the agency.<sup>297</sup>
- Fourth, NSPS authorized managers to use flexible pay increases associated with promotions and reassignments “to ensure valued workers remain with your organization.”<sup>298</sup>
- Finally, NSPS authorized retention incentives of up to 25 percent of basic pay—or even more in rare circumstances—to retain an employee with “unusually high or unique qualifications.”<sup>299</sup>

Given enough time, these mechanisms might have succeeded in giving the Department’s compensation structure a more market-based orientation. As long as NSPS operated alongside the old GS system, however, the ability of NSPS employees to compare their annual pay raises to those of GS employees made it difficult for the Department to make market adjustments that increased pay raises for one group of employees at the expense of another. In the brief period that NSPS was in effect, DOD rarely used market-based flexibilities, and these flexibilities appear to have had a negligible impact on the Department’s overall salary structure.

The Department reduced its own market flexibility by providing the full amount of the government-wide COLA to all NSPS employees in the first NSPS performance cycle.<sup>300</sup> The Department planned to apply 50 percent of the COLA to performance-based raises in the second NSPS performance cycle and base all raises on performance thereafter.<sup>301</sup> However, Congress intervened, requiring that NSPS employees receive at least 60 percent of the COLA, and DOD chose to allocate the remaining 40 percent to performance

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<sup>296</sup> Ibid., 66149 (section 9901.351).

<sup>297</sup> National Security Personnel System, *Managing Compensation under NSPS: A Guide for Managers and Supervisors*, 16.

<sup>298</sup> Ibid., 21.

<sup>299</sup> Ibid.

<sup>300</sup> *Critical Mission: Assessing Spiral 1.1 of the National Security Personnel System*, S. Hrg. 109-927 (statement of NSPS PEO Mary Lacey to Senator Collins ), 14. This action was viewed as a one-time event, however, because automatic pay adjustments reduced the amount of money available to reward individual performance and the Department’s ability to respond to market trends (see *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (prepared statement of Dan Blair, Acting OPM Director), 22).

<sup>301</sup> Ballenstedt, “Freedom to Manage: Under New Defense Personnel System, the Cost of Liberty Is High.”

pay pools rather than to market-based rate adjustments for targeted career groups.<sup>302</sup> Congress also changed the law in 2007 to require that all NSPS employees receive the same locality pay raises as GS employees, eliminating the Department's ability to use these funds for targeted local market supplements.<sup>303</sup>

The NSPS market mechanisms for rewarding existing employees through promotions and changed assignments were perceived by many as being *less* effective than the old civil service system. In particular, collapsing multiple pay grades and steps into a few broad pay bands meant that far fewer promotions were available to employees. Some employees complained that the promotion opportunities and career progression patterns in NSPS were not comparable to the old GS system.<sup>304</sup> Others expressed concern that any change within a pay band was considered a “reassignment”—with a maximum 5 percent pay raise<sup>305</sup>—even if substantial new duties were involved. As a result, employees concluded that there was little incentive under NSPS to assume a supervisory position.<sup>306</sup>

The market flexibilities offered by NSPS may have made it easier for the Department to attract skilled candidates as new hires by offering them salaries more commensurate with their experience.<sup>307</sup> Even here, however, there were problems: the morale of some existing employees was undermined by this market mechanism because these employees felt disadvantaged by the ability of outside hires to negotiate higher starting salaries.<sup>308</sup> One supervisor told an NSPS PEO evaluation team: “I personally think this is an outrage. These are key positions. Being able to attract leadership is critical. Not every position should be

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<sup>302</sup> 5 U.S.C. § 9902(e)(7) (as codified by the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3 (2008), SEC. 1106). In accordance with this provision, NSPS employees received annual adjustments of 1.5 percent (60 percent of the government-wide increase of 2.5 percent) in 2008 and 1.74 percent (60 percent of the government-wide increase of 2.9 percent) in 2009 (see National Security Personnel System, “January 2008 NSPS Payout Fact Sheet,” [http://www.dodfire.com/pay/FactSheet\\_2008.pdf](http://www.dodfire.com/pay/FactSheet_2008.pdf); National Security Personnel System, “January 2009 NSPS Payout Fact Sheet,” [http://cpol.army.mil/library/general/nsps-archives/docs-comp/NSPS\\_Fact\\_Sheet\\_2009\\_Payouts\\_2008-12-22.pdf](http://cpol.army.mil/library/general/nsps-archives/docs-comp/NSPS_Fact_Sheet_2009_Payouts_2008-12-22.pdf); Stephen Barr, “Defense Begins Transition to Merit-Based Pay,” *Washington Post*, September 17, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/16/AR2007091601300.html>).

<sup>303</sup> 5 U.S.C. § 9902(e)(8) (amended by National Defense Authorization Act for Fiscal Year 2008, SEC. 1106).

<sup>304</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-13.

<sup>305</sup> National Security Personnel System, *Managing Compensation under NSPS: A Guide for Managers and Supervisors*, 21.

<sup>306</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-15.

<sup>307</sup> *Ibid.*, 3-10–3-11.

<sup>308</sup> *Ibid.*, 3-11.



filled from outside; sometimes internal employees are in the best position to fill these positions.”<sup>309</sup>

## E. Assessment

The architects of NSPS sought to develop a single system that was flexible enough to meet the full range of the Department’s civilian personnel needs in a manner that was efficient and equitable—a tall order for such a large and diverse workforce. Moreover, by trying to solve such a wide range of personnel problems with a single system, NSPS established multiple points of failure, ensuring that skeptics and opponents of the new system would always be able to focus on shortcomings while ignoring successes.

By several measures, the NSPS pay-for-performance system was a striking success. Over a period of just three years, a Department that has frequently been unable to field even a simple business system upgrade without major system glitches and user resistance managed to bring 211,000 employees into an entirely new personnel system without any pause or perceptible adverse effect on ongoing DOD programs and operations. The initial spiral of 11,000 employees faced technical issues with the performance management system and with the IT system that had been designed to support it; however, with the total commitment of the Department’s senior leadership, these problems were quickly overcome.<sup>310</sup>

Overall, NSPS achieved some of its objectives while falling short on others. While far from a perfect system, it appears to have outperformed the old GS in several areas. An assessment of NSPS performance against its original objectives demonstrates the mixed nature of the record:

- *Objective 1: Reduce paperwork by simplifying the job classification system.* NSPS dramatically simplified the job classification system. A senior career DOD human resources manager testified in 2006: “[U]nder the current general schedule system, there are 400 OPM classification standards. Under NSPS, there will be only 15. So I can see that there’s going to be tremendous amount of savings on our part, when we implement NSPS. It will be simpler and much more timely and less effort involved by our staff in the future.”<sup>311</sup>

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<sup>309</sup> Ibid., 3-15.

<sup>310</sup> Crain, “The Brief, Eventful History of the National Security Personnel System,” 31–32.

<sup>311</sup> *Preparing for Transition: Implementation of the National Security Personnel System: Hearing Before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee of the Committee on Homeland Security and Governmental Affairs*, S. Hrg. 109-814, 109<sup>th</sup> Cong. (April 2006) (testimony of Jeffrey Wataoka, Director Human Resources Service Center Pacific, Department of the Navy), 13.

- *Objective 2: Bring in new talent by providing more flexibility on starting salaries.* The track record of NSPS was mixed. Some managers reported that the flexibility offered by NSPS allowed them to become more competitive in recruiting more highly skilled employees. Others, however, complained of hiring delays due to pay negotiations, difficulties hiring for specific pay ranges and specialty positions, and challenges caused by internal business rules that limited their flexibility.<sup>312</sup> Overall, most NSPS employees and senior leaders did not believe that the system had improved the hiring of new employees or the quality of applicants.<sup>313</sup>
- *Objective 3: Motivate employees to achieve mission objectives by better linking pay to performance.* The track record of NSPS was mixed. Most NSPS employees agreed that their performance appraisals were a fair reflection of their performance<sup>314</sup> and that their performance appraisals gave them the information they needed to understand what they had to do to improve their ratings.<sup>315</sup> Moreover, most NSPS employees understood how their work related to their organization's goals and priorities<sup>316</sup> and had a sense of personal empowerment with regard to work processes.<sup>317</sup> On the other hand, many NSPS employees believed that the predominance of "3" ratings had hurt employee morale.<sup>318</sup> A study by the NSPS PEO concluded: "Findings from employee focus groups and senior leader interviews generally agree [with survey results showing that] employees [are] more unsure than sure that NSPS has resulted in improvements relative to GS, such as strengthening the link between pay and performance, improving pay levels, and recognizing and rewarding performance."<sup>319</sup>
- *Objective 4: Empower supervisors to manage their own workforces by establishing goals and rewarding employees who achieve them.* NSPS does not appear to have been successful in empowering supervisors. Managers and employees generally agreed that the time required to develop good performance plans, discuss and assess performance, and give feedback to employees was

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<sup>312</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 3-10-3-11, 5-5.

<sup>313</sup> *Ibid.*, 4-23 (35–40 percent of employees disagreed with the statement that "NSPS has improved hiring new employees," while only 15–20 percent agreed) and 5-5 (senior leaders and supervisors generally believe that neither the quality of applicants nor employee performance has changed).

<sup>314</sup> *Ibid.*, 4-15 (55–75 percent agree, 15–25 percent disagree).

<sup>315</sup> *Ibid.*, 4-16 (55–75 percent agree, 15–30 percent disagree).

<sup>316</sup> *Ibid.*, 4-5 (80–85 percent agree, 5 percent disagree).

<sup>317</sup> *Ibid.*, 4-6 (50–60 percent agree, 20–25 percent disagree).

<sup>318</sup> *Ibid.*, 3-9.

<sup>319</sup> *Ibid.*, 5-1.

worthwhile.<sup>320</sup> Far from feeling empowered, however, many supervisors felt that they were undercut by pay pools, which rejected their recommendations and undermined their credibility with employees.<sup>321</sup> Moreover, the lack of transparency of business rules and the pay pool process undermined employee confidence that rewards were based on merit.<sup>322</sup>

- *Objective 5: Enhance efficiency by making employee compensation more sensitive to market forces.* NSPS, in the short time available to it, did not make civilian compensation responsive to market pressures. Tools such as market-based pay increases and targeted local market supplements were not used and were subsequently withdrawn in whole or in part by Congress. Market factors could be considered in setting salaries for new hire salaries, but the availability of this tool for new employees created a sense of unfairness for existing employees. The NSPS PEO study states: “Many employees believe that salaries are more market-sensitive for new hires, allowing organizations to recruit employees with high-level expertise more effectively. However, because salaries are not market-sensitive for existing employees, some perceive inequity.”<sup>323</sup>
- *Objective 6: Increase retention of top performers by rewarding excellence and removing artificial barriers on upward pay mobility.* NSPS had a generally positive record on this issue. Roughly half of NSPS employees expressed satisfaction with the recognition that they received for doing a good job, while only a quarter were dissatisfied.<sup>324</sup> Similarly, close to half of NSPS employees agreed that the system rewarded creativity and innovation, while less than 30 percent disagreed.<sup>325</sup> As one employee in a focus group for the NSPS PEO study explained: “If someone is a valued employee, you don’t have to wait to give that person a raise. This is a positive for employees who really deserve more money.”<sup>326</sup> On the other hand, the study found that “managers identified retaining supervisors, perceived pay inequities between current and new employees, top-of-pay-band pay caps, tailoring vacancy announcements within broad pay bands, and ratings inflation as challenges to retention.”<sup>327</sup>

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<sup>320</sup> Ibid., 4–34.

<sup>321</sup> Ibid., 3–16, 3–20.

<sup>322</sup> Ibid., 4–36.

<sup>323</sup> Ibid., 5-2.

<sup>324</sup> Ibid., 4-13.

<sup>325</sup> Ibid., 4-14.

<sup>326</sup> Ibid., 3-10.

<sup>327</sup> Ibid., 3-11.

- *Objective 7: Identify poor performers and encourage them to leave the workforce by denying them automatic pay raises.* The NSPS performance management system showed signs of success in addressing poor performers. In 2007, for example, 297 out of 10,000 NSPS employees (2.9 percent) were rated less than fully successful, dramatically more than the 150 out of 250,000 non-NSPS employees (0.06 percent) who received unacceptable ratings.<sup>328</sup> Employees “expressed general ambivalence as to whether NSPS [was] better or worse than their previous system for dealing with conduct and discipline.”<sup>329</sup> However, Commanders, Directors, and other senior leaders believed that NSPS provided increased ability to address poor performance, creating optimism that the Department would be able to remove them from the workforce over time.<sup>330</sup>
- *Objective 8: Increase workforce agility by simplifying the process for reassignment, deployment, and new duties.* The track record of NSPS was mixed. Supervisors expressed “appreciation for the increased flexibility in making assignments,”<sup>331</sup> but this flexibility was undermined by backlogs at personnel centers, which resulted in reported delays of up to eight months for reassignments at some locations.<sup>332</sup> Employees also referenced the 5 percent limit on pay increases associated with reassignments as a discouraging factor and worried that some employees would “game” the system to gain added pay.<sup>333</sup> Overall, employees surveyed showed “a reluctance to credit NSPS for any improvement” and believed that NSPS was worse than the previous system for hiring, placement, and promotion.<sup>334</sup>

By far, the biggest problem faced by the NSPS pay system was growing employee resistance. By February of 2008, a plurality of NSPS employees believed that the new system was worse or much worse than the previous system.<sup>335</sup> In September, GAO found that the longer employees served in NSPS, the more they disliked it, and expressed concern that growing discontent could lead to the system’s failure.<sup>336</sup>

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<sup>328</sup> Ibid., 2-24.

<sup>329</sup> Ibid., 5-8-5-9.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid., 3-2, 3-10.

<sup>332</sup> Ibid., 3-5.

<sup>333</sup> Ibid., 3-12, 3-15.

<sup>334</sup> Ibid., 5-5-5-6.

<sup>335</sup> Ibid., page 4-33 (28-50 percent say NSPS is worse or much worse; 14-17 percent say it is better or much better).

<sup>336</sup> Stephen Losey, “GAO Worries about Growing Contempt for NSPS,” *Federal Times*, September 15, 2008, 4.

The negative employee views extended to virtually every aspect of NSPS. A plurality of NSPS employees thought that the system was worse on hiring, placement and promotions; worse on pay levels; worse on performance management; worse on labor-management relations; worse on employee recognition and rewards; worse on workforce shaping; and worse on employee conduct and discipline than the previous system.<sup>337</sup> Perhaps most alarming of all was the fact that the longer NSPS was in effect, the more employees believed that NSPS would have an overall negative impact on DOD personnel practices.<sup>338</sup>

Change is always difficult in an institution as big and bureaucratic as DOD, and the comprehensive nature of NSPS gave employees many potential targets for dissatisfaction. With time, however, NSPS probably would have overcome these negative employee perceptions. Some of the early problems experienced by NSPS would have been worked out through minor changes and adjustments to the system. Employees would likely have come to accept other shortcomings. Federal employees have, after all, been living with the shortcomings of the GS system for the last four decades.

The Department's experience with the Lab Demo and Acq Demo programs showed that employee criticism at the outset had gradually changed to acceptance and then approval over a period of five to seven years.<sup>339</sup> This probably would have been the case with NSPS as well. In fact, a pay-for-performance system established for the Senior Executive Service (SES) at about the same time as NSPS—and which uses a similar approach to performance management and pay pools—successfully weathered early criticism and remains in use today.

Unfortunately for the advocates of NSPS and pay-for-performance in the federal government, the political problems caused by the Department's insistence on radical changes to labor relations and employee appeals systems meant that NSPS simply did not *have* five to seven years to prove that the new pay-for-performance approach could work. By 2009, a change in control of Congress and the election of a new President had created a new political environment. The unions, whose views had been dismissed by the Department,

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<sup>337</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 4-30–4-33. A 2013 study concluded that government pay-for-performance systems frequently result in frustration and dissatisfaction, due at least in part to the difficulty of developing objective measures of performance (see Choi and Whitford, “Merit-Based Pay and Employee Motivation in Federal Agencies,” 4).

<sup>338</sup> SRA International, Inc. *Program Executive Office (PEO), National Security Personnel System (NSPS) – 2008 Evaluation Report*, 4-43: Spiral 1.1 and 1.2 began with net favorable ratings of 35–40 percent positive and 25–30 percent negative, but rapidly lost ground, showing 20–25 percent positive and 35–50 percent negative within a year.

<sup>339</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 53; *The National Security Personnel System—Is It Really Working?*, H.A.S.C. No. 110-26, (written testimony of Max Stier, President and CEO, Partnership for Public Service), 60: The China Lake demonstration project was initially favored by 29 percent of employees; by 1998, support had grown to 71 percent of the workforce.

felt empowered. Negative employee views of the NSPS system made it vulnerable, and an inflamed political opposition ensured that it would not survive.

## 7. Labor Relations and the Collapse of NSPS

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Some senior DOD officials hoped to use the second chance afforded to the Department by Secretary England's intervention in NSPS implementation to reset the labor relations provisions and develop a more constructive relationship with the unions. Secretary England was skeptical of the need to implement performance-based pay for union workers at all. He later explained:

It was never clear to me that that was really a correct national strategy. It's very hard for people in a production line, or people repairing a vehicle, and particularly union people, to have pay for performance. That goes to the very heart of unions, which is negotiating equal pay packages for people in similar work and time. ...

I actually had some sympathy with the unions in all of this. ... The real benefit was with our non-union workforce in more skilled jobs, in more professional jobs. ...<sup>340</sup>

Mary Lacey was brought in to head the implementation effort, in part, because of her experience working with the unions as she ran the Lab Demo program in one of the Naval research laboratories. The hope was that she would be able to work through the labor relations provisions with the unions in a constructive manner.<sup>341</sup> However, she was not allowed to do so.

Instead, the NSPS team got a call from the White House and was told "here is your labor relations system." This system was not designed or developed by DOD, and the Department was not authorized to change it. To all appearances, it was a union-busting plan. Mary Lacey was given the thankless task of trying to defend a labor relations system over which she had no control.<sup>342</sup> OPM Associate Director Ron Sanders explained:

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<sup>340</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 34–35.

<sup>341</sup> Michael Dominguez (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, April 19, 2017.

<sup>342</sup> *Ibid.* See also *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (testimony of AFGE President John Gage), 46: "I have known Mary Lacey for a long time. ... we were at loggerheads ... on the collective bargaining aspects of NSPS, and we tried some negotiation. ... But it was very obvious that there just wasn't any discussion. ... And I thought that was kind of odd because Ms. Lacey and I had done a lot of business in the past. But on this

[W]e were ... basically prevented from moderation. Secretary England was savvy enough to know that unless you give a little bit to the unions, they'll get you one way or another. ... We ran up against some ideological objectives from the White House that precluded a more pragmatic approach.<sup>343</sup>

Even in the final stages of the “meet-and-confer” process before the issuance of the NSPS rule, Dr. Sanders said, the attitude of senior officials at OMB remained: “Why give? You don’t have to give. If you don’t have to give, why give?”<sup>344</sup>

During the strategic pause in NSPS implementation in early 2004, the Department abandoned many of the extraneous elements of its original NSPS labor relations proposal. No longer would it try to redefine what a union was or who it could represent. Proposals to change unions into fee-for-service organizations and change the basis on which they were recognized were dropped, as were most of the Department’s original proposals to exclude new categories of employees from union representation. When the draft rule implementing NSPS was published in February 2005, however, the proposed language still undercut nearly every aspect of employees’ collective bargaining rights.

First, the draft rule expanded the list of non-negotiable “management rights” to issues that had previously been subject to collective bargaining, including the procedures used to hire, assign, and direct employees; to assign work and make decisions regarding outsourcing; to lay off, retain, or discipline employees; and “to take whatever other actions may be necessary to carry out the Department’s mission.”<sup>345</sup> The preamble to the proposed rule stated: “The Department can take action in any of these areas without advance notice to the union.”<sup>346</sup>

Second, the draft rule prohibited collective bargaining with regard to any DOD or component “policies, regulations or similar issuances.”<sup>347</sup> “Issuances” were defined to include any “document ... to carry out a policy or procedure of the Department,” without regard to who approved it, as long as it was issued at the DOD or component level.<sup>348</sup> Not only were these issuances exempt from collective bargaining, they would automatically

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– this was a much different thing. I think DoD as an organization had their mind made up and they were going to do it their way and there was no looking back and no turning around.”

<sup>343</sup> Dr. Ronald P. Sanders (Associate Director of National Intelligence for Human Capital), interview by Putney, 48.

<sup>344</sup> *Ibid.*, 39.

<sup>345</sup> Department of Defense, “National Security Personnel System; Proposed Rule,” *Federal Register* 70, no. 29 (February 14, 2005): 7597 (section 9901.910 (a)), <https://www.gpo.gov/fdsys/pkg/FR-2005-02-14/pdf/FR-2005-02-14.pdf>.

<sup>346</sup> *Ibid.*, 7570.

<sup>347</sup> *Ibid.*, 7601 (section 9901.917(d)(1)).

<sup>348</sup> *Ibid.*, 7595 (section 9901.903).



override existing collective bargaining agreements.<sup>349</sup> In short, a collective bargaining agreement would be binding only on the union and the employees it represented. It would not be binding on the Department, which would have the power to change it at any time.

In fact, it appears that the entire approach of establishing the details of NSPS in implementing issuances and business rules rather than in the regulation itself was developed for the express purpose of avoiding consultation with the unions. OPM Director Kay Cole James, in her March 9, 2003, letter to the Secretary of Defense, laid out the approach, explaining that “the issuance of broad ‘enabling’ regulations” would put DOD “in a position to issue as many ... internal NSPS implementing directives as and when you see fit ... *without* further public comment, formal collaboration with unions, or OPM approval.”<sup>350</sup> Former OPM Associate Director Ron Sanders told the DOD historian that the whole point was to avoid the “agonizing process of consultation with the unions.”<sup>351</sup>

Employee representatives objected to these provisions at every opportunity,<sup>352</sup> telling Congress that the proposal “effectively eliminates collective bargaining” by taking previously negotiable issues, including “procedures and arrangements for overtime, shift rotation, flexible and compressed work schedules, safety and health programs, and deployment away from regular worksite” off the table.<sup>353</sup> AFGE promised to initiate “the biggest grass-roots mobilization of American workers ever seen” in opposition to the proposal.<sup>354</sup>

In the course of the meet-and-confer process, the unions noted that government-wide labor relations provisions already allowed the Department to take any action needed without prior collective bargaining in case of an emergency. When DOD argued that the existing definition of “emergency” was too narrow and constraining, the unions offered to

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<sup>349</sup> Ibid. “Any provision of a collective bargaining agreement that is inconsistent with ... DoD implementing issuances is unenforceable on the effective date of ... such issuances (7596 (section 9901.905)); Collective bargaining agreements are valid “only to the extent” that they are consistent with DoD issuances (7599 (section 9901.914(d)(3)).

<sup>350</sup> Letter from OPM Director Kay Cole James to Secretary Rumsfeld (March 9, 2004) (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 54–55 (emphasis in original)); Brad Bunn (former NSPS PEO), interview by Putney, 40.

<sup>351</sup> Dr. Ronald P. Sanders (Associate Director of National Intelligence for Human Capital), interview by Putney, 22.

<sup>352</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66128: “Without exception, employee representatives objected to the proposed labor relations regulations, both in their comments and during the meet-and-confer process.”

<sup>353</sup> *Implementation by the Department of Defense of the National Security System*, S. Hrg. 109-415 (statement of John Gage, National President, American Federation of Government Employees), 56–57. Union representatives also argued that the new National Security Labor Relations Board, established to resolve labor disputes in the Department, was not really independent (p. 57).

<sup>354</sup> Don Hale, “To All DoD Employees: The Valentine’s Day Slaughter of DoD Civilians,” memorandum (Washington, DC: American Federation of Government Employees (AFGE)), <http://www.afge171.org/DEFCON/Docs/NSPS/20050214TOALLDODEMLOYEES.pdf>.

extend it to cover any exigency “requiring action reasonably necessary to carry out the Department’s national security mission before collective bargaining concerning the action can be completed.”<sup>355</sup>

DOD rejected this proposal on the basis that DOD managers and supervisors needed the freedom to act without procedural constraints at all times:

The Department must be able to rely on the judgment and ability of managers and supervisors to make day-to-day decisions—even if this means deviating from established or negotiated procedures. Moreover, the Department’s managers and supervisor must be able to make split-second decisions to deal with operational realities free of procedural constraints.<sup>356</sup>

Even post-implementation bargaining would be too burdensome, the Department contended, because “the reality of DOD’s operational environment today is that change is constant, and as a consequence, so too would be post-implementation bargaining.”<sup>357</sup> In effect, the Department argued that because rapid action was *sometimes* called for, negotiations were *never* appropriate. The final rule implementing NSPS preserved the limitations on collective bargaining without significant substantive change.<sup>358</sup>

The DOD effort to maintain freedom of action also extended to the proposed process for employee grievances and appeals. Congress authorized the Department to establish a new appeals process that would provide NSPS employees fair treatment consistent with the merit principles. The process could be established within the Department but would have to provide for appeal to the MSPB.<sup>359</sup> To meet the statutory requirements, the Department proposed an approach that appeared to some outside observers as a Rube Goldberg

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<sup>355</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66128. See also “UDoDWC Proposal on Emergencies and Post-Implementation Bargaining,” [http://www.afge171.org/DEFCON/Docs/NSPS/20050509UDWCscope\\_of\\_bargaining.pdf](http://www.afge171.org/DEFCON/Docs/NSPS/20050509UDWCscope_of_bargaining.pdf).

<sup>356</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66128.

<sup>357</sup> *Ibid.*, 66129.

<sup>358</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66181 (section 9901.910) (implementing issuances override all collective bargaining agreements), 66123 (collective bargaining on DoD issuances prohibited) and 66181 (section 9901.910) (maintaining expanded definition of “management rights”). See also Stephen Barr, “Pentagon and Union Officials Differ on Progress, But Will Keep Talking,” *Washington Post*, May 20, 2005. <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/19/AR2005051901711.html>: reporting that Pentagon “would not budge” on collective bargaining issues. As the Preamble to the Final Rule explained: “Significant differences with many of the labor organizations remain over such issues as the scope of bargaining, implementing issuances that supersede conflicting provisions of collective bargaining agreements, the specificity of the regulations, the ability to grieve pay decisions, the use of behavior as part of performance evaluation and the use of performance in a reduction in force. These differences cannot be reconciled with the need for a contemporary and flexible system of human resources management . . .” (see Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66123).

<sup>359</sup> 5 U.S.C. § 9902(h) (as codified National Defense Authorization Act for Fiscal Year 2004, SEC. 1101).

scheme, designed not for efficiency or effectiveness, but to maximize the likelihood that management would prevail in as many appeals as possible.

Under the proposed NSPS system, employees would first take their cases to the Administrative Judges of the MSPB.<sup>360</sup> An Administrative Judge would make a “decision,” but this decision would not be final and no relief could be ordered, nor would any action against the employee be stayed.<sup>361</sup> Instead, there would be a period for DOD to review the decision and decide what to do. If the Department agreed with the decision of the Administrative Judge, it would become final, and the Department would determine whether it would serve as a precedent.<sup>362</sup> If the Department disagreed with the decision, it could remand the decision back to the Administrative Judge for reconsideration or modify or reverse the decision.<sup>363</sup> The decision be appealed to the full MSPB only after the Department acted.<sup>364</sup>

Moreover, employee appeals were to be considered pursuant to standards that were heavily weighted in favor of the Department. Judges were required to interpret the NSPS provisions “in a way that recognizes the critical national security mission of the Department” and “promote[s] the swift, flexible, effective day-to-day accomplishment of the mission, as defined by the Secretary.”<sup>365</sup> In addition, any penalty imposed by a DOD manager or supervisor would have to be upheld “unless such penalty is so disproportionate to the basis for the action as to be wholly without justification.”<sup>366</sup> If an Administrative Judge or the MSPB determined that a penalty was excessive, then “the maximum justifiable penalty”—defined as “the severest penalty that is not so disproportionate to the basis for the action as to be wholly without justification”—would have to be imposed.<sup>367</sup>

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<sup>360</sup> Department of Defense, “National Security Personnel System; Proposed Rule,” 7593 (section 9901.807(b)(2)).

<sup>361</sup> *Ibid.*, 7593 (section 9901.807(c)).

<sup>362</sup> *Ibid.*, 7594 (section 9901.807(k)(8)(i) and (ii)).

<sup>363</sup> *Ibid.*, 7594 (section 9901.807(k)(8)(iii)). The rule was silent as to who in DoD could exercise the power of modifying or reversing an Administrative Judge’s decision. See also *Implementation by the Department of Defense of the National Security System: Hearing Before the Committee on Armed Services*, S. Hrg. 109-415, 109<sup>th</sup> Cong. (April 2005) (statement of Derek B. Stewart, Director, Military and Department of Defense Civilian Personnel Issues, Government Accountability Office), 52: [T]he proposed regulations do not offer additional details on the department’s internal review process, such as how the reviews will be conducted and who will conduct them. An internal agency review process this important should be addressed in the regulations rather than in an implementing directive to ensure adequate transparency and employee confidence in the process.

<sup>364</sup> Department of Defense, “National Security Personnel System; Proposed Rule,” 7594 (section 9901.807(k)(9)).

<sup>365</sup> *Ibid.*, 7578 (section 9901.107(a)(2)).

<sup>366</sup> *Ibid.*, 7594 (section 9901.807(k)(6)).

<sup>367</sup> *Ibid.*

While this system was intended to preserve flexibility for the Department to act without external constraint, the message that it sent to employees was one of harsh and unforgiving justice. As Senator Levin complained at a 2005 hearing of the SASC:

[T]he draft regulation says that a proposed penalty against the Department of Defense employee may not be reduced on appeal unless ‘the penalty is so disproportionate to the basis for the action as to be wholly without justification.’ In those cases where the penalty is reduced, listen to this, the draft regulation says that ‘maximum justifiable penalty must be applied.’ That’s unfair. It’s harsh. It’s extreme on its face. ...

Equally important is what the draft regulation does not say. It does not require either DOD officials or reviewing authorities to take into account any of the many factors that might justify a reduced penalty, such as employees’ past record, whether the offense is intentional or advertent, the extent to which the employee was on notice or warned about the conduct in question, and the consistency of the penalty with those imposed on other employees for the same or similar offenses. ...

The message that that provision sends is that the Department is concerned only about discipline, and not interested in fairness. Even convicted criminals are not always subjected to the maximum permissible penalty... [The] Department is going to have difficulty convincing its employees that this new system will treat them fairly as long as it continues to insist that the appropriate penalty in adverse action cases is always the severest penalty.  
...<sup>368</sup>

DOD rejected these concerns and retained the appeals process largely unchanged in the final rule implementing NSPS.<sup>369</sup>

The NSPS labor relations and appeals rules preserved maximum flexibility and discretion for the Department, but that flexibility came at a high cost: the rules were never implemented.

One week after the final NSPS rule was published in the *Federal Register*, ten federal employee unions filed a lawsuit in federal court, seeking to strike down the labor relations and appeals provisions portions of the rule.<sup>370</sup> On November 16, 2005, the Administration

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<sup>368</sup> *Implementation by the Department of Defense of the National Security System: Hearing Before the Committee on Armed Services*, S. Hrg. 109-415, 109<sup>th</sup> Cong. (April 2005) (statement of Senator Carl Levin), 4-5, <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg28031/content-detail.html>.

<sup>369</sup> Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66192 (section 9901.107(a)(2) (deference to DoD)), 66209 (section 9901.807(f)(2)(ii) (penalty may not be mitigated unless “totally unwarranted,” “if mitigated, “severest penalty” must be applied)), 66209 (section 9901.807(g) (DoD right to review, remand, or revise decisions of MSPB Administrative Judges)).

<sup>370</sup> *American Federation of Government Employees, AFL-CIO et al. v. Donald H. Rumsfeld, Secretary of Defense, Complaint for Declaratory and Injunctive Relief*, Civil Action No. 05CV2183 (EGS), United

agreed to delay implementation of the labor relations and appeals provisions of NSPS until the court had an opportunity to rule on the lawsuit.<sup>371</sup> On February 27, 2006, Judge Emmet Sullivan ruled that the NSPS rules “entirely eviscerate collective bargaining,” in violation of the statute. The Judge’s ruling prohibited the Department from implementing any of the labor relations and appeals provisions of the final rule.<sup>372</sup> Over the next several months, Spiral 1 of NSPS was rolled out *without* the labor relations and appeals provisions.

The Justice Department appealed the NSPS opinion to the DC Circuit Court of Appeals, but two events in the next few months made the implementation of the proposed labor relations and appeals systems appear less likely than ever.

First, on June 27, 2006, the DC Circuit overturned the labor relations provisions in the new DHS personnel system.<sup>373</sup> The DHS statute included a provision (virtually identical to the NSPS statutory requirement) requiring DHS to ensure that employees had the right to bargain collectively.<sup>374</sup> The DHS collective bargaining rule contained provisions (virtually identical to the NSPS rule) that expanded non-negotiable management rights and provided for “Departmental issuances” to override collective bargaining agreements.<sup>375</sup> The court determined that the DHS rule violated the statutory requirement. In language that could have been taken from the union brief on the NSPS collective bargaining provisions, the court stated:

The most extraordinary feature of the Final Rule is that it reserves to the Department the right to unilaterally abrogate lawfully negotiated and executed agreements. ... If the Department could unilaterally abrogate lawful contracts, this would nullify the statute’s specific guarantee of collective bargaining rights, because DHS cannot “ensure” collective bargaining without affording employees the right to negotiate binding agreements.<sup>376</sup>

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States District Court for the District of Columbia, November 7, 2005, [http://www.afge171.org/DEFCON/Docs/NSPS/2005\\_11\\_07NSPSLawsuit.pdf](http://www.afge171.org/DEFCON/Docs/NSPS/2005_11_07NSPSLawsuit.pdf).

<sup>371</sup> Stephen Barr, “As Time Winds Down, Postal Service Bill’s Provision Wins Support,” *Washington Post*, November 17, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602199.html>.

<sup>372</sup> *American Federation of Government Employees, AFL-CIO v. Rumsfeld*, 422 F. Supp.2d, 16, (D.D.C. 2006), <https://www.courtlistener.com/opinion/2573489/american-fed-of-gov-empl-afl-cio-v-rumsfeld/>. Even national level bargaining, which had not been in dispute, was enjoined by the judge’s order (see *Critical Mission: Assessing Spiral 1.1 of the National Security Personnel System*, S. Hrg. 109-927 (testimony of Secretary England), 6).

<sup>373</sup> *National Treasury Employees Union v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006), <http://www.kentlaw.edu/faculty/mmalin/classes/PublicSectorSp09/CourseDocs/NTEUvChertoff.pdf>.

<sup>374</sup> 5 U.S.C. § 9701(b)(4) (2006).

<sup>375</sup> Management Rights, 5 C.F.R. Pt. 9701.511(a); 9701.515(d)(5) (2006).

<sup>376</sup> *National Treasury Employees Union v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006). With regard to management rights, the court found that “The right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over.

Once the DC Circuit found that these provisions violated the collective bargaining requirements of the DHS statute, it was difficult for many to see how the same Court could possibly find that the virtually identical provisions were legal under the virtually identical language in the NSPS statute.

Second, in November of 2006, Democrats gained six seats in the Senate and thirty-one seats in the House of Representatives, regaining control of both chambers. From the outset, the Administration had taken a “Republican-only” approach to NSPS, ignoring the concerns of Democrats and foregoing the opportunity afforded by the Collins bill to enact bipartisan legislation. Secretary England had rebuilt relations with Democrats but had not been allowed to address their concerns about the NSPS labor relations and appeals provisions. Now, the future of NSPS would be in the hands of leaders whom the Department had slighted for the previous three years.

Some DOD leaders saw the writing on the wall and thought it was time for the Department to try to cut its losses. The Principal Deputy Under Secretary of Defense for Personnel and Readiness, Michael Dominguez, approached Secretary England to suggest that NSPS be scaled back so that it would not apply to union-represented bargaining units. However, Secretary England rejected the change of course. In his view, one of the primary objectives of NSPS was to replace DOD’s existing patchwork of civilian personnel systems with a single system that applied to everybody. This objective was a matter of principle that he would not abandon.<sup>377</sup>

It was not long before the new Congress began to weigh in, and the concern was bipartisan. On March 6, 2007, the House Armed Services Committee (HASC) held a hearing on the subject “The National Security Personnel System – Is It Really Working?” One member of the Committee—a Republican—referred to NSPS as “another failed policy” of Secretary Rumsfeld.<sup>378</sup> At a second House hearing two days later, another Republican Congressman asked a panel of outside experts whether the new Congress should “just drop the whole idea” of NSPS or take other steps to address perceived problems.<sup>379</sup> The witnesses responded by suggesting that the focus going forward should be on getting the

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That is the result of the Final Rule adopted by DHS. The scope of bargaining under the HR system is virtually nil, especially when measured against the meaning of collective bargaining under Chapter 71.”

<sup>377</sup> Michael Dominguez (former Principal Deputy Under Secretary of Defense for Personnel and Readiness), interview by author, April 19, 2017. Secretary England’s rejection of Mr. Dominguez’ proposal to exclude union workers in the interest of uniformity appears to be at odds with his statement that the real benefit of NSPS was with the non-union workforce in more skilled jobs. However, senior leaders are often in the position of trying to reconcile competing objectives.

<sup>378</sup> *The National Security Personnel System—Is It Really Working?*, H.A.S.C. No. 110-26 (statement of Rep. Walter Jones of North Carolina), 19.

<sup>379</sup> *The Status of Federal Personnel Reform*, Serial No. 110-12 (statement of Rep. Kenny Marchant of Texas), 114.

performance management system right<sup>380</sup> and that the labor relations and appeals provisions should be repealed.<sup>381</sup> The Executive Vice President of the Partnership for Public Service explained that those provisions “stand in the way ... of the kind of employee buy-in and engagement and communication between supervisors and employees that are going to be necessary for the systems to succeed.”<sup>382</sup>

On May 18, 2007, the DC Circuit Court of Appeals surprised many observers by overturning the District Court decision that DOD’s labor relations and appeals rules had violated the NSPS statute. The court recognized that provisions of the NSPS statute “that seem to bestow a right” to collective bargaining “appear to work at cross-purposes” with other provisions that “simultaneously appear to snatch it away.”<sup>383</sup> However, the court reconciled this apparent conflict by determining that the right to collective bargaining was expressly made “subject to the provisions of this chapter” and could, therefore, be overridden by other parts of the statute.<sup>384</sup> On this basis, the court held that the statute afforded DOD “broad authority to curtail collective bargaining” until the sunset date of the labor relations provision in 2009.<sup>385</sup>

There are three important points to be understood about the D.C. Circuit’s decision. First, the Court’s decision is based on a perfectly plausible interpretation of a contradictory and unclear statute – after all, the labor relations provisions were largely written by Administration officials who specifically intended the language to authorize the creation of a dramatically new and different labor relations system. Second, the determination that the statute provided DOD with unlimited authority to curb the collective bargaining rights of its employees was at odds with the promise made by Secretary Rumsfeld and other senior DOD officials that NSPS would preserve those rights. Third, the decision came too late to save the labor relations and appeals provisions of NSPS, because Congress was already well on its way to addressing the issue itself.

On May 8, 2007 (a week before the D.C. Circuit’s decision), the HASC voted to roll back many of the authorities provided by the NSPS statute. The House bill proposed to

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<sup>380</sup> Ibid., (statements of Robert Tobias, Director, public sector executive programs, School of Public Affairs, American University; Joseph Swerzewski, former General Counsel, Federal Labor Relations Authority; Hannah Sistare, Vice President, NAPA; and Kevin Simpson, Executive Vice President, Partnership for Public Service), 114–116.

<sup>381</sup> Ibid., (statements of Charles Tiefer, former House Counsel and Professor at University of Baltimore School of Law), 115–116.

<sup>382</sup> Ibid., (testimony of Mr. Simpson), 116.

<sup>383</sup> American Federation of Government Employees, *AFL-CIO v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007), [http://www.afgelocal1345.org/NSPS\\_Decision.html](http://www.afgelocal1345.org/NSPS_Decision.html).

<sup>384</sup> Ibid.

<sup>385</sup> Ibid.

repeal authority for DOD-unique labor relations and appeals systems and reinstate full collective bargaining rights for NSPS employees.<sup>386</sup> The House language even proposed to curtail significant NSPS authorities that were completely unrelated to collective bargaining and appeals by

- revoking the authority for the NSPS performance management system and reinstating government-wide requirements for performance appraisals;
- requiring that NSPS employees receive the same annual pay adjustments (COLAs) and locality pay increases as other federal employees; and
- repealing the authority for flexible NSPS approaches to hiring, assignments, promotions, and reductions in force.<sup>387</sup>

The SASC acted two weeks later. The Senate provision was more modest than the House provision. Nonetheless, the Senate bill proposed to (1) repeal the DOD labor relations authority and reinstate collective bargaining rights<sup>388</sup> and (2) exclude “wage-grade” employees—blue collar workers who were not part of the GS and whose salaries were already established on a market basis—from NSPS.<sup>389</sup> The Senate bill provided that “implementing issuances” would be subject to collective bargaining, but softened the blow by exempting rates of pay from bargaining.<sup>390</sup>

Over the next six months, the two Committees worked out their differences. Like the House bill, the conference agreement repealed the authority for the NSPS labor relations system and for the NSPS appeals system.<sup>391</sup> Like the Senate bill, it excluded “wage-grade” employees from NSPS and preserved national-level bargaining.<sup>392</sup> The conference agreement eliminated the “meet and confer” process but preserved existing NSPS rules and exempted rates of pay from future collective bargaining requirements.<sup>393</sup>

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<sup>386</sup> National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110<sup>th</sup> Cong. (2008), § 1106(a)(1), § 1106 (a)(2), § 1106 (a)(5), and § 1106 (a)(9), as reported by the HASC. The provision further reinforced collective bargaining rights by requiring union consent before any use of national-level collective bargaining, precluding the inclusion of union-represented bargaining units in NSPS without union consent, and weakening the “meet and confer” process (§ 1106(a)(3) and § 1106(a)(8)).

<sup>387</sup> *Ibid.*, § 1106(a)(3), § 1106 (a)(5), and § 1106 (a)(9).

<sup>388</sup> National Defense Authorization Act for Fiscal Year 2008, S. 1547, 110<sup>th</sup> Cong. (2008), § 1104(b)(1), as reported by the SASC.

<sup>389</sup> *Ibid.*, § 1104(a).

<sup>390</sup> *Ibid.*, § 1104(b)(2) and § 1104 (b)(3).

<sup>391</sup> 5 U.S.C. § 9902(b) (as amended by the National Defense Authorization Act for Fiscal Year 2008, § 1106).

<sup>392</sup> *Ibid.*, § 9902(b)(4).

<sup>393</sup> National Defense Authorization Act for Fiscal Year 2008, SEC. 1106(b); 5 U.S.C. § 9902(e)(9) (as amended by the National Defense Authorization Act for Fiscal Year 2008, SEC. 1106(a)).



The conference agreement repealed DOD's authority to deviate from government-wide requirements for RIFs, but the NSPS performance management system and DOD's flexibility to address hiring, assignments, and promotions remained untouched.<sup>394</sup> Finally, the conferees agreed that NSPS employees with an acceptable level of performance would receive 60 percent of annual pay adjustments and all locality pay increases available to other federal employees.<sup>395</sup> DOD lost its authority to establish labor relations and appeals systems, but the core NSPS authority to establish a flexible new personnel system was left largely intact. The *Washington Post* quoted a congressional aide who explained: "We want them to do collective bargaining, but we want to give the Department a fair chance to show that pay for performance can work."<sup>396</sup>

For a time, it appeared that this compromise would save NSPS. The bill passed Congress by overwhelming bipartisan votes of 370-49 in the House and 90-3 in the Senate. The federal employee unions hailed the legislation as a victory, calling it "an early Christmas present from this Congress" (Ron Ault), a "light at the end of the tunnel" (Gregory J. Junemann), and "a victory for Defense workers" (Richard N. Brown)<sup>397</sup> AFGE President John Gage announced, "There haven't been many wins in our history bigger than this one."<sup>398</sup> From the DOD perspective, the legislation allowed NSPS to move forward. Over the next year, an additional 100,000 DOD employees converted from the old civil service system to NSPS.<sup>399</sup> The Department had reason to hope that it would have time to work out the bugs in the system and gain employee acceptance for the new performance management and pay-for-performance systems.

On May 22, 2008, DOD published a proposed rule implementing the legislative changes to NSPS. By far the most contentious aspect of the proposed rule was a lengthy provision defining "rates of pay," which were exempt from collective bargaining, to

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<sup>394</sup> 5 U.S.C. § 9902(b)(7) and § 9902(i)(1) (as amended by the National Defense Authorization Act for Fiscal Year 2008, SEC. 1106(a) (2008)).

<sup>395</sup> *Ibid.*, § 9902(e)(7) and § 9902(e)(8).

<sup>396</sup> Stephen Barr, "Compromise on Pentagon Pay System, Union Rights," *Washington Post*, December 10, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/09/AR2007120900897.html>. See also Peter Levine, "Civilian Compensation Reform: NSPS," 24.

<sup>397</sup> Stephen Barr, "Compromise on Pentagon Pay System, Union Rights" (quoting Ron Ault, president of the Metal Trades Department of the AFL-CIO, and Gregory J. Junemann, president of the International Federation of Professional and Technical Engineers); National Federation of Federal Employees, "Bush Signs Defense Authorization, NSPS Reform into Law," press release, January 29, 2008, <http://www.nffe.org/local178/ht/d/ReleaseDetails/i/5360>: quoting NFFE President Richard Brown.

<sup>398</sup> Brittany Ballenstedt, "Bush Signs Bill That Sends Unions Back to Bargaining Table at Defense," *Government Executive*, January 29, 2008, <http://www.govexec.com/defense/2008/01/bush-signs-bill-that-sends-unions-back-to-bargaining-table-at-defense/26180/>.

<sup>399</sup> David S. Chu (former Under Secretary of Defense for Personnel and Readiness), interview by Putney and Beck, 22: "What I think is significant about Congress's most recent action is that it decided the central elements of the system are worth preserving."

include not only the dollar amounts of pay rates, but also all of the internal business rules used to set these rates.<sup>400</sup> The preamble to the rule explained that “a rate of pay cannot be understood as simply an amount. A rate amount only has meaning in the context of the required set of conditions that define what the rate is and when it applies.”<sup>401</sup> This definition provoked outrage from the unions, who complained that the proposed rule was “dirty pool” and “an act of cynicism and defiance on DOD’s part,” designed to eliminate the right to collective bargaining just as Congress had restored it.<sup>402</sup>

DOD had painted itself into a corner. The Department had chosen to preserve maximum flexibility in the implementation of NSPS by placing only a bare bones description of the system in Department-wide regulations and leaving all of the detailed operational requirements to be established in implementing issuances and business rules. This approach would only work as long as the implementing issuances and business rules remained exempt from collective bargaining. It was not practical for DOD to conduct lengthy negotiations with the unions every time a pay pool wanted to change the control points or revise the way it allocated available funds between pay raises and bonuses.

Secretary England promised to narrow the definition of rates of pay in response to congressional concerns, but the real fix was that NSPS would simply not be extended to union employees.<sup>403</sup> In retrospect, Secretary England concluded that it was probably a mistake to try to bring union employees into NSPS in the first place:

[I]n retrospect, early on I’d have worked at just immediately excluding the unions from NSPS. I think we should’ve done that. ... Frankly, there’s 300,000, 400,000 people non-unionized that you could’ve brought into this program. That’s where the real value is anyway.

I think that the whole union thing greatly distorted everything. There was an enormous amount of energy and hours and, probably for everybody, all

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<sup>400</sup> Department of Defense, “National Security Personnel System; Proposed Rule,” *Federal Register* 73, no. 100 (May 22, 2008): 29905 (section 9901.305), <https://www.gpo.gov/fdsys/pkg/FR-2008-05-22>.

<sup>401</sup> *Ibid.*, 29888.

<sup>402</sup> *Improving Performance: A Review of Pay-for-Performance Systems in the Federal Government*, S. Hrg. 110-814 (statement of Mr. Gage), 31, and (testimony of John Gage, President, American Federation of Government Employees), 44. AFGE also initiated a “Double Cross” campaign, mobilizing its locals to seek action from Congress blocking the regulations (see American Federation of Government Employees, “NSPS Campaign: Double Cross,” September 2008, [http://www.afge171.org/DEFCON/Docs/NSPS/2008\\_09\\_17\\_NEXTSTEPSPRESENTATION.ppt](http://www.afge171.org/DEFCON/Docs/NSPS/2008_09_17_NEXTSTEPSPRESENTATION.ppt)).

<sup>403</sup> Letter from Secretary England to Senator Levin and Rep. Skelton (September 29, 2008) (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 29: promising to address the definition; Brittany Ballenstedt, “Pentagon Drops Plans to Convert Union Employees to NSPS,” *GovExec.com*, September 30, 2008, <http://www.govexec.com/defense/2008/09/pentagon-drops-plans-to-convert-union-employees-to-nsps/27783/>).

for naught at the end of the day. It was sort of tilting at windmills in retrospect. . . . Had I been smarter on day one, I would've gone to Rumsfeld and said, just make this the non-union workforce.<sup>404</sup>

With the election of a new President in 2008, the process of reexamination began again. During the campaign, candidate Barack Obama had responded to pressure from the federal employee unions with a letter expressing concerns about NSPS and promising that if he were elected, he would “substantially revise these NSPS regulations, and strongly consider a complete repeal.”<sup>405</sup> Federal employee unions expected him to meet that commitment.

Stoked by what they saw as an all-out attack on fundamental collective bargaining rights, the unions had made the complete demise of NSPS a cardinal legislative priority for more than five years. With allies back in charge of the White House and the Congress, they were not about to step back from the fight now. One union leader called NSPS “a system that is completely untenable and should never have been pursued.”<sup>406</sup> A second stated:

NSPS is the biggest affront to the federal workforce in modern history, and it is killing morale within the department. . . . The overwhelming majority of Defense workers despise NSPS. Repealing NSPS is our top legislative priority. We want it gone this year.<sup>407</sup>

When the new Congress convened, the federal employee unions lobbied for a complete repeal of NSPS, arguing that it should be possible to transition all employees back to the GS within a few months.

In the face of this determined opposition from important political allies, the incoming Administration had only a narrow window for continued civilian personnel reform. On March 16, 2009, the new Deputy Secretary of Defense, William Lynn III, announced that DOD and OPM would initiate a complete review of NSPS and that the Department would postpone any further conversions to NSPS until the review was complete.<sup>408</sup>

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<sup>404</sup> Gordon England (former Secretary of the Navy and Deputy Secretary of Defense), interview by Putney and Beck, 58.

<sup>405</sup> Letter from Barack Obama to Gregory Junemann (see Brook, Schroeder, and King, *National Security Personnel System: The Period of Implementation (November 24, 2003–January 16, 2009)*, 31); Barack Obama, letter to John Gage (September 9, 2008), <http://www.afge171.org/DEFCON/Docs/NSPS/NSPSObama.pdf>.

<sup>406</sup> Joe Davidson, “Pay-For-Performance Goes on the Defensive,” *Washington Post*, April 2, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/01/AR2009040103985.html>: quoting AFGE President John Gage.

<sup>407</sup> Joe Davidson, “Pentagon’s Personnel System Under Fire,” *Washington Post*, February 20, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/19/AR2009021903211.html>: quoting NFFE President Richard Brown.

<sup>408</sup> Joe Davidson, “Pentagon to Review Pay-for-Performance System,” *Washington Post*, March 17, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/16/AR2009031603087.html>.

On Capitol Hill, there were still Members and staff from both parties who believed that at least some of the NSPS authority should be preserved to provide the Department needed flexibility to hire talented people quickly and pay them salaries necessary to attract and retain them. Indeed, incoming OMB Director Peter Orszag informed Congress that the Obama Administration “strongly supports the concept of rewarding excellence with additional pay.”<sup>409</sup> However, this position had been weakened by years of fights over the largely unrelated issues of collective bargaining and employee appeals.

In June 2009, the HASC approved a provision terminating NSPS and requiring the return of all NSPS employees to prior personnel systems within a period of 12 months.<sup>410</sup> The SASC tried to save central elements of civilian personnel reform, making repeal contingent upon a finding by the Secretary of Defense: if the Secretary determined that termination would not be in the best interest of the Department and implemented appropriate changes, NSPS could continue.<sup>411</sup> Even in the event of repeal, the Senate bill provided that DOD would retain the authority for national level bargaining and the ability to waive civil service provisions as needed to establish effective hiring, assignment, and performance management systems.<sup>412</sup>

In July, the Defense Business Board (DBB) completed the NSPS review directed by Secretary Lynn. The DBB report supported the development of more flexible and modern performance management and pay-for-performance approaches in federal employment but identified a series of concerns with the NSPS systems. For example, the DBB found the following:

- Supervisors were frustrated by the authority of pay pools to change their ratings and require them to accept those changes.<sup>413</sup>
- The pay pool process had become “a fulcrum for criticism and suspicion,” with 40 percent of employees believing that it was not equitable.<sup>414</sup>

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<sup>409</sup> Joe Davidson, “Performance Pay for Federal Employees Still a Matter of Debate,” *Washington Post*, June 23, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062202978.html>.

<sup>410</sup> National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, 111<sup>th</sup> Cong. (2010), § 1112, <https://www.congress.gov/bill/111th-congress/house-bill/2647/text>; Joe Davidson, “Death Knell for NSPS?” *Washington Post*, June 19, 2009, [http://www.washingtonpost.com/wp-dyn/content/article/2009/06/18/AR2009061804055\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/06/18/AR2009061804055_2.html).

<sup>411</sup> National Defense Authorization Act for Fiscal Year 2010, S. 1390, 111<sup>th</sup> Cong. (2010), § 1101(g), <https://www.congress.gov/bill/111th-congress/senate-bill/1390/text>.

<sup>412</sup> *Ibid.*, § 1101(a)(2) and § 1101(c).

<sup>413</sup> Defense Business Board, *Review of National Security Personnel System*, 10–11.

<sup>414</sup> *Ibid.*, 11.

- The “collapsing” of six former grades into a single pay band that included almost 70 percent of the DOD workforce caused concerns about career and pay progression.<sup>415</sup>
- The lack of transparency in reassignments and promotion opportunities resulted in fears of cronyism and favoritism in supervisors and management.<sup>416</sup>
- The lack of standardization and transparency of business rules made the system confusing and challenging.<sup>417</sup>

If NSPS was going to be continued, the DBB concluded, it would have to be “reconstructed” from the ground up. A simple “fix” would not “address the depth of the systemic problems discovered.”<sup>418</sup> One DBB member elaborated that any new system would need a different name because the name “NSPS” had become “radioactive.”<sup>419</sup>

The DBB report was far less than the ringing endorsement that would have been needed to save NSPS from its critics. The federal employee unions insisted that the report had gotten the diagnosis right but was “way off on the cure.” NSPS would need to be repealed.<sup>420</sup> When the two Armed Services Committees met to resolve their differences, the House conferees insisted that anything less than total repeal of the NSPS provision would be unacceptable. The House would not agree to an amended statute, and no waivers of the repeal would be permitted.<sup>421</sup>

At the Senate’s insistence, the conference report authorized the Department to develop new, streamlined systems for hiring and performance management. The Department was also authorized to establish a new workforce incentive fund to help attract and retain skilled employees and to establish a new training program to help build civilian careers.<sup>422</sup> However, the House would not permit the possibility of a modified NSPS. The Department would have to start over from the beginning and build any modified systems from the ground up in close consultation with employees and their representatives.<sup>423</sup> With

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<sup>415</sup> Ibid., 13.

<sup>416</sup> Ibid., 14.

<sup>417</sup> Ibid., 15.

<sup>418</sup> Ibid., 6. The DBB also concluded that because of the history of NSPS it would not be possible to extend the NSPS system to union employees (p. 18).

<sup>419</sup> Joe Davidson, “Findings on Pay Structure Leave Some Cold,” *Washington Post*, July 17, 2009.

<sup>420</sup> Joe Davidson, “Rebuild Pay-For-Performance System, Panel Says,” *Washington Post*, August 26, 2009.

<sup>421</sup> National Defense Authorization Act for Fiscal Year 2010, Pub. L. 111-84, 123 Stat. 2190 (2009), SEC. 1113(b).

<sup>422</sup> Ibid., SEC. 1113(d).

<sup>423</sup> Peter Levine, “Civilian Compensation Reform: NSPS,” 25: The Senate would have liked to preserve the NSPS performance management system and hiring system, “but we couldn’t because even the name NSPS was too controversial at that point.”

the enactment of the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), NSPS was fully and finally repealed.

The reform provisions included in the FY 2010 NDAA proved to be of little consequence. DOD established a new Defense Civilian Emerging Leader Program but made minimal changes to hiring practices and decided not to establish the workforce incentive fund. The Department worked diligently with the unions for six years to develop a new performance management system as authorized by the bill. The problem was that the statute called for a system that would effectively link performance appraisals to bonus decisions and other performance-based actions, while the unions wanted a pass-fail system. When the effort was finally completed in 2016, the new system provided for three grades: outstanding, fully successful, and unacceptable.<sup>424</sup> The unions praised the result,<sup>425</sup> but it appeared in some ways to be a step backward from the statutory objective of better linking pay to performance.

With the repeal of NSPS, the Department was simply no longer ready to invest the energy and leadership required for comprehensive civilian personnel reform. In the best of times, it has been difficult for Democrats in Congress and the Executive Branch to advocate civilian personnel reforms that do not have the full support of the federal employee unions (although some have done so). After the demise of NSPS, however, it became nearly impossible. As an article in the *Washington Post* explained, any new reform efforts would have to contend with the suspicions and distrust generated by the fight over NSPS:

One lesson: If the new way smells anything like NSPS, it will stink to federal workers. ‘Any new system, whether at DOD or applied government-wide, cannot be viewed as NSPS 2.0 or NSPS-lite,’ Patricia Niehaus, president of the Federal Managers Association said ... “Perception is reality, and if employees believe they are being fed another NSPS, the system will be doomed from the start.”<sup>426</sup>

In many ways, the NSPS implementation effort was a model for successful reform efforts in the Department. The Department showed committed senior leadership over an extended period of time, including not only a dedicated program office reporting directly to the Deputy Secretary of Defense but engaged leaders at all levels in the military departments and defense agencies. The Department took a systematic approach to developing

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<sup>424</sup> Department of Defense, “DOD Civilian Personnel Management System: Performance Management and Appraisal Program,” DoD Instruction 1400.25, Volume 431 (Washington, DC: Office of the Under Secretary of Defense for Personnel and Readiness February 4, 2016), 7, [https://search.usa.gov/search?affiliate=dod\\_esd&query=1400.25%2C%20Volume%20431](https://search.usa.gov/search?affiliate=dod_esd&query=1400.25%2C%20Volume%20431).

<sup>425</sup> Andy Medici, “DoD to Roll Out ‘New Beginnings’ Performance Appraisal System,” *Federal Times*, May 14, 2015; The unions had advocated a “pass-fail” system with only two ratings; Stephen Losey, “DoD Task Force: Rate Civilian Employees on Pass-Fail Basis,” *Federal Times*, November 1, 2011.

<sup>426</sup> Joe Davidson, “Lessons Learned from Pay-For-Performance,” *Washington Post*, June 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/08/AR2010060804980.html>.

regulations, guidance, and training by working through teams that included experienced managers from throughout the Department and developed comprehensive outreach and training programs.

The problem was that the “big bang” approach to reform—requiring that the entire personnel system be changed at the same time—proved to be too much for the Department to achieve. The DBB was probably correct when it concluded that “In essence, NSPS attempted to accomplish ‘too much, too fast.’”<sup>427</sup> This problem was compounded by the Administration’s rigid insistence on labor relations and appeals provisions that made enemies of the unions and much of Congress and undermined employee acceptance of the system. One senior OPM official lamented, as NSPS struggled to remain viable in 2008:

I think if we had moderated our goals, while the unions still would have contested the result, they wouldn't have had nearly as much ammunition. . . . There are some pretty aggressive positions in the NSPS regs, positions that were probably defensible when you had a Republican administration and a Republican House and Republican Senate, and you're in the early days of the Global War on Terror and the Iraq war. There was a lot of momentum then and people were feeling pretty good about the long-term prospects. I wish we had 20/20 hindsight, but I think more moderation in adverse actions, more moderation in the collective bargaining rules probably would have--I can't say probably--might have resulted in a different legislative result.<sup>428</sup>

The revolutionary approach to reform may be able to achieve spectacular success if the conditions are precisely right. As the NSPS case shows, however, it is difficult to get the conditions right, and, if they are not right, the result is likely to be spectacular failure. In this case, the Bush Administration seriously underestimated the strength and staying power of the opposition to NSPS from the federal employee unions and their congressional allies, leading to such a failure. Unfortunately, the consequence of the failure of NSPS was the loss of the single greatest opportunity for comprehensive defense civilian personnel reform in more than a generation.

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<sup>427</sup> Defense Business Board, *Review of National Security Personnel System*, 6.

<sup>428</sup> Dr. Ronald P. Sanders (Associate Director of National Intelligence for Human Capital), interview by Putney, 44.

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## 8. The Road Forward

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In August 2015, Acting Under Secretary of Defense for Personnel and Readiness Brad Carson, charged by Secretary of Defense Ashton Carter with fleshing out a new initiative to shape the “Force of the Future,” circulated a draft proposal within the Pentagon that called for dramatic changes to the civilian personnel system. In language reminiscent of the arguments used to support NSPS, the draft stated:

The current General Schedule (GS) system is a 66-year-old relic. Enacted by the Classification Act of 1949, it is a system whose rigid architecture was built to support a preponderance of largely homogenous administrative and clerical positions at the time of its creation. ... Because this homogeneity nullified the need to be able to support a variety of skills and talents, a promotion structure that rewarded time in grade was built into the system. Sixty years later ... the system has not changed.<sup>429</sup>

The draft proposed the implementation of a pay-banding system for employees in professional and administrative jobs constituting 65 percent of the DOD workforce. Because this system would not have detailed definitions for grades and positions, the draft asserted, it would provide “additional managerial flexibility” and allow employees “more room to grow within each band.”<sup>430</sup>

After receiving critical comments from within the Department, Secretary Carson narrowed his approach to exclude all union employees, proposing to move the Department’s “non-bargaining unit civilian workforce from Title 5 authorities to Title 10 authorities for all personnel management actions, including hiring, determining compensation, managing performance, and promotion.”<sup>431</sup> The revised draft did not specify any details of the new system, explaining that “its goal is to provide the Secretary of Defense with the authority and flexibilities he currently lacks” to develop such systems.<sup>432</sup>

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<sup>429</sup> Department of Defense, *Force of the Future, Final Report: Reform Proposals*, report circulated for comment (Washington, DC: Office of the Secretary of Defense, August 3, 2015), 52.

<sup>430</sup> *Ibid.*, 52–53.

<sup>431</sup> Department of Defense, *Force of the Future* (Washington, DC: Office of the Secretary of Defense), 3, Draft, FOR OFFICIAL USE ONLY, posted online by *Government Executive*, September 16, 2015, [https://www.govexec.com/media/gbc/docs/pdfs\\_edit/091515cc1.pdf](https://www.govexec.com/media/gbc/docs/pdfs_edit/091515cc1.pdf).

<sup>432</sup> *Ibid.*

Without waiting for approval within the Pentagon, DOD officials discussed the revised proposal at a Round Table with the employee unions. The reaction was swift and definitive. AFGE labeled the proposal “a bad flashback” and a “retread of failed policies from the Bush administration,” asserting that NSPS “was so discriminatory and harmful to the workforce that it was repealed by Congress less than two years after taking effect.”<sup>433</sup> The International Federation of Professional and Technical Engineers (IFPTE) said that the proposal “slashes workers’ rights and is reminiscent of the discredited National Security Personnel System,”<sup>434</sup> while the United DOD Workers’ Coalition compared the effort to “the illegal overreach of the failed NSPS program.”<sup>435</sup> At the same time, multiple elements of the proposal remained under attack from the military Services and others in the Department itself.

Subsequent Force of the Future drafts watered down the civilian personnel proposal to call for a “detailed study of existing management and compensation systems, focusing on demonstration projects” to develop best practices that could form the basis for new pilots.<sup>436</sup> Eventually, even this proposal was abandoned. Six years after the demise of NSPS, the Department was far from ready to start down the same path again. The “big bang” approach to civilian personnel reform had been tried and failed and would not be revisited.<sup>437</sup>

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<sup>433</sup> Charles Clark, “Pentagon Plan to Move Civilian Workers Outside the Civil Service System Draws Fire,” *Government Executive*, September 15, 2015, <http://www.govexec.com/management/2015/09/pentagon-plan-move-civilian-workers-outside-civil-service-system-draws-fire/121043/>. See also American Federation of Government Employees, “2016 Issue Papers” (papers presented at the AFGE 2016 Legislative and Grassroots Mobilization Conference, Washington, DC, February 7–10, 2016), 9–12, 49–55, <https://www.afge.org/globalassets/documents/issue-papers/2016-issue-papers.pdf>.

<sup>434</sup> Gregory Junemann (International Federation of Professional & Technical Workers), letter to Paige Hinkle-Bowles, Deputy Assistant Secretary of Defense for Civilian Personnel Policy (September 9, 2015).

<sup>435</sup> Byron Charlton (UDWC Chairperson), letter to Secretary of Defense Ashton Carter (September 10, 2015).

<sup>436</sup> Department of Defense, *Force of the Future, Final Report: Reform Proposals*, ver. 5.0 (Washington, DC: Office of the Secretary of Defense, February 16, 2016), 58.

<sup>437</sup> The continuing radioactive nature of NSPS was further confirmed in 2017 when fourteen federal employee unions opposed the nomination of George Nesterzuk to be Director of OPM on the basis of the role he played in the development and implementation of NSPS. The unions stated: “Mr. Nesterzuk was one of the principal architects of NSPS, which turned out to be a discriminatory personnel system created out of extreme ideological disdain for the due process worker protections and merit system principals that define our modern day civil service. Not surprisingly, NSPS was ultimately found to be illegal by a federal court, and Congress took the corrective actions necessary by repealing it as a part of the FY 2010 NDAA, but not before hundreds of millions, if not billions of taxpayer dollars were wasted on Mr. Nesterzuk’s botched NSPS experiment” (see American Federation of Government Employees (AFGE) et al., letter to Senators Ron Johnson and Claire McCaskill (July 26, 2017), <http://www.nffe.org/ht/a/GetDocumentAction/i/145594>). Less than a week later, Mr. Nesterzuk withdrew his nomination (see George Nesterzuk, letter to President Trump (July 31, 2017), [https://cdn.govexec.com/media/gbc/docs/pdfs\\_edit/80117ew1.pdf](https://cdn.govexec.com/media/gbc/docs/pdfs_edit/80117ew1.pdf)).

Neither the repeal of NSPS nor rejection of a “new NSPS” meant the end of pay-for-performance in DOD, however. The Lab Demo program, which had been exempted from NSPS, was not affected by the repeal. The Acq Demo program, which had been absorbed by NSPS, was reinstated as a free-standing program. The Defense Civilian Intelligence Personnel System (DCIPS), which was established in parallel with NSPS, was allowed to continue after a brief pause. The SES pay-for-performance system, which was similar to NSPS in many ways, continued to operate without change. Subsequent reviews of these programs show that they provide helpful flexibilities for hiring and retention but still struggle to gain employee support.

A 2010 review of DCIPS conducted by NAPA found that the design of the system was “fundamentally sound” but that its implementation had been flawed. Senior intelligence component managers generally liked the DCIPS performance management system, the link of pay to performance, and the flexibility in setting pay for new hires through pay banding.<sup>438</sup> DCIPS employees agreed that DCIPS provided an improved link between individual performance objectives and organizational goals and priorities<sup>439</sup> but were nonetheless deeply skeptical of the validity of DCIPS performance ratings.<sup>440</sup> The report concluded:

Overall, employees have lost confidence in DCIPS performance ratings for various reasons, including the belief that there is little relationship between ratings and performance. Only slightly more than half of DCIPS survey respondents who rated this item believed their supervisors rated them fairly. This perception of unfairness affects morale and severely undermines the system.<sup>441</sup>

The panel recommended that DCIPS be continued but that the Department “act with urgency to address the implementation issue that have been identified.”<sup>442</sup>

A 2016 RAND review of the Acq Demo program concluded “that higher levels of contribution were associated with higher salaries, more rapid salary growth, more promotions, and a greater likelihood of retention.”<sup>443</sup> Starting salaries and overall salaries were higher in Acq Demo than in the GS system, providing important recruiting and retention

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<sup>438</sup> Edwin Dorn et al., *The Defense Civilian Intelligence Personnel System: An Independent Assessment of Design, Implementation, and Impact* (Washington, DC: National Academy of Public Administration, June 2010), 94–95, <http://www.napawash.org/wp-content/uploads/2010/08/FINAL-DCIPS-REPORT-June-2010.pdf>.

<sup>439</sup> *Ibid.*, 97–98.

<sup>440</sup> *Ibid.*, 84–85.

<sup>441</sup> *Ibid.*, 86.

<sup>442</sup> *Ibid.*, xiii.

<sup>443</sup> Jennifer Lamping Lewis et al., *2016 Assessment of the Civilian Acquisition Workforce Demonstration Project*, RR1783 (Santa Monica, CA: RAND Corporation, 2017), xx, 53–67, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1700/RR1783/RAND\\_RR1783.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1783/RAND_RR1783.pdf).

advantages for the acquisition workforce.<sup>444</sup> As a result of rapid escalation of salaries, however, fully 40 percent of employees in the Acq Demo program were affected by pay caps, precluding further growth in their pay.<sup>445</sup> Moreover, Acq Demo employees expressed the same concerns about lack of transparency and fairness caused by the use of pay caps, business rules, and pay pools that were expressed by NSPS employees—a problem that does not appear to have improved over time.<sup>446</sup> As with NSPS, Acq Demo employees and supervisors also found the performance management process to be burdensome and time-consuming.<sup>447</sup>

Despite this mixed record, Congress and the Department continue to view pay-for-performance systems as a helpful tool to address recruiting and retention issues for critical workforces in the Department. In 2015 and 2016, Congress made the Lab Demo program permanent, extended the Acq Demo program through December 31, 2020, and authorized a new personnel Demo program for the Department’s cyber workforce.<sup>448</sup>

In addition, DOD and the Congress have initiated a number of targeted but significant civilian personnel reforms within the framework of the existing civil service system. For example, the Department expanded the use of highly qualified experts (HQEs), increased the use of Science, Mathematics And Research for Transformation (SMART) scholarships for science, technology, and mathematics students committing to work at DOD and ramped up the use of career-broadening rotational programs for DOD civilians.<sup>449</sup> In addition, DOD sought to streamline the movement of civilians between components by establishing reciprocity for mandatory training requirements, drug tests, and identification (ID) cards and to improve the hiring process by authorizing the use of subject matter experts (SMEs) rather than rote questionnaires to identify the best qualified candidates for a position.<sup>450</sup>

Congress provided a series of targeted authorities for critical components of the workforce. In 2015, Congress enacted pilot programs for (1) flexible length and renewable term

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<sup>444</sup> *Ibid.*, 58–59.

<sup>445</sup> *Ibid.*, 105–107.

<sup>446</sup> *Ibid.*, 107–111.

<sup>447</sup> *Ibid.*, 117–120.

<sup>448</sup> National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, 130 Stat. 2000 (2016), SEC. 1121 and SEC. 1122, <https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf>; National Defense Authorization Act for Fiscal Year 2016, Pub. L. 114-92, 129 Stat. 726 (2015), SEC 846 and SEC. 1107, <https://www.congress.gov/114/plaws/publ92/PLAW-114publ92.pdf>.

<sup>449</sup> Ashton Carter, “Remarks on ‘The Next Two Links to the Force of the Future’” (Washington, DC: The Pentagon Courtyard, June 9, 2016), <https://www.defense.gov/News/Speeches/Speech-View/Article/795341/remarks-on-the-next-two-links-to-the-force-of-the-future/>.

<sup>450</sup> *Hearing to Receive Testimony on Department of Defense Civilian Personnel Reform* (March 2017) (statement of former Acting Under Secretary of Defense for Personnel and Readiness Peter Levine), <https://www.armed-services.senate.gov/hearings/17-03-23-department-of-defense-civilian-personnel-reform>.

technical appointments in the defense laboratories, (2) the rotation of financial management and acquisition personnel between DOD and the private sector, (3) increased pay caps for critical acquisition and technology positions, and (4) direct hire authority for technical experts into the acquisition workforce.<sup>451</sup> A year later, the FY 2017 NDAA included provisions that authorized (1) non-competitive temporary and term appointments to meet critical hiring needs, (2) direct hire authority for financial management experts, (3) increased pay caps for critical research and technology positions in the defense laboratories, and (4) direct hire authority for the Director of Operational Test and Evaluation and for DOD testing facilities.<sup>452</sup>

In addition, Congress gave the Department limited authority to weigh performance and market considerations in making decisions employee pay, promotion and retention within the existing civil service system. The FY 2016 NDAA included provisions that required DOD to base employee separations in future RIFs primarily on performance rather than on seniority,<sup>453</sup> extended the probationary period for new DOD employees from one year to two years,<sup>454</sup> and delayed periodic step increases for any employee whose performance is rated as “unacceptable.”<sup>455</sup> In contrast to similar provisions included in the NSPS rules,<sup>456</sup> these changes were enacted and appear likely to be implemented without major controversy, perhaps because they took place within the context of a stable and predictable civil service system in which employees retained their labor relations and appeals rights.

The FY 2017 NDAA included an even more significant reform, authorizing on-the-spot hiring of college students and recent graduates.<sup>457</sup> Secretary of Defense Carter called for this change as a part of his (revised and streamlined) Force of the Future initiative:

Right now, if a DOD recruiter meets an undergrad student, a grad student, or a recent graduate who’s a perfect candidate for a particular job opening, they have to send them to the USAJOBS website. For the job-seeker, many

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<sup>451</sup> National Defense Authorization Act for Fiscal Year 2016, SEC. 1109, SEC. 1110, SEC. 1111, SEC. 1112, and SEC. 1113.

<sup>452</sup> National Defense Authorization Act for Fiscal Year 2017., SEC. 1105, SEC. 1110, SEC. 1124, and SEC. 1125.

<sup>453</sup> National Defense Authorization Act for Fiscal Year 2016, SEC. 1101.

<sup>454</sup> *Ibid.*, SEC. 1105.

<sup>455</sup> *Ibid.*, SEC. 1106.

<sup>456</sup> See Department of Defense, “Department of Defense Human Resources Management and Labor Relations Systems; Final Rule,” 66162: unions express concern that performance-based RIF rule “could lead to abuse”; 66160: unions argued that probationary periods should not exceed one year; and 66142: commenters objected to withholding annual increases for employees with an unacceptable rating. Because of the controversy, Congress withdrew DoD’s authority to establish special RIF rules for NSPS in 2007, even as other workforce shaping authorities were retained (see 5 U.S.C. § 9902(e)(8)) (amended by National Defense Authorization Act for Fiscal Year 2008, SEC. 1106).

<sup>457</sup> National Defense Authorization Act for Fiscal Year 2017, SEC. 1106.

of you know what that means: an arduous process of creating an online resume, uploading transcripts and other documents, responding to supplemental questions, having the application processed, and much, much more.

...

But in today's job market, if you're a computer science or other in [science, technology, engineering and mathematics] major graduating from Stanford or MIT [Massachusetts Institute of Technology] or the University of Texas, or someone else very qualified with advanced training, you're not going to wait three more months after you applied for us to make you an offer. Competing employers aren't going to do that. By the time we get around to it, chances are you'll have gotten another offer already – if not accepted it already, and shown up for your first day of work somewhere else.<sup>458</sup>

Secretary Carter characterized direct student hiring authority as “a real game changer for us.”<sup>459</sup>

What these changes had in common was that they were targeted changes intended to improve specific problems in the existing civilian personnel system and avoid the massive change management issue created by trying to change the entire system at one time. Each of the changes was directed by Congress with specificity, avoiding concerns about the potential for abuse arising out of the open-ended authority of NSPS. Each change could be considered on its own merits, avoiding the multiple points of failure risked by the “big bang” approach to reform taken in NSPS. Also, each change could be implemented without the need to modify established labor relations and employee appeals processes and without the conflict and controversy associated with such changes.

This approach is the one that is most likely to bring about significant improvements in the defense civilian personnel system. Future reformers should recognize not only the problems with the existing system, but also the things that it does well. The GS establishes a stable, predictable, widely accepted hierarchical structure that provides predictable opportunities for advancement and an assurance of fairness and equity across an exceptionally diverse workforce. The appeals and labor relations processes of the civil service system, as frustrating as they can be for managers and supervisors, provide an assurance of transparency and regularity that has gained the confidence of employees and helped keep the system remarkably free of favoritism, nepotism and corruption for more than 50 years.

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<sup>458</sup> Ashton Carter, “Remarks on ‘The Next Two Links to the Force of the Future.’” The FY 2017 NDAA also included provisions establishing a public-private exchange program for defense civilian employees (SEC. 1104); strengthening the personnel authorities of the defense laboratories SEC. 1121–SEC. 1125); and ensuring that hiring authorities have an opportunity to consider merit-based information in the personnel file of a former employee before he or she is rehired (SEC. 1136 and SEC. 1140).

<sup>459</sup> Ashton Carter, “Remarks on ‘The Next Two Links to the Force of the Future.’”

Successful change should recognize that while improvement is always possible, there is no one “right” personnel system that will fix all problems. For this reason, change should be targeted to specific parts of the system that are not working well and provide needed flexibility without tearing down structures and rules that remain useful. It should recognize the diversity of the defense civilian workforce and accept that a solution that works for scientists and engineers in a defense laboratory may not be appropriate for welders and wrench-turners in an arsenal or a depot.

Finally, it should treat employees as allies, not as enemies. Gaining the support of all employees is not possible, but reform efforts are far more likely to succeed if reformers are conscious of the interests and needs of affected constituencies and do as much as possible to understand and address them. The federal employee unions are not likely allies for federal civilian personnel reform, but, as the NSPS experience shows, broad changes that unnecessarily aggravate their opposition are unlikely to pave the road to success.

Within this framework, there are many additional steps that could be taken to address the objectives that NSPS sought and failed to achieve. Because these would be discrete modifications to an existing system, no change to existing collective bargaining and appeals systems should be necessary to implement them. Moreover, they would not have to be adopted as a package, and the omission or failure of one proposal should not result in the failure of any other reform. Such steps could include the following:

- *Objective 1: Reduce paperwork by simplifying the job classification system.* As complicated as the OPM classification standards are, they establish a common framework to ensure that the GS system conforms to the merit systems principle of equal pay for equal work and does not become a “hodgepodge of jobs.” The main problem caused by the classification system is not too much paperwork—after all, only new or changed jobs need to be classified—but rather, the risk that an overly rigid system will cause recruiting and retention problems by making it difficult to appropriately classify high-skill, high-demand individuals and occupations. This problem could be addressed without throwing out the classification system by giving the Secretary of Defense authority to override the system and establish special classifications for individuals or occupations when it is appropriate to do so. Defense-unique occupational classifications could include higher grades for certain positions that require high-demand skills but are not management positions. Defense-unique individual classifications could take the form of a +1 grade for exceptionally high-performing individuals who provide a value beyond the normal classification of a position.<sup>460</sup>

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<sup>460</sup> The need to create specific position descriptions for civil service jobs may be a more problematic paperwork burden since some hiring managers spent countless hours refining position descriptions before running a competition. Managers have the authority to use standardized position descriptions; however, they rely on carefully tailored position descriptions to screen applicants because of a hiring system that

- Objective 2: Bring in new talent by providing more flexibility on starting salaries.* Congress already took the single most important step to increase the Department's access to students and recent graduates when it approved a pilot program for direct hiring in the FY 2017 NDAA. This authority should be made permanent. The issue of competitive salaries is also being addressed through unique pay programs applicable to some high-skill DOD occupations, such as lab employees, scientists and engineers, medical employees, and cyber personnel. Congress has shown a willingness to expand these programs to additional occupations for which the Department can document a need. The Department should take advantage of this flexibility by documenting additional high-skill career fields where enhanced hiring authorities and salary flexibilities are needed. A further step could be taken without undermining the existing civilian pay system by authorizing DOD to pay signing bonuses in appropriate cases. Because it is unlikely that the Department will ever be able to compete with the private sector on salaries for high-end skill sets, DOD's high-end recruiting efforts should focus on its most significant advantages: meaningful work and an important mission. Structured internship programs that provide highly qualified recruits an opportunity to see and participate in the important work of the Department are likely to provide a greater recruiting benefit than a restructured pay system.
- Objective 3: Motivate employees to achieve mission objectives by better linking pay to performance.* Regardless whether pay is a primary motivator for federal employees, DOD needs a credible performance management system to ensure that it makes sound decisions on employee pay, promotion, training, and retention. The NSPS performance management system placed a heavy burden on supervisors and managers, requiring a reported 40–50 hours per employee per year to administer. The “New Beginnings” system now being fielded in the Department imposes less of a burden but provides for only three ratings (outstanding, fully successful, and unacceptable), which reduces its usefulness in identifying and rewarding hardworking employees who go the extra mile to meet mission needs. The extraordinary investment of managerial time and effort required by the NSPS approach may be difficult to justify for the entire DOD workforce, but it is probably appropriate for high-skill, policy-making, and management positions where performance distinctions make the most difference. For this reason, DOD should consider reinstating a four- or five-rating perfor-

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would otherwise use only rote questionnaires to identify the “best qualified” candidates for a position, thus failing to serve as an effective screen for actual qualifications. This problem could be addressed by using panels of SMEs, rather than rote questionnaires, to determine the universe of best qualified candidates—obviating the need for narrowly tailored position descriptions.



mance management system for selected positions where the investment of managerial time is justified. Such a system could apply, for example, to employees in science and engineering, acquisition, cyber, and medical positions, and/or to GS13 to 15 positions throughout the Department.<sup>461</sup>

If Congress and the Department choose to expand pay-for-performance to additional categories of employees, they should consider doing so within the framework of the GS by making performance, rather than time-in-grade, the primary factor in awarding step increases for such employees.<sup>462</sup> Performance-based step increases for managers, supervisors, and critical knowledge workers would enable the Department to reward top performers in key parts of the workforce, while avoiding the pitfalls of broadbanding, opaque business rules, control points, and pay pools that undermined employee confidence in NSPS.

- *Objective 4: Empower supervisors to manage their own workforces by establishing goals and rewarding employees who achieve them.* One of the great failures of NSPS was that the pay pool process undermined the authority of line supervisors and the belief of employees that rewards were based on merit. On the other hand, managers and employees believed that the time required to develop performance plans, discuss and assess performance, and give feedback to employees was worthwhile. The Department should take steps to ensure that the “New Beginnings” performance management system now being fielded appropriately connects performance standards to mission, focuses on continual employee feedback, and avoids routine, “check-the-box” employee evaluations. The key motivating factor for federal employees appears to be the need to feel valued. Employees want to understand how their work contributes to the agency mission and be valued for that contribution. Rewards tied to such a system do not need to be monetary. Accordingly, the Department could empower supervisors and motivate employees through a more systematic effort to recognize high-performing employees with awards, certificates, letters of appreciation, and time off.
- *Objective 5: Enhance efficiency by making employee compensation more sensitive to market forces.* The NSPS authority to make targeted rate range adjustments and provide targeted local market supplements for specific career groups

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<sup>461</sup> Many of these employees are already in pay-for-performance systems pursuant to Lab Demo, Acq Demo, and other similar programs. The SES also has a pay-for-performance system with a four-grade evaluation process that was developed at the same time as the NSPS system.

<sup>462</sup> Currently, the first three step increases are awarded after one year each, the next three steps after two years each, and the last three steps after three years each. One option would be to modify this system to award step increases on the basis of points, rather than years, with a 5 rating worth 1.5 points, a 4 rating worth 1.0 points, and a 3 rating worth 0.5 points. Additional steps could be awarded on an accelerated basis to exceptional performers under existing authority for Quality Step Increases.

and occupations, based on market conditions was not used—perhaps because it could only be funded by reducing pay for other employees. Similar statutory authority exists in the GS system<sup>463</sup> but has also been neglected. This important authority should not be wasted. Targeted, market-based adjustments for career groups and occupations could significantly advance the recruitment and retention of high-skill, high-demand categories of employees. Congress could help by making this authority easier to use. In particular, the authority—which is currently reserved to the President, acting through OPM—could be delegated to the Secretary of Defense, who is better positioned to identify specific categories of employees for whom the authority may be needed. In the alternative, Congress could authorize special pays for specific categories of civilian employees, as it does for key occupational specialties in the military.<sup>464</sup>

- *Objective 6: Increase retention of top performers by rewarding excellence and removing artificial barriers on upward pay mobility.* Federal employee salaries under the civil service system are subject to a statutory ceiling, which can make it difficult to attract and retain high-skill, high-demand employees.<sup>465</sup> The NSPS legislation established a higher cap for NSPS employees and enabled the Department to pay higher salaries for top performers and individuals with critical skill sets.<sup>466</sup> Similar authority has been provided for employees in SES, senior-level (SL), and scientific and professional (ST) systems that are certified by OPM,<sup>467</sup> but this authority is not currently available for GS employees. Providing such authority to DOD—perhaps in conjunction with a new performance management system for GS13 to GS15 positions—would provide the Department a helpful tool for retaining top performers with critical skills. In addition, bonuses for GS employees have historically been limited to 1 percent of aggregate salaries, while SES, SL, and ST employees have been benefited

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<sup>463</sup> Special Pay Authority, 5 U.S.C. § 5305 (providing for occupational pay adjustments similar to the locality pay adjustments authorized by Locality-based Comparability Payments, 5 U.S.C. § 5304).

<sup>464</sup> For example, 37 U.S.C. § 302 (Special Pay: Medical Officers of the Armed Forces); § 302a (Special Pay: Optometrists); § 302b (Special Pay: Dental Officers of the Armed Forces), § 302c (Special Pay: Psychologists and Nonphysician Health Care Providers); § 302e (Special Pay: Nurse Anesthetists); § 302i (Special Pay: Pharmacy Officers); § 303 (Special pay: veterinarians); § 312c (Special Pay: Nuclear Career Annual Incentive Bonus); § 315 (Special pay: Engineering and Scientific Career Continuation Pay); and § 316 (Special Pay: Bonus for Members with Foreign Language Proficiency).

<sup>465</sup> Limitation on Certain Payments, 5 U.S.C. § 5307, establishes caps on total compensation for federal employees. For FY 2017, the caps were \$161,900 for GS employees, \$172,100 for SES, ST, and SL employees, and \$187,000 for SES, SL, and ST employees covered by OPM-certified performance appraisal systems.

<sup>466</sup> Department of Defense Personnel Authorities, 5 U.S.C. § 9902(e)(2), as added by SEC. 1101 of the FY 2004 NDAA.

<sup>467</sup> See Cobert, Beth, “January 2017 Pay Adjustments,” memorandum (Washington, DC: Office of Personnel Management, December 27, 2016), <https://www.chcoc.gov/content/january-2017-pay-adjustments>.

from a bonus pool of almost 5 percent of salaries.<sup>468</sup> A significant increase in the DOD bonus pool for GS employees would address this inequity and provide the Department an additional tool to reward excellence and retaining top performers.

- *Objective 7: Identify poor performers and encourage them to leave the workforce by denying them automatic pay raises.* DOD continues to have difficulty identifying and removing poor performers, in large part because managers would generally rather spend their time on substantive work rather than going through a performance improvement process that can take more than a year to complete even if it means leaving an unproductive employee on the payroll. Congress has now provided that employees whose performance is rated “unacceptable” are not eligible for periodic step increases in salary. Additional steps could be taken to address poor performers without undermining existing due process rights of employees. Such steps could include (1) instituting a routine review, before the expiration of a new employee’s two-year probationary period, to assess the employee’s performance and determine deliberately whether he or she should be retained as a tenured employee and (2) establishing dedicated performance improvement managers in each component to take the lead in counseling unproductive employees, making it possible for supervisors to take action against poor performers without sacrificing countless hours of their own time. The recently issued OMB memorandum on reducing the federal civilian workforce addresses employee performance in a way that may provide a helpful framework for such efforts.<sup>469</sup>
- *Objective 8: Increase workforce agility by simplifying the process for reassignment, deployment, and new duties.* While Department will never have the flexibility to deploy civilians in the same manner that it deploys members of the military,<sup>470</sup> DOD already has broad authority to reassign or detail federal employees

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<sup>468</sup> Nicole Ogrysko, “Feds’ Bonuses to Grow Slightly in 2017, after 6-Year Freeze,” *Federal News Radio*, November 22, 2016, <https://federalnewsradio.com/pay/2016/11/white-house-lifts-6-year-caps-performance-award-bonuses-spending-feds/>; for FY 2017, this amount has been raised to 1.5%; David Thornton, “SES Bonus Caps Going Up in 2017 by Nearly 3 Percent,” *Federal News Radio*, August 15, 2016, <https://federalnewsradio.com/pay/2016/08/ses-bonus-caps-going-2017/>; for FY 2017, this amount has been raised to 7.5%.

<sup>469</sup> Mick Mulvaney, “Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce,” memorandum M-17-22 (Washington, DC: Executive Office of the President, Office of Management and Budget, April 12, 2017), 12–13 <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-22.pdf>. Steps to maximize employee performance, including increased transparency for the Performance Improvement Plan (PIP) process and real-time manager support mechanisms for managers addressing performance issues.

<sup>470</sup> In January 2017, the Department extended its Global Force Management (GFM) process to cover civilian and military deployments (see Department of Defense, “Department of Defense Civilian Expeditionary Workforce,” DoD DTM 7-004 (Washington, DC: Office of the Under Secretary of Defense,

from one position to another equivalent position.<sup>471</sup> The impediment to such reassignments and details appears to be more cultural than legal. Even in the case of the SES, which was originally envisioned as a flexible rotational program, agencies have proven reluctant to move employees on other than a voluntary basis. Part of the problem is that DOD rarely thinks strategically about building needed capabilities and shaping its civilian workforce the way that it does with its military workforce. Some elements of the Department have begun to attack this problem and have developed useful tools for shaping the civilian workforce of the future. These tools include the Air Force Civilian Strategic Leader Program,<sup>472</sup> designed to build future civilian leaders through planned assignments and educational opportunities, and the Acquisition Workforce Strategic Plan,<sup>473</sup> under which component Directors of Acquisition Career Management provide needed focus on education, training, experience, and career development. Although the Department has shown that it does not have the bandwidth to develop a comprehensive strategic plan for the entire civilian workforce, other components and occupational communities within the Department should follow the example of the Air Force and the acquisition community by adopting similar career development models.

The Department also has statutory authority to hire civilian employees on a short-term basis to meet critical needs, through the HQE program, term appointment authority, the Intergovernmental Personnel Act (IPA) authority, and other transfer and rotational programs. However, these programs remain underused. The Department could increase the flexibility and responsiveness of its civilian workforce by significantly increasing the number of such short-term civilians and by allocating the budget and positions needed to do so. These authorities have the benefit of being adaptable to the needs of a particular organization,

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January 25, 2017), [https://search.usa.gov/search?affiliate=dod\\_esd&query=DTM%2017-004](https://search.usa.gov/search?affiliate=dod_esd&query=DTM%2017-004)). However, the deployment of civilians still depends on the willingness of individuals and their employing organizations to make them available.

<sup>471</sup> Agency Authority to Promote, Demote, or Reassign, 5 CFR § 335.102 (authority to reassign federal employee); Details; within Executive or Military Departments, 5 U.S.C. § 3341 (authority to detail federal employee).

<sup>472</sup> See Kat Bailey, “Selections Announced for Civilian Strategic Leader Program” (Joint Base San Antonio-Randolph, TX: Air Force Personnel Center Public Affairs, October 24, 2016), <http://www.af.mil/News/Article-Display/Article/984128/selections-announced-for-civilian-strategic-leader-program>. See also Michael Dominguez, “Keynote Address,” 13–14: Mr. Dominguez describes Air Force management of civilian workforce career development.

<sup>473</sup> Department of Defense. *Department of Defense Acquisition Workforce Strategic Plan, FY 2016 – FY 2021* (Washington, DC: Under Secretary of Defense for Acquisition, Technology, and Logistics, n.d.), [http://www.hci.mil/docs/DoD\\_Acq\\_Workforce\\_Strat\\_Plan\\_FY16\\_FY21.pdf](http://www.hci.mil/docs/DoD_Acq_Workforce_Strat_Plan_FY16_FY21.pdf).

avoiding the type of one-size-fits all solution that is unlikely to succeed in the Department of Defense.

A few of these recommendations address pay issues that have associated costs.<sup>474</sup> As the NSPS experience showed, however, it would be a mistake to insist on budget neutrality in implementing such recommendations. Employees tend to be more sensitive to decreases in pay or benefits than they are to increases in pay or benefits, so the benefits of increasing pay for a few employees are unlikely to offset the morale problems caused by decreasing pay for others. For this reason, it proved politically difficult to provide smaller annual “COLA” increases to NSPS employees than to GS employees and untenable to pay for targeted local pay adjustments for some career fields by reducing the locality pay available for other career fields. It would be better to omit a proposed reform altogether than to pay for a change that benefits some employees with a pay cut to other employees, undermining employee cohesiveness and productivity.

A large bureaucracy like DOD is always in need of improvement, and the Department’s leadership should always be striving to make the system work better. The targeted reforms recommended previously are based on an acceptance of the reality that different civilian personnel models are appropriate for different parts of the defense civilian workforce and a belief that there is no “right” civilian personnel system that can meet all of the Department’s needs. Taken together, these proposals could do much to improve the defense civilian personnel system. Even as separate, free-standing reforms, each is likely to result in a measurable improvement in the agility and responsiveness of that system.

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<sup>474</sup> These recommendations include those for new signing bonuses for recruits in critical positions; targeted pay adjustments or special pays for high-skill, high-demand career groups and occupations; and increased pay caps and bonus pools top performers with critical skill sets.

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## Appendix B. Abbreviations

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AFGE	American Federation of Government Employees
AFRL	Air Force Research Laboratory
AFSCME	American Federation of State, County and Municipal Employees
C.F.R.	Code of Federal Regulations
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
COLA	cost of living increase
CQ	Congressional Quarterly
CRS	Congressional Research Service
CSRA	Civil Service Reform Act
DBB	Defense Business Board
DCIPS	Defense Civilian Intelligence Personnel System
DHS	Department of Homeland Security
DOD	Department of Defense
DPE	Department for Professional Employees
DSB	Defense Science Board
DTM	Directive-type Memorandum
GAC	Governmental Affairs Committee
GAO	General Accounting Office Government Accountability Office
GFM	Global Force Management
GRC	Government Reform Committee
GS	General Schedule
H.R.	House of Representatives
HASC	House Armed Services Committee
HQE	highly qualified expert
IAFF	International Association of Fire Fighters
IAMAW	International Association of Machinists and Aerospace Workers
ID	identification
IDA	Institute for Defense Analyses
IFPTE	International Federation of Professional and Technical Engineers
IPA	Intergovernmental Personnel Act
IT	Information technology
KPP	Key Performance Parameter
KSA	Knowledge, Skills, and Abilities

MEBA	Marine Engineers' Beneficial Association
MIT	Massachusetts Institute of Technology
MSPB	Merit Systems Protection Board
MTD	Metal Trades Department
NAGE	National Association of Government Employees
NAPA	National Academy of Public Administration
NEA	National Education Association
NDAA	National Defense Authorization Act
NFFE	National Federation of Federal Employees
NPR	National Performance Review
NSPS	National Security Personnel System
OIPT	Overarching Integrated Product Team
OMB	Office of Management and Budget
OPM	Office of Personnel Management
OSD	Office of the Secretary of Defense
PIP	Performance Improvement Plan
PEO	Program Executive Office
S.	Senate
S&T	science and technology
SASC	Senate Armed Services Committee
SES	senior executive service
SL	senior-level positions
SMART	Science, Mathematics And Research for Transformation
SME	subject matter expert
ST	scientific and professional positions
STEM	science, technology, engineering and mathematics
U.S.C.	United States Code

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14. ABSTRACT  The collapse of the National Security Personnel System (NSPS) in 2009 was caused in significant part by the political miscalculations of Administration officials, who failed to build a broad base of bipartisan support and unnecessarily stoked opposition from federal employee unions and their allies in Congress. Future reform efforts could be more successful by taking a more incremental, targeted approach to build needed flexibilities into the Department of Defence's civilian personnel system. This review suggests a series of targeted reforms that might help address ongoing deficiencies in the Department's hiring, performance management, and pay systems. These reforms are designed to address the original objectives of NSPS but without triggering the substantive and political problems—including all-out opposition by the federal employee unions—that NSPS was unable to overcome.					
15. SUBJECT TERMS Institutional reform; National Security Personnel System; civil service; civilian workforce; pay for performance; performance management systems					
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