

Lesson Learned from an Attempt to Limit Collective Bargaining in the Federal Workplace; What Is the Takeaway from NSPS?

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I. Introduction

Within the realm of public sector collective bargaining, there has been a substantial amount of litigation in the last several years. This is, in great part, due to the establishment of the Department of Homeland Security (DHS) and the permission from Congress to create a new personnel system within the Department of Defense (DoD). The clash between the unions and the federal government is the result of these two departments' contention that they cannot efficiently transform their personnel systems with the constraints they perceive are imposed upon them by collective bargaining.

To fully grasp the issues in contention between these forces, one must understand the definition of collective bargaining in the federal workplace. The Federal Sector Labor Management Relations Act (FSLMRA) defines collective bargaining as:

the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.¹

Both the new DoD system (known as National Security Personnel System (NSPS)) and the new DHS system (known as MAXHR) attempted to abrogate collective bargaining as outlined by the FSLMRA.² The unions mounted attacks against this action. The National Treasury Employees Union³ (NTEU) secured decisions by the judiciary that an abrogation of collective bargaining by DHS in MAXHR was impermissible under its own implementing statute.⁴ The American Federation of Government Employees⁵ (AFGE) did not have the same success in the courts against the NSPS.⁶

This article addresses reasons behind the disparate court decisions, but its primary purpose is to comprehend the lesson that can be learned from this attempt to limit collective bargaining. When the Government attempts to make significant changes to systems that affect labor relations, the affected unions should be consulted and subjectively included in the decision making process. To ignore this inclusion is to risk a significant waste of time, energy, and resources. More importantly, it is to risk a loss of trust with the very employees affected by the new policy. To arrive at this conclusion, it is

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¹ 5 U.S.C. § 7103(a)(12) (2000).

² Nat'l Treasury Employees Union v. Chertoff (*Chertoff II*), 452 F.3d 839 (D.C. Cir. 2006); Am. Fed'n of Gov't Employees v. Rumsfeld (*Rumsfeld*), 422 F. Supp. 2d 16, 41, 43 (D.D.C. 2006), *rev'd sub nom.* Am. Fed'n of Gov't Employees v. Gates (*Gates*), 486 F.3d 1316 (D.C. Cir. 2007).

³ There were actually five unions that brought suit against DHS: (1) the National Treasury Employees Union, (2) American Federation of Government Employees, (3) National Federation of Federal Employees, (4) National Association of Agricultural Employees, and (5) Metal Trades Department of the AFL-CIO. Nat'l Treasury Employees Union v. Chertoff (*Chertoff I*), 385 F. Supp. 2d 1, 6 (D.D.C. 2005), *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839. To avoid confusion in, this article will refer to the lead plaintiff in this case, the NTEU. Both the NSPS case and the MAXHR case have multiple unions as plaintiffs. .

⁴ *Chertoff II*, 452 F.3d 839; *Chertoff I*, 385 F. Supp. 2d 1, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

⁵ There were thirteen unions, representing a combined 350,000 employees of the DoD, that brought suit against the DoD. *Rumsfeld*, 422 F. Supp. 2d at 21, *rev'd sub nom. Gates*, 486 F.3d 1316. To avoid confusion, this article will refer to the lead plaintiff in this case, the AFGE.

⁶ *Gates*, 486 F.3d 1316.

helpful to review the history of collective bargaining in the federal sector. From this snapshot of history, one sees how and when collective bargaining came to the federal worker, and what influences the unions held prior to and subsequent to the right to bargain collectively. This article will then look at how these union influences were affected by the inception of MAXHR and NSPS. Subsequently, this article will review the unions' responses as seen through the lawsuits challenging the two personnel systems, and how the AFGE responded to its losses in the court battle against NSPS. Ultimately, this article will attempt to discern how the unions achieve their endstate in today's federal labor relations. An overview of the progression of the new labor relations policies under both MAXHR and the NSPS lays a foundation for understanding this journey.

II. MAXHR Under the DHS

The DHS was established after the terrorist attacks of 11 September 2001.⁷ This institution brought together twenty-two federal agencies with approximately 170,000 employees.⁸ This consolidation of different organizations also placed "17 different unions, 77 existing collective bargaining units, 7 payroll systems, [and] 80 different personnel management systems"⁹ under the direction of this new department. Merging such a large and diverse group necessitated Congress to authorize a new personnel system to provide a contemporary yet flexible system that would adequately accommodate the needs of the new department's mission.¹⁰

The DHS published its final rule implementing MAXHR on 1 February 2005.¹¹ The DHS provided its proposed rule to the unions,¹² and accepted comments from the unions regarding the proposed rule. The DHS considered the unions' comments,¹³ and ultimately determined that any further consultation with the unions regarding the personnel system were unlikely to produce agreement.¹⁴ As such, DHS published its final rule.

This final rule expanded management rights and simultaneously restricted collective bargaining.¹⁵ Moreover, the final rule allowed management to reject terms of collective bargaining agreements if they were found to be inconsistent with a directive, policy, or regulation of the DHS.¹⁶ From a practical perspective, the existence of a binding contract as a result of a collectively bargained agreement would be illusory, as DHS could always promulgate a policy or directive that would negate terms within the contract.¹⁷

Immediately after DHS published its final rule implementing MAXHR, the affected unions sued to enjoin its implementation.¹⁸ The unions were successful and the DHS appealed the decision.¹⁹ The DHS lost its appeal and its personnel system was ultimately determined to violate its own implementing statute which required it to bargain collectively.²⁰

⁷ 6 U.S.C. §§ 101–557 (Supp. IV 2004).

⁸ *Chertoff I*, 385 F. Supp. 2d at 7 n.1, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

⁹ *Id.* (alteration in original).

¹⁰ 5 U.S.C. § 9701(a) (Supp. IV 2004).

¹¹ Department of Homeland Security Human Resources Management System, Final Rule, 70 Fed. Reg. 5272 (Feb. 1, 2005) (codified at 5 C.F.R. ch. XCVII and pt. 9701 (2008)) [hereinafter DHS Final Rule].

¹² *Chertoff I*, 385 F. Supp. 2d at 7, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 11.

¹⁷ See generally *Chertoff I*, 385 F. Supp. 2d at 17, *aff'd in part, rev'd in part, Chertoff II*, 452 F.3d 839.

¹⁸ *Id.* at 7.

¹⁹ *Chertoff II*, 452 F.3d 839.

²⁰ *Id.* at 844.

III. NSPS Under the Department of Defense

In the National Defense Authorization Act for Fiscal Year 2004, Congress required the DoD to transition to a new civilian personnel system.²¹ This civilian force transformation was to be a part of the DoD's overall transformation plans under then Secretary of Defense, Donald Rumsfeld.²² The goal was to create a flexible personnel system "designed to promote a performance culture in which the performance and contributions of the DoD civilian workforce are more fully recognized and rewarded."²³

Secretary Rumsfeld's contention was that the new threats and missions around the world required not only changing the work of the uniformed services, but also changing the work of the 700,000 civilians employed by the DoD.²⁴ To develop this transformation, the DoD collaborated with the civilian employees and their representative unions.²⁵ Approximately 450,000 DoD employees and more than 1,500 separate bargaining units were represented by forty-three unions.²⁶ The DoD met with these unions on a dozen occasions to collaborate on the design of NSPS.²⁷

The DoD published proposed regulations on 14 February 2005 (just two weeks after the DHS published its final regulations), and opened a thirty-day period for public comment.²⁸ The DoD also entered another period of at least thirty days to "meet and confer" with the unions regarding the proposed regulations.²⁹ The DoD made several revisions to the proposed regulations as a result of public comments and the "meet and confer" process.³⁰ These revisions did not resolve the major differences between the unions' position and that of the DoD:

Significant differences with many of the labor organizations remain over such issues as the scope of bargaining, implementing issuances that supersede conflicting provisions of collective bargaining agreements, the specificity of the regulations, the ability to grieve pay decisions, the use of behavior as part of performance evaluation and the use of performance in a reduction in force. These differences cannot be reconciled with the need for a contemporary and flexible system of human resource management as DoD seeks to transform the civilian part of the Total Force of military personnel, civilian employees, and DoD contractors.³¹

The DoD determined that further consultation was not likely to produce agreement on these issues, and the final rule was implemented on 1 November 2005.³² The affected unions filed suit against the DoD, and, like the unions involved in the DHS MAXHR lawsuit, they were successful at the district court level in enjoining the implementation of several aspects of NSPS.³³ Conversely however, the union victory against NSPS was short-lived. The U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court ruling, and held that the NSPS implementing statute granted DoD "temporary authority to curtail collective bargaining for DOD's civilian employees."³⁴

²¹ Pub. L. No. 108-136, 117 Stat. 1392 (2003); *Rumsfeld*, 422 F. Supp. 2d 16, 21 (D.D.C. 2006), *rev'd sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

²² Department of Defense Human Resources Management and Labor Relations Systems, Final Rule, 70 Fed. Reg. 66,116, 66,117 (Nov. 1, 2005) (codified at 5 C.F.R. ch. XCIX and pt. 9901) (2008) [hereinafter DoD Final Rule].

²³ *Id.* at 66,118.

²⁴ *Id.* at 66,117.

²⁵ *Id.* at 66,118.

²⁶ *Id.* at 66,120.

²⁷ *Id.*

²⁸ *Id.* at 66,121.

²⁹ *Id.*

³⁰ *Id.* at 66,122.

³¹ *Id.* at 66,123.

³² 5 U.S.C. § 9902(m)(3)(C)(ii) (Supp. IV 2004) (current version at 5 U.S.C.S. § 9902 (LexisNexis 2008)); *see also Rumsfeld*, 422 F. Supp. 2d 16, 35-36 (D.D.C. 2006), *rev'd sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007)

³³ *Rumsfeld*, 422 F. Supp. 2d 16, *rev'd sub nom. Gates*, 486 F.3d 1316.

³⁴ *Gates*, 486 F.3d at 1318.

IV. Overview of the History of Union Activity in the Federal Sector

To better grasp the differences in outcome of the unions' assaults on the MAXHR system of DHS and the NSPS of DoD, it is helpful to consider the history of collective bargaining in the federal sector. Understanding when and how the federal sector employees achieved the right to collectively bargain, and what actions unions took to achieve their workplace goals prior to and subsequent to this milestone, can shed light on how and why the unions have attacked these two personnel systems.

The existence of unions in the federal workplace dates back to the 1830's when skilled craftsmen joined unions already in existence in the private sector.³⁵ Today, public sector workers enjoy the constitutional right to join a union.³⁶ This protection is found in their right to freedom of association.³⁷ Yet, there exists no commensurate constitutional right to bargain collectively.³⁸ Moreover, because public employees were not covered by the National Labor Relations Act of 1935,³⁹ until 1962, federal workers, also lacked a statutory or regulatory right to collectively bargain. In 1962, President John F. Kennedy signed Executive Order 10,988 which provided limited rights to collective bargaining for federal workers.⁴⁰ In 1969, President Richard Nixon further defined and enhanced these collective bargaining rights when he issued Executive Order 11,491.⁴¹ These actions led to the Federal Service Management Relations Act of 1978 which is the main labor law for the federal sector today.⁴²

If unions existed for approximately 130 years in the federal workplace without the right to bargain collectively, how did they support their members? The unions provided support to public employees through three primary means: they engaged in politics, they represented individual workers in civil service hearings, and they engaged in bargaining on an informal level.⁴³

The political engagements surrounding NSPS and MAXHR should come as no surprise. Employee associations and unions, both public and private, have participated in politics for virtually their entire existence.⁴⁴ This is especially true in the federal sector where issues such as wages are set by statute,⁴⁵ and are, therefore, not negotiable in the collective bargaining process.⁴⁶ As such, to seek a wage increase, unions typically lobbied Congress to statutorily grant a pay raise. Unions used this lobbying process to achieve goals prior to having the ability to collectively bargain, and they continued to engage in such practices even after they achieved collective bargaining rights.⁴⁷ In some cases, a union would negotiate to give up something in the workplace in order to gain advantage in the bargaining process, but subsequently persuade the legislature to statutorily grant back to the worker that very thing given away during collective bargaining.⁴⁸

³⁵ HARRY T. EDWARDS ET AL., LABOR RELATIONS LAW IN THE PUBLIC SECTOR 1 (4th ed. 1991) (quoting *Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887, 893–96 (1972)). There is much discrepancy in scholarly work on when exactly unions were permitted in the public sector. Many courts refused to permit public employees to organize until the late 1950's. Joseph E. Slater, *The Court Does Not Know "What a Labor Union Is": How State Structures and Judicial (Mis)constructions Deformed Public Sector Labor Law*, 79 OR. L. REV. 981, 990 (2000) [hereinafter Slater, *The Court Does Not Know*]. However, there is evidence of their existence in some capacity as far back as the 1830's. EDWARDS ET AL., *supra*. By 1912, the Loyd-LaFollette act gave federal employees the right to organize (although not to bargain). Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 302 (2004) [hereinafter Slater, *Homeland Security*]. The goal of this article is not to determine at what juncture official union representation was permitted. Rather, the point is to simply acknowledge that federal employees have been organizing in some fashion, and struggling for greater rights to organize since at least the 1830's.

³⁶ *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1676, 1678 (1984).

³⁷ *Id.*

³⁸ *Id.*; see also DONALD H. WOLLETT ET AL., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 2 (4th ed. 1993).

³⁹ *Developments in the Law—Public Employment*, *supra* note 36, at 1676.

⁴⁰ Slater, *Homeland Security*, *supra* note 35, at 302.

⁴¹ *Id.*

⁴² *Id.* at 303.

⁴³ *Id.* at 345–46.

⁴⁴ See generally WOLLETT ET AL., *supra* note 38, at 6; EDWARDS ET AL., *supra* note 35, at 49 (quoting Rehmus, *Labor Relations in the Public Sector*, Paper prepared for the 3d World Congress, Int'l Indus. Relations Ass'n, London, Eng. (Sept. 3–7, 1973)).

⁴⁵ Slater, *Homeland Security*, *supra* note 35, at 303.

⁴⁶ *Id.*

⁴⁷ WOLLETT ET AL., *supra* note 38, at 6.

⁴⁸ EDWARDS ET AL., *supra* note 35, at 49 (quoting Rehmus, *supra* note 44); WOLLETT ET AL., *supra* note 38, at 6.

Aside from political involvement, unions represented members who appeared before civil service hearings and other legal entities. In more recent times, unions have represented members appearing before legal frameworks enforcing various employment laws such as Title VII of the 1964 Civil Rights Act.⁴⁹ Unions have filed lawsuits challenging decisions by government officials, such as the decision by the Transportation Security Administration to ban collective bargaining.⁵⁰

The methods of litigation and politics were complemented by the unions' third approach when prohibited from formal collective bargaining: that of informal collective bargaining. In such a practice, unions would negotiate agreements with government agencies, which could serve as a type of substitute for a formal contract.⁵¹

Given the lack of collective bargaining rights for all but the last forty years, and the ability of unions to devise imaginative means to support their members prior to the right to collectively bargain in any real sense, why was there such a fight to ensure that collective bargaining rights were not eviscerated? In the opinion of some commentators, the human resource systems in existence at that time were not effective in spite of union attempts to simulate a negotiation strategy.⁵²

Union representation rates strongly coincide with the union's ability to bargain collectively. "[T]he proportion of federal employees not working for the postal system and represented by unions climbed from 13 percent in 1961 to 60 percent in the mid-1970's."⁵³ As public sector union representation increased, private sector union representation decreased. From approximately the time President Kennedy authorized collective bargaining in the public sector through the 1990's, private sector "union density declined from more than 33% to less than 12%,"⁵⁴ while "public sector union density rose from less than 13% to around 40%."⁵⁵

Collective bargaining is viewed as an essential component for an efficient personnel system in the public sector. The increases in union representation of federal workers since the authorization of collective bargaining are impressive. These two factors combine to help one understand why the unions will not allow any curtailment of their right to bargain collectively, at least not without a serious fight. The DHS and the DoD apparently underestimated the importance of collective bargaining in the eyes of the public sector union, and certainly the voracity with which they will fight to keep the ability to collectively bargain.

V. How Do MAXHR and NSPS Affect Collective Bargaining?

Both the DHS and the DoD expanded management rights when they designed their new personnel systems. The DHS asserted that it was central to their mission that the agency is able to act quickly.⁵⁶ Quick action was deemed necessary not only in response to an emergency, but also to proactively "prepare for or prevent emergencies."⁵⁷ To that end, the DHS determined that it should revise management rights found in 5 U.S.C. chapter 71.⁵⁸

[The DHS] expanded the list of management rights that are prohibited from negotiation to include numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work . . . [The DHS] also excluded from mandatory negotiations the procedures that the Department would follow in exercising these expanded management rights.⁵⁹

⁴⁹ Slater, *Homeland Security*, *supra* note 35, at 349.

⁵⁰ *Id.* at 348. The Transportation Security Administration (TSA) prohibited collective bargaining. This is separate from the overall policies of MAXHR. As such, the unions have been fighting a separate battle within the TSA for the right to bargain collectively.

⁵¹ *Id.* at 346.

⁵² *Id.*

⁵³ EDWARDS ET AL., *supra* note 35, at 15 (quoting Sar A. Levitan & Frank Gallo, *Can Employee Associations Negotiate New Growth?*, MONTHLY LABOR REV., July 1989, at 5-13)).

⁵⁴ Slater, *Homeland Security*, *supra* note 35, at 300.

⁵⁵ *Id.*

⁵⁶ DHS Final Rule, *supra* note 11, at 5278.

⁵⁷ *Id.*

⁵⁸ *Id.* at 5279.

⁵⁹ *Id.*

A mere nine months later, the DoD published its final rule for NSPS.⁶⁰ Like the DHS, the DoD asserted that it was vital to its mission to be able to act quickly.⁶¹ The importance of this ability to act expeditiously was not just required in emergency situations, but was “necessary even in meeting day-to-day operational demands.”⁶² Presumably, to maintain management rights within the scope of those found in the FSLMRA would hinder the DoD’s ability to effectively and efficiently execute its mission subsequent to the terrorist attacks of 2001. As a result, through the NSPS, the DoD

expanded the list of management rights that are excluded from bargaining, including the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and the technology, methods, and means of performing work—rights that deal directly with the Department’s national security operations. In addition, [the DoD] excluded from bargaining the procedures that the Department would follow in exercising these expanded operational management rights.⁶³

Not only did DHS and DoD expand management rights when they devised their new personnel systems, both agencies also curtailed collective bargaining rights. The DoD declared that “collective bargaining is prohibited on such critical matters as procedures observed in making work assignments and deployments unless the Secretary, in his or her sole, exclusive, and unreviewable discretion, elects to bargain.”⁶⁴ This virtually mirrored the action by the DHS.⁶⁵ The DHS acknowledged that the FSLMRA required bargaining on these topics, and that the unions still requested to bargaining on these issues.⁶⁶ Moreover, the unions offered to allow the suspension of collective bargaining on these issues “under exceptional circumstances.”⁶⁷ Yet, the DHS declared that “[t]his is too high a bar.”⁶⁸ The DHS reasoned that “[i]n today’s operational environment, the exceptional has become the rule.”⁶⁹ The DHS went on to maintain, “the Department’s managers and supervisors must be able to make split-second decisions to deal with operational realities free of arbitrarily imposed standards.”⁷⁰

Expansion of management rights and restriction of traditional elements of collective bargaining were not the only impact the new rules set forth by the DHS and the DoD had on collective bargaining. Arguably, the most serious restriction affecting the overall right to bargain collectively was found in these two Departments’ declaration that new “issuances” would supersede collective bargaining agreements.⁷¹ The DoD pointed out that labor organizations “took strong exception to the provisions in the proposed regulations that would allow issuances to supersede conflicting provisions of any collective bargaining agreement and limit bargaining to only those matters that are not inconsistent with the issuances.”⁷²

So, what did it mean that issuances by the Departments would supersede collective bargaining agreements, and why did the unions make a “strong objection” to this? It meant that all of the collective bargaining agreements agreed to in good faith by all parties and in place at the time of the new regulations would find any provision that conflicted with the new regulations void. Rather than abide by the then existing contract between the union and the Departments until the contract ended, and then implement the new regulations, the new regulations would instead very quickly override any conflicting provisions in the existing labor contract.⁷³

⁶⁰ DoD Final Rule, *supra* note 22.

⁶¹ *Id.* at 66,119 & 66,128.

⁶² *Id.* at 66,128.

⁶³ *Id.*

⁶⁴ *Id.* at 66,119.

⁶⁵ DHS Final Rule, *supra* note 11, at 5279.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* It is no wonder that the unions became somewhat incensed by these new rules set forth by the DHS and the DoD. The DHS establishes in this very quote that it believes that mutually agreed upon procedural rules established through a collective bargaining process are “arbitrary.” It is not the point of collective bargaining to formulate “arbitrary standards.” Collective bargaining does not require a party to make concessions or agree to proposals. Rather the parties are to make a good faith effort to reach agreement. It is somehow unjust that a Department should declare what they have mutually agreed upon to somehow be an “arbitrary standard.”

⁷¹ DoD Final Rule, *supra* note 22, at 66,211, 66,212; DHS Final Rule, *supra* note 11, at 5333.

⁷² DoD Final Rule, *supra* note 22, at 66,128.

⁷³ *Id.* at 66,212; DHS Final Rule, *supra* note 11, at 5333.

Even more troubling from a union perspective was the idea that not only had the new regulations superseded collective bargaining agreements, but also any issuance that implemented these new regulations also potentially superseded a collective bargaining agreement. This meant that contracts that were bargained after the new regulations were in effect could be superseded. As Judge Collyer reasoned in *National Treasury Employees Union v. Chertoff*,⁷⁴ this ensured that any concept of a binding contract resulting from true collective bargaining was merely illusory.

Both the DoD and the DHS argued that all of these restrictions were needed in light of the requirement to transform their otherwise inefficient personnel systems into flexible systems, which were capable of responding to the threats faced by these agencies.⁷⁵ The DoD asserted that the personnel system in place prior to NSPS “encourage[d] a dispute-oriented, adversarial relationship between management and labor,” and that this “systematic inefficienc[y] detract[ed] from the potential effectiveness of the Total Force.”⁷⁶ The DoD’s bottom line was that it believed that these restrictions on collective bargaining would “ensure that the Department can act as and when necessary.”⁷⁷

The DoD acknowledged that the unions made “good faith” efforts, during the meet and confer process, to propose solutions in an attempt to meet the needs of the DoD.⁷⁸ However, in the end, the DoD determined that any differences between the unions and the DoD could not “be reconciled with the need for a contemporary and flexible system of human resource management.”⁷⁹

VI. The Unions Sue the Department of Homeland Security

A. MAXHR at the District Court

In *National Treasury Employees Union v. Chertoff (Chertoff I)*, five unions representing approximately 60,000 DHS employees, brought suit against the DHS when the DHS published its Final Rule that implemented MAXHR.⁸⁰ The NTEU claimed that the DHS failed to comply with the following requirements as set forth in the DHS implementing statute: that the new human resource system “be flexible, contemporary, and ensure the ability of the employees to bargain collectively.”⁸¹ The focus of the complaint, for purposes of this article, was that MAXHR did not ensure collective bargaining for the DHS employees.

The NTEU argued that:

every system of collective bargaining ever established by Congress has had three critical components: 1) a requirement that labor and management bargain in good faith over conditions of employment for purposes of reaching an agreement; 2) a provision that the agreements reached as a result of bargaining are binding on both parties equally; and 3) the establishment of a neutral forum for resolving disputes.⁸²

The NTEU further argued that none of these components were present in MAXHR.⁸³ The DHS responded that they were not bound by the standard collective bargaining principles of Chapter 71.⁸⁴ The *Chertoff I* court agreed that, in formulating the implementing statute for DHS as it had, Congress provided that DHS was free from the requirements of Chapter 71.⁸⁵ Yet,

⁷⁴ *Chertoff I*, 385 F. Supp. 2d 1, 25 (D.D.C. 2005), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

⁷⁵ DoD Final Rule, *supra* note 22, at 66,123, 66,128–66,129; DHS Final Rule, *supra* note 11, at 5279.

⁷⁶ DoD Final Rule, *supra* note 22, at 66,118.

⁷⁷ *Id.* at 66,119.

⁷⁸ *Id.* at 66,128.

⁷⁹ *Id.* at 66,123.

⁸⁰ *Chertoff I*, 385 F. Supp. 2d 1 (D.D.C. 2005), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839 (D.C. Cir. 2006); *see supra* note 3 and accompanying text.

⁸¹ *Chertoff I*, 385 F. Supp. 2d at 6, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

⁸² *Id.* at 25 (citing Plaintiffs’ Memorandum at 13).

⁸³ *Id.*

⁸⁴ *Id.* Chapter 71 refers to Chapter 71 of Title 5 of the United States Code. This is used in many instances interchangeably with the term “FSLMRA” and is the statutory provision that binds most of the Federal Government in labor management. *See* 5 U.S.C. ch. 71 (2000).

⁸⁵ *Chertoff I*, 385 F. Supp. 2d at 9, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

the *Chertoff I* court also noted that, in the implementing statute for DHS, Congress nonetheless required that the DHS ensure its employees could organize and bargain collectively.⁸⁶

Accordingly, one of the central questions became: what did it mean to “bargain collectively”? The FSLMRA defined collective bargaining⁸⁷ and the DHS adopted the definition into its regulations for MAXHR,⁸⁸ and the court in *Chertoff I* also recognized the factors outlined in the formal definition.⁸⁹ Regardless of the implied agreement by all parties on definition, the DHS argued “that they had to reconcile the competing requirements that [MAXHR] be ‘flexible,’ ‘contemporary,’ and ‘ensure . . . collective bargaining.’”⁹⁰ The DHS went on to argue, “[b]ecause [their] construction of these provisions is at the very least a reasonable interpretation, it must be upheld under [*Chevron*].”⁹¹

In *Chertoff I*, the U.S. District Court for the District of Columbia examined the requirements Congress set forth in the DHS implementing statute.⁹² The pivotal issue, for purposes of this article, was that Congress required the DHS to permit collective bargaining. The court in *Chertoff I* agreed that Congress did not require the DHS to conform to all the requirements of Chapter 71, but also reasoned that “collective bargaining” is a term of art, and that said term was defined in Chapter 71.⁹³ So, although the DHS was not bound by the requirements of Chapter 71, it was bound by the definition of collective bargaining as found in Chapter 71.

The DHS accepted this obligation when it adopted Chapter 71’s definition, in its entirety, into MAXHR.⁹⁴ After determining the definition of collective bargaining included the term “collective bargaining agreement,” the *Chertoff I* court endeavored to define this term.⁹⁵ The court determined that “[w]hile a collective bargaining agreement is a specialized form of contract, it retains the essential features of all contracts: ‘A contract is a promise or a set of promises, for breach of which the law gives a remedy, or performance of which the law in some way recognizes a duty.’”⁹⁶ The court in *Chertoff I* ultimately determined that “[t]he *sine qua non* of good-faith collective bargaining is an enforceable contract once the parties reach agreement.”⁹⁷

The DHS did not provide for an enforceable contract with MAXHR. The court in *Chertoff I* stated that the enforceability of any collectively bargained agreement under MAXHR was “illusory.”⁹⁸ This was true because DHS “retain[ed] numerous avenues by which [it could] unilaterally declare contract terms null and void, without prior notice to the Unions or employees, and without bargaining or recourse.”⁹⁹

The court in *Chertoff I* stated this as follows: “Under [MAXHR], the final results of collective bargaining would be essentially the same as the results of conferring: the Department would retain the sole and exclusive right to ignore the terms of its collective bargaining agreements whenever it believed necessary”¹⁰⁰ The court went on to reason: “A contract

⁸⁶ *Id.*

⁸⁷ The definition is found at 5 U.S.C. § 7103(a)(12) (2000). This definition is in “Chapter 71,” the very Chapter by which the DHS asserts it is not bound.

⁸⁸ DHS Final Rule, *supra* note 11, at 5332.

⁸⁹ *Chertoff I*, 385 F. Supp. 2d at 25, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

⁹⁰ *Id.* (quoting Defendants’ Memorandum at 36).

⁹¹ *Chertoff I*, 385 F. Supp. 2d at 25 (quoting Defendants’ Reply. at 22), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839 (referencing *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984)). *Chevron U.S.A. Inc.* sets the standard for judicial interpretation of statute. The standard it sets is if “the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chertoff I*, 385 F. Supp. 2d at 16 (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 842–43), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839. “But, if the statute is silent or ambiguous with respect to the issue at hand, then the Court must defer to the Agencies so long as their ‘answer is based on a permissible construction of the statute.’” *Id.* (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 843).

⁹² *Chertoff I*, 385 F. Supp. 2d. at 23–28, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

⁹³ *Id.* at 24.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 25 (quoting SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1, at 1–2 (Walter H.E. Jaeger ed., 3d ed. 1957), *quoted in* BLACKS LAW DICTIONARY 341 (8th ed. 2004)).

⁹⁷ *Id.*, *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839 (D.C. Cir. 2006).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 28.

that is not mutually binding is not a contract. Negotiations that lead to a contract that is not mutually binding are not true negotiations. A system of ‘collective bargaining’ that permits the unilateral repudiation of agreements by one party is not collective bargaining at all.”¹⁰¹

Accordingly, the *Chertoff I* court did not agree with the DHS argument that its reconciliation of the competing requirement to provide a flexible and contemporary personnel system that protected the employees’ right to collective bargaining were made reasonably. Nor did the *Chertoff I* court agree that the agencies “reasonable” balancing could be upheld under *Chevron*.¹⁰² Rather, the court determined that “no deference is due to the [DHS] because ‘Congress has directly spoken to the precise question at issue’ and directed that the [DHS] ensure employees rights to engage in collective bargaining.”¹⁰³

The *Chertoff I* court found that MAXHR “elevates flexibility above the equal statutory requirement that it ensure collective bargaining rights.”¹⁰⁴ Accordingly, *Chertoff I* enjoined the implementation of MAXHR.¹⁰⁵

B. MAXHR at the Appellate Court

The results of *Chertoff I* were ultimately appealed to the U.S. Court of Appeals for the District of Columbia by both the unions and the DHS.¹⁰⁶ The DHS claimed that the decision in *Chertoff I* went too far when it enjoined the implementation of MAXHR.¹⁰⁷ The unions argued that *Chertoff I* did not go far enough, because the lower court had not found that the expansion of management rights also violated the right to collectively bargain.¹⁰⁸

The Court of Appeals took up these issues in the case of *National Treasury Employees Union v. Chertoff (Chertoff II)*.¹⁰⁹ Regarding the holding in *Chertoff I* that MAXHR did not ensure collective bargaining because it did not guarantee a mutually binding contract, the court in *Chertoff II* affirmed:

[W]e agree with the District Court that the Department’s attempt to reserve to itself the right to unilaterally abrogate lawfully negotiated and executed agreements is plainly unlawful. If the Department could unilaterally abrogate lawful contracts, this would nullify the Act’s specific guarantee of collective bargaining rights, because the agency cannot “ensure” collective bargaining without affording employees the right to negotiate binding agreements.¹¹⁰

Due to the limited scope over which MAXHR would permit collective bargaining, the ruling in *Chertoff II* reversed the ruling in *Chertoff I*.¹¹¹ The court in *Chertoff II* reasoned that “[t]he right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over.”¹¹²

The DHS continued to argue that as they were not bound by Chapter 71, they were therefore not bound by the content of its definitions.¹¹³ The court in *Chertoff II* disagreed. Like the court in *Chertoff I*, the *Chertoff II* court embarked on a

¹⁰¹ *Id.*

¹⁰² *See Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984)

¹⁰³ *Chertoff I*, 385 F. Supp. 2d. at 28 (quoting *Chevron U.S.A. Inc.*, 467 U.S. at 842), *aff’d in part, rev’d in part, Chertoff II*, 452 F.3d 839.

¹⁰⁴ *Id.* at 17.

¹⁰⁵ *Id.*

¹⁰⁶ *Chertoff II*, 452 F.3d 839.

¹⁰⁷ *Id.* at 843–44.

¹⁰⁸ *Id.*

¹⁰⁹ *Chertoff II*, 452 F.3d 839. This case referred to the district court’s decision regarding the Government’s motion to alter and amend *Chertoff I* as *Chertoff II*. This article does not discuss the decision on the motion to alter and amend, and to lessen the confusion over the multiple cases, this article refers to the Court of Appeals decision as *Chertoff II*.

¹¹⁰ *Id.* at 844.

¹¹¹ *Id.* at 861.

¹¹² *Id.* at 860.

¹¹³ *Id.* at 863.

Chevron analysis of the implementing statute and determined that Congress did not “employ a term of art devoid of all meaning,” and that Chapter 71 provided the proper meaning to the term “collective bargaining.”¹¹⁴

The *Chertoff II* court pointed out that even under Chapter 71 the scope of bargaining was very narrow.¹¹⁵ It went on to reason that although the DHS was given the ability to waive the provisions of Chapter 71, it must still comply with the core meaning of collective bargaining under Chapter 71, to include the scope of bargaining.¹¹⁶ The *Chertoff II* court also reasoned that Chapter 71’s guidance in this area was not only narrow, but also flexible.¹¹⁷ As such the court stated:

if the Department follows the core notion of “collective bargaining” in the federal sector in defining the scope of bargaining under [MAXHR], as the Act requires, DHS will have extraordinary “flexibility” to achieve the goals of the statute and, at the same time, “ensure” that the limited benefits flowing from a “contemporary” program of collective bargaining in the federal sector are made available to its employees.¹¹⁸

Accordingly, the *Chertoff II* court held:

that the Final Rule violates the Act in so far as it limits the scope of bargaining to employee-specific personnel matters. The regulations effectively eliminate all meaningful bargaining over fundamental working conditions (including even negotiations over procedural protections), thereby committing the bulk of decisions concerning conditions of employment to the Department’s exclusive discretion.¹¹⁹

The *Chertoff II* court rather damningly noted “DHS’s Final Rule defies the plain language of the Act, because it renders ‘collective bargaining’ meaningless; and it is utterly unreasonable and thus impermissible because it makes no sense on its own terms.”¹²⁰ Not surprisingly then, the *Chertoff II* court ruled against the DHS regarding both the expansion of management rights and the restrictions on collective bargaining as regulated in MAXHR.

VII. The Unions Sue the DoD

As noted in section III of this article, the DoD regulations for NSPS came out a mere nine months after the DHS regulations covering MAXHR were put forth. Likewise the unions’ lawsuit attacking NSPS came only a matter of months after the lawsuits attacking MAXHR was filed.

Any comparison of the lawsuits against MAXHR and NSPS must first address the differences between the two original implementing statutes. Whereas the implementing statute for the DHS authorized the waiver of Chapter 71,¹²¹ the original implementing statute for NSPS specifically stated that the DoD could not waive Chapter 71.¹²² At the same time, the original implementing statute contained two sections that, notwithstanding the section that required compliance with Chapter 71, did permit the waiver of Chapter 71.¹²³

To better understand the ensuing lawsuits, one must take a closer look at the confusing contradiction of these provisions. Section 9902(b) of the original NSPS implementing statute set forth the system requirements: several of which, to be flexible and to be contemporary, were identical to the implementing statute for the DHS.¹²⁴ The original section 9902(b)(3)(D) stated

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 844.

¹¹⁶ *Id.* at 863–64.

¹¹⁷ *Id.* at 863.

¹¹⁸ *Id.* at 864.

¹¹⁹ *Id.* at 844.

¹²⁰ *Id.* at 864.

¹²¹ 5 U.S.C. § 9701(b), 9701(c) (Supp. IV 2004).

¹²² *Id.* §§ 9902(b)(3)(D), 9902(d)(2), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. §§ 9902(b)(3)(d), 9902(d)(2) (LexisNexis 2008)).

¹²³ 5 U.S.C. §§ 9902(k)(1), 9902(m), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

¹²⁴ 5 U.S.C. § 9902(b), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)).

that the NSPS “shall . . . not waive, modify, or otherwise affect . . . any other provision of this part (as described in subsection (d)).”¹²⁵ One, therefore, was required to look to the original subsection (d), which stated that Chapter 71, among other things, was non-waivable.¹²⁶ When read together, these two original subsections provided that NSPS was to comply with the provisions of Chapter 71.

Yet the analysis cannot stop there. Subsection (k)(1) of the original NSPS implementing statute provided:

Notwithstanding subsection (d), the Secretary of Defense, in establishing and implementing the National Security Personnel System . . . shall not be limited by any provision of this title or any rule or regulation prescribed under this title in establishing and implementing regulations relating to—

(A) the methods of establishing qualification requirements for, recruitment for, and appointments to positions;

(B) the methods of assigning, reassigning, detailing, transferring, or promoting employees; and

(C) the methods of reducing overall agency staff and grade levels, except that performance, veterans’ preference, tenure of employment, length of service, and such other factors as the Secretary considers necessary and appropriate shall be considered in decisions to realign or reorganize the Department’s workforce.¹²⁷

Accordingly, the DoD was not bound by the requirements of Chapter 71 when dealing with the three areas found in that subsection.

The other original subsection that must be addressed in the original NSPS copy implementing statute is subsection (m). The entirety of this rather large subsection exempted NSPS from the requirements of Chapter 71, in total contradiction to the requirement that NSPS comply with Chapter 71.¹²⁸ It provided that the Secretary of Defense could use a collaborative process, as opposed to the collective bargaining process required in Chapter 71, to build the NSPS.¹²⁹ Moreover, subsection (m) allowed for the abrogation of all existing collective bargaining agreements, along with subsequent collective bargaining agreements, until subsection (m) expired.¹³⁰

In addition to these specific provisions relating to Chapter 71, the original NSPS implementing statute, much like the DHS implementing statute, had a general requirement that NSPS was to ensure that the DoD employees could bargain collectively.¹³¹ This provision, like the requirement that NSPS be flexible and contemporary was found at the original section 9902(b)(4) within “system requirements.”¹³²

A. NSPS at the District Court

Building on their victory in the series of *Chertoff* decisions against MAXHR, the AFGE made virtually the same argument;¹³³ that regardless of any right to waive Chapter 71, NSPS was still required to ensure collective bargaining, which it had not.¹³⁴ In *American Federation of Government Employees v. Rumsfeld (Rumsfeld)*,¹³⁵ the court addressed this issue.

¹²⁵ 5 U.S.C. § 9902(b)(3), (b)(3)(D), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349.

¹²⁶ 5 U.S.C. § 9902(d)(2), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(d)(2)).

¹²⁷ 5 U.S.C. § 9902(k)(1), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

¹²⁸ 5 U.S.C. § 9902(m)(1), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

¹²⁹ *Id.* § 9902(m)(2).

¹³⁰ *Id.* § 9902(m)(8).

¹³¹ 5 U.S.C. § 9902(b)(4), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5)).

¹³² *Id.*

¹³³ The NTEU also argued that subsection 9902(m) did not waive Chapter 71, except in the narrow application of two distinct parts of subsection 9902(m). The court, looking at the plain language of the statute, disagreed with the NTEU. The court determined that the language of the statute could not be plainer, and that Chapter 71 was waived. *Rumsfeld*, 422 F. Supp. 2d 16, 36–39 (D.D.C. 2006), *rev’d, sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

¹³⁴ *Rumsfeld*, 422 F. Supp. 2d at 21, *rev’d sub nom. Gates*, 486 F.3d 1316.

¹³⁵ *Id.*

The DoD argued that it was not required to bargain collectively due to the language contained in the original section 9902(b)(4).¹³⁶ This section stated that NSPS shall “ensure that employees may organize, bargain collectively as provided for in this chapter, and participate through labor organizations of their own choosing in decisions which affect them, subject to the provisions of this chapter and any exclusion from coverage or limitation on negotiability established pursuant to law.”¹³⁷ The DoD’s argument was that the language “as provided for in this chapter” meant that the original section 9902(b)(4) was subject to the requirements of section 9902(m), as this subsection would imply that collective bargaining was not provided for in this chapter.¹³⁸ Therefore, section 9902(m) completely waived not only the requirement to follow Chapter 71, but also any requirement to bargain collectively.

The pertinent element of section 9902(m) stated “[n]otwithstanding section 9902(d)(2).”¹³⁹ As noted *supra* on page thirty-eight, subsection (d)(2) stated that Chapter 71 was nonwaivable. The *Rumsfeld* court called this language “crystal clear.”¹⁴⁰ As a result, the *Rumsfeld* court further reasoned that “[t]he clarity of this language, however, is a double edged sword for defendants. Although there is no doubt that (d)(2) is overridden by (m)(1), there is just as little doubt that (b)(4) is not overridden.”¹⁴¹

The *Rumsfeld* court went on to further analyze the argument that if subsection (m) did not provide collective bargaining, then subsection (b)(4) was limited by this fact.¹⁴² In terms of relevancy for this article, this is a pertinent part of both the decision and the appeal. The court’s reasoning is therefore quoted in full:

Defendants’ argument that “subject to the provisions of this chapter” means that the requirements of (b)(4) are limited by (m)(1) would render both provisions meaningless. First, as noted above, this reading ignores the specific language of (m)(1) that only (d)(2) is overridden. Second, even if the right to “bargain collectively” has a peripheral relevance to other parts of the statute, collective bargaining is a central issue to any labor relations system. It is difficult to understand the purpose of (b)(4) if it is inapplicable to the labor relations system.

The better reading, which gives meaning to all parts of the statute, is to interpret (b)(4) to acknowledge that chapter 71 may be modified but that despite the authorized modifications, the new system must ensure that the principles of collective bargaining are not totally eviscerated. By requiring that the NSPS retain the core components of collective bargaining, subsection (b)(4) acts as a qualifier to (m)(1)’s override of (d)(2).¹⁴³

The *Rumsfeld* court then determined that, under this interpretation, the collective bargaining requirements of the original NSPS implementing statute and DHS implementing statute were very similar.¹⁴⁴ The *Rumsfeld* court found that the reasoning of *Chertoff I* was, therefore, applicable.¹⁴⁵ Accordingly, the *Rumsfeld* court determined that the DoD’s Final Rule implementing NSPS did not ensure collective bargaining in conformity with the requirements of the original implementing statute.¹⁴⁶ As with the result of *Chertoff I*, the decision in *Rumsfeld* enjoined the agency from implementation of the labor-management relations portions of the Final Rule.¹⁴⁷

¹³⁶ *Id.* at 40.

¹³⁷ 5 U.S.C. § 9902(b)(4), *amended by* Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5)).

¹³⁸ *Rumsfeld*, 422 F. Supp. 2d at 40.

¹³⁹ 5 U.S.C. § 9902(m)(1), *amended by* Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902).

¹⁴⁰ *Rumsfeld*, 422 F. Supp. 2d at 40, *rev’d sub nom. Gates*, 486 F.3d 1316.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Rumsfeld*, 422 F. Supp. 2d at 41, *rev’d sub nom. Gates*, 486 F.3d 1316.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 53.

B. NSPS at the Appellate Court

The DoD appealed the *Rumsfeld* decision to the U.S. Court of Appeals for the District of Columbia in *American Federation of Government Employees v. Gates (Gates)*.¹⁴⁸ The main dispute in *Gates* revolved around the relationship of the then existing sections 9902(b)(4), (d)(2), and (m), and whether the *Rumsfeld* court properly interpreted that relationship.¹⁴⁹

The *Gates* court set out several pages of its opinion to analyze the differences between Chapter 71 and the original NSPS implementing statute, in an effort to “piece together the statutory puzzle.”¹⁵⁰ The court agreed that an initial impression led one to believe that the relevant sections of the NSPS implementing statute were contradictory, but the court then stated upon closer consideration, one could see how “the pieces come together and form a relatively coherent whole.”¹⁵¹

Generally, the idea was that subsections (b)(3), (b)(4), and (d)(2) were the sections that provided a mandate that the DoD bargain collectively with its employees under the NSPS.¹⁵² Yet, this requirement to bargain collectively existed only so long as nothing else in the original implementing statute took it away. Subsection (m) operated to take away the requirement to bargain collectively; at least through November of 2009.¹⁵³

Looked at a little closer, the original subsections (b)(3) and (d)(2) provided that Chapter 71 was not waivable, unless something else in the original NSPS implementing statute waived subsection (d)(2).¹⁵⁴ Even the *Rumsfeld* court recognized that subsection (m) clearly waived subsection (d)(2).¹⁵⁵ As such, NSPS was not bound by the constraints of Chapter 71; leaving the same argument that appeared in the *Chertoff* decisions. That argument maintained that (b)(4) provided a general right to collective bargaining, and NSPS did not meet the minimum required in that sense.

The difference with the original NSPS implementing statute was that subsection (b)(4) contained the language “as provided for in this chapter.”¹⁵⁶ The *Gates* court disagreed with the *Rumsfeld* court’s analysis.¹⁵⁷ The *Gates* court looked at this to mean that the DoD employees only had a right to collective bargaining as it was provided for in the remainder of the original NSPS implementing statute.¹⁵⁸ Thus subsection (b)(4) derived its collective bargaining right, not from itself, but from other subsections; like subsection (d)(2).¹⁵⁹ As subsection (m) overrode subsection (d)(2), there could be no collective bargaining provided in any other subsection.¹⁶⁰ Accordingly, subsection (m), in practical effect, overrode subsection (b)(4).¹⁶¹

The AFGE made three arguments in opposition:¹⁶² (1) the subsections providing for collective bargaining would have no purpose if subsection (m) simply overrode all of them;¹⁶³ (2) subsection (m) could not override all collective bargaining

¹⁴⁸ *Gates*, 486 F.3d 1316.

¹⁴⁹ *Id.* at 1321–25.

¹⁵⁰ *Id.* at 1319.

¹⁵¹ *Id.* at 1322.

¹⁵² *Id.* at 1322–24.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Rumsfeld*, 422 F. Supp. 2d 16, 40 (D.D.C. 2006), *rev’d sub nom. Gates*, 486 F.3d 1316.

¹⁵⁶ Subsection (b)(4) read: “ensure that employees may organize, bargain collectively as provided for in this chapter, and participate through labor organizations of their own choosing in decisions which affect them, subject to the provisions of this chapter and any exclusion from coverage or limitation on negotiability established pursuant to law.” 5 U.S.C. § 9902(b)(4) (Supp. IV 2004), *amended by* Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008)). The *Rumsfeld* court, in its analysis of this subsection, referred to the part that says “subject to the provisions of this chapter.” *Rumsfeld*, 422 F. Supp. 2d at 40, *rev’d sub nom. Gates*, 486 F.3d 1316. The *Gates* court references that portion that says “as provided for in this chapter.” *Gates*, 486 F.3d at 1322.

¹⁵⁷ *Gates*, 486 F.3d at 1318–19. The *Rumsfeld* court’s analysis of this language is set out in detail in section VII.A.

¹⁵⁸ *Id.* at 1322.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1322–24.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1324.

¹⁶³ *Id.*

“because Congress does not ‘hide elephants in mouseholes;’”¹⁶⁴ and (3) a reliance on the precedent set by *Chertoff II*.¹⁶⁵ Regarding the contention that the subsections that provided a right to bargain collectively had no meaning, the *Gates* court disagreed.¹⁶⁶ The court in *Gates* reasoned that “the Act sets up a temporary, experimental period through November 2009 during which DoD has broad leeway to restructure its labor relations system. But after November 2009, . . . the Chapter 71 collective bargaining requirements . . . will apply and govern labor relations for DoD’s civilian workers.”¹⁶⁷ As for the idea that Congress would not “hide elephants in mouseholes,” the *Gates* court agreed that subsection (m) was an “elephant,” but stated that subsection (m) was not hidden.¹⁶⁸ This left only the idea that the *Gates* case was somehow bound by the precedent of *Chertoff II*. In this regard, *Gates* pointed out that even the AFGE “candidly (and correctly) acknowledged that the statutory language governing DoD’s labor relations system is quite different from the statutory language governing the DHS’s labor relations system.”¹⁶⁹ Subsection (m) being the main difference in the two statutes, the *Gates* court significantly noted “the DHS statute contains no provision remotely equivalent to subsection (m) of the DoD statute. . . . [W]ithout subsection (m) . . . this case would be decided the same way as *Chertoff*.”¹⁷⁰

As a result, the *Gates* court held that the original NSPS implementing statute “authorizes DoD to curtail collective bargaining for DoD’s civilian employees through November 2009.”¹⁷¹ *Gates*, therefore, reversed the decision of *Rumsfeld*,¹⁷² and upheld DOD’s regulations implementing NSPS.

VIII. Union Actions After Losing the NSPS Lawsuit

One of the first moves the AFGE made after the *Gates* court held that the DoD was permitted to curtail collective bargaining was to ask the same court for a rehearing, and then a stay of the decision while the AFGE prepared for a further appeal. The rehearing was denied on 10 August 2007,¹⁷³ and the stay was denied by the court on 5 September 2007.¹⁷⁴

The next logical step after a loss at the Court of Appeals is usually an appeal to the Supreme Court of the United States. Yet, such an appeal carries its own dangers. The primary concern from the viewpoint of many of the involved unions was that if the appeal were lost, the Supreme Court’s decision might adversely affect the positive outcome achieved for the DHS employees in the *Chertoff* cases.¹⁷⁵ This was one of the reasons that all the unions involved in the NSPS lawsuits, except the AFGE, decided not to appeal to the Supreme Court.¹⁷⁶ Another concern for the AFGE was that any appeal to the Supreme Court might not be granted, as the Court rarely hears appeals of this nature.¹⁷⁷ Still, the AFGE expressed optimism that an appeal might be accepted as a result of the strong dissent in *Gates* and the decision in *Rumsfeld*.¹⁷⁸

In August 2007, the AFGE announced in a press release that it would file an appeal to the Supreme Court.¹⁷⁹ In October 2007, AFGE requested, and was granted, an extension to file a petition for a writ of certiorari.¹⁸⁰ Press reports continued to

¹⁶⁴ *Id.* at 1325 (citation omitted).

¹⁶⁵ *Id.* at 1326.

¹⁶⁶ *Id.* at 1324.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1325.

¹⁶⁹ *Id.* at 1326 (citing Transcript of Oral Argument, at 42–43).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 1327.

¹⁷³ See Supreme Court Docket, <http://www.supremecourtus.gov/docket/07-909.htm> (last visited Jan. 28, 2009) [hereinafter Supreme Court Docket].

¹⁷⁴ Am. Fed’n of Gov’t Employees v. Gates, 2007 U.S. App. LEXIS 21553 (D.C. Cir., Sept. 5, 2007) (per curiam).

¹⁷⁵ Brittany R. Ballenstedt, *Union Weighs Solo Supreme Court Challenge to Defense Personnel System*, GOV’T EXECUTIVE, Sept. 12, 2007, available at http://www.govexec.com/story_page.cfm?articleid=38000&sid=2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Press Release, Am. Fed’n of Gov’t Employees, AFGE to Take Battle over DoD Employee Rights to the Supreme Court (Aug. 13, 2007), available at <http://www.afge.org/Index.cfm?page=PressReleases&PressReleaseID=780>.

state that an actual appeal would not be made in light of pending congressional action.¹⁸¹ Yet, on 7 January 2008, the AFGE filed its petition for certiorari.¹⁸²

Outside the courts, the AFGE and the other unions involved in the NSPS dispute continued to lobby Congress to address their concerns.¹⁸³ As noted above, many of the unions determined that this would be the most effective course of action, and withdrew from any appeal to the Supreme Court.¹⁸⁴ To maximize their effort in lobbying Congress, thirty-six unions formed a coalition to deal specifically with NSPS.¹⁸⁵ This coalition even provided a “NSPS Lobbying Toolkit” for all to use.¹⁸⁶

In addition to lobbying Congress and continuing to appeal their cause in the courts, the unions have attempted to blunt the impact of NSPS by providing education about the new personnel system to their members.¹⁸⁷ This learning process should provide more information on the NSPS, and information on how to represent their members under this new system.¹⁸⁸

On 28 January 2008 the President signed into law H.R. 4986, The National Defense Authorization Act for Fiscal Year 2008 (NDAA).¹⁸⁹ In section 1106 of the legislation, Congress amended the implementing legislation for the NSPS almost in its entirety.¹⁹⁰ This legislation, for all intents and purposes, mooted the AFGE’s petition for certiorari with the Supreme Court only three weeks after the petition was filed. As a result, on 4 February 2008, the AFGE filed a motion to dismiss its petition for certiorari.¹⁹¹ On 6 February 2008, that motion was granted and the petition was dismissed.¹⁹² Although the AFGE achieved its goals related to collective bargaining within the NSPS, the AFGE still does not see NSPS as a fair personnel system and will continue to seek more reform of the pay system of NSPS.¹⁹³

IX. The Way Ahead: What Will Become of NSPS?

During the formulation of this article, the way ahead for NSPS was an ever-changing target. There were prospects of court decisions, congressional action, status quo, and myriad other possibilities. Just prior to the passage of the NDAA, the most obvious impact on NSPS, appeared to be the “sunset provision” established within the original implementing legislation for NSPS itself. Section 9902(m)(9) of the original NSPS implementing statute stated: “Unless it is extended or otherwise provided for in law, the authority to establish, implement and adjust the labor relations system developed under this subsection shall expire six years after the date of enactment of this subsection, at which time the provisions of chapter 71 will apply.”¹⁹⁴ This was the provision within the original legislation that would allow a return of most collective bargaining rights

¹⁸⁰ See Supreme Court Docket, *supra* note 173.

¹⁸¹ See Brittany R. Ballenstedt, *FEATURES Freedom to Manage*, GOV’T EXECUTIVE, Jan. 1, 2008, available at <http://www.govexec.com/features/0108-01/0108-01s1.htm>; Ballenstedt, *supra* note 175.

¹⁸² See Supreme Court Docket, *supra* note 173.

¹⁸³ See generally United Dep’t of Def. Workers Coalition Home Page, <http://www.uniteddodworkerscoalition.org/> (last visited Jan. 12, 2009) [hereinafter Workers Coalition Home Page].

¹⁸⁴ Ballenstedt, *supra* note 175.

¹⁸⁵ See generally Workers Coalition Home Page, *supra* note 183.

¹⁸⁶ United Dep’t of Def. Workers Coalition NSPS Lobbying Toolkit, available at <http://www.uniteddodworkerscoalition.org/toolkit.htm> (last visited Jan. 12, 2009).

¹⁸⁷ Press Release, Am. Fed’n of Gov’t Employees, AFGE Field Services Department Launches NSPS Training Program (Feb. 23, 2006), available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=580>.

¹⁸⁸ *Id.*

¹⁸⁹ Public L. No. 110-181, 122 Stat. 349 (2008).

¹⁹⁰ *Id.* § 1106.

¹⁹¹ See Supreme Court Docket, *supra* note 173; see also Press Release, Am. Fed’n of Gov’t Employees, Defense Authorization Bill Provides NSPS Fix (Jan. 30, 2008) [hereinafter Defense Authorization Bill Provides NSPS Fix], available at <http://www.afge.org/index.cfm?page=PressReleases&PressReleaseID=820>.

¹⁹² See Supreme Court Docket, *supra* note 173.

¹⁹³ Defense Authorization Bill Provides NSPS Fix, *supra* note 191.

¹⁹⁴ 5 U.S.C. § 9902(m)(9) (Supp. IV 2004), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902 (LexisNexis 2008)).

to the affected DoD employees. Moreover, it was the one provision cited by the *Gates* decision as resurrecting collective bargaining after the experimental implementation of NSPS.¹⁹⁵

Given the lobbying effort by the unions and the response by Congress, the chances of any legislation extending subsection (m) were virtually nonexistent when the *Gates* court set forth its decision. Thus, as the *Gates* court put it, the “experimental period” for implementing this new labor relations period would end at the close of November 2009.¹⁹⁶ This meant that, at the minimum, the full gamut of collective bargaining rights found throughout the majority of federal agencies would have been applicable to NSPS no later than December 2009.

Still, waiting for the sunset provision to activate could not be the only action by the Unions. On 7 January 2008, the AFGE petitioned for a writ of certiorari.¹⁹⁷ The majority of the unions pulled out of this appeal to the Supreme Court because they placed their emphasis on getting Congress to make legislative changes to NSPS.¹⁹⁸ The AFGE stated, on more than one occasion, that it too hoped it would not need to file the petition for a writ of certiorari because Congress would act to legislatively change NSPS prior to the deadline for the petitions filing.¹⁹⁹ In fact, Congress did act to legislatively change NSPS prior to AFGE’s filing deadline,²⁰⁰ but the legislation was pocket-vetoed by the President.²⁰¹ Still, this legislation had a greater chance of impacting collective bargaining within NSPS than any appeal to the courts.

The NDAA contains a section designed specifically to amend the implementing legislation for NSPS.²⁰² Section 1106 of the NDAA, the new implementing legislation, significantly amended the implementing legislation for NSPS.²⁰³ One of the most basic things it accomplished was that it removed subsection (m), in its entirety, from the NSPS legislation.²⁰⁴ Remembering that the *Gates* court stated that but for subsection (m), the NSPS issue would be decided exactly as the MAXHR issue in *Chertoff II*,²⁰⁵ this change alone to the NSPS implementing statute has a significant impact on collective bargaining within NSPS. In effect, if this were the only change made to the implementing legislation it would enjoin the DoD from implementing any of the labor relations sections of the NSPS implementing regulations.

In an effort to restore collective bargaining rights within NSPS, the NDAA goes further than removing subsection (m). The NDAA also removes the language “notwithstanding any other provisions of this part” from section 9902(a). Section 9902(b)(4) was renumbered as section 9902(b)(5), and similar language was removed from it. Section 9902(b)(5) now reads “ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusions from coverage or limitation on negotiability established pursuant to law.”²⁰⁶

The *Gates* court stated²⁰⁷ that the old subsection’s language gave a right to collective bargaining “as provided for in this chapter.”²⁰⁸ The *Gates* court interpreted this to mean that the old subsection derived its right to collective bargaining from other provisions of the implementing legislation such as the original subsection (d)(2) and that subsection (m) overrode all of

¹⁹⁵ *Gates*, 486 F.3d 1316, 1323 (D.C. Cir. 2007).

¹⁹⁶ *Id.* at 1324.

¹⁹⁷ See Supreme Court Docket, *supra* note 173.

¹⁹⁸ Ballenstedt, *supra* note 175.

¹⁹⁹ See Ballenstedt, *supra* note 181; Ballenstedt, *supra* note 175.

²⁰⁰ Pub. L. No. 110-181, § 1106, 122 Stat. 349 (2008).

²⁰¹ Memorandum of Disapproval, George W. Bush (Dec. 28, 2007) [hereinafter Memo of Disapproval], available at <http://merln.ndu.edu/archivepdf/iraq/WH/20071228-5.pdf>.

²⁰² Pub. L. No. 110-181, § 1106, 122 Stat. 349 (2008).

²⁰³ National Security Personnel System NDAA Impact on NSPS Regulations and DOD Implementing Issuances (Feb. 1, 2008) [hereinafter NDAA Impact on NSPS Regulations], available at http://www.afge.org/Documents/2008_02_05_NDAAImpactonNSPSforSrLeaders.pdf.

²⁰⁴ Pub. L. No. 110-181, § 1106(a), 122 Stat. 349.

²⁰⁵ *Gates*, 486 F.3d 1316, 1326 (D.C. Cir. 2007).

²⁰⁶ 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008).

²⁰⁷ *Gates*, 486 F.3d at 1322.

²⁰⁸ 5 U.S.C. § 9902(b)(4) (Supp. IV 2004), amended by Pub. L. No. 110-181, § 1106, 122 Stat. 349 (current version at 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008)).

this.²⁰⁹ With Congress' removal of the language "as provided for in this chapter" from the new subsection (b)(5), the subsection no longer derives its right to bargain collectively from any other source. The new subsection is clear that DoD employees within NSPS have a right to bargain collectively.

The *Gates* court also recognized that under the original implementing legislation for NSPS full collective bargaining rights would not be returned to DoD employees after the sunset provisions of subsection (m) took effect.²¹⁰ This was because subsection (k)(1) also had a limitation on collective bargaining, and this provision did not contain any sunset language.²¹¹ Subsection (k)(1) provided limited circumstances under which the Secretary of Defense was not limited by collective bargaining. Here too Congress amended the implementing legislation in the NDAA.²¹² The new implementing legislation changes the lettering of subsection (k) to subsection (i), and replaces the words "notwithstanding subsection (d)" with the words "subject to the requirements of chapter 71 and the limitations of subsection (b)(3)."²¹³ As such, the new subsection is opposite of the position taken by the old subsection; where the old subsection specifically excluded itself from chapter 71, the new subsection specifically subjects itself to chapter 71 and its right to bargain collectively.

With these changes Congress addressed each of the issues that the *Gates* decision found affected collective bargaining. Even so, Congress did not stop there. Presumably as a result of union lobbying, Congress made many more changes to the NSPS implementing legislation. As this article discusses collective bargaining rights under the NSPS, it is for another article to discuss the multitude of revisions made to the NSPS implementing legislation, and the potential issues these changes may raise.

Yet, one change and its resultant issue is worth noting for an illustrative purpose. The new implementing legislation for NSPS exempts all wage grade employees from NSPS.²¹⁴ This action may, in effect, make it more difficult for managers to supervise their departments. Currently, NSPS requires managers to spend a greater amount of time "coaching and rating" employees than was required under the general schedule (GS) system.²¹⁵ The "managerial workload" under NSPS is high.²¹⁶ Currently, some managers under NSPS are upset that the system requires them to manage employees under multiple systems.²¹⁷ Attempting to understand the different personnel systems and apply them appropriately to the various applicable workers can be difficult.²¹⁸ Even a supervisor that supports the new NSPS agrees that "what makes it so difficult is you can't be an expert in all the systems. . . . But if everyone comes under the same pay system, its going to be awesome."²¹⁹ Under the wage-grade exemption in the NDAA, there will not come a time of one system, and managers will continue to be called upon to spend more time and effort than was required of them prior to NSPS.

When Congress included the provisions regarding NSPS into the proposed legislation for the NDAA, the Executive Office of the President, Office of Management and Budget made it known that the President disagreed with these provisions, and that his senior advisors would recommend he veto any legislation that included them.²²⁰ The policy statement said:

The Administration strongly opposes [the section] which would significantly change the National Security Personnel System (NSPS). These changes eviscerate our efforts to make civilians equal partners in a Department at war by removing most NSPS flexibilities and completely revoking . . . the labor relations portions of NSPS. . . . By retaining the meet and confer and continuing collaboration provisions, while also

²⁰⁹ *Gates*, 486 F.3d at 1322.

²¹⁰ *Id.* at 1320.

²¹¹ *Id.*

²¹² 5 U.S.C.S. § 9902(i) (LexisNexis 2008).

²¹³ *Id.*

²¹⁴ *Id.* § 9902(b)(4).

²¹⁵ Ballenstedt, *supra* note 181.

²¹⁶ *Id.*

²¹⁷ *Id.* (quoting Elizabeth Waldron-Topp, president, FMA ch. 104, Ca.).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Statement of Administration Policy: H.R. 1585—National Defense Authorization Act for Fiscal Year 2008, Office of Mgmt. & Budget, Exec. Office of the President (May 16, 2007) [hereinafter Statement of Administration Policy], available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1585sap-h.pdf>.

. . . imposing chapter 71 obligations on the Department, the process becomes so administratively burdensome to design and operate that the effect of the bill is in essence a total revocation of the flexibilities Congress granted the department.²²¹

Within days of this statement of displeasure to the House of Representatives, the Senate published its press release regarding the NDAA.²²² The press release informed the public that the Senate markup also included a repeal of the DoD's authority to establish a new labor relations system under NSPS.²²³ Then again on 6 December 2007, as Congress prepared to send the NDAA to the President for signature, the Senate issued a press release stating, among other things, that the NDAA

[r]epealed the authority of DOD to establish a new labor relations system; restored collective bargaining and appeals rights; and allowed DOD to continue efforts to develop and implement a new pay-for-performance system, but only if the system is implemented in a manner that is consistent with existing labor relations requirements.²²⁴

President Bush did pocket-veto the bill, but he based this action on other grounds.²²⁵ Although his advisors stated they would recommend a veto if the NSPS changes were included in the bill,²²⁶ the President did not mention the NSPS changes in his Memorandum of Disapproval.²²⁷ The President's objection to the NDAA was over section 1083, which would allow U.S. courts jurisdiction to hear individual lawsuits against terrorist states.²²⁸ The President stated that he also had concerns over section 1079 relating to intelligence matter, but that if Congress fixed section 1083, the president would sign the NDAA into law.²²⁹

The new implementing legislation now requires that the DoD bargain collectively within NSPS.²³⁰ Moreover the new implementing legislation ensures that no collective bargaining agreement is superseded by the NSPS implementing statute, regulations, or any issuances that come from the DoD. Furthermore, any future issuance must be collectively bargained between the parties.²³¹ In essence, the NDAA gives the unions everything they sought in the initial NSPS lawsuits against the DoD, and more.

X. Conclusion

The DoD, in its NSPS implementing regulations, stated its belief in the importance of the employees' confidence in NSPS as follows:

A key to the success of NSPS is ensuring employees perceive the system as fair. In a human resources management system, fairness is the basis for trust between employees and supervisors. . . . [E]mployees will exercise personal responsibility and sustain a high level of individual performance and teamwork when they perceive that the human resources system and their supervisors are fair.²³²

²²¹ *Id.* at 1.

²²² Press Release, U.S. S. Comm. on Armed Servs., Senate Armed Services Committee Completes Markup of National Defense Authorization Bill for Fiscal Year 2008 (May 25, 2007), available at <http://armed-services.senate.gov/press/08mark.pdf>.

²²³ *Id.*

²²⁴ Press Release, S. Comm. on Armed Servs., Senate Armed Services Committee Completes Conference of National Defense Authorization Bill for Fiscal Year 2008, at 2–3 (Dec. 6, 2007), available at <http://armed-services.senate.gov/press/Conference%2008%20Press%20Release.pdf>.

²²⁵ Memo of Disapproval, *supra* note 204.

²²⁶ Statement of Administration Policy, *supra* note 220.

²²⁷ Memo of Disapproval, *supra* note 201.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ 5 U.S.C.S. § 9902(b)(5) (LexisNexis 2008).

²³¹ National Defense Authorization Act for Fiscal Year 2008, Public L. No. 110-181 § 1106(b), 122 Stat. 349 (2008).

²³² DoD Final Rule, *supra* note 22, at 66,118.

It might be perceived as baffling that the DoD would place emphasis on the need for employees to trust the system, while at the same time refusing to bargain with the employees.

The unions represent the interest of the employees. If the DoD refuses to bargain with the unions, the DoD is, in effect, refusing to bargain with its employees. The unions voiced many serious reservations about the implementing regulations for NSPS. Yet, the DoD stated that the differences between the unions and DoD could not “be reconciled with the need for a contemporary and flexible system of human resource management.”²³³ The DoD “recognized the good faith effort made by these labor organizations to meet the Department’s operational needs,”²³⁴ but ultimately decided not to compromise or bargain over the differences. This series of events subsequently led to the unions’ suit against the DoD.

In the MAXHR cases as well as the NSPS cases, the Departments argued that these new systems required flexibility, and that the systems could not be flexible if the Departments were required to bargain collectively. Contrary to this argument, the *Chertoff II* court found that if the DHS followed the basic requirements of collective bargaining as it exists in the federal sector, the DHS would have “extraordinary ‘flexibility’ to achieve the goals of the statute.”²³⁵

It would therefore be logical to conclude that employee trust would come from a more serious effort to fully consider their needs in the design of a new personnel system. With no confidence from the unions, and no confidence from the courts that this inclusion is present, it does not seem possible that the DoD’s stated goal of employee trust could have been achieved. From this perspective, the DoD underestimated the extent to which the unions’ position, and a right to collective bargaining would have on individual worker’s trust in NSPS.

The DoD also misjudged Congress. Secretary Donald Rumsfeld testified to Congress that: “The National Security Personnel System we are proposing . . . will not end collective bargaining. . . . To the contrary, the right of defense employees to bargain collectively would be continued.”²³⁶ The *Rumsfeld* court recognized that at least three senators believed that the NSPS implementing statute preserved the right to bargain collectively.²³⁷ Even so, Secretary Rumsfeld’s final implementing regulations for NSPS did, in every practical way, end collective bargaining.

Making statements of intent to Congress, and discerning that some members of Congress understand their implementing statute to conform to those statements of intent cannot lead to confidence in a system that is fundamentally contrary to those perceptions. The unions lobbied Congress to redefine the labor relations system in NSPS and Congress in turn changed the labor relations system to conform to the unions’ requests due presumably to those significant contradictions.

The DoD had a great opportunity to formulate a system under NSPS that met its goals for flexibility in a timely fashion. Yet four years after the passage of the NSPS implementing statute, the DoD remains unable to fully implement the NSPS as it originally envisioned. The DoD will now have to revise much of the NSPS to conform to the new demands of Congress.²³⁸ Were it not for the issues raised concerning collective bargaining at the outset, NSPS would be much further along toward implementing the perceived needs of the DoD.

The need for the union to bargain collectively and the union desire to protect that statutory privilege are not new elements to the DoD. The DoD underestimated these factors, and they underestimated the congressional reaction. It was a costly mistake in terms of effort, time, and resources in designing and implementing NSPS. If the DoD does not learn from this miscalculation moving forward, it may cost the DoD in the form of a total revocation of NSPS.²³⁹

²³³ *Id.* at 66,123.

²³⁴ *Id.* at 66,128.

²³⁵ *Chertoff II*, 452 F.3d 839, 864 (D.C. Cir. 2006).

²³⁶ *Rumsfeld*, 422 F. Supp. 2d 16, 26 (D.D.C. 2006) (quoting *Transforming the Department of Defense Personnel System: Finding the Right Approach: Hearing Before the S. Comm. On Government Affairs*, 108th Cong. 21 (2003) (statement of Donald Rumsfeld, Secretary of Defense)), *rev’d sub nom. Gates*, 486 F.3d 1316 (D.C. Cir. 2007).

²³⁷ *Id.* at 26–27.

²³⁸ *See generally* NDAA Impact on NSPS Regulations, *supra* note 203.

²³⁹ The unions intend to continue to seek changes to the NSPS pay system. Defense Authorization Bill Provides NSPS Fix, *supra* note 191. Moreover the new implementing statute for NSPS requires the Comptroller General to conduct annual surveys of employee satisfaction with NSPS, and report the findings to Congress. NDAA Impact on NSPS Regulations, *supra* note 203. Both NSPS and MAXHR are experimental personnel systems. Congress became so wary of MAXHR as an experiment that after the court decisions eviscerating the implementing regulations for that program, the House of Representatives proposed totally rescinding the implementing statute for the program. H.R. 1684, 110th Cong. § 511 (2007). Moreover, John Gates, president of AFGE, stated that a top priority for the union during President Obama’s administration is the death of NSPS. Alyssa Rosenberg, *Union Outlines Legislative*

Labor relations are a collaborative process that involves both management and workers alike. It seems that any labor counselor at the installation level should understand that inclusion of the unions in the decision making process is not only required by law but also a practical necessity. It allows for the trust former Secretary Rumsfeld sought between management and workers. Moreover, involving the unions early in negotiations seems to save time, money, and precious other resources.

The DoD at the macro level (along with DHS in its implementation of MAXHR) did not focus properly on this tenet that many labor counselors at the micro level are taught to follow. This oversight cost a great deal in the years wasted trying to implement policy under a new personnel management system.

Public sector unions are still very politically strong in our society. In treating the unions as an opponent instead of a collaborator in the formulation of this new personnel management system, the DoD missed an opportunity to save time and resources and also seriously miscalculated the will of the unions.

In any event, whether one is pro-union or pro-management, whether one is at the installation level or the Department level, one must understand that labor relations is a process that requires varying levels of cooperation and trust between the parties. The initial process to implement NSPS stands as an example of a failure to achieve that trust or cooperation.

Agenda, GOV'T EXECUTIVE, Feb. 4, 2009, available at http://www.govexec.com/story_page.cfm?articleid=41966&sid=59. In light of these factors, DoD could conceivably lose its ability to function under NSPS if it does not demonstrate to Congress that this is a worthy personnel system.