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CONGRESSIONAL CONTROL OF FEDERAL LABOR RELATIONS AND A CATCH-22: WHY A RETURN TO LABOR-MANAGEMENT "PARTNERSHIP" IN THE FEDERAL SECTOR IS NOT POSSIBLE

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Graduate Paper
(submitted in partial satisfaction of the requirements
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CONGRESSIONAL CONTROL OF FEDERAL LABOR RELATIONS AND A CATCH-22: WHY A RETURN TO LABOR-MANAGEMENT "PARTNERSHIP" IN THE FEDERAL SECTOR IS NOT POSSIBLE

With the implementation of labor-management "partnership," President Bill Clinton hoped to use his executive authority to create a new paradigm of cooperation between labor and management in the federal sector, and although his effort fell short of its goal, it does provide a lesson for the future. In 1993, shortly after taking office, President Clinton launched the National Performance Review (NPR), an ambitious attempt to review the operations of the entire federal government and determine how the government could operate more effectively at less cost. A principle finding of the NPR was that increased government effectiveness required that federal employees be empowered, given greater responsibility, and given a more important role in agency operations.[1] In the private sector, this approach to business was known as the quality imperative.[2] The NPR also recognized, however, that the culture of labor relations in the federal sector was an obstacle to the implementation of employee involvement. Labor-management relations in the federal sector had long been characterized as an unproductive, adversarial relationship.[3] In an effort to eliminate the "adversarial relationship that binds [labor and management] to noncooperation" in the federal

[1] *See generally* VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW, at 65-86 (1993) [hereinafter GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW]. The effort was known as an attempt to "reinvent the government." Major Richard K. Johnson, *National Performance Review and Reinvention: Should it "Reinvent" Our Federal Labor-Management Relations?,* 40 A.F. L. REV. 131 (1996).

[2] GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 66-68.

[3] GENERAL ACCOUNTING OFFICE, GGD-91-101, FEDERAL LABOR RELATIONS: A PROGRAM IN NEED OF REFORM 18-25 (1991) [hereinafter GAO, FEDERAL LABOR RELATIONS]. Major Michael R. McMillion, *Collective Bargaining In The Federal Sector: Has The Congressional Intent Been Fulfilled?,* 127 MIL. L. REV. 169, 215 (1990).

government, the National Performance Review[4] (NPR) recommended the use of a collaborative approach known as partnership.

In an effort to carryout the recommendations of the NPR, President Clinton issued Executive Order (EO) 12871, Labor-Management Partnerships.[5] Like many of his predecessors, President Clinton sought to use his executive authority to change the tenor of federal labor relations in an effort to improve the federal government's service to the public. There were two critical components of EO 12871.[6] The first was the creation of "partnership councils," designed to provide a separate forum for the pre-decisional involvement of federal employees and their union representatives in agency operations. The second, which had nothing to do with the NPR, was a directive to executive agencies to negotiate over certain topics that had previously been reserved for agency decision. In short, the President made the decision on behalf of all executive agencies to bargain over those issues.

Plagued by controversy and agency noncompliance, the effort was doomed from the beginning. Allegations the executive order was a political move designed to engender union support for the administration surfaced immediately. Various senior government managers, angered by their exclusion from this reform initiative, failed to fully support the effort. Perhaps most damaging to President Clinton's effort was the refusal of a majority of executive agency officials to comply with the order to bargain over the discretionary management issues. With agencies unwilling to bargain over those issues

[4] The National Performance Review (NPR) was instituted by President Clinton in 1993 in an effort to make the federal government more efficient and less costly.
[5] Exec. Order No. 12,871, 58 Fed. Reg. 52201 (Oct. 1, 1993).
[6] Other aspects of the executive order, such as the directive to use interested-based bargaining techniques, were an important part of President Clinton's reform initiative but did not impact federal labor relations in the same significant way.

and unions angered by agency noncompliance, President Clinton's "new paradigm" devolved into a scheme hampered by noncooperation and litigation over the order to bargain.

Even though the executive order was eventually repealed after President Clinton left office, it was tremendously popular with the federal labor unions. It is likely that with a more sympathetic administration, labor might urge a return to the expanded scope of bargaining and greater involvement in agency operations through partnership councils. However, under the current legislative scheme governing federal labor relations, a return to Clinton-style partnership would not be possible.

In 1978, when Congress promulgated the first statute governing federal labor relations, the president's authority over this aspect of agency operations was subordinated to the will of Congress. Although this aspect of President Clinton's executive order was subject to litigation, the extent of the President's power was never addressed. It is, perhaps, not surprising that the courts avoided this separation of powers issue given the complexity of this area of the law. In addition, the language of the executive order provided the key to the resolution of the litigation, making it unnecessary to attempt to unravel the intertwined threads of congressional and presidential power and control over executive agencies. Had the courts addressed the issue, President Clinton's use of executive power would have been struck down. Indeed, any attempt by a future president to expand the scope of collective bargaining would exceed his or her authority as President.

Further, an attempt to resurrect the partnership council concept would infringe upon the rights of unrepresented employees[7] and has the potential to seriously undermine the union's effort to serve as an exclusive representative. In the area of labor relations, focused as it is on collectivism and on management's relationship with unions and the employees represented by those unions, it is easy to overlook unrepresented employees. The ability of unrepresented employees to be free to exercise their rights and to participate fully in all the benefits and advantages of federal government employment cannot be abridged. Yet, unrepresented employees were excluded from participation on the partnership councils and, consequently, in the movement to include federal employees in the agency decision making process. An attempt by a future president to remedy this problem by making allowances for participation by unrepresented employees would create an entirely different problem. It would provide the perfect opportunity for the establishment of agency unionism in the federal government. This kind of arrangement—which involves agency control of a labor organization—would seriously threaten the carefully structured federal sector labor relations program devised by Congress.

This paper will examine the pitfalls of an attempt to return to Clinton-style partnership under the current legislative scheme. Part I will review the history of federal labor relations in order to provide a foundation to properly consider the problems associated with the resumption of partnership. Particular attention will be focused on the

[7] In the federal sector, members of the bargaining unit (*i.e.,* those represented by the union) are not required to be union members. 5 U.S.C. §7102 (1996). Thus, there is a distinction between dues paying union members and those employees who are not members but are nevertheless represented by the union (*i.e.,* bargaining unit member). The discussion in this paper is concerned only with the distinction between those employees who are represented (without regard to their status as members) and those employees who are not represented by a union (*i.e.,* not a member of a bargaining unit).

history of Presidential involvement in federal labor relations and on the current legislative scheme devised by Congress. Part II examines President Clinton's order that agencies must bargain over issues that previously were subject to bargaining at the agency's discretion. Section A provides an overview of agency reaction to the order, the administration's response, and the litigation that ensued. Section B attempts to answer the question the courts did not address—whether President Clinton exceeded his authority. Finally, Part III explores the impact of the partnership councils on federal labor relations. Section A deals with the problems associated with the exclusion of unrepresented federal employees from the councils, while section B evaluates the potential for agency unionism should those employees be allowed to participate in future partnership councils.

I. Background

Employee organization has been part of the federal civil service for over 170 years,[8] but the growth of federal employee unionism was quite slow compared to the growth of unions and collective representation in the private sector. It was not until the early 1960s that federal employee unionism began to develop. A number of explanations have been advanced as to why federal sector employees were slow to organize.[9] For example, labor market conditions did not favor organization because pension benefits were typically quite good and the stability of federal employment provided a strong sense

[8] Lieutenant Colonel Richard T. Dawson & Lieutenant Colonel W. Kirk Underwood, *Overview of Labor-Management Relations in the Air Force*, 35 A.F. L. REV. 1 (1991). Though there had been some early organizational activity, unionism among government employees started in the 1830s.

[9] These explanations have been generally applied to state, county, and municipal employees as well. Specific discussion as to the state of employee organization in these sections of the public sector is beyond the scope of this article.

of job security.[10] In addition, an unfavorable legal environment characterized by prohibitions on strikes and the absence of a requirement for the government to recognize or bargain with unions did not provide fertile ground for union growth.[11] Finally, private sector collective bargaining was viewed as inconsistent with the nature of government and the concept of sovereignty.[12] Concern for the public welfare and a fear that the ability of the elected officials to exercise their decision-making authority in the public interest would be impaired, prevented the application of private sector collective bargaining in the government process.[13] Indeed, it is the tension between the unwillingness of the government to share decision-making authority and the push for collective bargaining rights that characterizes the history of federal labor relations.[14] While this struggle may be portrayed as nothing more than a simple reluctance to share decision-making authority, it is clear even today that "the political nature of the government and its special relation to the public create a unique employment environment."[15] As a result, the federal sector labor relations program must maintain a balance between the rights and interests of federal employees and the rights, interests, and expectations of public as a whole.

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[10] John F. Burton, Jr., & Terry Thomason, *The Extent of Collective Bargaining in the Public Sector, in* PUBLIC-SECTOR BARGAINING 14 (Benjamin Aaron et al. eds., 2d ed. 1988); RICHARD C. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 10 (1984).
[11] Burton & Thomason, *supra* note 10, at 14. When unions did try to assert their rights of recognition, they were often rebuffed by a hostile judiciary. KEARNEY, *supra* note 10, at 10.
[12] K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 11 (1967); B.V.H. Schneider, *Public Sector Labor Legislation—An Evolutionary Analysis, in* PUBLIC-SECTOR BARGAINING, *supra* note 10, at 189.
[13] Schneider, , *supra* note 12, at 189.
[14] *Id.* at 190.
[15] *Id.* at 189.

A. Historical Origins: The Impact of Presidential Involvement

From the beginning, direct Presidential involvement has had an enormous influence on federal labor-management relations. The actions of some Presidents—for example, Presidents Jackson, Kennedy, and Carter—brought about important changes in the federal labor relations program, while the actions of others—such as President Reagan—helped delimit the boundaries of employee rights. In the absence of Congressional involvement, Presidential action defined federal labor relations.

Originally, federal employees working as skilled craftsmen joined labor organizations that served craftsmen employed in the private sector.[16] The goal of federal civilian employees who joined these organizations was a shorter workday. Earlier attempts by federal employees—particularly those in the naval shipyards of Philadelphia, Boston, and New York—to win a ten-hour workday met with no success.[17] Private sector trade organizations had already made this demand on behalf of private sector employees and federal employees turned to these trade organizations for assistance.[18] As private sector employers acquiesced to the demand for a ten hour day, pressure mounted on the federal government to make the same concession. Finally, in 1836, after a mass demonstration at the naval shipyard in Washington, D.C., involving shipyard workers and their private sector counterparts, President Andrew Jackson granted federal workers the ten hour day.[19]

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[16] Project, *supra* note 8, at 893. *See also* KEARNEY, *supra* note 10, at 2.

[17] KEARNEY, *supra* note 10, at 6. A large reason for this lack of success was that the naval shipyards were run by military officers unaccustomed to having their decisions second-guessed.

[18] Project, *supra* note 8, at 893. Strikes and other pressure inducing activities used by federal employees during this time were largely conducted by private sector labor organizations acting on behalf of the federal employees. Public employees did not have their own labor organizations and public official generally did not recognize the right of such employees to organize. *Id.*

[19] KEARNEY, *supra* note 10, at 6. Interestingly, the first employer to grant an eight-hour workday was the federal government. It was this push for an even shorter workday that "'led to the crystallization of the

Though this practice of direct Presidential involvement in federal labor relations would continue until the present day, the actions of the Chief Executive did not always benefit labor or garner support in Congress. As the public sector labor organizations, such as the postal unions,[20] grew and became more active in the late 1800s and early 1900s, the federal government again resisted the collective efforts of federal employees. Despite departmental orders forbidding the practice,[21] lobbying in Washington, D.C. by postal workers and the labor organizations representing them remained intense. This time, angered by constant agitation and an apparent unwillingness to obey the departmental order, President Theodore Roosevelt issued a gag rule forbidding all federal employees, individually or through their labor organizations, from lobbying the government for better working conditions.[22] After succeeding President Roosevelt, President William H. Taft issued a similar gag order.[23] Notwithstanding Presidential gag orders and intense union-busting activities aimed a federal employee labor organizations, the postal workers eventually won Congressional support. In 1912, Congress passed the Lloyd-LaFollette Act,[24] which abolished these gag rules, guaranteed the right of federal employees to join labor organizations, and provided these employees with the ability to

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principle of the [government] as a model employer maintaining the highest possible working standards in its services as an example for others to follow.'" KEARNEY, *supra* note 10, at 2 (quoting S. SPERO, GOVERNMENT AS EMPLOYER 87 (1948)). The status of the government as the model employer is often sited as a basis for the federal government's own labor and employment law actions.

[20] The earliest postal workers labor organization was formed in 1836 by letter carriers in New York. By the late 1880s, the Knights of Labor—originally a private sector labor organization—had organized local postal unions in a number of cities and, in 1890, the National Association of Letter Carriers was formed. KEARNEY, *supra* note 10, at 6.

[21] In 1895, Postmaster General William L. Wilson issued a department wide order forbidding postal workers from lobbying upon penalty of discharge. *Id.* at 7.

[22] *Id.* The order, Executive Order 1142, was issued in 1902.

[23] Dawson & Underwood, *supra* note 8, at 1-2. President Taft issued the order, Executive Order 1514, in 1909.

[24] Lloyd-LaFollette Act of 1912, ch. 389, §6, 37 Stat. 539, 555, *as amended,* 5 U.S.C. §7101 (1996).

petition Congress. This legislative action marked the first occasion in which Congress's determination concerning federal labor relations superceded action taken by a President.

From this point, the situation for public employee labor organizations remained static and disorganized, even as private sector labor unions enjoyed significant growth and government recognition.[25] Notwithstanding the formation of their own labor organizations,[26] public employees' secondary status in the labor movement was obvious.[27] Congress intentionally excluded federal employees from coverage under the National Labor Relations Act (NLRA) of 1935,[28] and there was no formal policy governing the relationship between federal employees and management. Ultimately, the reluctance of Congress and the President to promulgate any guidance resulted in a chaotic situation with different agencies instituting and maintaining very different labor relations programs.[29]

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[25] National Labor Relations Act of 1935, Pub. L. No. 74-198, §1, 49 Stat. 449 (codified as amended at 29 U.S.C. §151 (1998)). This legislation was originally passed as the Wagner Act. For a comprehensive review of the history of the private sector labor movement, see F.R. DULLES & M. DUBOFSKY, LABOR IN AMERICA: A HISTORY (4th ed. 1984).

[26] In 1917, the National Federation of Federal Employees (NFFE) was formed and covered all federal civilian employees except postal workers and those employees permitted to join affiliates of the American Federation of Labor. In 1932, the American Federation of Government Employees (AFGE) and the National Association of Government Employees (NAGE) were formed. KEARNEY, *supra* note 10, at 7. All three are active today along with 87 other unions representing federal employees. OFFICE OF PERSONNEL MANAGEMENT, UNION RECOGNITION IN THE FEDERAL GOVERNMENT 20-24 (1999) [hereinafter OPM, UNION RECOGNITION]. AFGE is the largest of all federal employee unions, with NFFE and NAGE third and fourth, respectively. *Id.* at 43. The National Treasury Employee Union (NTEU) is the second largest federal union. *Id.*

[27] HANSLOWE, *supra* note 12, at 11; Schneider, *supra* note 10, at 189. During this period, the only benefits secured by public employees generally resulted from gains achieved by the private sector unions.

[28] *See* 29 U.S.C. §152(2)&(3).

[29] Report of the Federal Labor Relations Council, *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Serv., 96th Cong., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1160 (Comm. Print 1979) [hereinafter Legislative History of the FSLMRS]

Finally, in 1962, with Congress unwilling to take action,[30] President John F. Kennedy ushered in the first formal federal labor relations program. With Executive Order (EO) 10988, Employee-Management Cooperation in the Federal Sector,[31] President Kennedy enabled federal employees to form and join their own unions and gave them the right to bargain collectively over conditions of employment. The order created a formal negotiating process, bargaining unit determination, exclusive recognition, and an unfair labor practice code to govern the relationship between labor and management.[32] Of particular significance was the strong emphasis on employee participation for the good of the civil service.[33] In the preamble to the order, President Kennedy stated:

> Participation of employees in the formulation and implementation of personnel policies affecting them contributes to the effective conduct of public business . . . . [T]he efficient administration of the Government and the well-being of employees require that orderly and constructive relationships be maintained between employee organizations and management officials, [and] effective employee management cooperation in the public service requires a clear statement of the respective rights and obligations of employee organizations and agency management . . . .[34]

Yet, even as cooperation and participation were articulated as the basis for granting collective rights to federal employees, the scope of bargaining was limited by a broad management rights clause and prohibitions on bargaining over wages and benefits.[35] There was also no central agency established to administer the new labor-management

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[30] Tension between President Kennedy and Congress led to the promulgation of EO 10988. Lack of Congressional support for collective bargaining rights for federal employees necessitated action by President Kennedy to fulfill a campaign promise. James Stern, *Unionism in the Public Sector, in* PUBLIC-SECTOR BARGAINING, *supra* note 10, at 55.

[31] Exec. Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962). EO 10987, setting forth a grievance procedure for adverse action taken against federal employees, was issued at the same time. Exec. Order No. 10,987, 27 Fed. Reg. 550 (Jan. 17, 1962).

[32] Exec. Order No. 10,988, 27 Fed. Reg. at 552-54. *See also* Schneider, *supra* note 12, at 195.

[33] Schneider, *supra* note 12, at 195.

[34] Exec. Order No. 10,988, 27 Fed. Reg. at 551.

[35] *Id.* at 554. Decisions concerning wages, retirement, and fringe benefits were left to the discretion of Congress. *See* Walter J. Gershenfeld, *Public Employee Unionization – An Overview, in* PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT 23 (Muriel K. Gibbons et al. eds., 1979).

relationship and strikes were forbidden.[36] Nevertheless, the order was considered an important step toward collective representation for federal employees.[37]

For the next fifteen years federal sector labor law was cobbled together from a collection of executive orders, regulations, and legislation. Notably, the backbone of federal labor relations law was the series of executive orders issued by President Kennedy, President Richard Nixon, and President Gerald Ford.[38] Dissatisfaction on both sides of the table was common as labor and management (and the government officials tasked with the administration of the federal personnel system) struggled under the patchworked system. Finally, at the behest of President Jimmy Carter, Congress dramatically restructured the federal employee personnel system when it passed the Civil Service Reform Act (CSRA) of 1978.[39] Included in the CSRA, among other things,[40]

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[36] Exec. Order No. 10,988, 27 Fed. Reg. at 552.

[37] Though limited in scope, EO 10988 was regarded by postal unions and other federal employee unions as their "magna carta." Many union leaders felt the executive order would enable them to move from what they characterized as "collective begging" to a formal process of collective bargaining. Stern, *supra* note 30, at 55; *see also* KEARNEY, *supra* note 10, at 43.

[38] EO 10988 was superceded in 1969 when President Nixon issued EO 11491. Among other things, Nixon's order created two administrative organizations to administer labor-management relations in the federal sector. The Federal Labor Relations Council was tasked with the enforcement of the order and the Federal Services Impasse Panel was established to assist the parties to resolve negotiation impasses. The order also provided for the negotiation of "official time" which allowed union representatives to attend to collective bargaining duties while on official time. Exec. Order No. 11491, 34 Fed. Reg. 17,605 (Oct. 29, 1969). This order was later amended by EO 11616 in August 1971, Exec. Order No. 11,616, 36 Fed. Reg. 17319, (Aug. 26, 1971), and EO 11636 in December 1971. Exec. Order No. 11,636, 36 Fed. Reg. 24901 (Dec. 17, 1971). In 1975, President Ford issued EO 11838, which further revised the federal labor relations program. Exec. Order No. 11,838, 40 Fed. Reg. 5744 (Feb. 6, 1975).

It is worth noting that despite the myriad of changes to Kennedy's initial order, the scope of bargaining was never significantly expanded. The management rights clause and the inability to bargain over wages and benefits (which exist to this day under the current statutory scheme) were always an important limiting factor.

[39] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C. (1978)). It should be noted that a reorganization plan made the structural changes to the civil service system while the legislation implemented the policy changes necessary to effect reform. *See* American Federation of Government Employees, AFL-CIO, Local 3882 v. Federal Labor Relations Authority, 944 F.2d 922, 925 (D.C. Cir. 1991) (citing Reorg. Plan No. 2 of 1978, 5 C.F.R. pts. 1-699, 1200-2600 (1991), 5 U.S.C. app at 1369 (1988); 124 Cong. Rec. 27547 (1978) (statement of Sen. Sasser)). For purposes of this article, the distinction between the Reorganization Plan and the CSRA is not material.

[40] The CSRA replaced the beleaguered Civil Service Commission with the Office of Personnel Management (OPM), which was tasked with the overall administration of the federal personnel system in

was Title VII, known as the Federal Services Labor-Management Relations Statute (FSLMRS or the Statute),[41] which codified federal sector labor-management relations and set forth the rights and responsibilities of employees, labor organizations, and management. The CSRA also replaced the Federal Labor Relations Council with the Federal Labor Relations Authority (FLRA or the Authority), an independent agency with rulemaking and adjudicatory functions analogous to those exercised by the National Labor Relations Board (NLRB or the Board) in the private sector.[42]

The FSLMRS gave the federal employee unions what they had been pursuing for decades—statutorily sanctioned collective bargaining rights. Though the orders by Presidents Kennedy, Nixon, and Ford did provide or enhance the collective rights of federal employees, as executive orders they could easily be altered, superceded, or

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the Executive Branch. *See* 5 U.S.C. ch. 11. OPM is responsible for assisting in the determination pay rates for executive branch employees, establishing and administering retirement benefits for such employees, and establishing and administering hiring standards, job classifications, and job descriptions. *See id.* Within the OPM is the Office of Labor and Employee Relations the purpose of which is to provide technical advice for agency labor-management policies, contract administration, and labor relations leadership for agency management. *See generally* KEARNEY, *supra* note 10, at 48. The CRSA also created the Merit Systems Protection Board to administer the federal employee merit system and to adjudicate employee appeals of adverse action taken by the agency against employees for instances of misconduct or unacceptable performance. *See* 5 U.S.C. ch. 12. The merit system is essentially a for-cause disciplinary system that prevents discharge at will, requiring instead that certain, more severe disciplinary action be taken only for cause.

[41] Federal Services Labor-Management Relations Statute, 5 U.S.C. §7101 (1996). The Federal Services Impasse Panel and its functions were carried over from EO 11491 and is the other agency responsible for the administration of the federal labor relations program.

[42] When discussing federal sector labor relations, comparisons to the NLRA are, perhaps, inevitable. Although the public and private sectors differ in significant ways, there are a few reasons that comparisons can be helpful. First, the NLRA has been serving the private sector well, albeit after a few important amendments, for 66 years. Second, the history of collective organization in both sectors is intertwined, and labor's successes in the private sector have often paved the way for public sector labor organizations. *See* KEARNEY, *supra* note 10, at 10, 13-14. Third, although "the degree of relevance of private sector case law to public sector labor relations will vary greatly," the United States Court of Appeals for the District of Columbia Circuit recognized that "the structure, role, and functions of the [FLRA] were closely patterned after those of the NLRB and that relevant precedent developed under the NLRA is therefore due serious consideration." Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280, 1287 (D.C. Cir. 1983).

overridden at any time by another President or by Congress.[43] Federal employee rights had for some time been at the mercy of changes in the political climate in the federal government.[44] A statutory foundation provided much sought after stability and certainty.

B. Federal Sector Labor Relations Under the FSLMRS

In promulgating the FSLMRS, the public interest was Congress's paramount stated concern. In its statutory statement of findings and purposes Congress made that point clear by noting that

> experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate though labor organizations of their own choosing . . . safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlement of disputes between employees and their employers . . .[45]

History has demonstrated that federal employees should be permitted to exercise collective rights in order to ensure fair and equitable working conditions. But, Congress realized that even while providing these rights to federal employees the impact on the public was the first consideration. It is axiomatic that governments (particularly our democratically designed form of government) are established by the people to serve the people. Thus, service to the people is inherently the primary consideration. In the context of granting collective bargaining rights, the public must have protection from overreaching by federal employees and their unions that would make it more costly, more difficult, or simply impossible for the federal government to function effectively and efficiently in protecting and providing services to the public. This dilemma represents

[43] Of course, legislation can be overridden, superseded or altered, as well. But, with legislation this is procedurally and politically more difficult.

[44] Indeed, the right to bargain collectively was first granted to federal employees as the result of a politically motivated campaign promise made by President Kennedy. Stern, *supra* note 30, at 55. During the floor debate on the labor relations bill one Congressman noted that, "testimony was overwhelmingly in support of the thrust of the [House] committee's legislation because the existing [executive order] program was susceptible to the whims of an incumbent President." 124 Cong. Rec. H8466 (daily ed. Aug. 11, 1978) (statement of Rep. Clay), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 853.

the "overriding labor relations problem in the public sector: the need to separate or reconcile political accountability and the bilateral authority inherent in the grant of collective-bargaining rights."[46]

Congress resolved that dilemma with the FSLMRS. The legislation as a whole demonstrates Congress's determination to strike a careful balance between the interests of the federal employees on the one hand and the federal government on the other for the good of the public as a whole.[47] The Senate Governmental Affairs Committee commenting on its sponsorship of a statutory federal labor relations program acknowledged the "special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business."[48] The House Committee on the Post Office and Civil Service noted its intent to broaden the scope of collective bargaining for federal civilian employees and their unions while simultaneously "preserv[ing] the essential prerogatives and flexibility Federal managers must have."[49] This approach "[struck the] proper balance between the public interest and [federal

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[45] 5 U.S.C. § 7101(a).

[46] Schneider, *supra* note 12, at 190.

[47] *See* S. Rep. No. 95-969, Legislative History of the FSLMRS, *supra* note 29, at 746 (calling responsive, efficient, and effective government a public right); *see also* 124 Cong. Rec. S14281 (daily ed. Aug. 24, 1978) (remarks of Sen. Sasser), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 1015 (describing the Senate's "truly extraordinary effort" to compromise and balance the interests of federal employees and the government agency's ability to function effectively).

[48] S. Rep. No. 95-969, Legislative History of the FSLMRS, *supra* note 29, at 749 (concerning S. 2640). Although S. 2640 ultimately became the CSRA, the House's version of the bill (H.R. 11280) contained the language that became the FSLMRS.

[49] H.R. Rep. No. 95-1403, Legislative History of the FSLMRS, *supra* note 29, at 689-90. The need to preserve the authority of the federal government to make certain decisions unfettered by the labor relations process was not an idea that originated within the committee meetings concerning the FSLMRS. Though this idea has been prevalent for quite some time, *see* KEARNEY, *supra* note 10, at 9-10, more modern concerns originated with the birth of federal sector labor relations under President Kennedy. A task force appointed by President Kennedy to access the need for and nature of a federal sector labor relations program was given two guiding principles: preservation of the public interest and retention of appropriate management responsibilities. President's Task Force on Employee-Management Relations in the Federal Service, Employee-Management Practice in the Federal Service, Staff Report ii (1961), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 1179.

employees]."[50] The Supreme Court of the United States recognized Congress's effort to bring stability to federal sector labor relations. In its first case involving the FSLRMS, the Court observed that "the [FSLRMRS], declaring that 'labor organizations and collective bargaining in the civil service are in the public interest,' . . . significantly strengthened the position of the public employee unions while preserving the ability of federal managers to maintain an effective and efficient Government."[51] In a per curium decision five years later, the Court reiterated that "Title VII [of the CSRA] strives to achieve a balance between the rights of federal employees to bargain collectively and 'the paramount public interest in the effective conduct of the public's business.'"[52]

The FSLMRS does provide federal employees with the statutory right to organize and bargain collectively. Generally, a federal employee is any individual employed by an agency, except that supervisors, management officials, and strikers are not considered employees.[53] Each such employee has the "right to form, join, or assist any labor

[50] H.R. Rep. No. 95-1403, Legislative History of the FSLMRS, *supra* note 29, at 682.
[51] Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 92(1983) (quoting 5 U.S.C. §7101).
[52] Federal Labor Relations Authority v. Aberdeen Proving Ground, Department of the Army, 485 U.S. 409, 411-12 (1988) (per curium) (citing Message from the President transmitting a Draft of Proposed Legislation to Reform the Civil Service Laws 4, Legislative History of the FSLMRS, *supra* note 29, at 626).
[53] 5 U.S.C. §7103(a)(2). Other individuals, such as members of the uniformed services, are also excluded from the definition of employee, but they are not relevant for purposes of this article. The definition of employee under FSLMRS also includes any employee whose job has "ceased because of an unfair labor practice." *Id.* at §7103(a)(2)(B). Interestingly, the definition of employee under the NLRA, which is also inclusively written, is different in one significant respect. An employee under the NLRA is "any employee," including those whose work has "ceased as a consequence of, or in connection with any current labor dispute or because of an unfair labor practice." 29 U.S.C. §152(2). The language in the NLRA concerning unfair labor practices (and labor disputes) refers, at least in part, to employees who are on strike. *Id.* By contrast, the analogous portion of the FSLMRS does not encompass striking employees as they are specifically excluded as employees under the same section. 5 U.S.C. §7103(a)(2)(i). This is, not surprisingly, because strikes by federal employees are illegal. *See* 18 U.S.C. §1918 (2000) (making it a criminal violation for federal employee to strike).

The agencies that fall within the scope of the FSLRMS are the executive agencies, the Library of Congress, the Government Printing Office, and the Smithsonian Institution. 5 U.S.C. §7013(a)(3). Several agencies are specifically excluded from the definition of agency: the General Accounting Office, Federal

organization, or to refrain from [that] activity, freely and without fear of penalty or reprisal and each employee [is] protected in the exercise of such a right."[54] Further, employees have the right to act for a labor organization as a representative and in that capacity to present the views of the labor organization to the heads of agencies and other appropriate government officials.[55] Employees also have the right to engage in collective bargaining with respect to the conditions of employment through their chosen representative.[56] Just as in the private sector, such representatives are typically labor organizations. Under the Statute, a labor organization is defined as an organization composed entirely or partially of employees, in which such employees participate and

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Bureau of Investigation, Central Intelligence Agency, National Security Agency, Tennessee Valley Authority, the Federal Services Impasse Panel, and the FLRA. *Id.*

[54] 5 U.S.C. §7102.

[55] *Id.* at §7102(1).

[56] *Id.* at §7102(2). The rights of private sector employees under the NLRA are similar, though the language used to describe the basic rights of employees suggests an important difference. Private sector employees also have "the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . [and] the right to refrain from such activities . . . ." 29 U.S.C. §157. There are three distinctions that are worth mentioning. First, private sector employees also have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." *Id.* The absence of similar language in the FSLMRS suggests that the collective rights of federal employees are not as broad as those granted to private sector employees and that these rights were not granted as a mechanism for the aid and protection of federal employees. Indeed, the FSLMRS does not appear to extend any protection to employees participating in concerted activities unrelated to union membership or activity. *See* PETER B. BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE 1365 (13th ed. 2000); *see also* Veterans Administration Medical Center, Bath, New York and American Federation of Government Employees, Local 491, 4 F.L.R.A. 563, 571 (1980) (finding that §7102 did not extend protection to employees participating in concerted activities unrelated to union activities or membership and that early versions of the House bill contained provisions that would have allowed protection for such activity but that the Senate version of the bill, which ultimately prevailed on this point, did not contain such language). Second, while private sector employees are specifically given the right to bargain over wages and hours, *see* 29 U.S.C. §157, federal employees generally do not enjoy this right. *See, e.g.,* 5 U.S.C. §7103(a)(12) (explaining scope of bargaining and excluding wages); *but see* Ft. Stewart Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990) (holding that certain federal employees may bargain over wages because this was a condition of employment). Third, use of the word "each" in the Statute suggests that every federal employee holds the collective rights individually. By contrast, the rights granted by the NLRA are extended to private sector employees collectively rather than in an individually. *See, e.g.,* National Labor Relations Board v. City Disposal Systems, Inc., 465 U.S. 822 (1984) (finding that an individual employee's refusal to work was protected because his action was based on the collective bargaining agreement and inured to the benefit of all the employees in the bargaining unit); Emporium Capwell Co., v. Western Addition Community Organization, 420 U.S. 50 (1975) (noting that the NLRA is based on the notion that individual rights are generally subordinated to the rule of the majority).

pay dues, and which has the purpose of dealing with the agency concerning grievances and conditions of employment.[57] Organizations sponsored by an agency are explicitly excluded from the definition of labor organization.[58]

The right to engage in collective bargaining requires that once the agency has recognized the exclusive representative of the employees in a bargaining unit, the two sides must meet to negotiate in good faith for the purpose of arriving at a collective bargaining agreement.[59] Collective bargaining is defined as the mutual obligation of the parties to consult and bargain in good faith over conditions of employment.[60] The parties are required to meet at reasonable times, but neither is compelled to agree to a proposal or to make a concession.[61] Conditions of employment include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions"[62] but does not include policies, practices or matters specifically provided for by federal statute.[63] Thus, any proposal to bargain must relate to a condition of employment or there is no obligation on the part of the agency to bargain.

Like the private sector, there are three categories of subjects of collective bargaining – mandatory, permissive, and prohibited subjects. But, while mandatory subjects of bargaining in the private sector include issues such as pay, hours, benefits, and subcontracting, mandatory subjects of bargaining in the federal sector are limited to

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[57] 5 U.S.C. §7103(a)(4).
[58] *Id.* at §7103(a)(4)(C)&(D). The definition of a labor organization under the NLRA, which is broader, contains no such exclusions. *See* 29 U.S.C. §152(5). It is, however, an unfair labor practice for an employer to sponsor or support a labor organization. *Id.* at §158(a)(2). For a more extensive discussion of this point see *infra* note 390.
[59] 5 U.S.C. §7114(a)(4).
[60] *Id.* at §7103(a)(12).
[61] *Id.*
[62] *Id.* at §7103(a)(14).
[63] *Id.* at §7103(a)(14)(C). For example, federal sector unions are not permitted to bargain over wages or benefits as those matters are provided for by federal statute. *See* 5 U.S.C. §5331-5332 (1988).

the statutory definition of conditions of employment.[64] As a result, the scope of federal sector bargaining is quite narrow by comparison to the private sector. Permissive subjects of bargaining concern certain managerial issues that Congress made bargainable at the election of the agency and which are discussed in greater detail below.[65] The prohibited subjects of bargaining in the federal sector are quite numerous and limit the duty to bargain in some important ways. Certain issues were determined by Congress to be the exclusive province of agency decision makers and were therefore reserved as management rights.[66] In addition to the rights reserved to management by the FSLMRS, there are further limitations. First, to the extent a proposal conflicts with federal law, there is no duty to bargain.[67] This limitation was designed to insure that decisions made by Congress for the benefit (or regulation) of all employees could not be changed at the bargaining table.[68] Second, if the proposal conflicts with a government-wide rule or regulation there is again no duty to bargain.[69] A current collective bargaining agreement (CBA) can override such a rule or regulation if it becomes effective during the life of that

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[64] *See* 5 U.S.C. §7103(a)(14).

[65] *Id.* at §7106(b)(1); *see also* Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C., 14 F.L.R.A. 644, 648 (1984) (referring to matters covered by section 7106(b)(1) as "permissive" subjects of bargaining).

[66] *Id.* at §7106(a). For enumeration and discussion of these rights, see *infra* notes 93-106 and accompanying text.

[67] *Id.* at §7117(a). For example, in *American Federation of Government Employees, Local 1547, and Department of the Air Force, Luke Air Force Base*, 55 F.L.R.A. 684 (1999), the FLRA determined that the agency was not required to bargain over a union proposal that the agency buy or reimburse bargaining unit employees for motorcycle safety equipment required only by the agency and not by any other law. The Authority concluded that since federal law prohibited the agency from buying the requested equipment unless the federal government, and not the employee, received the benefit of the purchase, the proposal conflicted with federal law. *Id.* at 686. In arriving at this conclusion, the Authority determined that since the agency did not require the employees to commute on motorcycles or use motorcycles in the performance of their duties, the government was not the primary beneficiary of the use of safety equipment. *Id.*

[68] McMillion, *supra* note 3, at 204.

[69] 5 U.S.C. §7117(a). A government-wide rule or regulations are those regulations or official declarations that apply to federal employees as a whole and are binding on the agencies and officials to which they apply. *See* Defense Contract Audit Agency and American Federation of Government Employees, 47

agreement.[70] Once that CBA expires, the rule or regulation takes priority for the same reason as that supporting the precedence of federal law. Finally, a proposal that conflicts with an agency-wide rule or regulation is not negotiable provided the agency can show a compelling need for the rule or regulation.[71]

Bargaining under the Statute is required under three circumstances. First, bargaining is required upon recognition of the exclusive representative in order to reach a collective bargaining agreement or whenever a new contract is required to replace the expiring agreement.[72] Second, although the FSLMRS does not expressly mention bargaining mid-term, under certain conditions bargaining during the term of an existing CBA is permissible and can be initiated by either the union or the agency.[73] Finally, the Statute provides for bargaining over procedures and appropriate arrangements.[74] This type of bargaining is often referred to as impact-and-implementation bargaining. Generally, prior to implementing a change in a condition of employment, the agency must provide the union with notice of the change and an opportunity to bargain over

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F.L.R.A. 512, 521 (1991) (explaining requirement for government-wide rule or regulation and finding that a bulletin concerning total quality management program structure was nonbinding guidance).

[70] 5 U.S.C. §7116(a)(7).

[71] *Id.* at §7117(a)(2). The FLRA is tasked with the authority to determine compelling need. *Id.* at §7117(b)(1). A compelling need is presumed absent an FLRA determination that no compelling need exists. *See* Federal Labor Relations Authority v. Aberdeen Proving Ground, Department of the Army, 485 U.S. 409 (1988) (per curium). In that case, the Court found that it was improper for the FLRA to make a "compelling need" determination in conjunction with a ULP proceeding. While the FLRA had authority to make the compelling need determination, it could only do so prior to a ULP proceeding. Section 7117(b) provides for a special procedure to make that determination, and an attempt to make that decision at a ULP proceeding without having first used the special procedure would frustrate the "careful balance" Congress wanted to preserve when it promulgated the FSLMRS. *Id.* at 413.

[72] 5 U.S.C. §7103(a)(12).

[73] National Federation of Federal Employees, Local 1309 v. Department of the Interior, 526 U.S. 86 (1999); *see generally* Todd A. Portzline, *The Federal Services Labor-Management Relations Statute Permits But Does Not Require Union Initiated Mid-Term Bargaining:* National Federation of Federal Employees, Local 1309 v. Department of the Interior, 38 DUQ. L. REV. 181 (1999). The particular nuances of mid-term bargain are beyond the scope of this article and will not be the subject of further discussion.

[74] *See* 5 U.S.C. §7106(b)(2)&(3).

those aspects of the change that are within the scope of bargaining.[75] This obligation most often arises when the agency exercises one of its reserved rights under section 7106. Although the agency is not required to bargain over the substance of the change, the agency is obligated to bargain over procedures necessary to implement the change and appropriate arrangements for bargaining unit employees who suffer more than a *de minimus* adverse impact.[76] But, where the change is substantively negotiable, the agency must negotiate over the decision to make the change, as well as the procedures and appropriate arrangements necessitated by the change.[77] Thus, if the matter is substantively negotiable, everything about the decision is subject to bargaining.[78]

Certain limitations were built into the federal labor relations program by Congress to ensure the balance so crucial to the efficient and effective conduct of the government's business.[79] These limitations reflect Congressional reluctance to give federal sector labor

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[75] *Id.*; United States Army Corps of Engineers, Memphis District, Memphis, Tennessee, 53 F.L.R.A. 79, 81 (1997); *see also* Memorandum from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, Guidance in Determining Whether Union Bargaining Proposals are Within the Scope of Bargaining Under the Federal Services Labor-Management Relations Statute (Sep. 10, 1998) [hereinafter Swerdzewski Memorandum, Scope of Bargaining], *reprinted in* BROIDA, *supra* note 56, at 2232.

[76] Department of Health and Human Services, Social Security Administration, 24 F.L.R.A. 403, 407-08 (1986); Association of Civilian Technicians, Montana Air Guard Chapter No. 29 v. Federal Labor Relations Authority, 22 F.3d 1150, 1155 (D.C. Cir. 1994) (noting that matters falling within subsections 7106(b)(2) and (3) concerning procedures and appropriate arrangements must be the subject of negotiation even if bargaining would affect the management rights enumerated in subsection 7106(a)).

[77] Swerdzewski Memorandum, Scope of Bargaining, *supra* note 75, at 2232. In these situations, the extent of the change's impact is immaterial. Air Force Logistics Command, Warner Robbins Air Logistics Center, Robins Air Force Base, Georgia, 53 F.L.R.A. 1664, 1669 (1998) (declining the opportunity to reexamine Authority precedent that the *de minimus* requirement applies only to section 7106(b)(2) and (3) bargaining).

[78] Swerdzewski Memorandum, Scope of Bargaining, *supra* note 75, at 2232.

[79] *See* 123 CONG. REC. E333 (daily ed. Jan. 26, 1977) (statement of Rep. Clay), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 831. Of course, there were members of Congress who felt that the legislation was not going far enough in providing rights to the unions. Congressman Clay stated, "I am not totally delighted with this final product because it does not begin to afford the rights to employees which, in my judgement are essential ingredients of any labor relations program. 124 Cong. Rec. H9637 (daily ed. Sep. 13, 1978) (remarks of Rep. Clay), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 931. Another Congressman noted that the Udall substitute language was barely acceptable to Congressmen Ford and Clay whom he referred to as "outstanding spokesman for the rights of the Federal

unions the ability to exert pressure on a particular agency or set of agencies in a way that would jeopardize government services.[80] It is clearly not within the public interest when services are halted because an agency and a union are unable to agree on a particular issue that goes to the heart of government operations. By taking certain issues out off the bargaining table and by prohibiting the use of traditional private sector economic weapons, Congress at least minimized the possibility of an interruption in services.

First, the FSLMRS did not grant federal employees the right to bargain over wages, fringe benefits, or retirement benefits. While not specifically stated in those terms, the Statute does indicate there is no duty to bargain over polices, practices, and matters specifically provided for by federal statute.[81] Congress establishes the wages and benefits for most of the federal employees pursuant to federal law.[82] Even the main proponents of the compromise bill concluded that such a decision was necessary to ensure the efficient operation of the federal government. Congressman Udall stated "there is not really any argument in this bill . . . about Federal collective bargaining for wages and fringe benefits and retirement – the kinds of things giving us difficulty in the Postal Service today. . . . [W]ages and hours and retirement and benefits will continue to be established by law through Congressional action."[83] Underscoring the need for control, Congressman Ford acknowledged that "[n]o matters that are governed by statute

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employee groups." 124 Cong. Rec. H9633 (daily ed. Sep. 13, 1978) (remarks of Rep. Udall), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 923.

[80] *See* McMillion, *supra* note 3, at 199 (noting that Congress recognized that a powerful union could abuse the federal government causing harm to the public); *see also* 124 CONG. REC. H9647 (daily ed. Sep. 13, 1978) (statement of Sen. Lott), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 950.

[81] 5 U.S.C. §7103(a)(14(C)

[82] 5 U.S.C. §5331-5332. Known as the General Schedule, it covers the vast majority of federal workers who are generally referred to as general schedule employees. There are also other payment schedules established by federal law that cover other federal workers. *See* Captain Natalie L. Griffin, *The Wages of Federal Employees: Can We Talk?,* 129 MIL. L. REV. 141, 172 (1990). Well over ninety percent of the federal workforce have their salaries set by law. *See id.* at 148.

(such as pay, money-related fringe benefits, retirement and so forth) could be altered by a negotiated agreement."[84]

Second, federal employees do not have the right to strike in the federal sector. The Statute makes it an unfair labor practice for a federal sector union to strike.[85] Moreover, a union is not allowed to condone a strike or any kind of work stoppage or slowdown,[86] and any union that participates in such an activity risks the loss of its status as a labor organization.[87] By the same token, a federal employee will lose his or her status as an employee entitled to protection under the FSLMRS.[88] The rationale commonly asserted today for the prohibition against strikes is that they "result in distortion of the political process and an obstruction of the normal operations of government, with unions taking advantage of their superior power relative to the other

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[83] 124 CONG. REC. H9633 (daily ed. Sep. 13, 1978) (remarks of Rep. Udall), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 923.

[84] 124 CONG. REC. H8468 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 682.

[85] 5 U.S.C. §7116(b)(7). The Taft-Hartley Act of 1947 was the first piece of continuing legislation that prohibited federal employees from striking. *See* Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (repealed 1955). Although that portion of the Taft-Hartley Act was subsequently repealed, 23 Pub. L. No. 84-330, 69 Stat. 624 (1955), federal employees were still forbidden to strike. *Id.* §4, 69 Stat. at 625. Even at the genesis of the federal labor relations program, EO 10988 proscribed federal employee strikes. Exec. Order No. 10,988, 27 Fed. Reg 551, 552 (Jan. 17, 1962). Federal employees have never enjoyed a right to strike, and those that did have paid a price. *See* Craig A. Olson, *Dispute Resolution in the Public Sector, in* PUBLIC-SECTOR BARGAINING, *supra* note 10, at 163-4 (noting that approximately 12,000 air traffic controllers were fired and the union decertified as a result of the strike conducted by the Professional Air Traffic Controllers Organization).

[86] 5 U.S.C. §7116(b)(7).

[87] *Id.* at §7103(a)(4)(D). The union can also be decertified, rendering it unable to represent federal employees. *Id.* at §7120(f).

[88] *Id.* at §7103(a)(2)(v). More importantly, perhaps, a federal employee who participates in a strike is permanently barred from federal employment, *see id.* at §7311, and is guilty of a felony. 18 U.S.C. §1918 (2000). It is also a crime to aid and abet a striker. *Id.* at §1231. Federal employees are even required to take an oath not to strike. *See* 5 U.S.C. §3333(a).

One of the more well known instances of presidential involvement in federal labor relations was President Reagan's decision to fire nearly 12,000 air traffic controllers and to decertify the union after their attempt to strike in violation of federal law. *See Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir. 1982). For a comparison of the right to strike in the public and private sectors, see Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?*, 38 STAN. L. REV. 1097 (1986).

interest groups."[89] This distortion can have a financial affect, with tax dollars being reallocated to the benefit of federal employees and the detriment of other interest groups or the public, and a nonmonetary affect in the form of a change in agency procedure made in response to a strike or threat thereof.[90] As an alternative to economic warfare to resolve bargaining impasses, the Statute provides for third party resolution of disputes between management and labor. The Federal Services Impasse Panel (FSIP), a branch of the FLRA, is authorized to resolve bargaining impasses concerning conditions of employment, though its decisions can be subject to review by the FLRA.[91] Generally, if the FSIP is unable to assist the parties to resolve the impasse, the parties present their dispute at a hearing before the FSIP, which will then resolve the dispute by ordering one side to accede to the demands of the other.[92]

Third and perhaps most important, is the limitation on bargaining occasioned by the management rights clause.[93] Management rights are divided into two types. Section 7106(a) constitutes exclusive management rights that are not subject to bargaining. In this regard they are prohibited subjects and they include the right to "determine the

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[89] KEARNEY, *supra* note 10, at 214; *see also* HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNION AND THE CITIES 167 (1971).

[90] *See* WELLINGTON & WINTER, *supra* note 89, at 167. Wellington and Winter go on to note that collective bargaining provides a forum for interaction with government that is generally not available to other groups. *Id.* at 169.

[91] 5 U.S.C. §7119(c)(1); *see also* Marvin J. Levine, *Legal Obstacles To Union-Management Cooperation In The Federal Sector*, 42 LABOR L. J. 103, 108-09 (Feb. 1991).

[92] 5 U.S.C. §7119(c)(5).

[93] *Id.* at §7106. Congress's decision to remove these management rights from the negotiation process was done "[i]n an effort to balance collective bargaining rights of employees against the need to secure the effective administration of government." Association of Civilian Technicians, Montana Air Guard Chapter No. 29 v. Federal Labor Relations Authority, 22 F.3d 1150, 1151 (D.C. Cir. 1994). The task force appointed by President Kennedy to determine the best approach to federal sector labor-management relations concluded that preservation of the public interest and retention of a certain amount of decision making authority for management could only be achieved by limiting the scope of bargaining. President's Task Force on Employee-Management Relations in the Federal Service, Employee-Management Practice in the Federal Service, Staff Report II (1961), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 1179.

mission, budget, organization, number of employees, and internal security practices of the agency;"[94] the right to "hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action;" [95] and the right to assign work, make determinations with regard to subcontracting, make manning decisions,[96] and make promotion decisions.[97] The other type of management right includes what are regarded as permissive subjects of bargaining. They are "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on technology, methods, and means of performing work."[98] Normally referred to as "(b)(1)" issues, they could be the subject of bargaining if the agency, at the level of recognition, elects to engage in such bargaining, though the agency is not required to make that election.[99] This decision is vested in the agency officials at the level of recognition and cannot be altered by higher level agency management.[100] Even after making the election to bargain, the agency could terminate

[94] 5 U.S.C. §7106(a)(1).
[95] *Id.* at §7106(a)(2)(A).
[96] *Id.* at §7106(a)(2)(B).
[97] *Id.* at §7106(a)(2)(C). The final exclusive management right includes the ability to take whatever actions may be necessary to carry out the agency mission during emergencies. *Id.* at §7106(a)(2)(D).
[98] *Id.* at §7106(b)(1). These are called permissive subjects since FLRA precedent has described matters mentioned in section 7106(b)(1) as "permissive" subjects of bargaining. *See, e.g.,* Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C., 14 F.L.R.A. 644, 648 (1984). For example, permissive subjects at the United States Customs Service might include the type of weapons the agents will carry or the types of searches they will conduct, when they will be done, and how they should be conducted. These matters constitute methods and means of performing work. Another example provides an interesting contrast. At the Internal Revenue Service, methods and means of performing work might include decisions on how audits are conducted and under what circumstances an audit is done. It is clear that permissive subjects vary from agency to agency and can encompass very different issues with drastically different implications. Furthermore, other permissive topics which concern numbers, types, and grades of employees or positions assigned will have budget, operational, and administrative consequences that will also impact each agency much differently.
[99] *See* Federal Deposit Insurance Corporation, Headquarters and National Treasury Employees Union, 18 F.L.R.A. 768, 771 (1985) (noting that section 7106(b)(1) matters are bargainable only at the election of the agency).
[100] *See* Advice Memorandum No. 95-3, from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, Refusal to Bargain Over section 7106(b)(1) Subjects (Feb. 28, 1995) (on

and withdraw from bargaining at any time prior to agreement,[101] and an attempt by either party to bargain to impasse is an unfair labor practice.[102] Once an agreement as to a (b)(1) issue is reached, that agreement provision may not be disapproved by an agency head pursuant his or her authority under section 7114(c) simply because the agreement concerns a (b)(1) issue.[103]

A recent change in the relationship between these two management rights clauses had important implications for President Clinton's executive order. Section 7106(a) management rights were originally viewed as superior to the potentially bargainable management rights in section 7106(b).[104] Thus, a decision to bargain over a (b)(1) subject made at the level of recognition could be overturned by the agency head pursuant to section 7114(c) if the matter to be discussed implicated a management right under section 7106(a). Pursuant to the D.C. Circuit's holding in *Association of Civilian Technicians, Montana Chapter No. 29 v. Federal Labor Relations Authority*,[105] section 7106(b)(1) is now considered an exception to the list of nonnegotiable management rights listed in subsection 7106(a). In other words, a union can enforce the agency's agreement to bargain over the issue under subsection 7106(b)(1) even though the matter might also

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file with the author); *see also* National Association of Government Employees, Local R4-75 and Department of the Interior, National Park Service, Blue Ridge Parkway, 24 F.L.R.A. 56, 61-62 (1986).

[101] *Id.* at 771-72.

[102] *See* Sport Air Traffic Controllers Organization and Air Force Flight Test Center, Edwards Air Force Base, California, 52 F.L.R.A. 339 (1996) (finding that union's instance to impasse over its ability to tape record the collective bargaining sessions was a unfair labor practice because the matter was a permissive subject of bargaining).

[103] *See* Blue Ridge Parkway, 24 F.L.R.A. at 62. Under section 7114(c), the head of an executive agency must approve any agreement reached at the level of recognition between the agency and the union. 5 U.S.C. §7114(c). The scope of review under section 7114(c), however, is limited in that the agency head must approve the agreement if it is in accordance with the FSLMRS and other applicable laws, rules, or regulations. *Id.* at 61.

[104] National Guard Bureau, Alexandria, Virginia and Association of Civilian Technicians, Montana Chapter No. 29, 45 F.L.R.A. 506 (1992), *reversed,* Association of Civilian Technicians, Montana Chapter No. 29 v. Federal Labor Relations Authority, 22 F.3d 1150 (D.C. Cir. 1994). In *National Guard Bureau*, the Authority had held that section 7106(b)(1) was not an exception to section 7106(a).

pertain to a section 7106(a) exclusive management right not normally subject to the requirement to bargain.[106] The decision by the D.C. Circuit became an impediment to the implementation of EO 12871 requiring agencies to bargain over subjects in section 7106(b)(1). Traditionally, agencies had been generally unwilling to bargain over the subjects contained in subsection 7106(b)(1) for fear of conceding too much power or authority. The decision in *Association of Civilian Technicians* makes agencies even less willing to bargain over (b)(1) issues because an agreement to bargain over a (b)(1) issue would now require the agency to bargain over its exclusive management rights in section 7106(a). This is one important reason why the requirement to bargain over (b)(1) issues in EO 12871 became such a controversial issue. In effect, President Clinton's order to bargain over (b)(1) issues put section 7106(a) management rights on the table.

C. Partnership

From the beginning, federal sector labor relations were supposed to be cooperative.[107] A task force, appointed by President Kennedy to study and make recommendations concerning federal labor relations, rejected the private sector model of collective bargaining because the adversarial system would not serve the public

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[105] 22 F.3d 1150 (D.C. Cir. 1994).

[106] Association of Civilian Technicians, 22 F.3d at 1155 (noting that the proper relationship between management rights enumerated under subsections 7106(a) and (b)(1) is that subsection 7106(b)(1) lists certain topics that overlap the management rights contained in subsection 7106(a), but are still proper subjects of bargaining). For a contrary view, see James J. Powers, *Symposium on Section 1983: Student Notes and Comments: "Partnership Buster" In the Federal Government: The Relationship Between 5 U.S.C. 7106(a) and (b)(1)*, 72 CHI.-KENT L. REV. 837 (1997) (arguing that court's rationale in *Association of Civilian Technicians*, was incorrect and that the two subsections are actually mutually exclusive). The Authority has since ruled in accordance with the D.C. Circuit's holding in *Association of Civilian Technicians*. *See* National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky, 51 F.L.R.A. No. 36 (1995) (holding that "matters encompassed by the terms of section 7106(b)(1) constitute exceptions to the rights set forth in section 7106(a)."). This issue is actually highly controversial and probably not finally resolved. *See* United States Department of Commerce, Patent and Trademark Office and Patent Office Professional Association, 53 F.L.R.A. 858 (1998) (discussing the issue of the relationship between sections 7106(a) and (b)(1) and refusing to overturn court supported Authority precedent despite agency pressure to do so).

effectively.[108] The cooperative approach was thought to be the best way to include federal employees in the formulation and implementation of personnel policies and practices. By approving the findings and recommendations of the task force, President Kennedy made cooperation the government's first federal sector labor relations policy. A study commissioned by President Nixon adopted the policies first set forth by the Kennedy task force,[109] and President Nixon continued the stated policy of labor-management cooperation when he issued EO 11491.[110] Even as the Senate considered passage of the FSLMRS bill, its support was based on the desire for a program characterized by "cooperative and constructive relationships between labor organizations and management officials."[111]

At first blush, this approach seems to make sense. As one commentator suggested, "the public sector appears to provide unique opportunities for cooperation between unions and management."[112] The limitations on the scope of bargaining, the union's ability to lobby Congress to make changes in the agency (e.g., the agency's budget), and the shared mission of public service and the mutual concerns of the parties all provide tremendous potential for cooperative relations.[113] However, cooperative relationships are vulnerable to power imbalances,[114] mistrust,[115] and a lack of a collective

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[107] McMillion, *supra* note 3, at 179.
[108] The task force concluded that while the private sector bargaining model was useful in some respects, a wholesale transplant of the private sector system would be unworkable. Legislative History of the FSLMRS, *supra* note 29, at 1161; *see also* McMillion, *supra* note 3, at 179. The title of the task force report was 'A Policy for Employee-Management Cooperation in the Federal Service.' Legislative History of the FSLMRS, *supra* note 29, at 1177.
[109] *See* Legislative History of the FSLMRS, *supra* note 29, at 1163.
[110] Exec. Order No. 11,491, 34 Fed. Reg. 17605, 17605 (Oct. 29, 1969) (stating in the preamble that the participation of federal employees should be based on cooperative relationships).
[111] S. Rep. No. 95-969, Legislative History of the FSLMRS, *supra* note 29, at 749
[112] Levine, *supra* note 94, at 104.
[113] *Id.*
[114] *Id.* at 105 (referencing R. Schwartz et al., Creating and Maintaining a Union-Management Cooperative Effort: The Internal Revenue Service, National Treasury Employees Union Incentive Pay Experience (July

motivation to reach a fair and equitable result.[116] In the federal sector, that vulnerability seems evident.

Notwithstanding the desire of the architects of the federal program and the latent potential for cooperative relations, dissatisfaction with the system began to emerge shortly after promulgation of the FSLMRS. Over time, unions and the various agencies became embroiled in an adversarial relationship characterized by endless litigation over minor issues.[117] Examples of minor issues that had to be litigated at the FLRA include a dispute over the use of a radio at work,[118] the extent of coffee consumption during breaks,[119] removal of a water cooler,[120] and removal of two office partitions and a typewriter.[121] Unfortunately, these examples are not anecdotal.[122] As one commentator observed, "[i]f the evolution of labor-management relations in the federal sector has demonstrated anything, it is management's reluctance to concede power and the unions' desire for more power."[123] There was also significant uncertainty in the administration of

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1-3, 1985) (unpublished paper presented at the Annual Meeting of the East Region International Personnel Management Association, Baltimore, Maryland)).

[115] *See* Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L. J. 41, 52 (1985).

[116] *See id.*

[117] *See* GAO, FEDERAL LABOR RELATIONS, *supra* note 3, at 18-20.

[118] American Federation of Government Employees, Local 1568 and U.S. Department of Housing and Urban Development, 34 F.L.R.A. 630 (1990).

[119] Veterans Administration, VA Hospital, Brockton, Massachusetts and National Association of Government Employees, 35 F.L.R.A. 188 (1990).

[120] U.S. Department of Labor, Employment Standards Administration, Boston, Massachusetts and American Federation of Government Employees, 37 F.L.R.A. 25 (1990).

[121] U.S. Department of Health and Human Services, Social Security Administration and American Federation of Government Employees, 38 F.L.R.A. 193 (1990).

[122] *See* GAO, FEDERAL LABOR RELATIONS, *supra* note 3, at 18. Comments made by neutral observers that were reported in the General Accounting Office report demonstrate the prevalence of this problem. One observer commented that "'litigation and minutiae are the norm too often.'" *Id.* at 20. Another stated "'[agencies and unions] litigate everything.'" *Id.* During an interview several years ago, a local union president affiliated with the American Federation of Government Employees told an industry journal that "[the union] bargain[s] virtually every time they turn out the light." Susannah Zak Figura, *Muscling In: For Federal Unions, Partnership Means Power and They Want More of It*, GOVT. EXEC (June 1999), at 21 [hereinafter Figura, *Muscling In*].

[123] McMillion, *supra* note 3, at 211.

what the parties soon realized was a complex and highly technical program.[124] Indeed, a 1991 General Accounting Office (GAO) report concluded that the federal labor relations program had fallen short of contributing to the effective conduct of the government's business, of involving employees in decisions affecting their working conditions, and in facilitating the collaborative resolution of disputes between labor and management.[125] Not oblivious to the concerns about the FSLMRS, the House Subcommittee on Civil Service held hearings in an effort to better understand the problems that seemed to plague its carefully balanced program.[126] Although dissatisfaction was evident,[127] Congress was ultimately unwilling or unable to make changes in the legislation.

In 1993, President Clinton and Vice President Gore instituted the National Performance Review, a top to bottom review of the federal government's functions and procedures. The goal of the NPR was to "make government work better and cost less."[128] Adopting the 1991 GAO Report findings, the NPR concluded that the only way to change the adversarial nature of federal labor relations was to create a partnership between federal agencies and labor unions.

On October 1, 1993, to promote the principles and recommendations of the NPR and in what was described as an effort to "establish a new form of labor-management relations," President Clinton issued Executive Order 12871, Labor-Management

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[124] *See* GAO, FEDERAL LABOR RELATIONS, *supra* note 3, at18-22 (reporting that one agency official observed that "'[w]hat we have . . . is a labor law program not a labor relations program'").
[125] *See* GAO, FEDERAL LABOR RELATIONS, *supra* note 3, at 76.
[126] *See generally* Title VII of the Civil Service Reform Act of 1978: Hearing Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 100th Cong. (1988).
[127] One member of Congress referred to the federal sector labor relations program as "this mess." *Id.* at 2 (remarks of Rep. Schroeder). Representative Clay, a leader in the effort to pass the FSLMRS, expressed great dismay at the failure of that legislation. *See generally id.* at 3-8 (statement of Rep. Clay). The national union presidents invited to testify at the hearings expressed similar dissatisfaction. *See generally id.* at 84-160.
[128] GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at i.

Partnerships.[129] The goals of EO 12871 were increased cooperation between agencies and unions[130] and the involvement of federal employees and their unions "as full

[129] Exec. Order No. 12,871, 58 Fed. Reg. 52201 (Oct. 1, 1993). In relevant part, the Executive Order states:

> The involvement of Federal Government employees and their union representatives is essential to achieving the National Performance Review's Government reform objectives. Only by changing the nature of Federal labor-management relations so that managers, employees, and employees' elected union representatives serve as partners will it be possible to design and implement comprehensive changes necessary to reform Government. Labor-management partnerships will champion change in federal Government agencies to transform them into organizations capable of delivering the highest quality services to the American people.
>
> By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, and in order to establish a new form of labor-management relations throughout the executive branch to promote the principles and recommendations adopted as a result of the national Performance Review, it is hereby ordered:
>
> **Section 1**: THE NATIONAL PARTNERSHIP COUNCIL. (a) *Establishment and Membership.* There is established the National Partnership Council (Council). . . .
>
> (b) *Responsibilities and Functions.* The Council shall advise the President on matters involving labor-management relations in the executive branch. Its activities shall include:
>
> (1) supporting the creation of labor-management partnerships and promoting partnership efforts in the executive branch, to the extent allowed by law;
>
> (2) proposing to the President by January 1994 statutory changes necessary to achieve the objectives of this order, including legislation consistent with the National Performance Review's recommendations . . .
>
> **Sec. 2**: IMPLEMENTATION OF LABOR-MANAGEMENT PARTNERSHIPS THROUGHOUT THE EXECUTIVE BRANCH. The head of each agency subject to the provisions of chapter 71 of tile 5, United States Code shall:
>
> (a) create labor-management partnerships by forming labor-management committees or councils at appropriate levels, or adapting existing councils or committees if such groups exist, to help reform Government;
>
> (b) involve employees and their union representatives as full partners with management representatives to identify the problems and craft solutions to better serve the agency's customers and mission; . . .
>
> (d) negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same; . . .
>
> **Sec. 3**: NO ADMINISTRATIVE OR JUDICIAL REVIEW. This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by the party against the United States, . . .

partners" in an effort to reform the federal government. [131] In an effort to achieve these goals, President Clinton directed the formulation of "partnership councils" at the national level and the level of recognition.[132] This meant that a partnership council was created at the agency level and additional councils were to be created at the level of recognition—wherever there existed a collective bargaining agreement between a subunit of the agency and a bargaining unit.[133] The order also established a National Partnership Council (NPC), the function of which was to promote the formation and implementation of partnership councils at agencies throughout the federal government, advise the President on matters pertaining to federal sector labor relations, propose legislation necessary to achieve the objectives of the order, and to collect and disseminate information concerning

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Id. at 52201-03.

[130] Interestingly, while President Clinton may have envisioned a new form of labor-management relations, there was really nothing new about it. The goals and motivations for his executive order were no different than the goals and motivations for EO 10988 or the FSLMRS. Politics aside, President Clinton, President Kennedy, and Congress all claimed to have been motivated by the public interest and the maintenance of an effective and efficient government. Moreover, all three felt they were creating a program based on a cooperative model. The difference between them, in the simplest terms, is that while President Kennedy and Congress designed a structure that enabled cooperation between unions and agencies, President Clinton attempted to mandate cooperation for the entire federal government. President Clinton's approach in this regard, which included mandatory (b)(1) bargaining, upset a balance of power carefully constructed to provide for meaningful collective representation for employees in an industry where Congress decided that a certain degree of management control is necessary for efficient and effective government.

[131] Memorandum from President William Clinton, to the Heads of Executive Departments and Agencies, Reaffirmation of Executive Order 12871 – Labor-Management Partnerships 1 (Oct. 28, 1999) [hereinafter Presidential Memorandum, Reaffirmation of Executive Order 12871] (on file with the author).

[132] Exec. Order No. 12,871, 58 Fed. Reg. at 52202. The specific requirement was outlined in Section 2(a) of the order.

[133] For example, in the Department of the Air Force, the level of recognition is at the base level. Thus, to the extent a particular base had a collective bargaining agreement with a bargaining unit of employee on that base, a partnership council was supposed to be established. There was no partnership council at the Air Force headquarters level because that was not the level of recognition. Interview with Gordon Canning, Senior Labor Relations Specialist, Department of the Air Force, in Washington D.C. (Mar. 22, 2001). There was, however, a partnership council for the entire Department of Defense known, not surprisingly, as the Department of Defense Partnership Council. Interview with Gordon Canning, *supra*. As of 1999, there were over 2,000 separate bargaining units, of which all but 124 were covered by an agreement. OPM, UNION RECOGNITION, *supra* note 26, at 19. Theoretically, there should have been approximately 1,876 partnership councils throughout the government.

partnership efforts in the executive branch.[134] In addition, EO 12871 called for federal agencies to negotiate over permissive subjects of bargaining.[135] Guidance on the implementation of EO 12871 issued by OPM stated in no uncertain terms that "bargaining over the subjects set forth in 5 U.S.C. 7106(b)(1) [was] mandatory."[136] Finally, though less dramatically, the order called for training in consensual methods of negotiation such as interest-based bargaining to be given to managers, supervisors, and employees who were also union representatives.[137]

Ultimately, President Clinton's approach to labor-management cooperation came to an end. On February 17, 2001, barely seven years after President Clinton introduced partnership, President George W. Bush issued Executive Order 13203 which revoked EO 12871 and the October 1999Presidential memorandum, entitled 'A Reaffirmation of Executive Order 12871.'[138] President Bush's executive order dissolved the NPC and required the Director of OPM and the heads of all executive branch agencies to rescind any rules, regulations, or other guidelines implementing President Clinton's executive order.[139] The dissolution of EO12871 also had the effect of removing the direction to agencies to bargain over permissive subjects found in section 7106(b)(1).[140]

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[134] Exec. Order No. 12871, 58 Fed. Reg. at 52202.
[135] *Id.*; Presidential Memorandum, Reaffirmation of Executive Order 12871, *supra* note 131.
[136] Memorandum from James B. King, Director, Office of Personnel Management, for Heads of Departments and Agencies and Presidents of Federal Employee Unions, Guidance for Implementing Executive Order 12871, at 2 (Dec. 16, 1993) [hereinafter OPM Memorandum, Guidance for Implementing Executive Order 12871] (on file with the author).
[137] Exec. Order No. 12871, 58 Fed. Reg. at 52202-03
[138] Exec. Order No. 13,203, 66 Fed. Reg. 11227 (Feb. 17, 2001).
[139] *Id.*
[140] The order did not relieve agencies of the obligation to bargain or maintain a partnership council if either obligation was written into a collective bargaining agreement. *Id.*

II. Mandatory Bargaining Over Permissive Subjects and the Limits of Presidential Authority

Quite apart from whether cooperation is a workable form of federal labor relations, the concept of partnership faltered for other reasons. From the beginning the executive order and the partnership concept met with resistance from labor and management, and it was enough to prevent the Clinton version of labor-management cooperation from ever really taking hold in the federal government.[141] Many viewed the executive order as a political move designed to mollify the federal unions, which were also faced with a pledge by the same administration to cut over two hundred thousand federal jobs.[142] Mid-level federal managers, unhappy they had not been given a place in the new program,[143] were concerned that labor unions would enjoy too much power under the new partnership regime.[144]

To be sure, there were some success stories, which one would expect with fruitful cooperative relationships,[145] but problems caused by implementation, litigation, and

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[141] Figura, *Muscling In, supra* note 122, at 20 (noting that resistance on the union side originated with the local rather than the national officials); Stephen Barr, *Stronger Role for Unions Backed*, WASH. POST, Feb. 5, 1999, at A31 [hereinafter Barr, *Stronger Role for Unions*] (noting that from the start many federal agencies resisted compliance with the order).

[142] Donald Devine, *Reinvention Payoff?: Keeping the Unions Happy*, WASH. TIMES, Dec. 22, 1993, at A18; Stephen Barr, *Organizing for Empowerment; As Job Cuts Loom, Clinton's 'Partnership' Offers Wider Union Role*, WASH. POST, Oct. 13, 1993, at A19 [hereinafter Barr, *Organizing for Empowerment*]; Stephen Barr, *A Labor-Management Thicket Awaits Bush Administration*, WASH. POST, Jan. 12, 2001, at B2 [hereinafter Barr, *Labor-Management Thicket*] (noting that critics viewed the National Partnership Council as a political reward for labor union support of the Clinton/Gore ticket); Mike Causey, *A Bargain for Unions*, WASH. POST, Sep. 29, 1993, at D2 (noting that insiders believe that unions were given expanded bargaining rights in return for acquiescence over the administration's plan to cut federal jobs or to cancel a planned pay raise).

[143] Barr, *Labor-Management Thicket, supra* note 142; Figura, *Muscling In, supra* note 122, at 22 (describing the noticeable exclusion of mid-level managers from the partnership concept).

[144] Barr, *Stronger Role for Unions, supra* note 141, at A31.

[145] *See, e.g.*, NATIONAL PARTNERSHIP COUNCIL, REPORT TO THE PRESIDENT ON PROGRESS IN LABOR-MANAGEMENT PARTNERSHIPS 17-31 (Oct. 1996) (describing successful partnerships at the United States Mint in Philadelphia, Department of Education, Distribution Depot at Warner Robbins Air Force Base, Picatinny Arsenal Fire Department, Philadelphia Region of the Social Security Administration, and the North Texas District of the Internal Revenue Service); Barr, *Stronger Role for Unions, supra* note 141 (noting that ULP charges filed with the FLRA decreased to 5,702 in 1998 from 8,674 when President

overreaching yielded a program that was not widely supported[146] and that did not live up to the promise. Perhaps the most contentious issue concerned the requirement that agencies bargain over subjects listed in section 7106(b)(1).[147] A 2000 OPM study on labor-management partnerships concluded that "no other section of the Executive Order

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Clinton took office); Figura, *Muscling In*, *supra* note 122, at 24 (referencing the successful implementation of the Social Security Administration's 800 number telephone service and the decrease in grievances and litigation cost at the Customs Service). Of course, one problem with crediting these successes to partnership is that it can be difficult to determine whether a particular success might have occurred in the absence of partnership. Surely, a number of gains can be attributed to cooperation between the agency and the union. But, other aspects of the executive order so obscured the labor relations atmosphere that attributing each and every success to partnership is probably not accurate. For example, a (now-defunct) federal awards program recognized the cooperation of unions and agencies in achieving noteworthy results through partnership. The award was called John N. Sturdivant National Partnership Award—for the late president of AFGE—and Vice President Gore presented the awards on behalf of the NPC. The awards were presented for the first time in 1996 to, among others, the Red River Army Depot for labor-management cooperation that reportedly saved the organization from extinction. Kelly Air Force Base, in San Antonio, Texas, is also regarded as another partnership success story because cooperation resulted in a substantial reduction in the number of unfair labor practice complaints. Kelly Air Force Base reported saving $2 million in litigation costs by resolving disputes using partnership, as well as a decrease in the number of grievances from forty-seven to twelve and in ULP filings from 193 to one between 1992 and 1994. *See* David Hornestay, *Partnership Pays*, GOVT. EXEC. (Feb. 1996), at 43. Of course, EO 12871 was not issued until October 1, 1993. While these two cases are touted as examples of partnership-style cooperation, the partnership order appeared to have little to do with either case. Cooperation among the parties was necessitated by events, not because it was required by partnership. Johnson, *supra* note 1, at 141-43. Cooperation among labor and management may have resulted in even more substantial and identifiable gains had the problems associated with partnership not prevented productive interaction between some agencies and the unions.

[146] One survey of executive agency labor relations specialists conducted in 1996 shed some light on the lack of wide spread support for the Clinton approach. Cathie M. Lane, *Bittersweet Partnerships*, GOVT. EXEC. (Feb. 1996), at 41 [hereinafter Lane, *Bittersweet Partnerships*]. While many favored a cooperative approach—ninety-three percent of those surveyed felt that cooperative relationships are more productive—seventy percent noticed no change in the level of friction between labor and management under partnership. *Id.* at 42. Decreases in litigation and ULP complaints are often cited as one of the primary benefits of partnership. *See* Hornestay, *supra* note 145, at 43; Telephone Interview with Steve Muir, Director, Division of Legal and Technical Services, Health Care Financing Administration (Jun. 6, 2001) (stating that the reduction of grievances became the measure of a good partnership arrangement). But, more than eighty percent of the respondents said there agencies had not experienced any decrease in third party litigation, though there was hope that the increased use of alternative dispute resolution would help in this regard. Lane, *Bittersweet Partnerships, supra*, at 42.

A recent survey by the executive office responsible for administering the National Partnership for Reinventing Government found that after five years of partnership, only twenty-five percent of federal employees felt that cooperation had been successful in their agencies; twenty-seven percent felt labor management relations were poor; and forty-eight percent voiced no opinion. Brian Friel, *Managers Oppose Order to Bargain With Unions*, GovExec.com, *at* http//www.govexec.com/dailyfed/0299/021299b2.htm (Feb. 12, 1999).

[147] Barr, *Labor-Management Thicket*, *supra* note 142 (citing the 2000 OPM study on labor-management partnerships); Interview of Tim Curry, Labor Relations Specialist, Department of Defense Field Advisory Service, in Washington, D.C. (Feb. 23, 2001).

has yielded such mixed results nor [sic] stimulated more controversy."[148] This aspect of President Clinton's program, perhaps more than any other, led to the demise of the partnership effort.[149]

A. Impact of the Direction to Bargain Over (b)(1) Issues

When the executive order was initially issued, many understood it as a requirement for agencies to bargain over the statutorily optional topics.[150] Thus, although union proposals to bargain over these issues could ordinarily be rejected by the agency pursuant to the FSLMRS, the executive order changed that by directing heads of the various agencies to negotiate over those issues and instruct subordinate officials to do the same.[151] Even though the order appeared to contradict the Statute's assignment of discretion to the individual agencies, the OPM's implementation guidance left little doubt as to the expectations of the Clinton administration. Referring to topics in section 7106(b)(1) as "formerly discretionary subjects," the guidance explained that "under Executive Order 12871, bargaining over the subjects set forth in 5 U.S.C. §7106(b)(1) is now mandatory, and a failure by agency managers to engage in such bargaining would be

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[148] OFFICE OF PERSONNEL MANAGEMENT, LABOR-MANAGEMENT PARTNERSHIP: A REPORT TO THE PRESIDENT 11 (Dec. 2000) [hereinafter OPM, REPORT TO THE PRESIDENT].

[149] It was clear that the disagreement between labor and management concerning the requirement to bargain over (b)(1) and the ensuing controversy conflicted with the nominal purpose of the executive order to increase cooperation and interest-based bargaining. The concept of interest-based bargaining is an "orientation to negotiation which focuses on solutions to the parties' sets of underlying needs and objectives." Carrie Menkle-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754, 794 (1984). Rather than focusing on the parties' positions and on using compromise to reach a solution, the problem solving approach focuses on reconciling the interests of the parties. ROGER FISCHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN 42 (Bruce Patton ed., Penguin Books 1991) (1981); Menkle-Meadow, *supra,* at 795. The federal sector-wide clash over (b)(1) bargaining rights, on the other hand, was highly positional. To the extent the parties in a particular negotiation were embroiled in a fight over bargaining (b)(1) issues, focusing on interests and not on positions would have been impossible. Thus, interest-based bargaining would be completely useless. In this regard, it can be argued that President Clinton tried to do too much, too fast.

[150] *See* Marick F. Masters & Robert S. Atkin, *Reforming Federal Sector Labor Relations: Recommendations of President Clinton's National Partnership Council*, 45 LABOR L. J. 352, 356 (1994); Powers, *supra* note 106, at 856-57.

inconsistent with the President's directive."[152] Further, bargaining would include the substance of a proposal and not merely the impact and implementation of a decision related to these subjects.[153] Agencies were required to memorialize this commitment in the partnership agreements to be drafted by the various partnership councils.[154] The agencies and unions were obligated to bargain "in good faith, using interest-based bargaining, with the objective or reaching an agreement."[155] In what appears to be an even greater effort to inject the requirements of the executive order into the statutory scheme, the guidance provided for impasse resolution by the Federal Services Impasse Panel.[156] Like mandatory subjects, permissive subjects could now be negotiated to impasse, and the impasse was subject to FSIP review and decision. Agencies were to abide by any decision of the FSIP.[157] In short, the executive order rendered the agency discretion portion of section 7106(b)(1) meaningless by removing agency discretion and requiring them to bargain over these subjects to impasse.

Notwithstanding the lack of ambiguity in the administration's position, most executive agencies simply chose not to follow that part of the order.[158] This resistance

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[151] Exec. Order No. 12871, 58 Fed. Reg. at 52202.
[152] OPM Memorandum, Guidance for Implementing Executive Order 12871, *supra* note 136.
[153] *Id.*
[154] *Id.*
[155] *Id.* This aspect of the guidance memorandum raises an interesting, albeit technical point. If Congress set up the requirement for good faith bargaining and that definition is clear and does not include the need for either party make a concession or agree to a proposal, can a cooperative style of negotiation be mandated consistent with the law? The Authority observed that a requirement to bargain in a particular manner—as with the interest-based bargaining sanctioned in the executive order—might go beyond the Statute, which does not prescribe a method of bargaining. *See* United States Department of Commerce, Patent and Trademark Office and Patent Office Professional Association, 53 F.L.R.A. 858 (1998). Whether the Authority equates going beyond the Statute with being illegal is not clear from the opinion.
[156] OPM Memorandum, Guidance for Implementing Executive Order 12871, *supra* note 136. The authority for the dispute resolution and impasse resolving responsibilities of FSIP are found in section 7119.
[157] *Id.* Normally, agency heads can review the FSIP decision and refuse to follow the decision if the union proposal concerned a section 7106(b)(1) subject. 5 U.S.C. §7114(c). The executive order deprived agency heads of that authority.
[158] Figura, *Muscling In*, *supra* note 122, at 21; Brian Friel, *Clinton Promises to Push for Wider Role for Unions*, GovExec.com, *at* http://www.govexec.com/dailyfed/1099/100699b1.htm (Oct. 6, 1999); Stephen

was quite unusual and doubtless a stunning surprise to the administration.[159] While a minority of agencies did consent to bargain over (b)(1) issues and even made that commitment part of their partnership and collective bargaining agreements,[160] most agencies refused to bargain, believing the order to be unenforceable.[161] Defiant agency officials relied on the clear wording of section 7106(b)(1) which gives them sole discretion to elect to bargain and on Authority precedent giving management the authority to stop the bargaining any time prior to impasse.[162]

By contrast, many national union officials, convinced that bargaining over section 7106(b)(1) issues was an integral part of partnership[163] and unhappy with agency intransigence,[164] turned to the administration for answers. In an attempt to put political pressure on agencies to force them to bargain, Vice President Gore planned to circulate a memorandum requiring agency heads to make the election on behalf of their agency to

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Barr & John F. Harris, *Clinton Plans New Push to Expand Union's Role in Agencies' Decisions,* WASH. POST, Oct. 5, 1999, at A15 (referring to Clinton's order as the "oft-ignored executive order"); Brian Friel, *Panel: Unions Should Get More Bargaining Rights*, GovExec.com, *at* http://www.govexec.com/dailyfed/0699/061799b2.htm (Jun. 17, 1999).

[159] In a June 1998 statement, Bobby Harnage, the national president of the American Federation of Government Employees (AFGE) president remarked that he knew of "'no other situation where the heads of several federal agencies—political appointees, one and all—told their boss, in effect, to 'get lost' after receiving an explicit presidential command.'" Barr, *Stronger Role for Unions, supra* note 141, at A31.

[160] Telephone Interview with Steve Muir, *supra* note 146 (acknowledging that prior to his employment with HCFA, the agreement to bargain over (b)(1) issues was written into the collective bargaining agreement with AFGE).

[161] Brian Friel, *Managers, Union Wage Battle Over Bargaining*, GovExec.com, *at* http://www.govexec.com/dailyfed/0399/031099b1.htm (Mar. 10, 1999).

[162] Figura, *Muscling In*, *supra* note 122, at 21, 25 (noting that as of June 1999, even OPM, the agency charged with administering the partnership executive order and which publicly endorses bargaining (b)(1) issues, had yet to engage in (b)(1) bargaining in its own negotiations).

[163] Bobby Harnage, national president of the AFGE, has made this view clear. "Partnership has a partner and that is (b)(1) bargaining. The (b)(1) issue is going to determine the future of partnership." Figura, *Muscling In*, *supra* note 122, at 21 (quoting Harnage). Commenting on the importance of bargaining over issues set forth in section 7016(b)(1), Robert M. Tobias, national president of the NTEU, commented, "It's impossible to have cooperation and partnership when what's on the table is so narrow. I see what the president has done is to expand the scope of bargaining in an effort to give us an opportunity to participate, to be involved, and to make it easier for us to be less adversarial." Barr, *Organizing for Empowerment*, *supra* note 142, at A19.

[164] Brian Friel, *Panel: Unions Should Get More Bargaining Rights*, GovExec.com, *at* http://www.govexec.com/dailyfed/0699/061799b2.htm (June 17, 1999)

negotiate over section 7106(b)(1) subjects.[165] Among other things, the memorandum suggested that agency unwillingness to comply with the executive order resulted from confusion over the meaning of the President's directive and that the uncertainty impeded the progress of partnership.[166] The memorandum also directed agency heads to sign a pledge stating, "I am hereby making the election to bargain over the matters set forth in 5 U.S.C. 7106(b)(1)."[167] By requiring agency heads to make a formal, written election to bargain, the administration hoped to quell concerns about the legality of the order and put to rest the controversy over (b)(1) bargaining.

After strong objections from a majority of federal agencies,[168] resistance from four federal managers groups,[169] and communications with the Vice President in which three senior cabinet members refused to make the election,[170] the administration decided against this approach. Instead, President Clinton issued a memorandum reaffirming his commitment to partnership and reiterating the objectives of the executive order.[171] There was no further mention of section 7106(b)(1) or agency reluctance to bargain over those matters. In an effort to induce compliance, the memorandum instituted an annual

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[165] Figura, *Muscling In*, *supra* note 122, at 25; Barr, *Stronger Role for Unions*, *supra* note 141; Brian Friel, *Gore Set to Order More Bargaining Rights For Unions*, GovExec.com, *at* http://www.govexec.com/dailyfed/0299/020499b2.htm (Feb. 4, 1999).

[166] Draft Memorandum, Vice President Al Gore, to Heads of Departments and Agencies, Compliance With Executive Order 12871 (undated) (on file with the author); *see also* Barr, *Stronger Role for Unions*, *supra* note 141.

[167] Draft Memorandum for Heads of Departments and Agencies, Subject: Compliance with Executive Order 12871 (undated) (on file with the author); *see also* Figura, *Muscling In*, *supra* note 122, at 25 (quoting same draft memorandum).

[168] Brian Friel, *Civil Service Changes Take a Back Seat to Bargaining*, GovExec.com, *at* http://www.govexec.com/dailyfed/0799/072999b1.htm (July 29, 1999); Figura, *Muscling In*, *supra* note 122, at 21.

[169] Brian Friel, *Managers Oppose Order to Bargain With Unions*, GovExec.com, *at* http://www.govexec.com/dailyfed/0299/021299b2.htm (Feb. 12, 1999); Figura, *Muscling In*, *supra* note 122, at 21.

[170] Barr, *Stronger Role for Unions, supra* note 141; Interview with Kenneth Smith, Deputy Director, Office of Workforce Relations, Internal Revenue Service, in Washington, D.C. (12 April 2001). The three cabinet officials were from the Departments of Defense, the Treasury, and Justice.

[171] Presidential Memorandum, Reaffirmation of Executive Order 12871, *supra* note 131.

reporting requirement for agencies to provide information concerning steps taken to implement the mandates of the executive order.[172] The reporting requirement seemed to have little effect, however. In the only report ever to be issued by OPM pursuant to the memorandum, only nine agencies (out of the thirty-eight agencies that provided compliance information) reported agreements to negotiate over (b)(1) subjects.[173] Twenty-one of the remaining agencies addressed (b)(1) topics with the unions but did not engage in bargaining in the traditional fashion, and only three of those agencies were found by OPM to be in substantial compliance with this part of the executive order.[174] In addition to the twenty-six agencies that were not in substantial compliance with the executive order and the 1999 reaffirmation memorandum, many unions that issued separate reports to the OPM commented on the reluctance or refusal of management to negotiate over (b)(1) topics.[175] Even with the reporting requirement, less than one-third of federal agencies complied substantially with the order to bargain over (b)(1) issues.

The somewhat unorthodox attempt to force agencies to comply with a Presidential directive and the subsequent reaffirmation memorandum appear, at first, to be unusual responses to executive agency refusal to comply with a Presidential directive. In actuality, three legal rulings limited the administration's ability to deal with the issue. The most significant was a 1998 FLRA holding that the requirement to bargain over (b)(1) was unenforceable as a matter of law.[176] Subsequent rulings from the District of

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[172] *Id.*
[173] OPM, REPORT TO THE PRESIDENT, *supra* note 148, at 11.
[174] *Id.* The other eight agencies did not engage in any discussions with the union related to (b)(1) subjects. *Id.*
[175] *Id.* Out of the thirty-eight agencies that provided information to OPM, only twelve were found to be in substantial compliance. *Id.* at 11-12, table 7.
[176] United States Department of Commerce, Patent and Trademark Office and Patent Office Professional Association, 54 F.L.R.A. 360 (1998).

Columbia Circuit Court of Appeals and the Ninth Circuit Court of Appeals provided the final word on the issue.

In 1998, in *United States Department of Commerce, Patent and Trademark Office and Patent Office Professional Association (Commerce II)*,[177] the Authority was finally presented with the question whether EO 12871 required federal agencies to bargain over matters set forth in section 7106(b)(1). Dodging the larger question of the President's authority to bind the executive branch agencies and notwithstanding a lengthy dissent, the Authority answered in the negative. In that case, the agency provided the union with copies of a position description for new, permanent patent examiner positions that the agency had previously discussed with the union. After receiving a vacancy announcement indicating the positions were two-year term appointments, the union sought information from the agency as to whether it was establishing a new "program." The union made a subsequent request concerning the discrepancy between the permanent appointments and the two-year term appointments and requested to bargain over the "negotiable aspects" of the program. The agency failed to respond to either inquiry. After the new examiners were hired, the union learned that the vacancy announcement had correctly described the new positions as two-year term appointments.[178] The union filed an unfair labor practice charge contending that the issue should have been negotiated and that the agency violated sections 7116(a)(1) and (5) for refusing to negotiate in good faith.[179]

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[177] 54 F.L.R.A. 360 (1998).
[178] *Id.* at 363.
[179] Prior to deciding the section 7106(b)(1) issue, the Authority had determined that at a minimum, the agency was required to bargain about the impact and implementation of its decision to make the positions two-year term appointments as opposed to the permanent position previously discussed with the union. Department of Commerce, Patent and Trademark Office and Patent Office Professional Association (Commerce I), 53 F.L.R.A. 858, 859 (1997) (partial decision and procedural order). The Authority also

The Authority ultimately determined there was no requirement on the part of the agency to bargain over the substance of the decision pursuant to section 7106(b)(1) even though section 2(d) of EO 12871 appeared to require agencies to bargain.[180] Finding the executive order to be mandatory in nature without actually effecting an election to bargain over section 7106(b)(1) topics,[181] the Authority provided four bases for its holding. First, the executive order's use of the word "shall" as opposed to language indicating the President was actually making an election to bargain suggested that section 2(d) was not an election to bargain.[182] Second, the context in which the command to bargain in section 2(d) appeared suggested the President was not trying to effect action under the FSLMRS.[183] Since the other directives in section 2 concerned matters outside the ambit of the FSLMRS, so too did section 2(d). Third, the OPM guidance did not establish that section 2(d) constitutes an election to bargain.[184] Of particular significance to the Authority in this regard was OPM's startling concession that the language in

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concluded that the agency's decision concerning the term appointments was a matter encompassed by section 7106(b)(1). *Id.* at 869-70 (making this determination despite the fact that the decision was also encompassed by section 7106(a)). The decision concerning the impact of the executive order on section 7106(b)(1) was postponed until the parties to this case, the four companion cases, and the amicus curiae could brief the issue more thoroughly. *Id.* at 859-60.

[180] Commerce II, 54 F.L.R.A. at 362. The Authority affirmed its earlier finding that the issue of hiring, which falls within the exclusive management rights listed in section 7106(a), could, nevertheless, be substantively bargainable because it also fell within the subjects listed in §7106(b)(1). *Id.* at 373-75. The basis for this decision were previous FLRA and court decisions holding that an issue that falls within section 7106(b)(1) over which the agency agrees to bargain are subject to bargaining even though the issue is also encompassed in section 7106(a). *Id.* (referencing Association of Civilian Technicians, Montana Air Guard Chapter No. 29 v. Federal Labor Relations Authority, 22 F.3d 1150, 1151 (D.C. Cir. 1994), and National Association of Government Employees, Local R5-184 and United States Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 51 F.L.R.A. 386 (1995)). Although the relationship between these two sections does have an impact on the nature and extent of the subjects over which an agency must bargain, the accuracy of the decisions in *Association of Civilian Technicians* and *Veterans Affairs Medical Center* are beyond the scope of this paper. For an excellent discussion of this issue and an evaluation of the court's holding in *Association of Civilian Technicians*, see Powers, *supra* note 106.

[181] Commerce II, 54 F.L.R.A. at 372.

[182] *Id.* at 378 (noting that directing a person to take action is not necessarily the same as undertaking the action oneself).

[183] *Id.* at 380.

[184] *Id.* at 384-85.

section 2(d) was not an election to bargain.[185] Finally, the Authority found that the express language of section 3 of EO 12871 negated any suggestion that the President intended to make an election to bargain on the part of executive agencies.[186] The Authority's determination in this regard rested on the language indicating the order was for the internal management of the executive branch and the portion of section 3 stating that the executive order was "'not intended to, and does, not, create any right' to 'administrative or judicial review, or any other right enforceable by a party.'"[187] Rejecting the contention that the language in section 3 pertained only to enforcing the order as opposed enforcing a right under the Statue—in this case an election to bargain under section 7106(b)(1)—the Authority concluded that construing section 2(d) as an enforceable election to bargain would render section 3 meaningless.[188] Thus, under the clear wording of section 3, section 2(d) could not be construed as an election to bargain, reviewable and enforceable under the Statute.

On appeal to the D.C. Circuit as *National Association of Government Employees v. Federal Labor Relations Authority*,[189] the Authority's holding was confirmed. Reviewing the case de novo,[190] the court held that the language in section 2(d) did not

[185] *Id.* at 383, n.24 (citing to OPM Brief at 5). The dissenting member was troubled by the concession, but ignored it. *Id.* at 398 (Member Wasserman, dissenting in part).
[186] *Id.* at 382.
[187] *Id.* at 380 (quoting Exec. Order No. 12,871, 58 Fed. Reg. at 52203).
[188] *Id.* at 381. The Authority did offer a fifth rationale supporting their holding, but it was more of a rejection of the FLRA General Counsel's theory for enforcing section 2(d) than it was a basis for its holding. The General Counsel argued that failing to find that section 2(d) was an election would render the entire executive order meaningless. *Id.* at 385. Rejecting the underlying premise of the argument, the Authority found many instances of agency compliance with the order to bargain and that failure to enforce section 2(d) would not change that. *Id.* at 387.
[189] 179 F.3d 946 (1999).
[190] The court noted that although the Authority is entitled to "considerable deference" in the interpretation of the FSLMRS, courts do not defer to the Authority's interpretation of statutes and regulations unrelated to federal sector labor relations. Since the Authority's decision rested on the interpretation of an executive order rather than the FSLMRS, *de novo* review was appropriate. *Id.* at 950.

constitute an election.[191] The court determined that the "'precise words'" of section 2(d) indicated the President did not intend to make an election to bargain but only to direct his subordinates to take a particular action—to bargain over section 7106(b)(1) topics.[192] Supporting its judgment in this regard, the Court noted that directing a subordinate to take an action is not the same as undertaking the action for oneself.[193] Section 3 of the order, the court found, further reinforced its holding. Like the Authority, the court concluded that the language of section 3 left no doubt the executive order was an internal directive, not subject to administrative or judicial review.[194]

One year later, the ninth Circuit was called upon to decide the same issue in *American Federation of Government Employees v. Federal Labor Relations Authority*.[195] Using the same rationale as the D.C. Circuit, the Ninth Circuit held that the executive order was not an election to bargain within the meaning of section 7106(b)(1).[196] Concluding that section 3 of the order precluded a finding the President intended to make an election to bargain, the court noted that the meaning of the word "mandatory" meant only that the President could discipline a government official who failed to bargain.[197] Like the Authority and the D.C. Circuit, the Ninth Circuit chose not to address the more

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[191] *Id.*
[192] *Id.*
[193] *Id.* (citing Commerce II, 54 F.L.R.A. at 378). For example, if the President orders the Secretary of State to terminate an employee, that order does not cause the termination because only the Secretary of State can terminate an employee whom only the Secretary was authorized to appoint. *Id.* (citing National Treasury Employees Union v. Reagan, 663 F.2d 239, 247-48 (D.C. Cir. 1981)).
[194] *Id.* at 951. The court's interpretive double standard is clear. On the one hand, the court makes its decision concerning the nature of the order by finding the "precise words" of section 2(d) did not support the contention the President made an election to bargain because he did not actually say he was making the election. *See id.* at 950. On the other hand, the court finds by implication that the language in section 3 indicates the executive order was not an election. *See id.* at 951. The President could have used precise words in section 3 stating that the executive order was not to be construed as an election to bargain.
[195] 204 F.3d 1272 (2000).
[196] *Id.* at 1276.
[197] *Id.* (referencing and accepting the OPM guidance that the direction to bargain was mandatory).

complex question of whether the President had the authority to make that election on behalf of the executive agencies.

This issue was, however, mentioned by the dissenting member in *Commerce II*, though treatment of the issue was more conclusory than analytical. In dissent, Member Wassermann determined that the President did have authority to make the election for two reasons. First, the President is the head of the executive branch and as such controls the actions of the agencies that make up that branch.[198] Second, the historical exercise of the President's power with respect to federal labor relations also supported the President's actions.[199] Thus, both constitutionally and statutorily, the President's issuance of the executive order was within his authority.[200] While the dissent correctly noted that there are constitutional and statutory sources of Presidential authority to issue executive orders, a more in-depth analysis, which follows, suggests a President's authority to make an election to bargain on behalf of a federal agency is less than clear.

B. Exceeding a President's Authority

The resolution of this question is important not only in terms of assessing the impact of the President Clinton's executive order on federal labor relations, but also as to whether a future President has the authority to require that agencies bargain over the topics in section 7106(b)(1). Unfortunately, the resolution of this issue is by no means simple, and much seems to depend on the nature and extent of the President's action and the alleged source of authority for his action. Nevertheless, the point of this section of the paper is that under the current legislative scheme, the President cannot make an

[198] Commerce II, 54 F.L.R.A. at 400 (Member Wasserman, dissenting in part).
[199] *Id.* at 401 (referencing EO 11491 as the order establishing the federal labor relations program) (Member Wasserman, dissenting in part).
[200] *Id.* (referencing 5 U.S.C. §7301) (Member Wasserman, dissenting in part).

enforceable election to bargain on behalf of the entire executive branch notwithstanding his position as chief executive.

The dilemma presented by this question is, to be sure, unique and difficult to answer for a few reasons. First, most executive orders institute legislative polices based on a specific grant of statutory authority, while others concern executive managerial policy.[201] Those that deal with executive managerial policy are often directed at executive agencies impacting, sometimes in significant ways, their internal process.[202] Even in these cases, the order typically concerns the fulfillment of the agency's delegated function.[203] By contrast, President Clinton's executive order dealt with federal sector labor relations, a purely internal process of the executive branch. Technically, this aspect of agency operations has no direct connection to rule making or the function for which the agencies were created.[204] Second, most law suits challenging executive orders concern agency action necessitated by efforts to comply with the order.[205] Rather than

[201] Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12291*, 1983 DUKE L.J. 285 (April 1983). An example of the latter variety, EO 12291 issued by President Reagan required agencies to make a cost benefit analysis, not unlike an environmental impact analysis, prior to issuing certain important regulations. *See* Exec. Order No. 12,291, 3 C.F.R. § 127 (1982).

[202] *See, e.g.,* Exec. Order No. 11,821, 3 C.F.R. § 926 (1993) (establishing an 'Inflation Impact Statement Program,' the order, issued by President Ford, required agencies to outline the cost of proposed regulations and provide the information to the Office of Management and Budget).

[203] *See, e.g.,* Exec. Order No. 12,044, 3 C.F.R. § 152 (1993), *revoked* Exec. Order No. 12,291, 3 C.F.R. § 122 (1993). EO 12044 required a detailed regulatory analysis of proposed agency rules. Both this order and President Ford's order are excellent examples of orders that relate to fulfillment of the agencies' functions.

[204] Of course, the reason this issue became so contentious is that the scope of the order created a potential for significant impact on the performance of the agencies' functions. This was especially problematic in light of the Authority's position on the requirement to bargain over matters in section 7106(b)(1) despite the infringement on exclusive areas of management authority under section 7106(a). *See supra* notes 93-106 and accompanying text. Agencies forced to bargain over technology, methods, and means of performing work would be compelled to deal with mission, budget, an internal security practices at the same bargaining table. Thus, for an agency, the executive order had a very real and direct connection to its function.

[205] *See, e.g.,* Independent Meat Packers Association v. Butz, 526 F.2d 228 (8th Cir. 1975), *cert. denied* 426 U.S. 966 (1976) (finding that EO 11949 was intended primarily as a managerial tool for implementing the

agency action, the partnership executive order was plagued by agency inaction or, more accurately, agency disobedience. To complicate matters, there have been few, if any situations involving widespread agency noncompliance of this sort. Third, challenges to executive orders directed at executive agencies generally come in the form of private party suits attempting to block agency implementation of an order.[206] The challenges concerning the partnership order were instituted by private parties—federal sector labor unions—anxious to make the agencies comply with the directive. It is certain that a future attempt by a President to make an election under section 7106(b)(1) will generate suits by the same parties if agencies again refuse to follow the directive.

As with every situation involving the President's use of an executive order, at the heart of this question is the nature of the authority upon which the President's actions are based. The partnership executive order is no exception. Yet, this issue highlights, in a different way, the confluence of presidential and congressional control over administrative agencies. Unlike the question of control over agency administrative processes and rulemaking, this issue concerns the extent to which Congress controls the "business" practices of the federal government and federal employees and the President's ability to exert control over his appointees and subordinate employees.

As a basic matter, a President's power to issue executive orders must be given to him by the Constitution or through a delegation of authority from Congress.[207] Cautious

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President's personal economic policies and not as a legal framework enforceable by private civil action); [cite to case with Reagan order].

[206] *See, e.g.,* Chrysler Corp. v. Brown, 441 U.S. 281 (1979) (concerning company's challenge to EO 11246 and EO 11375 regarding nondiscrimination and affirmative action requirements for government contractors); Meat Packers, 526 F.2d 228; Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).

[207] *See* Dames & Moore v. Regan, 453 U.S. 654, 668 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

about the potential for oversimplification,[208] the Supreme Court has accepted Justice Jackson's characterization as the best analytical framework to assess Presidential authority.

> When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.' When the President acts in the absence of congressional authorization he may enter 'a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.' In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference or quiescence.' Finally, when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions 'only by disabling the Congress from acting upon the subject.'[209]

Thus, it appears that there are three concerns when evaluating the actions of a President in issuing an executive order. The first consideration is whether the order is based on a

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[208] Dames & Moore, 453 U.S. at 669 (acknowledging that executive action might not fall neatly into one of these three pigeon holes and heeding the warning of Justice Holmes that "'[the] great ordinances of the Constitution do not establish and divide fields of black and white.'" (Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))).

Indeed, there seems to be no consensus as to the appropriate analytic approach to resolving separation of powers questions. *See* Peter Struass, *Bowsher V. Synar: Formal And Functional Approaches To Separation-Of-Powers Questions -- A Foolish Inconsistency?*, 72 CORNELL L. REV. 488(1987) (describing and distinguishing the two generally accepted approaches to the analysis of separation of powers issues – formalism and functionalism).

[209] Dames & Moore, 453 U.S. at 668-9 (quoting Youngstown Sheet & Tube, 343 U.S. at 637-38).

It is worth noting that Professor Raven-Hansen makes a distinction between orders that are lawful and orders that are binding even though they are not lawful. Raven-Hansen, *supra* note 201, at 296-297. According to Professor Raven-Hansen, the President's managerial executive orders can be considered rules of the agencies to which they apply and, even though they lack the force an effect of law, may nevertheless be binding on an agency under the doctrine that agencies are bound by their own rules. *Id.* This particular aspect of Professor Raven-Hansen's framework does not seem to have application in this instance. As previously noted, the partnership order applied not to agency rule making procedures per se, but to an agency's own internal practices. The doctrine that an agency is bound by its own rules applies to the processes by which it promulgates rules and regulations. *Id.* at 311 (noting that the rule is a "'judicially evolved rule' of uncertain application" and citing Vitarelli v. Seaton, 359 U.S. 535, 547 (1959)). Indeed, Professor Raven-Hansen indicates that internal rules of procedure that guide the agency in its day-to-day activities do not fall within this doctrine. *Id.* at 296. Of course, an agency's labor relations program qualifies as procedures that guide the agency in its daily activities. Yet, the President does have sole authority to remove the head of an executive agency for any reason, to include failure to fulfill a direct order. *See* Myers v. United States, 272 U.S. 52 (1926); *but see* Humphrey's Executor v. United States, 295 U.S. 602 (1935) (finding that the power of removal was not available to the extent in conflicted with

specific grant of authority from Congress.[210] Such a grant of authority can be express, implied, or fairly contemplated from the statutory language.[211] Courts, however, have concluded that anything less than a specific grant of authority in a statute is insufficient to serve as a basis for an executive order.[212] The second consideration is whether the President's constitutional authority supports his action.[213] In this regard, the authority can be a pure exercise of the President's constitutionally delegated powers or in "conjunction with congressional acquiescence in long-standing executive practice."[214] Finally, the President is not permitted to act contrary to the legislative will of Congress unless he is accorded exclusive power by the Constitution.[215]

A careful review of the possible sources of statutory authority indicate that none of them support an express, implied, or fairly contemplated delegation to the President to order bargaining over subjects in section 7106(b)(1). In reviewing the existence of a

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Congressional action concerning independent agencies). In that way, a partnership order could have a binding affect.

[210] Raven-Hansen, *supra* note 201, at 297.

[211] Youngstown Sheet & Tube, 343 U.S. at 637; Chrysler Corp. 441 U.S. at 308; *see also* Raven-Hansen, *supra* note 201, at 298.

[212] *See* Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976) (holding that only a specific grant of authority, rather than the Constitution standing alone, can give an executive order the force and effect of law); Stevens v. Carey, 483 F.2d 188 (7th cir. 1973) (holding that an executive order issued without a specific statutory delegation of authority carries no legal effect).

[213] Raven-Hansen, *supra* note 201, at 297.

[214] *Id.*

[215] Youngstown Sheet & Tube, 343 U.S. at 637; Humphrey's Executor, 295 U.S. 602 (finding the President's effort to remove a Federal Trade Commissioner to be contrary to the policy of Congress and an intrusion upon an area of congressional control); Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) (finding that EO12,954 was an impermissible act of Presidential authority because it conflicted with the NLRA).

Connected to the issue of the President's authority to legislate by executive order is the question of whether the President's action is subject to judicial or administrative review. *See* Dalton v. Specter, 511 U.S. 462 (1994) (holding that presidential action taken pursuant to a statutory grant of authority is not subject to judicial review when the President has been given broad discretion to carry out the statutory mandate); *see also* Gordon M. Clay, *Executive Abuse of the Procurement Power:* Chamber of Commerce v. Reich, 84 GEO. L.J. 2537, 2577 (1996). In the context of the partnership order issued by President Clinton or any future order attempting to resurrect partnership, the question of judicial review would probably not be applicable. As previously demonstrated, law suits concerning the validity of such an order would almost certainly be instituted by federal employee labor unions seeking to enforce the order in the face of agency

statutory grant of authority, it is not necessary to constrain the inquiry to the sources cited by the President in the partnership executive order. Indeed, contemplation of the possibility of a return to Clintonian partnership suggests that other sources should be considered.

An appropriate place to start the analysis is the authority cited by President Clinton in the order, 3 U.S.C. 301.[216] President Clinton cited the same authority in another controversial executive order recently struck down by the D.C. Circuit in *Chamber of Commerce v. Reich.*[217] EO 12954 prohibited government agencies from contracting with companies that hired permanent replacements for striking employees. The D.C. Circuit found that the NLRA, buoyed by a Supreme Court ruling, preserves the right of employers to permanently replace economic strikers and that EO 12954 directly conflicted with that aspect of the NLRA.[218] Finding EO 12954 invalid as a result of a conflict with the NLRA, the court did not address the validity of section 301 as a source of authority.[219] Specifically, section 301 authorizes the President to delegate to the heads

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refusal to comply. *See* NAGE, 179 F.3d 946. In this situation, the suit would allege an agency violation of section 7106(b)(1).

[216] That section states in relevant part:

> The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, . . . , to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: Provided, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions.

3 U.S.C. §301 (1997).

[217] 74 F.3d 1322 (D.C. Cir. 1996). In addition to 3 U.S.C. 301, the President cited the Constitution, the laws of the United States generally, and 40 U.S.C. 486(a)—the Procurement Act—as other sources of authority. Exec. Order No. 12,954, 60 Fed. Reg. 13,203 (Mar. 8, 1995).

[218] Chamber of Commerce, 74 F.3d at 1332 (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)).

[219] The implication of the failure to address this issue is two fold. First, by ignoring the claimed source of authority, the court suggests that to the extent an order conflicts with a Congressional act, it is invalid no

of the various agencies the powers granted to the President by Congress. In other words, it provides a basis for the President to empower the various cabinet level officers to act on his behalf where Congress has given authority to the President to carry out some duty.[220] However, that section cannot be interpreted as authorizing the President to direct the heads of the executive agencies or their subordinates in the exercise of the authority granted them by Congress to carryout the agency's function or to conduct internal agency operations. Nor can it be viewed as an implied or reasonably contemplated grant of such authority. In short, section 301 does not empower the President to issue legally binding executive orders controlling the actions of agency officials.[221] If section 301 granted such authority, then nearly any executive order that concerned an executive agency would be statutorily supported. Section 301 has never been interpreted to grant such broad power to the President.

Likewise, nothing in the FSLMRS provides any authority, express or otherwise, for a Presidential order to bargain over permissive subjects listed in section 7106(b)(1). Section 7106(b)(1) itself leaves the decision to bargain to the "agency"[222] and there is no mention whatsoever of the President as in other parts of the FSLMRS.[223] Indeed, section

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matter the source of authority. Whether the Supreme Court meant for such an analytical hierarchy to be applied in these cases is not clear in light of its caution with this issue. *See* Youngstown Sheet & Tube, 343 U.S. 638; Dames & Moore, 453 U.S. at 669. Second, failure to even mention section 301—there was reference to the other specific source of authority—could indicate that statute can never (or was not intended to) serve as authority for Presidential action of this sort.

[220] *See* 5 U.S.C. §7301 (1996) (referencing delegation of presidential authority under 3 U.S.C. 301 and 18 U.S.C. 201).

[221] The removal power does proved the President with a means of control over agency heads he appointed. *See* Meyers v. United States, 272 U.S. 52 (1926). But, that is not the same as the power to issue enforceable executive orders.

[222] 5 U.S.C. §7106(b)(1)

[223] *See id.* at §7103(b)(1) (giving the President authority to exclude or suspend agencies from coverage in cases of national emergency); *id.* at §7104(b) (giving the President appointment power for members of the Authority and the General Counsel).

On two occasions, President Reagan issued executive orders concerning federal labor relations. Unlike President Clinton's executive order, both were based on express grants of authority found in the

7106(a) specifically references management officials as having authority to refuse to bargain over exclusive management rights.[224] Moreover, giving this authority to an agency head or member of the executive agency is not the functional equivalent of giving the authority to the President.[225] This is especially true given the Authority's position that it is the agency at the level of exclusive recognition that is authorized to make the election to bargain over section 7106(b)(1) matters.[226] Even the agency head is powerless to alter such a decision made at the level of recognition.[227]

This raises another compelling issue related to section 7106(a) that cuts against a grant of Presidential authority in FSLMRS. If the Authority's current position concerning the relationship between sections 7106(a) and (b)(1) is correct, then it seems even less likely that Congress would have intended to grant the authority to the President to force (b)(1) bargaining. Congress expressed desire to exempt certain management decisions from the duty to bargain under section 7106(a) was clear. The Authority, however, has adopted the position that Congress intended section 7106(b)(1) to be an exception to section 7106(a).[228] Thus, if the agency agreed to bargain over a section

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FSLMRS. Executive Order 12391 partially suspended certain provisions of the FSLMRS related to Department of Defense operations overseas. *See* Exec. Order No. 12,391, 47 Fed. Reg. 50457 (Nov. 4, 1982). Section 7103(b)(2) provided a clear grant of authority for this action. *See* 5 U.S.C. §7103(b)(2) (stating "the President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States . . . ."). Executive Order 12632, amending an earlier executive order, exempted certain agencies from coverage under the FSLMRS because these agencies were primarily engaged in intelligence, counterintelligence, investigative, or national security work. *See* Exec. Order No. 12632, 53 Fed. Reg. 9852 (Mar. 23, 1988) (amending Exec. Order No. 12,171, 44 Fed. Reg. 66565 (Nov. 19, 1979)). The authority for this order is section 7103(b), which gives the President power to exclude agencies from coverage under the FSLMRS for certain specific reasons. *See* 5 U.S.C. §7103(b).

[224] 5 U.S.C. §7106(a).

[225] Michael Herz, *United States v. United States: When Can The Federal Government Sue Itself?*, 32 WM. AND MARY L. REV. 893, 929 (1991).

[226] *See* National Association of Government Employees, Local R4-75 and Department of Interior, National Park Service, Blue Ridge Parkway, 24 F.L.R.A. 56 (1986).

[227] *See id.; see also supra* note 103-104 and accompanying text.

[228] National Association of Government Employees, Local R5-184 and Department of Veterans Affairs Medical Center, Lexington, Kentucky, 51 F.L.R.A. 386, 391 (1995) (agreeing with D.C. Circuit that the

7106(b)(1) issue, the union could enforce that agreement even if the matters discussed touched on a section 7106(a) matter.[229] As long as management did not consent to bargain over any (b)(1) issue, the rights under section 7106(a) were safe.[230] But, if the FSLMRS does grant the President authority to force (b)(1) bargaining, that meant agencies would have to bargain over (b)(1) issues and any exclusive management rights in section 7106(a) that were related to the (b)(1) issue. It is unclear whether President Clinton meant to create this state of affairs when he issued the executive order, especially since it predated the *Association of Civilian Technicians* decision. However, President Clinton did issue the reaffirmation memorandum after the *Association of Civilian Technicians* decision. The President's failure to change the order to bargain over (b)(1) subjects suggests his intention to expand the scope of bargaining to include the exclusive management rights listed in section 7106(a). The impact on the federal labor relations scheme cannot be overstated. It creates a state of affairs exactly contrary to Congress's desire to reserve certain issues exclusively for management.[231] Congress established what it in its collective legislative wisdom felt was an appropriate balance between the

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exercise of management rights listed in section 7106(a) is subject to section 7106(b)(1)). *See supra* notes 93-106 and accompanying text.

[229] Theoretically, an agency can agree to bargain over an issue that is covered by both section 7106(a) and (b)(1). Agencies, however, are unlikely to ever agree to bargain over an issue that touches upon a section 7106(a) topic.

[230] An interesting by-product of the *Association of Civilian Technicians,* 22 F.3d 1150, 1151 (D.C. Cir. 1994), decision, making section 7106(a) rights subject to bargaining if it was related to a (b)(1) issue, is that it is now even less likely that management would consent to bargain over a (b)(1) issue. This of course is contrary to President Clinton's desire to bargain over those issues. In that regard, the *Association of Civilian Technicians* decision and the Authority's assent is a "partnership buster." *See* Powers, *supra* note 106, at 837 (referencing an FLRA General Counsel memorandum calling the decision about the relationship between the two management rights sections a "partnership buster").

[231] One of the purposes of the FSLRMS was to eliminate some of the management rights reserved by EO 11491 and simultaneously "make [it] clear that the purpose of the management rights clause [in the FSLMRS] is to preserve the management functions listed." 124 Cong. Rec. H9649 (daily ed. Sep. 13, 1978) (remarks of Rep. Ford), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 954. One commentator observed that it was unlikely Congress intended to give agencies the discretion to negotiate away their reserved rights under section 7106(a). Powers, *supra* note 106, at 864, n.189 (explaining

rights of federal employees and the effective and efficient conduct of the government's business. It, therefore, seems unlikely that Congress would have permitted that balance to be upset to such a degree by vesting any discretion at all in the President or any other official.

At first blush, 5 U.S.C. 301 and 5 U.S.C. 7301 of the Administrative Procedure Act seem to provide possible support for a Presidential decision to bargain over permissive subjects. Section 301 pertains to the authority of agency heads to prescribe regulations for their respective departments.[232] It appears unlikely that this grant of authority could extend to the President. Indeed, the Supreme Court has characterized section 301 as a simple "housekeeping statute" that is nothing more than "a grant of authority to the agency to regulate its own affairs."[233] As to 5 U.S.C. 7301, President Nixon's executive order altering the federal labor relations program cites that statute as authority for the action.[234] Indeed, in a case that predates the FSLMRS, Supreme Court concluded that 5 U.S.C. 7301 provided authority for President Nixon to issue EO 11491.[235] While this statute continues to provide the President with the authority to regulate standards of conduct[236] and political or ethical issues as they relate to employees, it no longer serves as a grant of authority for labor relations issues. With the

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Congress's determination that agencies should not to negotiate general policy questions concerning how the agency does its work).

[232] Section 301 states in pertinent part, "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. §301 (1996).

[233] Chrysler Corp. v. Brown, 441 U.S. 281, 309-10 (1979). It could be argued further that the failure to specifically include the President at all suggests the absence of any authority at all under this statute.

[234] *See* Exec. Order No. 11491, 34 Fed. Reg. at 17605. Section 7301 states, "The President may prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. §7301.

[235] Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974).

[236] *See, e.g.,* American Federation of Government Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (upholding validity of EO 12564 promulgated pursuant to 5 U.S.C. §7301 and providing for suspicionless drug testing of certain federal employees).

promulgation of the FSLMRS, Congress displaced the President as the regulatory authority for federal labor relations. Although there are numerous references in the legislative history to this effect,[237] two comments provide the clearest indication of Congressional intent. During floor debate in the House, Representative Clay stated, "The Udall substitute provides for: A statutory Federal labor-management program which cannot be universally altered by any President . . . ."[238] During floor debate in the Senate, Senator Sasser indicated that the proposed legislation "take[s] the important step of establishing congressional control over the federal labor relations program."[239] With the enactment of the FSLMRS, section 7301 no longer provides Presidential authority for action related to federal labor relations.

Turning to a constitutional source of authority for an order that requires (b)(1) bargaining, there again seems to be no support for this proposition. There does not seem to be a direct source of authority in the constitution nor does acquiescence by Congress provide a justification for such an order.

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[237] For example, Congressman Ford stated that "to continue to tinker with the Executive order system is to delay the obvious: What is now needed in the Federal Government is a labor-relations program based on legislation." 124 Cong. Rec. H8467 (daily ed. Aug. 11, 1978) (remarks of Rep. Ford), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 855. During another floor debate, Congressman Ford stated, "what we are trying to say with title VII is that [federal employees] should be reassured . . . that whatever rights the Congress from time to time gives them are protected . . . because what we will be saying for the first time . . . that it is Congress that sets policy in this area." 124 Cong. Rec. H9648 (daily ed. Sep. 13, 1978) (remarks of Rep. Ford), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 952. Even President Carter's remarks recognized Congressional ascendancy. During the signing of the bill, President Carter stated that the act "moves Federal labor relations from Executive order to statute." Legislative History of the FSLMRS, *supra* note 29, at 639.

[238] 124 Cong. Rec. H9637 (daily ed. Sep. 13, 1978) (remarks of Rep. Clay), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 931. The Udall substitute became the house version of the bill that was eventually signed into law as the FSLMRS.

[239] 124 Cong. Rec. S14281 (daily ed. Aug. 24, 1978) (remarks of Sen. Sasser), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 1015.

First, it could be argued that the President's constitutional obligation to "take care that the laws be faithfully executed"[240] serves as an independent source of authority. In *Myers v. United States*, the Supreme Court determined that the President's obligation in this regard is not limited to those laws enacted by Congress, but include rights, duties, and responsibilities growing out of the Constitution itself.[241] In the context of his position as head of the executive branch this is a powerful argument. As President Clinton indicated in his partnership order, the purpose of the order was to improve the functioning of the executive branch. It may be that the order or a similar future order would be considered an effort to insure the law is executed in a way that enhances the process already established by Congress.

The fallacy in this argument is that the President does not have the authority to establish the manner in which the agencies conduct business under the law. Congress very often places decision-making power in an agency head rather than in the President.[242] "If Congress does so, the President may influence the decision indirectly, but the decision remains that of the department head. Even the Supreme Court opinion that most insistently protects the President's administrative prerogatives, *Myers v. United States*, endorses this scheme." [243] Moreover, the President does not have the legal authority to direct agency employees as that responsibility rests with the head of the

[240] U.S. CONST. art. II, § 2.
[241] Myers v. United States, 272 U.S. 52, 61 (1926).
[242] Indeed, section 7106(b)(1) is an example of just such a delegation of authority. Congress gave the agency at the level of exclusive recognition the discretion to bargain over permissive subjects. *See* National Association of Government Employees, Local R4-75 and Department of Interior, National Park Service, Blue Ridge Parkway, 24 F.L.R.A. 56 (1986) (interpreting section 7106(b)(1)). There is no indication that Congress intended that decision to be exercised by anyone other than the appropriate agency official.
[243] Herz, *supra*, note 225, 927-28 (citing Meyers, 272 U.S. 52); *see also* Buckley v. Valeo, 424 U.S. 1, 140-41 (1976) (per curiam) (holding that the performance of a statutory governmental duty exercised pursuant to a public law can be accomplished only by the individual duly appointed to that position).

agency.[244] Thus, the decisions concerning agency operations and the most effective way to carry out its functions under the law are not the President's. The only way the President can control the actions of an agency is to threaten to or actually remove from office the offending agency director.[245] The President can provide direction, guidance, give binding instructions, and even institute a reporting requirement as a means of establishing control.[246] Since the President retains political accountability for the executive branch, some forms of control are certainly necessary.[247]

Second, it seems clear that the President has no independent constitutional authority to make law. The partnership executive order or any order that would require (b)(1) bargaining could not be construed as executing the law. President Regan's actions associated with the PATCO strike could be considered executing the law because

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[244] 1 J. STEIN, G. MITCHELL, & B. MEZINES, ADMINISTRATIVE LAW § 4.02[2] (1991 Cum. Supp.) (citing 10 Op. Att'y Gen. 527-29 (1863)); *see also* Herz, *supra* note 225, at 927-29.

[245] Herz, *supra* note 225, at 928. As President and former Chief Justice William H. Taft stated

> [C]onsider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. The Comptroller of the Treasury is an appointee of the President, and in a general sense is his subordinate. If the President does not like him as a Comptroller, he can remove him and with the consent of the Senate put in another one, but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer.

WILLIAM H. TAFT, THE PRESIDENT AND HIS POWERS 81 (Columbia University Press, 1916). Professor Herz noted that the authority of the President to remove a recalcitrant agency head is a poor substitute for direct control. Removal is disruptive, slow, difficult, and potentially politically embarrassing. Herz, *supra* note 225, at 928-29.

[246] One commentator has argued that the President has a constitutional right to require periodic reports of this sort from heads of agencies. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch,* 84 COLUM. L. REV. 573, 662-222 (1984). President Clinton took this very step when he reaffirmed his commitment to the executive order and to partnership. He required agency heads to send annual reports detailing agency compliance with the executive order. Presidential Memorandum, Reaffirmation of Executive Order 12871, *supra* note 131.

[247] "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984).

termination of employees who strike and decertification of the union[248] supporting a strike are statutorily sanctioned responses to a violation of the law that forbids federal employees to strike.[249] By contrast, President Clinton's actions could be more accurately characterized as law making. The order to bargain over permissive subjects fundamentally altered the law by removing statutorily vested discretion from agencies officials at the level of recognition. In addition, after the *Association of Civilian Technicians* decision, the order also had the effect of subjecting congressionally established exclusive management rights to collective bargaining.[250] Given the significance of its impact, President Clinton's executive order is more accurately characterized as law making, which the courts have traditionally disallowed.[251] As the Supreme Court noted in *Youngstown Sheet & Tube*, the "President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[252]

Professor Raven-Hansen has noted that as head of the executive branch, the President does have intrinsic authority to issue executive orders that pertain to internal agency operations and procedures and to housekeeping matters.[253] The ability to issue such orders, he notes, is necessary if the executive branch is to run effectively.[254] An example of such an order is one describing the procedures for processing commemorative

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[248] *See* 5 U.S.C. §7120(f).
[249] *See* 18 U.S.C. §1918 (2000); 5 U.S.C. §7116(b)(7).
[250] *See supra* notes 106-108 and accompanying text and notes 229-232 and accompanying text.
[251] Youngstown Sheet & Tube, 343 U.S. at 587.
[252] *Id.*
[253] Raven-Hansen, *supra* note 201, at 310. There seems to be some general agreement on this point, as the commentator called the existence of this inherent authority "uncontroversial." *Id.* at 310-311.
[254] *Id.* at 310.

proclamations.[255] Such an order is "self-evidently directed at internal executive procedure."[256] There are three drawbacks to the application of this principle to justify an order concerning (b)(1) bargaining. First, an order dealing with bargaining and other matters impacting federal labor relations is quite a bit more far reaching and external than an order dealing with a comparatively simple administrative procedure. Unlike an administrative "paper-pushing" order, an order concerning federal labor relations impacts the lives and jobs of thousands of federal employees, the coffers of the government and the federal employee unions, and the overall success of the agency. Second, Congress has not prescribed any rules governing the processing of commemorative proclamations as it has with federal labor relations. Finally, even if such an order were valid as an exercise of intrinsic authority, it would not have any binding effect or carry the force of law since the source of authority was not legislative.[257] Beyond this non-binding ability to manage and guide the executive branch, it is doubtful that the President has any independent executive authority to require (b)(1) bargaining through executive order.

Third, it can scarcely be argued that Congress has in some way acquiesced in the area of regulation of federal labor relations or, more specifically, to the Presidential determination of the scope of collective bargaining. Congress has a long history of regulating federal sector labor relations, which includes executive branch employees.[258] To be sure, the regulation of federal labor relations has historically been shared with the President. It could even be argued that until promulgation of the FSLMRS, Presidential activity through the years, culminating with President Nixon's executive order, was the

[255] *Id.* (citing Exec. Order No. 12,081, 3 C.F.R. 224 (1978)).
[256] *Id.*
[257] *Id.* at 310-11 (citing Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980)).
[258] See *supra* notes 20-45 and accompanying text.

primary force behind the regulation of this area. This, however, is not sufficient to establish Congressional acquiescence.

The issue of Congressional acquiescence arises in situations where Congress and the President generally enjoy concurrent authority. In the past, these cases, falling within this "twilight zone" of shared power,[259] have arisen in the areas of foreign policy and national security. In one such case, *Dames & Moore v. Regan*,[260] the Supreme Court dealt with a question of acquiescence by considering the "inferences drawn from the character of the legislation Congress has enacted in the area"[261] along with the President's constitutional power.[262] Upholding the President's authority to issue various executive orders in connection with the resolution of the Iran hostage crisis, the Court noted there had been no express or implied delegation of power by Congress.[263] The Court found support for the exercise of the President's authority where the relevant legislation Congress had enacted was "closely related to the question of the President's authority" in foreign policy and contained sufficient "legislative intent to accord the President broad discretion" such that it invited independent Presidential action.[264] The Court imposed two important qualifiers. First, a contrary expression of legislative intent would deprive the President of authority.[265] Second, there had to be a history of Congressional acquiescence in the face of similar Presidential action.[266] Past practice by

[259] *See* Youngstown Sheet & Tube, 343 U.S. at 637 (calling this area of concurrent authority the "zone of twilight") (Jackson, J., concurring).
[260] 453 U.S. 654 (1981).
[261] *Id.* at 686.
[262] Raven-Hansen, *supra* note 201, at 303.
[263] Dames & Moore, 453 U.S. at 678.
[264] *Id.*
[265] *Id.*
[266] *Id.*

itself does not establish acquiescence.[267] Rather, "the predicate for congressional acquiescence is an unbroken executive practice of sufficient duration, consistency, and visibility for Congress to know of the practice."[268]

Applying this analysis to an executive order mandating bargaining over permissive subjects would suggest a lack of congressional acquiescence in presidential authority for such an order. Even conceding that the regulation of federal labor relations falls within the twilight zone of concurrent authority, the first part of the *Dames & Moore* analysis fails to support the independent exercise of Presidential power. To be sure, the FSLMRS is closely related to the President's authority in the regulation of federal labor relations. That enactment took the place of two important executive orders that had initially established the labor relations program. It is, however, difficult to argue that Congress intended to leave broad discretion to the President thereby inviting independent Presidential action. By its very nature, the FSLMRS represented a Congressional decision to resolve issues that until then had been left to the President. In areas where Congress exercises close control, the absence of an express grant of authority for a particular presidential action suggests such authority does not exist.[269] Nowhere in section 7106 does there appear language that could be construed as an express grant of authority to the President to alter the duty to bargain concerning the various management rights.

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[267] *Id.* at 686 (citing United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915)).
[268] Raven-Hansen, *supra* note 201, at 305.
[269] Raven-Hansen, *supra* note 201, at 305. There could be no more clear an expression of Congress's intent to exercise control than Senator Sasser's comment that the FSLMRS "establish[ed] congressional control over federal labor relations." 124 Cong. Rec. S14281 (daily ed. Aug. 24, 1978) (remarks of Sen. Sasser), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 1015.

The second part of the *Dames & Moore* analysis also fails because the Congressional acquiescence requirement cannot be satisfied. Certainly, the exercise of Presidential authority in the area of federal labor relations does have sufficient duration, consistency, and visibility for Congress to know of the practice. In *Dames & Moore*, the executive practice at issue had gone on for 180 years.[270] Arguably, the 165-year history of Presidential involvement in federal labor relations[271] satisfies the requirement. But, it is difficult to argue the practice is unbroken. Historically, Congress has enacted legislation that directly impacted federal employees. The Lloyd-LaFollette Act,[272] Wagner Act,[273] and Taft-Hartley Act[274] are all examples of Congressional reaction. Of course, the most glaring instance of Congressional reaction to Presidential activity in federal labor relations is the FSLMRS. While President Carter did urge passage of legislation to take the place of the executive orders, Congress ultimately discarded his version in favor of its own.[275] Even putting aside the history of congressional legislation, the enactment of the FSLMRS alone defeats the notion that the exercise of executive authority has been unbroken sufficiently to qualify as Congressional acquiescence. Simply put, Congressional reaction in response to a known or established executive

[270] *See* Dames & Moore, 453 U.S. at 679, n.8; *see also* Contractors Association v. Secretary of Labor, 442 F.2d 159, 168-71 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971) (relying on the acquiescence theory to uphold EO 11246 and the thirty year practice of using executive orders prohibiting discrimination by federal contractors).
[271] See *supra* notes 16-45 and accompanying text.
[272] Lloyd-LaFollette Act of 1912, ch. 389, §6, 37 Stat. 539, 555, *as amended,* 5 U.S.C. §7101 (1996) (permitting federal employees to join labor unions).
[273] 29 U.S.C. §151 (1998) (specifically excluding federal employees from coverage under the act).
[274] Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (repealed 1955) (making it illegal and criminal for federal employees to strike).
[275] H.R. Rep. No. 95-1403, at 12, *reprinted in* Legislative History of the FSLRMS, *supra* note 29, at 682 (stating that "the committee agrees that the time has come to establish by statute a labor-management relations system for federal employees, but disagrees with the President's specific proposal."). The House's version of the bill ultimately became the FSLMRS.

practice overcomes acquiescence.[276] Without Congressional acquiescence, the President's action to mandate bargaining over permissive subjects must fail.

Finally, there is the issue of Presidential action in the face of congressional legislation on the subject. Simply stated by Justice Jackson,

> when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.[277]

More specifically, "'except in the rare case where Congress crosses a constitutional boundary, the policy decisions made through the legislative process bind individuals, agencies, courts, and the president.'"[278] Although only two executive orders have ever been challenged and subsequently struck down, both were found, among other things, to be at odds with Congressional policy.

In *Youngstown Sheet & Tube v. United States*,[279] the Supreme Court struck down President Truman's attempt to end a labor dispute by seizing a steel factory using an executive order. Finding no authority for such an act in the Constitution or any statute, the Court also recognized that during deliberation over the Taft-Hartley Act, Congress had affirmatively rejected the seizure mechanism as a way to end labor disputes.[280] Ultimately concluding rather generally that the President simply lacked authority, the Court pointed out that "[t]he President's order [did] not direct that a congressional policy be executed in a manner prescribed by Congress . . . [but rather] direct[ed] that a

[276] Raven-Hansen, *supra* note 201, at 305.
[277] Youngstown Sheet & Tube, 343 U.S. at 638-39 (Jackson, J., concurring)).
[278] Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U.L. REV. 1239, 1244 (1989).
[279] 343 U.S. 579 (1952).
[280] *Id.* at 586 (citing 93 Cong. Rec. 3637-45).

presidential policy be executed in a manner prescribed by the President."[281] For Justice Jackson, whose concurrence is generally thought to be the most important statement of that Court on the issue of separation of powers, the President's action was invalid because it conflicted with an act of Congress in an area where Congress has jurisdiction and into which the President's inherent constitutional authority did not reach.[282]

More recently, in *Chamber of Commerce v. Reich*,[283] the D.C. Circuit struck down an executive order issued by President Clinton that would have required federal agencies to withhold public contracts from companies that permanently replaced economic strikers. In that case, President Clinton claimed to have issued the executive order under the authority of the Procurement Act.[284] After determining that the executive order was subject to judicial review, the court of appeals immediately recognized that a conflict with the NLRA was the strongest argument against the order.[285] The court was particularly motivated by the broad policy of the NLRA, established by Congress and enforced through a broad preemption doctrine,[286] which calls for "'uniform application' of its substantive rules and [the avoidance of] the diversities and conflicts likely to

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[281] *Id.* at 588.
[282] *Id.* at 660. Justice Jackson stated,

> The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers.

Id. (Jackson, J. concurring).
[283] 74 F.3d 1322 (1996).
[284] *See* Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (Mar. 8, 1995).
[285] Chamber of Commerce, 74 F.3d at 1332.
[286] *See generally* San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (establishing the doctrine of *Garmon* preemption); Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) (establishing the doctrine of *Machinists* preemption).

result'" from the application of different labor laws in different jurisdictions.[287] The court distinguished an earlier case concerning an executive order that set wage and price controls and prohibited federal agencies from contracting with companies that failed to comply with the wage and price controls.[288] In that case, the court simply found that the executive order did not subvert the collective bargaining process and so did not contradict the NLRA.[289] In the instant case, the executive order, which prevented employers from engaging in a lawful activity established under the NLRA, stood in direct conflict with the NLRA and, therefore, could not be sustained.[290]

Like President Clinton's order in *Chamber of Commerce*, the partnership executive order conflicts with section 7106(b)(1). Congress expressly left the discretion to the agency officials at the level of exclusive recognition to determine whether to bargain over permissive subjects.[291] There was no indication at all that Congress intended for the entire executive branch to act in concert in making such a decision. Nowhere in the legislative history is there mention of Presidential discretion or involvement concerning the scope of collective bargaining. Certainly, at a minimum, the implied desire of Congress in this regard is clear. As a practical matter, moreover, Congress's decision to leave the choice to the various agencies at the level of exclusive recognition makes sense given the varied and unique missions, requirements, and operations of the different agencies. Requiring all agencies to bargain on permissive

[287] Chamber of Commerce, 74 F.3d at 1338 (quoting National Labor Relations Board v. Nash-Finch Co., 404 U.S. 138, 144 (1971))
[288] American Federation of Labor and Congress of Industrial Organizations v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc), *cert. denied*, 443 U.S. 915 (1979) (concerning EO 12092 issued by President Carter).
[289] *Id.* at 796.
[290] Chamber of Commerce, 74 F.3d at 1338.
[291] *See* National Association of Government Employees, Local R4-75 and Department of Interior, National Park Service, Blue Ridge Parkway, 24 F.L.R.A. 56 (1986). The President is not an agency under the FSLMRS. *See* 5 U.S.C. §7103(a)(5).

subjects would have a drastically different effect from agency to agency. Such an order would be directly counter to the wishes of Congress and the balance it sought to achieve when it provided for the agency alone to make this decision.[292]

It might be argued that had that been its intention, Congress could have expressly indicated the President did not have the authority to make the election. There are three reasons this argument cannot be given serious consideration. First, the converse is equally true and would have been easier for Congress to accomplish. Had Congress wanted the President to have the ultimate discretion in this area, it would have made that intention clear with an express grant of authority. Second, it skirts the constitutional line for Congress to expressly deny authority to the President. The separation of powers is provided for in the Constitution and Congress risks running afoul of these provisions and, specifically, the President's obligation to ensure the laws are executed with express denials of power. Finally, it is not reasonable to expect Congress to foresee every eventuality. Congress thought it was removing the federal labor relations program from the executive order system where it was subject to "the whim or the mercy of the President, who, with a stroke of a pen, could undo all of those collective bargaining

[292] It is worth noting that in 1988, Congress held hearings on the FSLMRS in order to take testimony concerning possible remedial measures. During that hearing, the committee and some of the witnesses who testified specifically addressed the concept of partnership and a proposal to increase the scope of bargaining by limiting management rights. *See* Title VII of the Civil Service Reform Act of 1978: Hearing Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 100th Cong., 113, 118-19 (1988) (statement of Robert M. Tobias, National President, NTEU); *see also id.* at 143 (statement of James Peirce, National President, National Federation of Government Employees); *see also id.* at 165-67 (statement of Edward Murphy, Legislative Counsel, National Association of Government Employees). Representative Shroeder, Chairwoman of the Subcommittee on Civil Service, concluded the hearings with an acknowledgement that the committee would not address the matter further that year but that the following year it would be possible to discuss amending the FSLMRS. *See id.* at 186. No further action was ever taken by the subcommittee or by Congress. Professor Masters acknowledged that President Clinton's executive order was an attempt to circumvent a perceived inability to change in the law. Telephone Interview with Marick Masters, Professor, Katz Graduate School of Business, University of Pittsburgh (Mar. 29, 2001).

rights."[293] With such commentary in the legislative history, there was little reason to expect Congress to anticipate that a President would nevertheless attempt to contradict the collective will of Congress and change a provision borne of lengthy discussion and legislative compromise.

III. Infringing on the Rights of Employees and Unions

The other important aspect of President Clinton's executive order was the use of partnership councils. The executive order and the partnership councils were specifically designed to promote the principles and recommendations of the NPR.[294] The goal of the NPR was to improve government operations by making them more efficient and effective.[295] The principal means to achieve this goal was employee involvement and participation.[296] Borrowing heavily on the private sector experience with employee participation and new management techniques,[297] the NPR made several recommendations designed to increase worker participation and productivity. One such recommendation was the formation of labor management partnerships.[298]

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[293] 124 Cong. Rec. H9458 (daily ed. Sep. 11, 1978) (remarks of Rep. Udall), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 886. Of course, President Clinton did not "undo" the collective bargaining rights of federal employees with his executive order. But, he did take the kind of action Congress clearly did not want Presidents to take – he changed the program on a "whim" with the "stroke of a pen." For other comments as to Congress's intent, see *supra* note 238-240 and accompanying text.

[294] Interview with Andrew Wasilisin, Chief, Labor-Management Relations Division, Office of Labor and Employee Relations, Office of Personnel Management, in Washington, D.C. (Jun. 28, 2001).

[295] *See* GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 65-91; *see also* Marick F. Masters, Draft Report, A Final Report to the National Partnership Council on Evaluating Progress and Improvements in Agencies' Organizational Performance Results from Labor-Management Partnerships 9 (Feb. 15, 2001) (cited and quoted with permission) (copy on file with the author) [hereinafter Masters, Draft NPC Report].

[296] Masters, Draft NPC Report, *supra* note 295, at 9.; *see also* GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 65-91. The title of that chapter is "Chapter 3: Empowering Employees to Get Results."

[297] GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 66 (discussing the employee participation initiatives of companies such as General Electric, Motorola, and Harley-Davidson).

[298] GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 87-88.

In keeping with the recommendations of the NPR, the executive order called for the creation of "labor-management partnerships by forming labor-management committees or councils at appropriate levels."[299] These partnership councils were designed to engender greater labor-management collaboration to foster employee participation through their unions. The agencies were directed to "involve employees and their union representatives as full partners with management representatives to identify problems and craft solutions to better serve the agencies customers and its mission."[300] In order to support the creation of these partnership councils, President Clinton called for the formation of the National Partnership Council (NPC). The NPC, staffed by an assortment of senior government and federal employee union officials,[301] was set up to, among other things, advise the President on federal sector labor relations.[302] Tasked with a variety of other functions, one of the primary tasks of the

[299] Exec. Order No. 12,871, 58 Fed. Reg. 52201, 52202 (Oct. 1, 1993).
[300] *Id.*
[301] The NPC membership included the Director of OPM, who chaired the NPC; the Deputy Secretary of Labor; the Deputy Director of Management, Office of Management and Budget; Chair of the FLRA; the Director of the Federal Mediation and Conciliation Service; senior officials from two randomly selected executive agencies not already represented on the NPC; the Secretary-Treasurer of the Public Employees Department of the AFL-CIO; and the national presidents from the three largest federal employee unions, the American Federation of Government Employees, the National Federation of Federal Employees, and the National Treasury Employees Union. Exec. Order No. 12,871,58 Fed. Reg. at 52201. In 1994, the at-large agency members were from Treasury and Defense.

Noticeably excluded from the NPC were officials from the other unions that represented federal employees, officials from any of the professional associations representing federal managers or supervisors, and any employees who were not represented by a union appointed as at-large members. The exclusion of members from the latter two groups is particularly ironic in light of the goal of the executive order to "promote the principles and recommendations" of the NPR. Exec. Order No. 12,871, 58 Fed. Reg. at 52201. The NPR made a specific recommendation that the senior executive service, the highest level of career managers in the federal government, be strengthened to become a key element in the effort to change the culture of government. GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 163 (concerning recommendation HRM11). After a great deal of protest at being excluded from the NPC, *see* Figura, *Muscling In*, *supra* note 122, at 22 (reporting that officials from the various federal manager professional associations were angered about the exclusion from the NPC since it was at their level that the policy changes would have to be carried out), an elected official from the Senior Executive Association and from the Federal Managers Association were added to the council. Exec. Order No. 12,983, 60 Fed. Reg. 66855 (Dec. 21, 1995).
[302] Exec. Order No. 12,871, sec. 1(b), 58 Fed. Reg. at 52201. The NPC was established in under the Federal Advisory Committee Act (FACA), 5 U.S.C. App 2 (1998). Exec. Order No. 12,871, 58 Fed. Reg.

NPC was to promote the formation of partnership councils throughout the federal government.[303]

The guidance issued by OPM concerning the implementation of labor-management partnerships indicated that "agencies and unions" were to give priority to forming partnership councils.[304] The memorandum defined appropriate levels as offices and military installations where a bargaining relationship existed.[305] The memorandum also suggested formation of partnership councils at the national level of the agency.[306] Any partnership council that was formed was encouraged by the OPM memorandum to commit to "partnership principles agreements" outlining the agency arrangements for the partnership, the procedures for bargaining over (b)(1) issues, and dispute resolution procedures.[307]

The mandate to bargain over subjects listed in section 7106(b)(1) tended to affect the partnership councils in ways that did not fully comport with the recommendations of the NPR.[308] According to the OPM memorandum, the parties were to use the council forum to discuss (b)(1) issues and design procedures to resolve disputes. The NPC, in its 1994 Report to the President, recommended that "[n]otwithstanding the bargaining limitations of the Statute, councils should have the authority . . . to address and resolve any issues they deem appropriate with the concurrence of the highest agency-level

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at 52202. The authority of the President to establish the NPC under the FACA is beyond the scope of this paper.

[303] Exec. Order No. 12,871, 58 Fed. Reg. at 52201. Among the other functions, the NPC was to propose changes to the current statutory structure necessary to achieve the recommendations of the NPR, act as a clearinghouse for information about partnership efforts in the executive branch, and use expertise from individuals inside and outside the government in an effort to foster partnership arrangements. *Id.* at 52202.

[304] OPM Memorandum, Guidance for Implementing Executive Order 12871, *supra* note 136.

[305] *Id.*

[306] *Id.*

[307] *Id.*

partnership council."[309] Clearly, there was a desire, motivated in part by the (b)(1) issue and the OPM memorandum, to have partnership councils take up matters usually reserved for collective bargaining in addition to matters Congress meant to exclude.

The NPR proposal, however, indicated partnership councils would be separate from the collective-bargaining forum.[310] The council would exist as an entity separate from the collective bargaining relationship and provide a forum for employees to provide input on operational issues in an effort to find better ways to accomplish the agency mission. Indeed, the Internal Revenue Service had maintained such a system with the NTEU prior to the implementation of partnership.[311] This two-track system, was designed to keep employee participation and pre-decisional involvement separate from the issues covered in the collective bargaining relationship.[312] The IRS/NTEU model, called the Joint Quality Improvement Process, was cited in the Report of the National Performance Review as an example of the kind of employee involvement contemplated by the NPR.[313]

While partnership councils throughout the executive branch dealt with aspects of agency operations in a manner consistent with the NPR and the executive order, the councils also dealt with conditions of employment.[314] A study conducted by Professor Masters indicated that partnership councils throughout the executive branch dealt with issues such as quality of work life, labor-employee relations, human relations policies,

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[308] Interestingly, The NPR did not mention 5 U.S.C. 7106(b)(1), and did not advocate bargaining over issues contained in that section.

[309] NATIONAL PARTNERSHIP COUNCIL, A REPORT TO THE PRESIDENT ON IMPLEMENTING RECOMMENDATIONS OF THE NATIONAL PERFORMANCE REVIEW 11 (Jan. 1994) [hereinafter NPC, 1994 REPORT].

[310] *See* Masters, Draft NPC Report, *supra* note 295, at 15.

[311] Interview with Andrew Wasilisin, *supra* note 294.

[312] *Id.*

[313] *See* GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 87.

technology, reductions-in-force, privatizing, and agency grievance procedures.[315] But, matters unrelated to the collective bargaining relationship seemed to be of greater concern for most partnership councils. Issues such as agency business and performance, customer service, and employee productivity were all covered extensively by councils across the executive branch.[316]

While the goal of employee participation through cooperation has enjoyed some success in the private sector and has the potential to bring similar results in the federal sector, the partnership executive order was flawed in a way that suggests such a program-wide change is simply not possible under the current law. Clinton's attempt to impose an employee participation program on the statutory framework of the FSLMRS was problematic. Its failure in form and implementation to include employees not represented by unions violated 5 U.S.C. 7116(a)(1). Yet, an attempt by a future president to revive partnership councils by issuing an executive order similar to President Clinton's would also be problematic if unrepresented employees were included. Such an executive order could lead to practical problems associated with government sponsorship under 5 U.S.C. 7116(a)(3). Perhaps not surprisingly, there is almost no FLRA or federal court precedent concerning this issue, making reference to NLRB precedent necessary in order to illustrate the problem.

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[314] Interview with Andrew Wasilisin, *supra* note 294; Masters, Draft NPC Report, *supra* note 295, at 26.
[315] Masters, Draft NPC Report, *supra* note 295, at 26, tbl. 8.
[316] Masters, Draft NPC Report, *supra* note 295, at 26. It is debatable whether President Clinton could, through executive order, mandate changes to the collective bargaining process by creating a new forum for bargaining, creating new topics over which discussion must take place, and by requiring that cooperation and conciliation be the form of bargaining used. Collective bargaining under the FSLMRS requires simply that the agency and union meet at reasonable times in good faith (which means neither side is compelled to agree or concede) to discuss conditions of employment. 5 U.S.C. §7103(a)(12).

A. Encouraging Participation in a Labor Organization

Another flaw in the Clinton executive order was its failure to include unrepresented employees in the partnership council scheme. The goal of the NPR and the executive order was employee participation.[317] Indeed, that was a central theme of the NPR.[318] Chapter 3, entitled "Empowering Employees to Get Results" describes the need for and importance of employee involvement as a means of improving the provision of services to the public.[319] By decentralizing decision making authority, recognizing employee accomplishment, and enhancing the quality of work life—in short, by empowering the employee—the organization benefits. The paramount consideration in this regard is the employee, every employee. Yet the executive order focused only on employees represented by a labor union. Excluding unrepresented employees, whether or not this was the President's intention, not only violated the requirements of the FSLMRS, it diminishes the potential impact of the participation of over one-third of the federal workforce.[320] The scheme designed to implement the goals of the NPR, actually impeded the realization of those goals.

Several aspects of Clinton's order evidenced the exclusion of unrepresented employees. In its discussion of the formation of partnership councils, the order described labor-management committees rather than employee-management committees.[321] The

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[317] *See* Memorandum from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, Pre-Decisional Involvement: A Team-Based Approach Utilizing Interest-Based Problem Solving Principles (Jul. 15, 1997) (calling pre-decisional involvement of employees in the process the cornerstone of EO 12871) [hereinafter Swerdzewski Memorandum, Pre-Decisional Involvement]; Interview with Andrew Wasilisin, *supra* note 294.
[318] Masters, Draft NPC Report, *supra* note 295, at 9.
[319] *See generally* GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 65-91.
[320] Forty percent of federal employees are not represented by union. OPM, UNION RECOGNITION, *supra* note 26, at 19 (indicating that there are 2,218 bargaining units in the federal sector and that sixty percent of federal employees are represented by a union).
[321] Exec. Order No. 12,871, 58 Fed. Reg. at 52202.

order expressed the intention to involve "employees and their union representatives as full partners"[322] rather than an intent to involve "employees, with or without their union representatives." Moreover, the language in the OPM's implementing guidance almost exclusively referenced represented employees.[323] At only one point are unrepresented employees specifically referred to, and then only in a manner that clear excludes them from participation in partnership councils.[324] The implication is clear; employees not represented by unions were not to be included on partnership councils.

Any lingering doubt quickly dissolves once consideration is given to the implementation of the partnership council concept. The NPC was designed, in part, to promote the executive order and the principles and recommendations of the NPR. Its membership, however, did not include any unrepresented employees appointed as at-large members. This seems counterintuitive since one significant purpose of the NPR was increased employee participation.[325] Certainly, if the President wishes to create a federal sector labor relations advisory panel of some sort, then it is permissible to exclude unrepresented employees. Indeed, their exclusion is expected. The NPC, however, was charged with more than a simple advisory responsibility. Furthermore, like the NPC,

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[322] *Id.*

[323] *See* OPM Memorandum, Guidance for Implementing Executive Order 12871, *supra* note 136. Some examples are illustrative. In the introduction to its guidance, the memorandum states, "Within the spirit of the [NPR] and the executive Order, each agency and its components must help to build-labor-management partnerships specifically tailored to the needs of employees, their representatives, and management." *Id.* In the section concerning establishment of partnership councils the memorandum states that, "Agencies and unions should give priority to forming or adapting partnership councils." *Id.* That section goes on to indicate that these councils will only exist where there are bargaining units. *Id.*

[324] *See id.* In section 2, entitled 'Involve Employees and Union Representatives as Full Partners With Management,' the memorandum states, "Establishing or adapting partnership councils will be a major step in achieving partnerships. *Other methods of involvement* may also be appropriate and useful for both bargaining unit and non-bargaining unit employees." *Id.* (emphasis added).

[325] *See* Swerdzewski Memorandum, Pre-Decisional Involvement, *supra* note 317 (calling pre-decisional involvement "a process to provide for employee input as stakeholders in the decision" and calling it the cornerstone of EO 12871, which was designed to implement the reform objectives of the NPR). Had the

there were no partnership councils anywhere within the federal government that included unrepresented employees by design.[326] There were also no federal agencies that maintained partnership councils made up of only management representatives and unrepresented employees,[327] though there was one unique case.[328]

The segregation of unrepresented employees is problematic because service on partnership council was a condition of employment from which unrepresented employees were being excluded.[329] A condition of employment is any personnel policy, practice, or matter that affects working conditions.[330] Service on a partnership council certainly constituted a working condition. To say nothing of the ability to have that kind of direct input on agency operations, it seems obvious that the opportunity to serve on a council

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recommendation of the NPR been to increase unionized employee involvement, the exclusion of unrepresented employees would make perfect sense.

[326] Interview with Andrew Wasilisin, *supra* note 294; Interview of Professor Marick Masters, *supra* note 292. In his study of partnership, Professor Masters came across only "a handful" instances where there were unrepresented employees involved in labor-management partnership council activities. There involvement appeared to be minimal, at best. *Id.*

[327] Interview with Andrew Wasilisin, *supra* note 294 (indicating that specific information on this issue was not collected, but that they were unaware of any such partnership counsels).

[328] Interview of Professor Marick Masters, *supra* note 292. There was only one case Professor Masters found where non-union employees were included by design. That small agency unit had an unusual employment configuration that was uniquely ill suited to unionization. *Id.*

[329] Of course, it could be argued that there were unique problems concerning federal labor relations and that the partnership councils made up of only bargaining unit employees represented the President's solution. To be sure, the executive order does indicate that it is implementing a new form of labor-management relations. *See* Exec. Order No. 12,871, 58 Fed. Reg. at 52201. But, the focus of the executive order and its purpose was the implementation of the NPR recommendation of increased employee involvement for the betterment of government. Employee involvement of the kind described in the NPR cannot be limited to only those employees who happen to be represented by unions. More importantly, the partnership councils did not grow out of individual collective bargaining arrangements, in the same manner as the pre-decisional involvement committees that existed prior to the executive order. *See* GAO, FEDERAL LABOR RELATIONS, *supra* note 3, at 64 (referencing the Joint Quality Improvement Process between the Internal Revenue Service and the National Treasury Employees Union and the PACER SHARE productivity enhancement program between the Sacramento Air Logistics Center and the American Federation of Government Employees). The Clinton partnership councils were created as a government-wide program to involve employees throughout the government in an effort to implement government-wide reforms. As such, it had more in common with conditions of employment than the benefits associated with exclusive representation by a union. In any event, it is not at all clear that the President through executive order could force the creation of these councils only where collective bargaining arrangements exist simply because he thinks it a better way to carry on labor relations.

[330] 5 U.S.C. §7103(a)(14) (1996).

would likely be professionally and personally rewarding; increase an employee's visibility in the organization, leading to increased likelihood of promotion and with it greater pay; add to the list of an employee's accomplishments; lead to a professional award or recognition; and result in increased job experience. As a condition of employment, all employees should be entitled to participate in some capacity.

At first glance, it would appear that any agency that complies with the order, which limits partnership council participation to those employees represented by a union, actually encourages affiliation with a labor organization by discriminating against unrepresented employees with respect to that condition of employment. Compliance sends a clear message that union representation is a prerequisite to involvement with a partnership council and its attendant benefits.[331] A government sanctioned program[332] that results in this kind of segregation would surely be a considered an unfair labor practice if it affected employees involved with a union or engaged in union activities.

[331] During deliberations on the bill that would eventually become the FSLMRS, Congress expressed concern over forcing federal employees to support a union or become a union member. During floor debates, one representative expressed reservations at "any effort to force union membership on an employee, particularly a Federal employee, . . . [because it] runs against the tide of good public opinion and proper constitutional practice." 124 Cong. Rec. H9640 (daily ed. Sep. 13, 1978) (remarks of Rep. Ashbrook), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 937. In response another representative decried "mandatory unionism instead of giving all of the workers an opportunity to decide for themselves." *Id.* (remarks of Rep. Collins).

[332] At this point, it is important to distinguish between the partnership councils created by the executive order and the quality circle-type committees that are set up between the management of an agency and the union that represents its employees. A committee of the latter variety, established as a result of a collective bargaining relationship that was lawfully instituted is permissible. Such a committee is a natural outgrowth of the collective bargaining relationship and is legal provided the union is part of or consents to such a committee. *See* Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii and Hawaii Federal Employees Metal Trades Council, 29 F.L.R.A. 1236 (1987). By contrast, partnership councils established under the executive order do not grow out of an existing relationship. The majority of partnership councils were created as part of previously existing collective bargaining relationships. But, the executive order and the NPR it purported to implement had nothing to do with collective bargaining relationships. Part of an executive branch wide policy, the partnership councils were created for reasons that were supposed to be distinct from the collective bargaining relationship. *See* Masters, Draft NPC Report, *supra* note 295, at 15.

That the program happens to affect unrepresented employees should not and would not alter that conclusion.

Section 7116(a)(1) makes it an unfair labor practice for the agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter."[333] While many employee and union rights are protected from abuse by 7116(a)(1), the present situation implicates the employee rights found in section 7102. In pertinent part, that section states, "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."[334] Normally, this section is invoked in situations involving employees engaged in union activity. But, any system designed to protect an employee's right to join a union must absolutely protect the right of an employee not to.

While there are no cases in which the Authority or the federal courts have ruled on the issue of the government encouraging union participation,[335] the Authority has determined that "section 7116(a)(1) and (2) prohibits discrimination between bargaining unit and nonbargaining unit employees with respect to conditions of employment based

[333] 5 U.S.C. §7116(a)(1). Although it is routinely coupled with other unfair labor practice violations, a violation of section 7116(a)(1) can stand alone. *See* Department of Justice, Federal Correctional Institution, El Reno, Oklahoma and American Federation of Government Employees, Local 171, 2000 FLRA Lexis 194; F.L.R.A. ALJ Dec. No. 154 (2000).

[334] *Id.* at §7102. Section 7 of the NLRA is the private sector analogue. 29 U.S.C. §157 (1998).

[335] The issue has been raised in a few cases in the context of a violation of section 7116(a)(2). *See, e.g.,* National Treasury Employees Union and U.S. Department Of The Treasury, Internal Revenue Service, 1999 FLRA Lexis 264; 55 F.L.R.A. 23 (1999) (refusing to rule on agency argument that under section 7116(a)(2), "it may not take actions, such as extending special benefits to union representatives, that encourage, or have the 'foreseeable effect' of encouraging, employees to support a labor organization"); Department Of Health And Human Services, Regional Personnel Office, Seattle, Washington and Jeffrey A. Saul, 47 F.L.R.A. 1338 (1993) (rejecting agency contention that selecting the union president for a special duty assignment would unfairly penalize employees who chose not to take on the responsibility of union office).

solely on bargaining unit status."[336] The issue was also raised in Congress during floor debate on the labor relations bill. Concern that one version of the bill "almost [brought] on mandatory unionism"[337] prompted warnings that "any effort to force union membership on any employee, particularly a Federal employee, without a vote certainly runs against the tide of good public opinion and proper constitutional practice."[338] A review of unfair labor practice cases regarding the infringement upon the rights of the employee reveals a common theme that has application in this situation.

A frequent violation of section 7116(a)(1) concerns the conduct of the agency toward the union or the represented employee. An agency can violate this section if its actions, under the circumstances, "would tend to coerce or intimidate the employee" or are such that the employee could reasonably have drawn a coercive inference from the statement or conduct.[339] The agency's conduct is measured using an objective standard.[340] Like all the circumstances surrounding the conduct, the subjective perception of the employee and the intent of the agency are taken into consideration, but do not themselves resolve the issue.[341] Likewise, the degree of animosity may be

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[336] Department of the Air Force, Lowry Air Force Base, Denver. Colorado and American Federation of Government Employees, Local 1974, 36 F.L.R.A. 183, 187 (1990); *see also* The Baltimore Sun Company v. National Labor Relations Board, 2001 U.S. App LEXIS 15995, at *11-12 (4th Cir. Jul. 18, 2001). In *Baltimore Sun*, the court stated that "employee self-determination in the collective bargaining process is perhaps the most fundamental promise of the [NLRA]." *Id.* at *11. Section 7 of the NLRA, which grants the employee the right to join or refrain from joining a union, "guards with equal jealousy" the employees decision to join or union or to refrain from joining a union. *Id.* at *12. Section 7102 of the FSLMRS is the analogous provision to section 7 of the NLRA and the reasoning of the Fourth Circuit can be applied with equal force to the right of federal employee self-determination.

[337] 124 Cong. Rec. H9640 (daily ed. Sep. 13, 1978), *reprinted in* Legislative History of the FSLMRS, *supra* note 29, at 937 (statement of Rep. Collins).

[338] *Id.* at 937 (statement of Rep. Ashbrook).

[339] Department Of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky and National Federation Of Federal Employees, Local 466, 49 F.L.R.A. 1020, 1034 (1994) (citing Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah and American Federation of Government Employees, Local 1592, 35 F.L.R.A. 891, 895 (1990)).

[340] *Id.*

[341] *Id.* (citing Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 34 F.L.R.A. 956, 962 (1990)).

relevant, but its existence is not necessary to find a violation.[342] Thus, the question is one of reasonableness in evaluating the agency's conduct. Applying this reasoning to the creation of the partnership councils suggests this conduct on the part of the government ran afoul of the Statute. Putting aside the perceptions of the unrepresented employees and the intent of the President, it is certainly reasonable that the program as conceived and as it was later implemented could lead a unrepresented employee to draw the coercive inference that membership in a bargaining unit entitles one to certain benefits or opportunities that are not available to unrepresented employees. At a minimum, the program would tend to intimidate such an employee in the exercise of their right to refrain from union association.

From a broad perspective, the program was designed in large measure to curry favor with the unions. While it is probable there existed no animosity or intent to discriminate against unrepresented employees, the objective person could reasonably conclude the President did mean to enhance the power of the unions as it related to the executive agencies. For example, the President, on his own initiative, directed agencies to bargain over (b)(1) subjects. In addition, he failed to reiterate the narrow purpose of the executive order despite the NPC's 1994 report which advocated an expansive role for the partnership councils, codification of the new "right" to bargain over permissive subjects, and mandatory union membership for all bargaining unit employees.[343]

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[342] *Id.*.

[343] NPC, 1994 REPORT, *supra* note 309, at ii-iv. In its first report to the President, issued four months after the executive order, the NPC concluded that effective labor-management partnerships required the ability to address and resolve any issue the council wished. *Id.* at ii. The NPC also determined that failure to require all bargaining unit employees to pay union dues was an impediment to an effective partnership. *Id.* at iv. Union security has long been a priority for federal labor unions. *See* Captain Dean C. Berry, *Union Security in the Federal Sector*, 1989 ARMY LAW. 3 (1989) (providing a comprehensive review of this issue).

From the more narrow perspective of the employee, the coercive effect at the level of recognition, which in many cases is a single office or military installation, could be difficult to ignore. It is easy to imagine a group of employees or even a single unrepresented employee "looking in from the outside" and watching as the bargaining unit employees enjoy greater interaction and influence with management than ever before. Of course, the nature of collective representation is that employees represented by a union enjoy greater access to management as they bargain over mandatory subjects. This is an important aspect of union representation. There are two considerations that suggest the exclusion of unrepresented employees from partnership councils is different. First, unrepresented employees can still discuss working conditions with management on an individual (or even group) basis, though management is not statutorily obligated to engage in those discussions. Second and more importantly, it is one thing when that access, interaction, and influence grows out of a single labor-management relationship where the parties involved make a decision to operate in this fashion. It is a completely different matter when a government-wide program is created where a prerequisite to interaction with management is bargaining unit membership. The partnership councils created by President Clinton did not grow out of a collective bargaining relationship. Rather, it was the preexisting collective relationship that qualified an employee to take part in a partnership council. Thus, President Clinton's order negatively impacted the right of each unrepresented employee to refrain from union activity without fear of penalty. This is all that is required for an unfair labor practice under section 7116(a)(1).

Another violation of section 7116(a)(1) that illustrates the illegality of the President Clinton's concept concerns agency action in bypassing the union to interact

directly with the employees. Simply stated, it is an unfair labor practice for an agency to deal directly with the employees on matter related to collective bargaining or grievances without the knowledge and consent of the union.[344] Such an action on the part of the agency violates section 7116(a) because it "inherently interferes with the rights of employees [under section 7102] to designate and rely on the Union for representation."[345] The corollary to this employee right is the right not to designate or rely on a union for representation.[346] Agency action or, in this case, executive action that excludes employees from a process in which they are allowed to participate simply because they are unrepresented inherently interferes with and penalizes their exercise of the right not to be part of the union. Unrepresented employees have a right to access and enjoyment of the same conditions of employment as a bargaining unit employee.[347] The executive order created a condition of employment while simultaneously limiting access to unions and the employees they represented.

B. Partnership and "Agency Unionism"

An easy solution to the problem of infringing upon the rights of unrepresented employees would be to expressly reference those employees in the executive order and

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[344] Social Security Administration and American Federation Of Government Employees, Local 1923, 1999 FLRA LEXIS 260; 55 FLRA No. 160 (1999) (holding that the agency's action in negotiating directly with a bargaining unit employee over conditions of employment and subsequently reaching an agreement was illegal).

[345] U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas and American Federation of Government Employees, Local 3828, 51 F.L.R.A. 1339, 1346 (1996) (finding that a formal meeting conducted without the union despite its right to be present violated rights of the employee as well as the union).

It is worth noting that excluding a union from a formal meeting is also a violation of section 7116(a)(1) and (8). *Id.* The union has a right under section 7114(a)(2)(A) to be present at all formal discussions involving an employee in the bargaining unit concerning any grievance or any personnel policy or practice or some other condition of employment. 5 U.S.C. §7114(a)(2)(A) (1996). This provides another example of an exclusionary agency action that results in an unfair labor practice.

[346] 5 U.S.C. §7102.

[347] Lowry Air Force Base, 36 F.L.R.A. 183, 187 (1990); *see also* Baltimore Sun, 2001 U.S. App LEXIS 15995, at *11-12.

any guidance issued by OPM. Actually, requiring them to participate or making allowances for their participation in partnership council activities or other forms of pre-decisional involvement would certainly honor the section 7102 rights of the unrepresented employees.[348] Yet, therein lies the Catch-22. To the extent a return to government mandated partnership councils attempted to remedy that problem in this fashion,[349] it would create the perfect environment for the growth of "company unionism" or, more accurately, "agency unionism." Whether unrepresented employees are included on a partnership council with bargaining unit employees or if unrepresented employees alone serve on a partnership council, an unfair threat to unionization and the right to self-organization exists.

One goal of the NPR (and the stated purpose of the executive order) was to include federal employees in the decision making process in order to create a more efficient and effective government. If all federal employees are included, as they surely must be, then unrepresented employees will have a voice in the pre-decisional involvement process. In this situation, the evil to be guarded against is not necessarily the intentional creation of an agency union, though this is not beyond the realm of possibility. Rather, the concern is the inadvertent creation of an agency union atmosphere.

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[348] This aspect of the paper does have application to any committee designed to institute pre-decisional involvement. To the extent unrepresented employees can participate in such groups, *see* Memorandum from Joe Swerdzewski, General Counsel, Federal Labor Relations Authority, to Regional Directors, The Duty to Bargain Over Programs Establishing Employee Involvement and Statutory Obligations When Selecting Employees for Work Groups, Aug. 8, 1995, *reprinted in* BROIDA, *supra* note 56, at 2143, 2145 (explaining that agency management can get input from its employees on matters that do not relate to conditions of employment without the consent of the union) [hereinafter Swerdzewski Memorandum, Programs Establishing Employee Involvement], it will be critical to guard against discussions concerning working conditions and other issues usually reserved for an exclusive representative. The possibility this could occur is far from remote. Moreover, simply having such a close relationship with management may, as a practical matter, make it more difficult for a union to organize those employees.

The threat of agency unionism or agency unions has thus far not been a concern in the federal sector, but the same cannot be said of the private sector. Indeed, from the earliest days of the NLRA when employers formed "sham unions,"[350] until as late as 1995 when Congress passed but President Clinton vetoed the Teamwork for Employees and Managers Act (TEAM Act),[351] company unionism has been a source of intense concern. Prohibited by section 8(a)(2) of the NLRA,[352] employers are not permitted to dominate, interfere with, or provide financial support or any other assistance to a labor organization. The primary evil to be avoided was the practice of employers in creating company unions.[353] Company unions, composed of employees and management representatives who would discuss conditions of employment, continued to emerge despite passage of the NLRA. They were often called sham unions because far from actually working to create better conditions for the employees, the actual purpose of these organizations was to prevent legitimate unions from organizing the employees and to create the illusion that the employees were negotiating with management.[354]

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[349] There is no other way to remedy the problem.

[350] Sham unions were actually a source of concern well before passage of the NLRA. During debates over the bill that would eventually become the NLRA, Senator Wagner argued that such organizations were the greatest threat to the implementation of true collective bargaining. *Hearings on S. 2926 Before the Senate Comm. on Labor and Education*, 73rd cong., 2nd Sess. 8-9 (1934), *reprinted in* 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 438-39 (1985) (statement of Sen. Wagner) [hereinafter Legislative History of the NLRA].

[351] *Clinton Vetoes Republican Labor Measure*, ST. LOUIS POST-DISP., Jul. 31, 1996, at 5A. Actually, as late as 1997, the TEAM Act was still being debated in Congress and was the subject of a number of hearings. *The Teamwork For Employees and Managers Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources,* 105th Cong. (1997), available in *1997 WL 63032.*

[352] That section states in relevant part that "it shall be an unfair labor practice for an employer to dominate or interfere with the formulation or administration of any labor organization or contribute financial or other support to it . . ." 29 U.S.C. §158(a)(2) (1998).

[353] Abigail Evans, *Note: Cooperation Or Co-Optation: When Does A Union Become Employer-Dominated Under Section 8(a)(2) Of The National Labor Relations Act?*, 100 COLUM. L. REV. 1022, 1028-29 (2000) (explaining the motivation for section 8(a)(2) of the NLRA).

[354] Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331, 333-34 (1994).

Today, there is continued debate over the impact of section 8(a)(2) on the private sector workplace. The issue is whether section 8(a)(2) goes so far as to prevent all forms of employee participation or pre-decisional involvement.[355] The answer is pretty clearly no, but the much more complex and troubling problem is identifying those employee-employer organizations that are permissible as opposed to those that violate the requirements of section 8(a)(2).[356] Legitimate employee participation committees have been growing in importance over the last two decades.[357] Commenting on the phenomenon, one federal court of appeals explained that in an "effort to succeed in an increasingly competitive global marketplace, many companies have developed employee involvement structures which encourage employee participation in the design of workplace policies and procedures to improve the efficiency and effectiveness of the corporate organization and to create a workplace environment which is satisfactory to employees."[358] Such organizations, borne of "management's recognition that employees are capable of contributing far more to their companies than the mere performance of

[355] Michael H. LeRoy, *"Dealing With" Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromation*, 73 NOTRE DAME L. REV. 31, 63 (1997) (recognizing that section 8(a)(2) is being applied to employee participation committees in a way that was probably not contemplated in 1935 when the NLRA was passed) [hereinafter LeRoy, *"Dealing With" Employee Involvement*].

[356] Professor Estreicher explained that when section 8(a)(2) was written, the dominant theories of workplace management advocated hierarchal organization with the decision makers at the top and the rank and file workers at the bottom. These workers, which constituted the vast majority of employees, had no ability to provide input or make decisions and were required only to do what they were told. By contrast, in today's workplace, those theories of management have been more or less rejected in favor of increased worker participation and responsibility. In this atmosphere, Professor Estreicher concludes, section 8(a)(2)'s application becomes problematic. *Teamwork for Employees and Managers Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources*, 103rd Cong. (1997) (testimony of Prof. Samuel Estreicher) [hereinafter *TEAM Act Hearings*].

[357] *See* LeRoy, *"Dealing With" Employee Involvement, supra* note 355, at 63, n.228 (referencing the federal courts' acknowledgement of the growing importance of employee participation committees).

[358] Electromation, Inc. v. National Labor Relations Board, 35 F.3d 1148, 1156 (7th Cir. 1994) (citing several amici curiae explaining the need for such committees); *see also TEAM Act Hearings, supra* note 356 (testimony of Prof. Samuel Estreicher).

tasks assigned to them by management,"[359] help "increase the contributions and morale of employees, thereby leading to greater worker productivity and satisfaction."[360] Yet, the extent to which employee participation committees are permitted by law is not clear[361] and the debate as to the future of such organizations and the impact of section 8(a)(2) remains intense.[362]

While the problem of company/agency unionism has historically not been an issue in the federal sector, a return to Clinton-style partnership councils could change that.[363] Programs for employee pre-decisional involvement and employee-management work groups were been part of federal civil service prior to EO 12871. Generally, however, these employee participation committees were formed at agency offices where

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[359] Electromation, 35 F.3d at 1156.

[360] Moberly, *supra* note 354, at 331.

[361] Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers,* 69 CHI.-KENT. L. REV. 59, 86 (1993) (noting that the exact scope of section 8(a)(2)'s prohibition is unclear).

[362] *Id.; see generally* Clyde W. Summers, *A Structured Exception to Section 8(a)(2),* 69 CHI.-KENT L. REV. 129 (1993); Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812 (1993); Samuel Estreicher, *Employee Involvement and the Company Union Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U.L. REV. 125 (1994); Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor Management Cooperation Coexist?,* 8 DEPAUL BUS. L. J. 159 (1996); William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3, 11 (1996); Abigail Evans, *Note: Cooperation Or Co-Optation: When Does A Union Become Employer-Dominated Under Section 8(a)(2) Of The National Labor Relations Act?*, 100 COLUM. L. REV. 1022 (2000).

[363] This issue will become particularly problematic if Congress ever passes legislation making union membership compulsory. *See* NPC, 1994 REPORT, *supra* note 309, at 20-21 (mentioning, as one of the NPC's first legislative proposals, the need to change the law to require union membership). At this time, membership in a federal union is not required for bargaining unit employees. 5 U.S.C. §7102 (1996). Currently, only a small portion of the federal employees in a bargaining unit are members of the union. For example, as of January 1991, only thirty percent of the 600,000 employees represented by the AFGE were members of the union. Jonathan Walters, *The Power of Play*, GovExec.com, *at* http://www.govexec.com/features/0199/0199s3.htm. The rest are often referred to as "free riders." *Id.* This suggests that for many, union representation is a no-lose proposition because there is no requirement to pay dues to secure representation. If, however, the law changes and federal employees are required to pay union dues, it is quite possible that union representation among federal workers could decrease since representation would no longer be free. It is also likely that unions would find it more difficult to organize (or remain the exclusive representative for) various offices. To the extent the membership of the committees or councils is made up of unrepresented employees, the problems discussed above will become even more pronounced.

the employees were already members of a bargaining unit.[364] Whenever a legal dispute arose involving such a committee, the issue concerned whether and to what extent there was a duty to bargain.[365] Under current law, the agency cannot establish or implement an employee participation program without the union's permission if discussions concern matters related to working conditions.[366] If, however, unrepresented employees are permitted to participate on partnership councils or a similar committee, then the issue will no longer be whether there is a bargaining obligation. Of course, there will be no union involved. Instead, the issue will be whether interacting with unrepresented employees in this manner interferes with the employees' freedom of choice or jeopardizes the unions' ability to organize those employees. To the extent a council's interactions include working conditions, the problem of agency unionism becomes much more tangible.

Under the FSLMRS, there is statutory protection against agency unions. Section 7116(a)(3) makes it an unfair labor practice for an agency to "sponsor, control, or otherwise assist any labor organization."[367] Interestingly, a review of Authority precedent, reveals no cases involving the threat of agency unionism or any attempts to seek protection from that provision for illegal sponsorship or control of a labor organization by an agency. Rather, cases under section 7116(a)(3) have nearly always involved an attempt by a rival union to unseat an incumbent that has already organized

[364] Perhaps the most successful such program was the Joint Quality Improvement Process, which grew out of the collective bargaining relationship between the Internal Revenue Service and the National Treasury Employees Union. Referenced in both the NPR, *see* GORE, REPORT OF THE NATIONAL PERFORMANCE REVIEW, *supra* note 1, at 87, and the 1991 GAO Report, *see* GAO, FEDERAL LABOR RELATIONS, *supra* note 3, at 64, this agency-wide program involved the bargaining unit employees and the union in a structured effort with the agency to improve organizational effectiveness.
[365] *See generally* Swerdzewski Memorandum, Programs Establishing Employee Involvement, *supra* note 348, at 2143.
[366] *See* Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii and Hawaii Federal Employees Metal Trades Council, 29 F.L.R.A. 1236 (1987).
[367] 5 U.S.C. §7113(a)(3) (1996).

the employees and served as their exclusive representative.[368] But, like section 8(a)(2) of the NLRA, the primary purpose of section 7116(a)(3) is to "prevent 'company unionism.'"[369] The Authority has noted,

> Despite this difference in phraseology, the prohibitions in section 8(a)(2) are comparable with the proscriptions in section 7116(a)(3) of the Statute. Specifically, both statutes forbid an employer's unduly influencing a labor organization: section 8(a)(2) by use of the word 'domination,' and section 7116(a)(3) through the word 'control.' Similarly, both statutes prohibit an employer from improperly supporting and fostering a labor organization: section 8(a)(2) through phrases that outlaw 'interfering with the formation or administration . . . [and] contributing financial or other support' and section 7116(a)(3) by use of the terms 'sponsor' and 'assist.'[370]

Thus, to the extent section 8(a)(2) of the NLRA prohibits certain kinds of employee-management committees dominated by the employer, so to must section 7116(a)(3) prohibit the same types of committees dominated by an agency.[371] Indeed, the Authority has determined that Supreme Court precedent interpreting section 8(a)(2) will be applicable to cases under section 7116(a)(3).[372] Under the Authority's description of the

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[368] *See* Social Security Administration and National Treasury Employees Union and American Federation Of Government Employees, 52 F.L.R.A. 1159, 1177 (1997)

[369] Social Security Administration, 52 F.L.R.A. at 1172, 1175 (citing American Federation of Government Employees v. Federal Labor Relations Authority, 840 F.2d 947, 955-56 (D.C. Cir. 1988) (stating "'[section 7116(a) (3)] is aimed primarily at preventing agency domination of unions and preserving the bargaining representative's independence . . . . Like its analogue in private sector labor law, §8(a)(2) of the National Labor Relations Act, . . . it is directed at the problem of company unions.'")); *see also*, Legislative History of the NLRA, *supra* note 350, at 15-16 (remarks of Senator Wagner); *but see* Social Security Administration, 52 F.L.R.A. at 1192 (rejecting the contention that sections 7116(a)(3) and 8(a)(2) are comparable and concluding instead that private sector precedent interpreting section (8)(a)(2) has limited value in the interpretation of section 7116(a)(3)) (Member Wasserman concurring).

[370] Social Security Administration, 52 F.L.R.A. at 1176 (calling the two provisions analogous).

[371] There is effectively no legislative history describing Congress's intent regarding the scope or purpose of section 7116(a)(3). *See* Social Security Administration, 52 F.L.R.A. at 1167 (citing Legislative History of the FSLMRS, *supra* note 29, at 695) (explaining that the only legislative history on section 7116(a)(3) is one innocuous example of permissible agency assistance in an election campaign involving rival unions).

[372] Id. at 1176. For cases arising under section 8(a)(2), the Court has determined that analysis requires a review the totality of the circumstances, *see* International Association of Machinists v. National Labor Relations Board, 311 U.S. 72, 80 (1940), to determine whether the employers action has interfered with the employees' freedom of choice. *See* National Labor Relations Board v. Link-Belt Co., 311 U.S. 584, 588 (1941). This analysis is applicable in cases arising under section 7116(a)(3) concerning agency conduct in relation to rival employee unions in an election campaign. Social Security Administration, 52 F.L.R.A. at 1176 (determining that in such cases the Authority will examine "whether, in the totality of circumstances, the employer interfered with employee freedom of choice by failing to maintain a proper arms-length relationship with the labor organization involved").

analogy to be drawn between the NLRA and FSLMRS provisions, it follows then that Supreme Court precedent would be equally applicable to the resolution of agency union cases under section 7116(a)(3). In light of the Authority's willingness to use Board precedent wherever appropriate, the Board's interpretation of section 8(a)(2) will provide an analytical model to be applied in cases arising under section 7116(a)(3).

Currently, under section 8(a)(2), it is an unfair labor practice for an employer to create and maintain an employee-employer organization if the management's participation is too substantial and if the organization attends to conditions of employment.[373] The Board has developed a two-part test to assess the validity of an employee participation committee.[374] The first issue is whether the committee meets the statutory definition of a labor organization under the NLRA.[375] The definitional elements are 1) employee participation, 2) a purpose to deal with the employer, 3) activity concerning conditions of employment or other working conditions, and 4) employee

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The issue of employer interference with employee's freedom of choice, the prohibition of which has been accepted by the Authority in cases arising under section 7116(a)(3), has an interesting application to the impact of President Clinton's partnership council scheme on unrepresented employees. If the government is not permitted to assist, aid, or sponsor a single union to such a degree that it interferes with the employee's freedom of choice, then logically, the government cannot assist or sponsor all unions for the same reason. The executive order implies a clear sponsorship of all unions, and by so doing, interferes with the freedom of choice of unrepresented employees to remain unrepresented. In this way the executive order may violate section 7116(a)(3).

[373] The Board's refinement of this doctrine continues to evolve and future rulings will help clarify the application of section 8(a)(2) in the nonunion setting. *See* LeRoy, *"Dealing With" Employee Involvement, supra* note 355, at 61 (providing a comprehensive review of the Board's section 8(a)(2) cases since *Electromation*). Given the Authority's recognition of the relationship between section 8(a)(2) and section 7116(a)(3), the Board's development of section 8(a)(2) law will impact the interpretation of section 7116(a)(3).

[374] Electromation, 309 N.L.R.B. at 996; *see also* EFCO Corp v. National Labor Relations Board, No. 99-1147, 2000 U.S. App. LEXIS 10909, at *13 (8th Cir. May 17, 2000) (endorsing *Electromation's* two-part test).

[375] Electromation, 309 N.L.R.B. at 994. Section 2(5) of the NLRA defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. §152(5) (1998).

members serving in a representational capacity.[376] In *NLRB v. Cabot Carbon, Inc.*,[377] the Supreme Court found that the term "deal with" in section 2(5) of the NLRA was broader than the term collective bargaining.[378] According to the Court, an employee committee is a labor organization under the definition in section 2(5) if the purpose or activities of the committee, in whole or in part, involved dealing with employers concerning grievances, disputes, or working conditions, even if the committee was not engaged in actual bargaining or included a bargaining agreement.[379] The Board augmented the definition of dealing with by determining that it involved a "bilateral mechanism" in which proposals from the committee concerning working conditions were given "real or apparent" consideration by management.[380] One instance of bilateral dealing is insufficient to constitute dealing.[381] Rather, it must be the pattern and practice of the committee to engage in bilateral discussions.[382] The second issue is whether the committee violated section 8(a)(2) because the employer "'dominated, influenced, or

[376] Electromation, 309 N.L.R.B. at 996. Whether the representational requirement is critical was not answered by the Board in *Electromation* because employees on the committee in question were representing other employees. *See id.* at 994, n.20 (refusing to reach the issue but noting that Member Devaney, in his concurrence, indicates that the representation element is essential); *see also* National Labor Relations Board v. Webcor Packaging, Inc., 118 F.3d 1115 (6th Cir. 1997) (refusing to determine whether such a committee is a labor organization even though the employee members do not represent other employees).
[377] 360 U.S. 203 (1959).
[378] *Id.* at 211.
[379] *Id.* at 212-13.
[380] Electromation, 309 N.L.R.B. at 995, n.21; *see also* National Labor Relations Board v. Peninsula General Hospital Medical Center, 36 F.3d 1262, 1268 (4th Cir. 1994) (adopting the Board's formulation of the term "dealing with"). The Board further explained that a unilateral mechanism such as a suggestion box or brainstorming session did not constitute dealing with. Electromation, 309 N.L.R.B. at 995, n.21. Presumably, management gives real or apparent consideration to proposals conveyed in this fashion. Thus, the distinction between the two seems weak.
[381] Vons Grocery, 320 N.L.R.B. 53, 54 (1995) (finding that a quality control committee that normally discussed operational issues but which on one occasion discussed working conditions—dress code and point system for accidents—was not a labor organization under section 2(5) and, therefore, not impermissible under section 8(a)(2)); *see also* Peninsula General, 36 F.3d at 1271-72 (noting that "isolated instances" of bilateral communication do not constitute dealing).

interfered with the formation or administration'" of the committee or provided support of some variety.[383] Employer domination or interference with formation or administration occurs when management creates the committee and the committee has no effective existence independent of the employer.[384] In *National Labor Relations Board v. Newport News Shipbuilding Co.,*[385] the Supreme Court determined that a finding of anti-union animus or a specific motive to interfere with the employees rights was not required to show employer domination under section 8(a)(2).[386] The domination will, however, have the effect of depriving the employees of their absolute right to engage in self-organization.[387] Although it is clear that this issue of employer domination is intensely fact specific, making it impossible to accurately prejudge the validity of a particular partnership council, the application of private sector precedent indicates the tenuous status of the partnership council concept.

Application of private sector precedent to cases that could arise under section 7116(a)(3) must begin with the first prong of the *Electromation* analysis—whether the employee participation committee is a labor organization. Admittedly, the application of this part of the *Electromation* test initially appears to be troublesome since the test is based on the definition of labor organization under the NLRA, which is not the same under the FSLMRS.[388] Yet, the differences in the two definitions do not negate the

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[382] E.I. Du Pont De Nemours & Co. v. Chemical Workers Association, 311 N.L.R.B. 893, 894 (1993) (finding dealing where management interacted with employees while developing proposals because management was then in a position to reject the proposal).
[383] EFCO Corp., 2000 U.S. App. LEXIS 10909, at *14 (quoting Electromation, 35 F.3d at 1158).
[384] Electromation, 309 N.L.R.B. at 994.
[385] 308 U.S. 241 (1939).
[386] *Id.* at 251.
[387] EFCO Corp., 2000 U.S. App. LEXIS 10909, at *18 (citing Newport News Shipbuilding, 308 U.S. at 249).
[388] The definitions differ in three respects. First, the FSLMRS specifically indicates that a labor organization can be composed partially of employees, *see* 5 U.S.C. §7103(a)(4), while the NLRA definition

application of the test for two reasons. First, the elements of the first prong of two-part *Electromation* test are reflected in the definition of a labor organization under the FSLMRS. Under the FSLMRS, a labor organization is defined as an "organization composed in whole or in part of employees, in which employees participate and pay dues, and which has the purpose of dealing with an agency concerning grievances and conditions of employment."[389] Thus, this definition provides a basis for using the same elements in the application of the first prong of the *Electromation* test.[390] Second, a

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does not. *See* 29 U.S.C. §152(5). Second, the FSLMRS definition requires that the employees pay dues, *see* 5 U.S.C. §7103(a)(4), while the NLRA definition does not. *See* 29 U.S.C. §152(5). Finally, the FSLMRS does not make specific reference to a representation committee or plan, *see* 5 U.S.C. §7103(a)(4), while the NLRA does. *See* 29 U.S.C. §152(5). One other distinction must be noted. The FSLMRS definition of labor organization specifically excludes organizations sponsored by an agency. *See* 5 U.S.C. §7103(a)(4)(C). The NLRA definition does not. *See* 29 U.S.C. §152(5). The implication of this exclusion will be discussed *infra* note 390.

[389] 5 U.S.C. §7103(a)(4). This definition of a labor organization is much more narrow than the definition in the NLRA.

[390] Only the representation element cannot be found in the FSLMRS definition of labor organization. But as Professor Estreicher noted, the NLRA also "does not expressly contain such a requirement; read literally, section 2(5) reaches 'any organization of any kind' satisfying the 'dealing with' and subject-matter elements." Estreicher, *supra* note 362, at 144. In addition, neither the Board nor any court has ever ruled that this element must be satisfied. Even so, analysis will show that this element is satisfied. *See infra* notes 408-409 and accompanying text.

It is worth noting that the definition of labor organization requires that employees participate and "pay dues." 5 U.S.C. §7103(a)(4). As noted above, section 7116(a)(3) was designed to, among other things, prevent agency unionism. Simply because the members of a partnership council pay no dues does not mean that discussions cannot include working conditions or that the agency has not interfered with the organizational freedom of its employees. Moreover, focusing on this definitional argument might create a loophole that makes it possible for an agency-sponsored organization to exist unchecked. If these partnership councils—existing as agency-sponsored organizations—could not be regulated under section 7116(a)(3) because they were not labor organizations as they are strictly defined, then nothing would prevent agencies from maintaining such organizations. This counterintuitive result is hardly what Congress could have intended especially when considering the Authority's interpretation of the purpose of section 7116(a)(3). If, as the Authority as determined, one purpose of section 7116(a)(3) is to prevent agency unions, then a rigid devotion to the definition of a labor organization would make that section ineffective.

It also should be noted that section 7103(a)(4) specifically excludes from the definition of a labor organization any organization sponsored by an agency. *Id.* at §7103(a)(4)(C). As creatures of an executive order, a partnership council can surely be called agency-sponsored organization. The impact of this provision on the operation of section 7116(a)(3) is confusing. First, agency-sponsored organizations are grouped with other types of organizations that are also specifically excluded—those that discriminate illegally, advocate the overthrow of the government, and participate in strikes. *Id.* at §7103(a)(4)(A), (B), and (D). The implication of the specific exclusions from the definition of labor organization is that such organizations do not enjoy the protections, rights, and benefits of being a labor organization because of the illegal activities of the organization. Second and most troubling, if agency-sponsored organizations are not labor organizations, then it is not clear how section 7116(a)(3) would ever reach this conduct since it is an unfair labor practice under that section to sponsor a "labor organization." *Id.* at §7116(a)(3). It may be that

nonunion partnership council is exactly the kind of organization that can be the subject of impermissible employer domination to the detriment of the employees and the unions—especially in the federal sector.

Turing to application of the first prong of the test to nonunion partnership councils, it is clear that the first element is satisfied. A labor organization under the FSLMRS does require employee participation.[391] An integral part of the partnership council concept was employee participation. It was actually the purpose of the executive order to include employees in a pre-decisional role on the council.

The second definitional element, that the council has a purpose of dealing with management, would also be satisfied. The stated purpose of the Clinton partnership councils was to interact with management on various operational issues. It is fair to argue that a future partnership council with the same purpose that is improperly structured could easily meet the definition of "deal with." First, per *Cabot Carbon*, there does not have to be a collective bargaining relationship to satisfy the statutory requirement to of "dealing with" management. Thus, its status as a nonunion council would not matter. Second, the council would be "dealing with" management if bilateral discussions with management involved a pattern and practice of management approval of council proposals. Of course, if bilateral discussions were not the standard operating procedure—if, for example, the council only engaged in brainstorming—then there

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the specific exclusion of an agency-sponsored organization from the definition was meant to indicate that such organizations were not permitted. But, this interpretation renders the Authority's interpretation of section 7116(a)(3) a nullity. In addition, the word "sponsored" is not defined, making it difficult to understand what Congress meant by this provision. The difficulty reconciling sections 7103(a)(4)(C) and 7116(a)(3) are further complicated by the requirement that to be considered a labor organization, dues must be collected from its members. No agency sponsored employee participation committee would ever be likely to charge dues.

[391] 5 U.S.C. §7103(a)(4).

would be no dealing.[392] Finally, if the councils included both management and employee members, as they did under Clinton's order, this would put management in a position to reject employee proposals. This would also amount to dealing with management.[393]

To be considered a labor organization, however, the council must also concern itself with grievances or working conditions. This is the third element of the definition. To be sure, this was not the nominal purpose of the partnership councils under President Clinton, though the NPC initially advocated bargaining over any issue, including conditions of employment.[394] Because bargaining is quite limited in the federal sector, pre-decisional involvement committees, like a partnership council, can take on the role of a labor organization.

Notwithstanding its stated purpose, a nonunion partnership council could easily take up matters related to working conditions. The problem of the overlap between (b)(1) issues and the exclusive management rights listed in section 7106(a),[395] illustrates the closely integrated nature of the issues in the federal sector. Without clear issues of delineation, like those of pay and benefits in the private sector, it would be easy for a pre-decisional committee to turn its attention to working conditions whether or not this expanded purpose was intended.[396]

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[392] *See* Vons Grocery, 320 N.L.R.B. 53.

[393] *See* Du Pont, 311 N.L.R.B. 893, 894. A council in which management members only facilitate discussion or serve as an observer would not be one that deals with management. *Id.* at 895. It should be noted that in the federal sector, it is unlikely that management would not retain some sort of approval power over a proposal or agreement reached by a partnership council. Even collective bargaining agreements between a union and an agency are subject to limited agency head approval. *See* 5 U.S.C. §7114(c)(1).

[394] NPC, 1994 REPORT, *supra* note 309, at 11.

[395] *See supra* notes 106-108 and accompanying text and notes 229-232 and accompanying text.

[396] It is sometimes not always clear when an issue moves from a legitimate pre-decisional matter to one of working conditions. *See e.g.,* U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky, 53 F.L.R.A. 312 (1997) (determining that an agreement made during a partnership council discussion was binding as if it had been made during a collective bargaining session). In *FAA, Standiford Tower,* the agency and the union established a

In addition, any discussions concerning changes in agency operations will certainly implicate a change in working conditions. For example, any changes concerning the layout of a new facility will impact the working conditions of employees in that facility.[397] The problem of maintaining a separation between productivity or quality and working conditions has been recognized in the private sector, as well.[398] As Professor Estreicher testified when he appeared before a Senate committee holding hearings on the TEAM Act, "the distinction between 'productivity' or 'quality' and [wages, hours, grievances, and working conditions] is likely to prove ephemeral in many instances."[399] Professor Estreicher noted further that employee suggestions on productivity and quality will likely have some impact on working conditions.[400] Professor Gottesman even more directly asserted that "there is always the potential that employee-participation structures, no matter what motivated the employer to create them,

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partnership council pursuant to EO 12871. The council discussions were to focus on pre-decisional issues and not on conditions of employment, which were to be left to the formal collective bargaining relationship. During the partnership council meetings, the agency invited the union's participation in the pre-decisional deliberations over the architectural plans for a new air traffic control tower. During the course of the discussions, the parties began to consider matters concerning working conditions, such as the size of the employee break room and locker room. Eventually, the parties reached an agreement to alter the plans to accommodate the union's suggestions. When the changes were disapproved at a higher level, the union filed an unfair labor practice charge. The Authority noted that although the sessions between the parties were conducted in the partnership atmosphere that did not preclude a finding that collective bargaining occurred given the nature of the subjects being discussed. *Id.* at 319.

[397] *See, e.g., id.* at 318-19.

[398] In *Electromation*, Member Raudabaugh made this very point. He expressed concern that committees established to discuss purely operational matters or ways to improve productivity would end up addressing issues pertaining to wages and terms and conditions of employment. He determined that most employee participation committees of this sort could not avoid discussing these issues. *See Electromation*, 309 N.L.R.B. at 1008 & n20 (Member Raudabaugh concurring); *but see id.* at 1004, n.3 (expressing view that carefully structured employee participation committees can avoid such issues) (Member Oviatt concurring).

[399] *TEAM Act Hearings, supra* note 356 (testimony of Prof. Samuel Estreicher).

[400] *Id.*; *see also* Estreicher, *supra* note 362, at 147 (noting, for example, that an employee participation committee focusing on ways to use existing personnel more effectively will inevitably turn its attention to subjects such as shift schedules and job assignments).

will expand beyond the employer's control and in time turn into real collective-bargaining engines."[401]

In the federal sector, the potential for such a committee to turn to discussions about working conditions is even more acute. The reason is that operational issues are even more closely intertwined with working conditions. It is tempting to think that with a broader area of management rights that can never be the subject of bargaining, it would be easy to confine discussions to only those issues. Indeed, it is this generally held belief that makes it possible for management to establish an employee committee to discuss these matters without obtaining the consent of the union.[402] Yet, with fewer issues to bargain over, even the most minor changes in working conditions take on great significance at the bargaining table.[403] This is one of the oft-cited reasons that labor relations in the federal sector is so contentious. Thus, to the extent a proposed operational change has even the slightest impact on a working condition, this could lead to more protracted discussions. This is not to say that a committee would be unable to focus its discussions on operational issues, productivity, or quality. Surely, such a thing is possible. The concern is that in a nonunion setting in the federal sector, there is a very real danger that an employee committee could take up matters it should not discuss.

Beyond the problem of discussing working conditions, employees who perceive a close, productive relationship with management will be less likely to jeopardize or simply alter that relationship by voting to organize. Given the limited scope of bargaining in the

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[401] *See* Gottesman, *supra* note 361, at 87.
[402] *See* Swerdzewski Memorandum, Programs Establishing Employee Involvement, *supra* note 348, at 2144-45.
[403] *See, e.g.,* Figura, *Muscling In*, *supra* note 122, at 21. (referencing a statement by a local union president that the union bargains any time management turns out the lights); *see also supra* notes 117-121 and accompanying text.

federal sector, this is a far more serious threat to unions under a concept similar to partnership. A federal union might find it extremely difficult to become the exclusive representative where the employees and management representatives have an ongoing relationship. Indeed, there is strong evidence that this problem already exists in the private sector.[404] To the extent working conditions become part of the focus for such a committee, however inadvertently, organizational efforts are threatened to an even greater degree.

Finally, the fourth element, the representative status of the employees on the committee, is also satisfied. Though there is no requirement of representative status in the definition of labor organization under the FSLMRS, it has been an important consideration in the private sector.[405] The representative status of non-bargaining unit employees on partnership councils cannot be ignored. To avoid the problem of

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[404] See LeRoy, *"Dealing With" Employee Involvement*, *supra* note 355, at 35, n.17. Professor LeRoy references a 1994 study of 165 NLRB representation elections that showed that unions encountered an employee participation program in 38% of their campaigns, which was up from 7% in 1988. The study also found that unions won 48% of the elections where no employee participation program existed, but only 32% where such a program was in place. *Id.* (citing Jim Rundle, Winning Hearts and Minds: Union Organizing in the Era of Employee Involvement Programs, Cornell University and AFL-CIO Conference Paper (Washington, D.C. 1996)); *see also* Jim Rundle, *Winning Hearts and Minds: Union Organizing in the Era of Employee Involvement Programs*, *in* ORGANIZING TO WIN 213 (Kate Bronfenbrenner et al. eds., 1998). As to the nature of the employee participation programs in the private sector, Professor LeRoy quotes the author of the study:

> 'In less than ten years, employee involvement programs have grown from a blip on the radar screen to a significant new phenomenon facing union organizers. They are now encountered by organizers in one third of all organizing campaigns. For all the hope that some academics have bestowed on them as vehicles for improving employee 'voice' in an increasingly non-union work world, the ones the organizers encounter are far from benign. They are accompanied by aggressive anti-union campaigns, and as employee organizations, are utterly undemocratic.'

Id. (quoting Jim Rundle, Winning Hearts and Minds: Union Organizing in the Era of Employee Involvement Programs).

[405] The courts and the Board have never indicated satisfaction of that element was necessary for a finding of labor organization status, but these forums have given weight to the representative nature of the committees in question. *See, e.g.,* Electromation, 309 N.L.R.B. at 994, n.20; Webcor Packaging, 118 F.3d at 1120; *see also* Estreicher, *supra* note 362, at 144-46 (noting that the Board's threshold for this finding has generally been quite low).

representation, it would be necessary to put every unrepresented employee in the office on the council. As a practical matter, this simply would not be possible. Thus, at the level of recognition, unrepresented members of the council will inevitably assume a representative status, purporting to collect input from and speak on behalf of all unrepresented employees in the office.[406] In addition to the concerns expressed above, the representational status of these employees makes the existence of a nonunion partnership council all the more likely to interfere with or displace a legitimate union.

Applying the second prong of the *Electromation* analysis, it appears that a nonunion partnership council could be easily subject to agency domination. The Authority's determination that section 7116(a)(3) prohibits the same conduct as section 8(a)(2) of the NLRA, makes application of the *Electromation* standard of domination appropriate. A nonunion partnership council created from an executive order, whose function would be set forth in such an order, and that would not exist without agency participation, satisfies the notion of domination and interference as explained in *Electromation*. That promulgation of such an executive order would be done without union animus or any intent to interfere with the section 7102 rights of federal employees would not matter. The agency's control over a nonunion partnership council would to some degree impact the right of federal employees to organize. While it seems as though no partnership council like the ones created by President Clinton could escape a finding of domination or interference, the issue will turn on the specific facts and the exact nature of the council's operation.

[406] The presence of unrepresented federal employees on the NPC, would almost certainly create the impression that they serve as representatives of unrepresented employees throughout the executive branch.

One counterargument that could be raised concerning the violation of section 7116(a)(3) is based on the interplay between that section and section 7116(a)(1). In *Social Security Administration and National Treasury Employees Union and American Federation Of Government Employees*,[407] the Authority concluded that an agency does not violate section 7116(a)(3) when it takes action necessary to comply with section 7116(a)(1)'s prohibition on discrimination.[408] By the same token, a violation of section 7116(a)(1) is not excused simply because the agency's action was necessary to avoid a violation of section 7116(a)(3).[409] In short, section 7116(a)(1) generally trumps section 7116(a)(3). Applying this rule to the issue of unrepresented partnership council's seems to lead to the conclusion that an agency would not violate section 7116(a)(3) by including unrepresented employees on a partnership council or by maintaining a council comprised solely of unrepresented employees. The agency would actually be absolved of a violation of section 7116(a)(3) because its actions in forming and maintaining such a partnership council were required by section 7116(a)(1).

While this argument seems valid on its face, the application of the rule set forth in *Social Security Administration* is inappropriate. First, the rule was formulated and applied in a case that concerned agency conduct during an election campaign between an incumbent and a rival union.[410] In that regard, the issue was access to the employees by the rival union.[411] While application of the rule in that situation is sound, it is difficult to apply the rule in the context of an agency union. Second, action by an agency to

[407] 52 F.L.R.A. 1159 (1997).
[408] *Id.* at 1179 (reversing its an earlier holding to the contrary).
[409] *Id.* at 1179-80.
[410] *See id.* at 1179.
[411] Unlike the discrimination concerns addressed by section 7116(a)(2), section 7116(a)(1)'s prohibition against discrimination relates to arbitrary enforcement of no solicitation rules by the agency. *See generally id.*

maintain an agency union is itself a violation of section 7116(a)(1). Interfering with freedom of choice of unrepresented employees by establishing an agency union is a violation of the rights of such employees in the same way that their exclusion from partnership councils is a violation. Finally, application of the rule in the context of agency unions, would allow agencies to form such partnership councils without fear of consequence.

None of the foregoing, however, suggests that it is not desirable or possible for an agency to maintain a pre-decisional relationship with its employees. In the private sector, neither the Board nor the courts have ruled that section 8(a)(2) prevents strict pre-decisional involvement. Moreover, there is ample evidence that operational effectiveness is enhanced when employees are given the opportunity to provide input and even make decisions.[412] Often, committees are established to facilitate employee participation.[413]

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[412] *See* Stephanie Overman, *Labor Secretary Preaches Cooperation*, HR MAGAZINE (Nov. 1993), at 43 (reporting comments of then-Labor Secretary Robert Reich concerning impact of employee participation committees); Linda Thornberg, *Can Employee Participation Programs Really Work?,* HR MAGAZINE (Nov. 1993), at 49. There is also a great motivation on the part of employers to communicate with their employees concerning working conditions. Employers today understand that employees have certain expectations concerning the conditions of their employment. To keep employees, it is necessary to meet those expectations. Of course, the most practical way to accurately assess the level of satisfaction among the employees is to open channels of communication. Certainly, there is nothing illegal about suggestion boxes and other similar forms of communication. With regard to the NLRA, Congress certainly did not intend to outlaw all forms of communication. *Electromation,* 309 N.L.R.B. at 1000 (noting that the Senate committee considering the NLRA made it clear that "'normal relations and innocent communications' are not prohibited") (Member Devaney concurring). The difficulty arises when methods of communication become more interactive and, to the extent some employees purport to speak on behalf of other employees, representational in nature. At some point, a line, drawn by the NLRA in the private sector and the FSLMRS in the federal sector, is crossed. Once that happens, the conduct is considered illegal. Given the differences in labor relations in the private and federal sector, it is not unreasonable to suppose that the line is not drawn in the same place.

[413] Joseph B. Ryan, *Comment: The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act,* 40 U.C.L.A. L. REV. 571, 579-88 (1992) (describing in detail the various forms of employee participation programs used by private sector employers). As noted above, this was the intended goal that motivated the creation of partnership councils. *See supra* note 294-316 and accompanying text.

Like section 8(a)(2),[414] section 7116(a)(3) is broad enough to allow legitimate employee participation committees. Yet, there is a tension between the ability of an agency to interact with its employees in this manner, the collective rights of those employees, and the organizational rights of labor organizations.[415] As the highly partisan debate over the TEAM Act demonstrates, that conflict has been more keenly felt in the private sector, but to the extent a return to partnership leads to the creation of nonunion partnership councils, the issue could become a great deal more pronounced.

IV. Conclusion

Labor-management cooperation and employee involvement undoubtedly have their place in the federal sector labor relations program. In keeping with a long history of presidential participation in federal sector labor relations, President Clinton took the initiative to make cooperative relationships and employee involvement the standard for the executive branch agencies. To this end, President Clinton issued EO 12871, which, among other things, expanded the scope of bargaining and created employee participation committees. Unfortunately, this effort, referred to as labor-management partnerships, exceeded the President's authority, infringed on the legislative prerogative of Congress, and violated the rights of unrepresented employees. Although President Bush eventually repealed EO 12871, President Clinton's foray into federal labor relations provides important lessons for a future president interested in resurrecting labor-management

[414] Electromation, 30 N.L.R.B. at 1000 (Member Devaney concurring). In *Electromation*, Member Oviatt also stated that "[the NLRA] does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace." *Id.* at 1004. *See also* Moberly, *supra* note 354, at 357 (noting that there have been no Board or court cases that have struck down properly constructed employee participation programs).

[415] In the private sector, the cases concerning this issue are legion. *See, e.g.,* National Labor Relations Board v. Steamway Division of Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); Chicago Rawhide Mfg. Co. v. National Labor Relations Board, 221 F.2d 165 (7th Cir. 1955); Hertzka & Knowles v. National Labor

partnerships. Under the current legislative scheme, a return to labor-management partnership is not possible. In the absence of congressional authority, the President simply cannot make a legally binding decision to expand the scope of bargaining. In addition, while employee participation programs (or partnership councils) are permissible when created pursuant to a specific collective bargaining relationship, they cannot be instituted as a government-wide program without including unrepresented employees. The right of unrepresented employees to enjoy the same conditions of employment as their represented counterparts is clear. However, attempting to remedy the problem by incorporating unrepresented employees in employee participation committees, introduces a greater threat to collective bargaining and employee self-determination—agency unionism. While it has not been an issue in the federal sector up to now, the threat should not be ignored.

All of this emphasizes the complexity of federal sector labor relations and the need for a balanced, apolitical, and deliberate approach to federal labor legislation. President Carter recognized this when he asked Congress to assume control of the program in 1978. As a result, it is no longer feasible for Presidents to make unilateral changes to the labor relations scheme without exceeding their authority or jeopardizing the rights of federal employees. This is, perhaps, the most important lesson to be learned from President Clinton's labor-management partnerships.

Relations Board, 503 F.2d 625 (9th Cir. 1974); National labor Relations Board v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979).